

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2015

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SENATE BILL 336  
Judiciary I Committee Substitute Adopted 4/21/15  
Third Edition Engrossed 4/27/15  
House Committee Substitute Favorable 6/3/15

Short Title: Estate Planning/Uniform Trust Code.

(Public)

Sponsors:

Referred to:

March 19, 2015

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW GOVERNING ESTATE PLANNING AND  
FIDUCIARIES, TO AMEND THE UNIFORM TRUST CODE, AND TO ESTABLISH A  
UNIFORM POWERS OF APPOINTMENT ACT.

The General Assembly of North Carolina enacts:

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

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

**~~SUBCHAPTER IV. STANDBY GUARDIANS FOR MINOR  
CHILDREN. GUARDIANS.~~**

"Article 21.

"Standby Guardianship.

**"§ 35A-1370. Definitions.**

For purposes of this Article:

- (1) "Alternate standby guardian" means a person identified in either a petition or designation to become the guardian of the person or, when appropriate, the general guardian of a minor ~~child, child or incompetent adult~~, pursuant to G.S. 35A-1373 or to G.S. 35A-1374, when the person identified as the standby guardian and the designator or petitioner has identified an alternate standby guardian.
- (2) "Attending physician" means the physician who has primary responsibility for the treatment and care of the parent or legal guardian. When more than one physician shares this responsibility, or when a physician is acting on the primary physician's behalf, any such physician may act as the attending physician pursuant to this section. When no physician has this responsibility, a physician who is familiar with the petitioner's medical condition may act as the attending physician pursuant to this Article.
- (3) "Debilitation" means a chronic and substantial inability, as a result of a physically debilitating illness, disease, or injury, to care for one's minor ~~child, child or to satisfy his or her duties as guardian of the person or as~~ general guardian of an incompetent adult.



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- 1 (4) "Designation" means a written document voluntarily executed by the  
2 designator pursuant to this Article.
- 3 (5) "Designator" means a person who suffers from a progressive chronic illness  
4 or an irreversible fatal illness and who is (i) the biological or adoptive  
5 parent, the guardian of the person, or the general guardian of a minor ~~child-~~  
6 child, or (ii) the guardian of the person or the general guardian of an  
7 incompetent adult. A designation under this Article may be made on behalf  
8 of a designator by the guardian of the person or the general guardian of the  
9 designator.
- 10 (6) "Determination of debilitation" means a written determination made by the  
11 attending physician which contains the physician's opinion to a reasonable  
12 degree of medical certainty regarding the nature, cause, extent, and probable  
13 duration of the debilitation of the petitioner or designator.
- 14 (7) "Determination of incapacity" means a written determination made by the  
15 attending physician which contains the physician's opinion to a reasonable  
16 degree of medical certainty regarding the nature, cause, extent, and probable  
17 duration of the incapacity of the petitioner or designator.
- 18 (8) "Incapacity" means a chronic and substantial inability, as a result of mental  
19 or organic impairment, to understand the nature and consequences of  
20 decisions concerning the care of one's minor ~~child,~~ child or of an  
21 incompetent adult, and a consequent inability to make these decisions.
- 22 (8a) "Incompetent adult" means an adult or emancipated minor who is subject to  
23 a guardianship of the person or a general guardianship.
- 24 (9) "Minor child" means an unemancipated child or children under the age of 18  
25 years.
- 26 (10) "Petitioner" means a person who suffers from a progressive chronic illness  
27 or an irreversible fatal illness and who is (i) the biological parent, the  
28 adoptive parent, the guardian of the person, or the general guardian of a  
29 minor ~~child-~~child, or (ii) the guardian of the person or the general guardian  
30 of an incompetent adult. A proceeding under this Article may be initiated  
31 and pursued on behalf of a petitioner by the guardian of the person, the  
32 general guardian of the petitioner, or by a person appointed by the clerk of  
33 superior court pursuant to Rule 17 of the Rules of Civil Procedure as  
34 guardian ad litem for the purpose of initiating and pursuing a proceeding  
35 under this Article on behalf of a petitioner.
- 36 (11) "Standby guardian" means a person appointed pursuant to G.S. 35A-1373 or  
37 designated pursuant to G.S. 35A-1374 to become the guardian of the person  
38 or, when appropriate, the general guardian of a minor child or incompetent  
39 adult upon the death of a petitioner or designator, upon a determination of  
40 debilitation or incapacity of a petitioner or designator, or with the consent of  
41 a petitioner or designator.
- 42 (12) "Triggering event" means an event stated in the designation executed or  
43 order entered under this Article which empowers the standby guardian, or  
44 the alternate standby guardian, if one is identified and the standby guardian  
45 is unwilling or unable to serve, to assume the duties of the office, which  
46 event may be the death of a petitioner or designator, incapacity of a  
47 petitioner or designator, debilitation of a petitioner or designator with the  
48 petitioner's or designator's consent, or the consent of the petitioner or  
49 designator, whichever occurs first.
- 50 ...

1 "§ 35A-1373. Appointment by petition of standby guardian; petition, notice, hearing,  
2 order.

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

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

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

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

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

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

1 (f) At the hearing, the clerk shall receive evidence necessary to determine whether the  
2 requirements of this Article for the appointment of a standby guardian have been satisfied. If  
3 the clerk finds that the petitioner suffers from a progressive chronic illness or an irreversible  
4 fatal illness, that the best interests of the minor child or incompetent adult will be promoted by  
5 the appointment of a standby guardian of the person or general guardian, and that the standby  
6 guardian and the alternate standby guardian, if any, are fit to serve as guardian of the person or  
7 general guardian of the minor ~~child~~, child or incompetent adult, the clerk shall enter an order  
8 appointing the standby guardian named in the petition as standby guardian of the person or  
9 standby general guardian of the minor child or incompetent adult and shall issue letters of  
10 appointment to the standby guardian. The order may also appoint the alternate standby guardian  
11 named in the petition as the alternate standby guardian of the person or alternate general  
12 guardian of the minor child or incompetent adult in the event that the person named as standby  
13 guardian is unwilling or unable to serve as standby guardian and shall provide that, upon a  
14 showing of that unwillingness or inability, letters of appointment will be issued to the alternate  
15 standby guardian.

16 ...  
17 **"§ 35A-1374. Appointment by written designation; form.**

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

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

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

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

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

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

1 (e) The standby guardian shall file a petition pursuant to subsection (d) of this section  
2 within 90 days of the date of the commencement of the standby guardian's authority under this  
3 section, or the standby guardian's authority shall lapse after the expiration of those 90 days, to  
4 recommence only upon filing of the petition.

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

6 (1) Append the written designation of such person as standby guardian; and

7 (2) Append a copy of either (i) the determination of incapacity of the designator;  
8 (ii) the determination of debilitation of the designator and the written  
9 consent of the designator; (iii) the designator's consent; or (iv) proof of death  
10 of the designator, such as a copy of a death certificate or a funeral home  
11 receipt; and

12 (3) If the petition is by a person designated as an alternate standby guardian,  
13 state that the person designated as the standby guardian is unwilling or  
14 unable to act as standby guardian, and the basis for that statement; and

15 (4) State whether there are any lawsuits, in this State or any other jurisdiction,  
16 involving the minor child or incompetent adult and, if so, identify the  
17 parties, the case numbers, and the states and counties where filed; and

18 (5) Be verified by the standby guardian or alternate standby guardian in front of  
19 a notary public or another person authorized to administer oaths.

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

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

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

43 (1) The person was duly designated as a standby guardian or alternate standby  
44 guardian;

45 (2) That (i) there has been a determination of ~~incapacity; incapacity of the~~  
46 designator; (ii) there has been a determination of debilitation and the  
47 designator has consented to the commencement of the standby guardian's  
48 authority; (iii) the designator has consented to that commencement; or (iv)  
49 the designator has died, such information coming from a document, such as  
50 a copy of a death certificate or a funeral home receipt;

1 (3) That the best interests of the minor child or incompetent adult will be  
2 promoted by the appointment of the person designated as standby guardian  
3 or alternate standby guardian as guardian of the person or general guardian  
4 of the minor ~~child;~~child or incompetent adult;

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

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

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

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

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

18 ...

19 **"§ 35A-1376. Restoration of capacity or ability; suspension of guardianship.**

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

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

32 (2) Be in writing; and

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

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

42 ...

43 **"§ 35A-1379. Appointment of guardian ad litem.**

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

47 (b) The duties of the guardian ad litem, when appointed, shall be to make an  
48 investigation to determine the facts, the needs of the minor child or incompetent adult and the  
49 available resources within the family to meet those needs, and to protect and promote the best  
50 interests of the minor child or incompetent adult until formally relieved of the responsibility by  
51 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. AUTHORIZE LIVING PROBATE PROCEDURE ALLOWING A PERSON**  
19 **TO PETITION THE PROBATE COURT FOR AN ORDER CONFIRMING THE**  
20 **VALIDITY OF THAT PERSON'S WILL**

21 **SECTION 2.** Chapter 28A of the General Statutes is amended by adding a new  
22 Article to read:

23 "Article 2B.

24 "Living Probate.

25 **"§ 28A-2B-1. Establishment before death that a will or codicil is valid.**

26 (a) Any individual who is a resident of North Carolina and who has executed a will or  
27 codicil may file a petition seeking a judicial declaration that the will or codicil is valid.

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

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

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

43 (c) Failure to use the procedure authorized by this Article shall not have any evidentiary  
44 or procedural effect on any future probate proceedings.

45 **"§ 28A-2B-2. Venue.**

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

48 **"§ 28A-2B-3. Contents of petition for will validity.**

49 (a) Petition. – A petition requesting an order declaring that an individual's will or  
50 codicil 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 at the time the will  
7           was executed.
- 8           (4)    A statement that the individual was free from undue influence and duress  
9           and executed the will in the exercise of the individual's free will.
- 10          (5)    A statement identifying the individual, and all persons believed by the  
11          petitioner to have an interest in the proceeding, including, for any interested  
12          parties who are minors, information regarding the minor's appropriate  
13          representative.

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

17          **"§ 28A-2B-4. Declaration by court; bar to caveat.**

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

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

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

38          **"§ 28A-2B-5. Confidentiality.**

39          (a)    Following the entry of a judgment, a party to the proceeding may move that the  
40          contents of the file be sealed and kept confidential, and upon such motion, the clerk shall seal  
41          the contents of the file from public inspection. The contents of the file shall not be released  
42          except by order of the clerk to any person other than:

- 43           (1)    The petitioner named in the petition.
- 44           (2)    The testator of the will.
- 45           (3)    Interested persons who appeared in the proceedings, interested persons who  
46           have otherwise submitted to the jurisdiction of the court, and the attorneys  
47           and guardians of the interested persons.
- 48           (4)    The attorney for the petitioner.
- 49           (5)    The judge hearing or reviewing the matter.

50          For good cause shown, the court may order the records that are confidential under this section  
51          to be made available to a person who is not listed in this section.



1 **"§ 28A-2B-6. Costs and attorneys' fees.**

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

7  
8 **PART III. ENACT THE UNIFORM POWERS OF APPOINTMENT ACT**

9 **SECTION 3.(a)** The General Statutes are amended by adding a new Chapter to  
10 read:

11 **"Chapter 31D.**

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

13 **"Article 1.**

14 **"General Provisions and Definitions.**

15 **"§ 31D-1-101. Short title.**

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

17 **"§ 31D-1-102. Definitions.**

18 The following definitions apply in this Chapter:

- 19 (1) "Appointee" means a person to whom a power holder makes an appointment  
20 of appointive property.
- 21 (2) "Appointive property" means the property or property interest subject to a  
22 power of appointment.
- 23 (3) "Blanket-exercise clause" means a clause in an instrument which exercises a  
24 power of appointment and is not a specific-exercise clause. The term  
25 includes a clause that:
- 26 a. Expressly uses the words "any power" in exercising any power of  
27 appointment the power holder has.
- 28 b. Expressly uses the words "any property" in appointing any property  
29 over which the power holder has a power of appointment.
- 30 c. Disposes of all property subject to disposition by the power holder.
- 31 (4) "Donor" means a person who creates a power of appointment.
- 32 (5) "Exclusionary power of appointment" means a power of appointment  
33 exercisable in favor of any one or more of the permissible appointees to the  
34 exclusion of the other permissible appointees.
- 35 (6) "General power of appointment" means a power of appointment exercisable  
36 in favor of the power holder, the power holder's estate, a creditor of the  
37 power holder, or a creditor of the power holder's estate.
- 38 (7) "Gift-in-default clause" means a clause identifying a taker in default of  
39 appointment.
- 40 (8) "Impermissible appointee" means a person that is not a permissible  
41 appointee.
- 42 (9) "Instrument" means a writing.
- 43 (10) "Nongeneral power of appointment" means a power of appointment that is  
44 not a general power of appointment.
- 45 (11) "Permissible appointee" means a person in whose favor a power holder may  
46 exercise a power of appointment.
- 47 (12) "Person" means an individual, estate, trust, business or nonprofit entity,  
48 public corporation, government or governmental subdivision, agency,  
49 instrumentality, or other legal entity.
- 50 (13) "Power of appointment" means a power that enables a power holder acting  
51 in a nonfiduciary capacity to designate a recipient of an ownership interest in

1 or another power of appointment over the appointive property. The power of  
2 appointment may be general or nongeneral and presently exercisable or not  
3 presently exercisable. The term does not include a power of attorney.

4 (14) "Power holder" means a person in whom a donor creates a power of  
5 appointment.

6 (15) "Presently exercisable power of appointment" means a power of  
7 appointment exercisable by the power holder at the relevant time. The term:

8 a. Includes a power of appointment not exercisable until the occurrence  
9 of a specified event, the satisfaction of an ascertainable standard  
10 relating to an individual's health, education, and support or  
11 maintenance within the meaning of section 2041(b)(1)(A) or section  
12 2514(c)(1) of the Internal Revenue Code, as amended, or the passage  
13 of a specified time only after one of the following:

14 1. The occurrence of the specified event.

15 2. The satisfaction of the ascertainable standard.

16 3. The passage of the specified time.

17 b. Does not include a power exercisable only at the power holder's  
18 death.

19 (16) "Specific-exercise clause" means a clause in an instrument which  
20 specifically refers to and exercises a particular power of appointment.

21 (17) "Taker in default of appointment" means a person who takes all or part of  
22 the appointive property to the extent the power holder does not effectively  
23 exercise the power of appointment.

24 (18) "Terms of the instrument" means the manifestation of the intent of the maker  
25 of the instrument regarding the instrument's provisions as expressed in the  
26 instrument or as may be established in a judicial proceeding.

27 **"§ 31D-1-103. Governing law.**

28 (a) The creation, revocation, or amendment of the power of appointment is governed by  
29 either of the following:

30 (1) The law of the jurisdiction designated in the terms of the instrument creating  
31 the power.

32 (2) If no jurisdiction's law is designated in the terms of the instrument creating  
33 the power or if the jurisdiction's law so designated is contrary to a strong  
34 public policy of the law of the jurisdiction of the donor's domicile at the  
35 relevant time, then the law of the jurisdiction of the donor's domicile at the  
36 relevant time.

37 (b) The exercise, release, or disclaimer of the power, or the revocation or amendment of  
38 the exercise, release, or disclaimer of the power, is governed by either of the following:

39 (1) The law of the jurisdiction designated in the terms of the instrument creating  
40 the power.

41 (2) If no jurisdiction's law is designated in the terms of the instrument creating  
42 the power or if the jurisdiction's law so designated is contrary to a strong  
43 public policy of the law of the jurisdiction of the power holder's domicile at  
44 the relevant time, then the law of the jurisdiction of the power holder's  
45 domicile at the relevant time.

46 **"§ 31D-1-104. Common law and principles of equity.**

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

49 "Article 2.

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

51 **"§ 31D-2-201. Creation of power of appointment.**

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

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

3 (2) Except as otherwise provided in subsection (b) of this section, the instrument  
4 creating the power transfers the appointive property.

5 (3) The terms of the instrument creating the power manifest the donor's intent to  
6 create in a power holder a power of appointment over the appointive  
7 property exercisable in favor of a permissible appointee.

8 (b) Subdivision (1) of subsection (a) of this section does not apply to the creation of a  
9 power of appointment by the exercise of a power of appointment.

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

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

13 **"§ 31D-2-202. Nontransferability.**

14 A power holder may not transfer a power of appointment. If a power holder dies without  
15 exercising or releasing a power, the power lapses.

16 **"§ 31D-2-203. Presumption of unlimited authority.**

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

19 (1) Presently exercisable.

20 (2) Exclusionary.

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

22 **"§ 31D-2-204. Exception to presumption of unlimited authority.**

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

25 (1) The power is exercisable only at the power holder's death.

26 (2) The permissible appointees of the power are a defined and limited class that  
27 does not include the power holder's estate, the power holder's creditors, or  
28 the creditors of the power holder's estate.

29 **"§ 31D-2-205. Rules of classification.**

30 (a) In this section, the term "adverse party" means a person with a substantial beneficial  
31 interest in property who would be affected adversely by a power holder's exercise or  
32 nonexercise of a power of appointment in favor of the power holder, the power holder's estate,  
33 a creditor of the power holder, or a creditor of the power holder's estate.

34 (b) If a power holder may exercise a power of appointment only with the consent or  
35 joinder of an adverse party, the power is nongeneral.

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

38 **"§ 31D-2-206. Power to revoke or amend.**

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

41 (1) The instrument creating the power is revocable by the donor.

42 (2) The donor reserves a power of revocation or amendment in the instrument  
43 creating the power of appointment.

44 "Article 3.

45 "Exercise of Power of Appointment.

46 **"§ 31D-3-301. Requisites for exercise of power of appointment.**

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

49 (1) The instrument exercising the power is valid under applicable law.

50 (2) The terms of the instrument exercising the power manifest the power  
51 holder's intent to exercise the power.

- 1           (3) Subject to the provisions of G.S. 31D-3-304, the terms of the instrument  
2           exercising the power satisfy the requirements of exercise, if any, imposed by  
3           the donor.

4 **"§ 31D-3-302. Intent to exercise; determining intent from residuary clause.**

5           A residuary clause that does not contain a blanket-exercisable clause or specific-exercise  
6 clause manifests the power holder's intent to exercise a power of appointment only if all of the  
7 following apply:

- 8           (1) The terms of the instrument containing the residuary clause (including any  
9           valid codicil or amendment to the instrument) do not manifest a contrary  
10           intent.  
11           (2) The power is a general power exercisable in favor of the power holder's  
12           estate.  
13           (3) There is no gift-in-default clause or the clause is ineffective.  
14           (4) The power holder did not release the power.

15 **"§ 31D-3-303. Intent to exercise after acquired power.**

16           Unless the terms of an instrument exercising a power of appointment manifest a contrary  
17 intent:

- 18           (1) If the power holder is not also the donor of the power, a blanket-exercise  
19 clause in the instrument extends to a power acquired by the power holder  
20 after executing the instrument containing the clause.  
21           (2) If the power holder is also the donor of the power, the blanket-exercise  
22 clause extends to the power acquired by the power holder after executing the  
23 instrument only if there is no gift-in-default clause or the gift-in-default  
24 clause is ineffective. The blanket-exercise clause does not extend to the  
25 power if there is a gift-in-default clause that is effective.

26 **"§ 31D-3-304. Substantial compliance with donor-imposed formal requirement.**

27           A power holder's substantial compliance with a formal requirement of appointment  
28 imposed by the donor, including a requirement that the instrument exercising the power of  
29 appointment make reference or specific reference to the power, is sufficient if both of the  
30 following apply:

- 31           (1) The power holder knows of and intends to exercise the power.  
32           (2) The power holder's manner of attempted exercise of the power does not  
33 impair a material purpose of the donor in imposing the requirement.

34 **"§ 31D-3-305. Permissible appointment.**

35           (a) If a power holder of a general power of appointment permits appointment to the  
36 power holder or the power holder's estate, the power holder may make any appointment,  
37 including an appointment in trust or an appointment that creates a new power of appointment  
38 that the power holder could make in disposing of the power holder's own property.

39           (b) If a power holder of a general power of appointment permits appointment only to  
40 the creditors of the power holder or the creditors of the power holder's estate, or both, the  
41 power holder may appoint only to those creditors.

42           (c) Unless the terms of the instrument creating a power of appointment manifest a  
43 contrary intent, the power holder of a nongeneral power may:

- 44           (1) Make an appointment in any form, including an appointment in trust, in  
45           favor of a permissible appointee.  
46           (2) Create a general power in a permissible appointee.

47           (d) The terms of the instrument may permit the power holder of a nongeneral power to  
48 create a nongeneral power in any person to appoint to one or more of the permissible  
49 appointees of the original nongeneral power.

50 **"§ 31D-3-306. Appointment to deceased appointee.**

51           An appointment to a deceased appointee is ineffective.

1 **"§ 31D-3-307. Impermissible appointment.**

2 (a) An exercise of a power of appointment in favor of an impermissible appointee is  
3 ineffective.

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

6 **"§ 31D-3-308. Selective allocation doctrine.**

7 If a power holder exercises a power of appointment in a disposition that also disposes of  
8 property the power holder owns, the owned property and the appointive property must be  
9 allocated in the permissible manner that best carries out the power holder's intent.

10 **"§ 31D-3-309. Capture doctrine; disposition of ineffectively appointed property under**  
11 **general power.**

12 To the extent a power holder of a general power of appointment, other than a power to  
13 withdraw property from, revoke, or amend a trust, makes an ineffective appointment:

14 (1) The gift-in-default clause controls the disposition of the ineffectively  
15 appointed property.

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

18 a. To the power holder if the power holder is a permissible appointee  
19 and living.

20 b. If the power holder is an impermissible appointee or deceased, to the  
21 power holder's estate if the estate is a permissible appointee.

22 c. If the power holder is an impermissible appointee or deceased and if  
23 the estate is not a permissible appointee, under a reversionary interest  
24 to the donor or the donor's transferee or successor in interest.

25 **"§ 31D-3-310. Disposition of unappointed property under released or unexercised general**  
26 **power.**

27 (a) To the extent that a power holder releases a general power of appointment other  
28 than a power to withdraw property from, revoke, or amend a trust, the gift-in-default clause  
29 controls the disposition of the unappointed property. If there is no gift-in-default clause or to  
30 the extent that the clause is ineffective, the unappointed property passes under a reversionary  
31 interest to the donor or the donor's transferee or successor in interest.

32 (b) To the extent a power holder fails to exercise a general power of appointment other  
33 than a power to withdraw property from, revoke, or amend a trust, the gift-in-default clause  
34 controls the disposition of the unappointed property. If there is no gift-in-default clause or to  
35 the extent the clause is ineffective, the unappointed property passes as follows:

36 (1) To the power holder if the power holder is a permissible appointee and  
37 living.

38 (2) If the power holder is an impermissible appointee or deceased, to the power  
39 holder's estate if the estate is a permissible appointee.

40 (3) If the power holder is an impermissible appointee or deceased and if the  
41 estate is not a permissible appointee, under a reversionary interest to the  
42 donor or the donor's transferee or successor in interest.

43 **"§ 31D-3-311. Disposition of unappointed property under released or unexercised**  
44 **nongeneral power.**

45 To the extent that a power holder releases, ineffectively exercises, or fails to exercise a  
46 nongeneral power of appointment:

47 (1) The gift-in-default clause controls the disposition of the unappointed  
48 property.

49 (2) If there is no gift-in-default clause, or to the extent that the clause is  
50 ineffective, the unappointed property:

51 a. Passes to the permissible appointees, if both of the following apply:

1           1. The permissible appointees are defined and limited.

2           2. The terms of the instrument creating the power do not  
3           manifest a contrary intent.

4           b. If there is no taker under sub-subdivision a. of this subdivision,  
5           passes under a reversionary interest to the donor or the donor's  
6           transferee or successor in interest.

7   **"§ 31D-3-312. Disposition of unappointed property if partial appointment to taker in**  
8   **default.**

9           Unless the terms of the instrument creating or exercising a power of appointment manifest a  
10          contrary intent, if the power holder makes a valid partial appointment to a taker in default of  
11          appointment, then the taker in default of appointment may share fully in unappointed property.

12   **"§ 31D-3-313. Appointment to taker in default.**

13          If a power holder makes an appointment to a taker in default of appointment and the  
14          appointee would have taken the property under a gift-in-default clause had the property not  
15          been appointed, then the power of appointment is deemed not to have been exercised and the  
16          appointee takes under the clause.

17   **"§ 31D-3-314. Power holder's authority to revoke or amend exercise.**

18          If the terms of an instrument creating a power of appointment do not prohibit the power  
19          holder from revoking or amending an exercise of the power, a power holder may revoke or  
20          amend the exercise of a power only if one of the following apply:

21           (1)   The instrument creating the exercise of the power of appointment may be  
22           revoked or amended.

23           (2)   The power holder reserves a power of revocation or amendment in the  
24           instrument exercising the power of appointment.

25                   "Article 4.

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

27   **"§ 31D-4-401. Disclaimer.**

28          Consistent with Chapter 31B of the General Statutes:

29           (1)   A power holder may disclaim all or part of a power of appointment.

30           (2)   A permissible appointee, appointee, or taker in default of appointment may  
31           disclaim all or part of an interest in appointive property.

32   **"§ 31D-4-402. Authority to release.**

33          A power holder may release a power of appointment, in whole or in part, except to the  
34          extent that the terms of the instrument creating the power prevent the release.

35   **"§ 31D-4-403. Method of release.**

36          A power holder of a releasable power of appointment may release the power in whole or in  
37          part as follows:

38           (1)   By substantial compliance with a method provided in the terms of the  
39           instrument creating the power.

40           (2)   If the terms of the instrument creating the power do not provide a method or  
41           the method provided in the terms of the instrument is not expressly made  
42           exclusive, by an instrument manifesting the power holder's intent by clear  
43           and convincing evidence.

44   **"§ 31D-4-404. Revocation or amendment of release.**

45          A power holder may revoke or amend a release of a power of appointment only to the  
46          extent that one of the following applies:

47           (1)   The instrument of release is revocable by the power holder.

48           (2)   The power holder reserves a power of revocation or amendment in the  
49           instrument of release.

50   **"§ 31D-4-405. Power to contract; presently exercisable power of appointment.**

51          A power holder of a presently exercisable power of appointment may contract:



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

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

6 **"§ 31D-5-504. Creditor claim; nongeneral power.**

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

10 (b) Appointive property subject to a nongeneral power of appointment is subject to a  
11 claim of a creditor of the power holder or the power holder's estate to the extent that the power  
12 holder owned the property and, reserving the nongeneral power, transferred the property in  
13 violation of the Uniform Fraudulent Transfer Act, Article 3A of Chapter 39 of the General  
14 Statutes.

15 (c) If the initial gift in default of appointment is to the power holder or the power  
16 holder's estate, a nongeneral power of appointment is treated for purposes of this Article as a  
17 general power.

18 "Article 6.

19 "Miscellaneous Provisions.

20 **"§ 31D-6-601. Uniformity of application and construction.**

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

23 **"§ 31D-6-602. Relation to Electronic Signatures in Global and National Commerce Act.**

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

28 **"§ 31D-6-603. Application to existing relationships.**

29 (a) Except as otherwise provided in this Chapter, on or after the effective date of this  
30 Chapter:

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

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

35 (3) This Chapter applies to a judicial proceeding concerning a power of  
36 appointment commenced before the effective date of this Chapter unless the  
37 court finds that application of a particular provision of this Chapter would  
38 interfere substantially with the effective conduct of the judicial proceeding  
39 or prejudice a right of a party, in which case the particular provision of this  
40 Chapter does not apply and the superseded law applies.

41 (4) A rule of construction or presumption provided in this Chapter applies to an  
42 instrument executed before the effective date of this Chapter unless there is a  
43 clear indication of a contrary intent in the terms of the instrument or unless  
44 application of that rule of construction or presumption would impair  
45 substantial rights of a party created under North Carolina law in effect prior  
46 to the effective date of this Chapter, in which case that rule of construction  
47 or presumption does not apply and the superseded rule of construction or  
48 presumption applies.

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



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

4               **SECTION 3.(b)** G.S. 31-4 and G.S. 31-43 are repealed.

5  
 6       **PART IV. CLARIFY THE LAW REGARDING THE AUTHORITY OF A PERSONAL**  
 7 **REPRESENTATIVE TO SELL OR TAKE ACTION WITH RESPECT TO REAL**  
 8 **PROPERTY OF A DECEDENT AND AMEND THE ELECTIVE SHARE STATUTES**  
 9 **REGARDING VALUATION OF PARTIAL OR CONTINGENT INTEREST**  
 10 **PROPERTY**

11               **SECTION 4.(a)** G.S. 28A-13-3 reads as rewritten:

12       "**§ 28A-13-3. Powers of a personal representative or fiduciary.**

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

- 21               (1) To take possession, custody or control of the personal property of the  
 22 decedent. If in the opinion of the personal representative the personal  
 23 representative's possession, custody or control of such property is not  
 24 necessary for purposes of administration, such property may be left with or  
 25 surrendered to the heir or devisee presumptively entitled thereto.—~~The~~  
 26 ~~personal representative has the power to~~
- 27               (1a) To take possession, custody or control of the real property of the decedent if  
 28 the personal representative determines such possession, custody or control is  
 29 in the best interest of the administration of the estate, decedent, including the  
 30 power to eject occupants of real property. Prior to exercising such power  
 31 over real property the procedure as set out in subsection G.S. 28A-13-3(e)  
 32 shall be followed, except with respect to real property that is devised to the  
 33 personal representative in the decedent's will or title to which is acquired by  
 34 the personal representative during the estate administration, in which case  
 35 the personal representative shall be immediately entitled to custody,  
 36 possession, and control, and may institute an estate proceeding under  
 37 subsection (d) of this section to enforce those rights. property, under  
 38 subsection (c) of this section or under G.S. 28A-13-3.1. If the personal  
 39 representative determines that such possession, custody or control is not in  
 40 the best interest necessary for purposes of the administration of the estate  
 41 such property may be left with or surrendered to the heir or devisee  
 42 presumptively entitled thereto.

43       ...

- 44               (12) To borrow money for such periods of time and upon such terms and  
 45 conditions as to rates, maturities, renewals, and security as the personal  
 46 representative shall deem advisable, including the power of a corporate  
 47 personal representative to borrow from its own banking department, for the  
 48 purpose of paying debts, taxes, and other claims against the estate, and to  
 49 mortgage, pledge or otherwise encumber such portion of the estate as may  
 50 be required to secure such loan or loans. In respect to the borrowing of  
 51 money on the security of the real property of the decedent, G.S. 28A-17-11

1 is ~~controlling~~controlling unless the authority to mortgage, pledge, or  
 2 otherwise encumber real property of the decedent to secure loans is granted  
 3 to the personal representative under G.S. 28A-13-3.1.

4 ...  
 5 (27) To ~~sell~~sell, exchange, give options upon, partition, or lease real property of  
 6 the estate in the manner prescribed by the provisions of G.S. 28A-13-3.1 or  
 7 Article 17 of this ~~Chapter~~Chapter, as applicable.

8 ...  
 9 (a1) Except as qualified by express limitations imposed in a will of the decedent, and  
 10 subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal  
 11 representatives, a personal representative shall have absolute discretion to make the election as  
 12 to which items of the decedent's personal and household effects shall be excluded from the  
 13 carry over basis provision of the federal income tax law and such election shall be conclusive  
 14 and binding on all concerned.

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

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

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

- 28 (1) A description of the real property which is the subject of the petition;  
 29 (2) The names, ages, and addresses, if known, of the devisees and heirs of the  
 30 decedent;  
 31 (3) A statement by the personal representative that the personal representative  
 32 has determined that such possession, custody or control is in the best interest  
 33 of the administration of the estate.

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

41 ...."

42 **SECTION 4.(b)** Article 13 of Chapter 28A of the General Statutes is amended by  
 43 adding three new sections to read:

44 "**§ 28A-13-3.1. Power of personal representative to deal with real property without a**  
 45 **court order.**

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

- 50 (1) Incorporation by reference of the powers in G.S. 32-27 when title to the real  
 51 property is devised to the personal representative.

1           (2)    An express power granted to the personal representative in the will when  
2           title to the real property is devised to the personal representative.

3           (3)    An express power granted to the personal representative in the will when  
4           title to the real property is not devised to the personal representative if (i) the  
5           decedent specifically indicates an intent that the power applies to real  
6           property and (ii) the personal representative determines that exercise of the  
7           power with respect to the real property complies with an express standard set  
8           forth by the decedent in the will or, if no such standard is set forth, is in the  
9           best interest of the estate. For purposes of this section, provisions in the will  
10          stating that the power applies to the real property "whether or not title is  
11          devised to the personal representative" or "even though title is not devised to  
12          the personal representative" or other similar language is sufficient to indicate  
13          such an intent.

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

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

23          **"§ 28A-13-3.2. Notice of exercise of power with respect to real property not devised to**  
24          **personal representative.**

25          (a)    If in accordance with G.S. 28A-13-3.1(a)(3) a personal representative intends to  
26          exercise a power with respect to real property of the decedent not devised to the personal  
27          representative, the personal representative shall give written notice of the personal  
28          representative's intent to exercise that power to the devisees of the real property. The notice  
29          shall include a description of the real property that is the subject of the notice and a summary of  
30          the power the personal representative intends to exercise. The notice shall further include a  
31          statement that the devisees of the real property have 30 days from the service date of the notice  
32          to file a petition before the clerk under G.S. 28A-2-6 contesting the authority of the personal  
33          representative under G.S. 28A-13-3.1(a)(3) to exercise the power the personal representative  
34          intends to exercise.

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

39          (c)    If no devisee files a petition within 30 days after being served with the notice  
40          required under this section, the personal representative shall be entitled to exercise the power  
41          with respect to the real property, and the devisees of the real property shall have no further right  
42          to contest or challenge the power the personal representative intends to exercise. In such event,  
43          the personal representative shall file in the office of the clerk of court in the county where the  
44          estate is being administered, as well as in the office of the clerk of court in the county where the  
45          real property is located, a copy of the notice required by this section, together with an affidavit  
46          of the personal representative or the attorney for the personal representative to the effect that a  
47          copy of the notice was served on each devisee entitled to receive notice in accordance with this  
48          section and that no devisee filed an action within the requisite time period to determine whether  
49          the personal representative had the power with respect to the real property. Such notice and  
50          affidavit shall be filed prior to the date on which the personal representative intends to exercise  
51          the power.

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

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

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

12 **"§ 28A-13-3.3. Reimbursement of devisees for payment of carrying costs.**

13       (a) If in accordance with G.S. 28A-13-3.1(a)(3) the representative sells or exchanges  
14 the decedent's real property not devised to the personal representative a devisee shall be entitled  
15 to reimbursement from the net proceeds arising from the sale or exchange of all carrying costs  
16 incurred by the devisee before the personal representative took possession, custody, and control  
17 of the real property.

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

20           (1) Insurance, ad valorem taxes, or other governmental charges or assessments  
21 on the real property.

22           (2) Reasonable costs incurred to secure or to make necessary repairs to the real  
23 property.

24           (3) Payment of principal and interest on any indebtedness incurred before the  
25 decedent's death that is secured by a lien against the real property.

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

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

39       **SECTION 4.(c)** G.S. 28A-15-1(c) reads as rewritten:

40       "(c) If it shall be determined by the personal representative that it is in the best interest of  
41 the administration of the estate to sell, exchange, give options upon, partition, lease, or  
42 ~~mortgage~~ mortgage, or otherwise dispose of any real estate or interest therein to obtain money  
43 for the payment of debts and other claims against the decedent's estate, the personal  
44 representative shall institute a special proceeding before the clerk of superior court for such  
45 purpose pursuant to Article 17 of this Chapter, except that no such proceeding shall be required  
46 for a sale made pursuant to authority given by will. ~~A general provision granting authority to~~  
47 ~~the personal representative to sell the testator's real property, or incorporation by reference of~~  
48 ~~the provisions of G.S. 32-27(2) shall be sufficient to eliminate the necessity for a proceeding~~  
49 ~~under Article 17. sale, exchange, option, partition, lease, mortgage, or other disposition under~~  
50 G.S. 28A-13-3.1. If a special proceeding has been instituted by the personal representative  
51 pursuant to G.S. 28A-13-3(c), the personal representative may petition for sale, lease, or

1 mortgage of any real property as a part of that proceeding and is not required to institute a  
2 separate special proceeding."

3 **SECTION 4.(d)** G.S. 28A-15-2 reads as rewritten:

4 **"§ 28A-15-2. Title and possession of property.**

5 (a) Personal Property. – Subsequent to the death of the decedent and prior to the  
6 appointment and qualification of the personal representative or collector, the title and the right  
7 of possession of personal property of the decedent is vested in the decedent's heirs; but upon the  
8 appointment and qualification of the personal representative or collector, the heirs shall be  
9 divested of such title and right of possession which shall be vested in the personal  
10 representative or collector relating back to the time of the decedent's death for purposes of  
11 administering the estate of the decedent. But, if in the opinion of the personal representative,  
12 the personal representative's possession, custody and control of any item of personal property is  
13 not necessary for purposes of administration, such possession, custody and control may be left  
14 with or surrendered to the heir or devisee presumptively entitled thereto.

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

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

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

26 (3) If a decedent's will grants the personal representative a power under  
27 G.S. 28A-13-3.1 to transfer the title to the decedent's real property by sale,  
28 exchange, or partition, the transfer of the title pursuant to the exercise of that  
29 power divests the devisees or heirs of title to the real property and vests title  
30 in the grantee of the instrument transferring title. The devisees' or heirs' title  
31 is divested, and the title becomes vested in the grantee upon delivery of the  
32 instrument transferring title to the grantee. Any transfer of title to real  
33 property pursuant to Article 17 of this Chapter also divests the devisees or  
34 heirs of the title to that real property and vests title pursuant to the procedure  
35 in Article 17 of this Chapter.

36 (c) Real Property: Options, Leases, or Mortgages. – An option, lease, or mortgage of  
37 the decedent's real property by the personal representative under G.S. 28A-13-3.1 or under  
38 Article 17 of this Chapter encumbers the devisee's or heir's title upon the recordation of the  
39 applicable instrument creating or evidencing the option, lease, or mortgage according to law or  
40 upon the execution of the lease if the lease is not required to be recorded by G.S. 47-18 and is  
41 not recorded.

42 (d) Real Property: Docketed Judgments or Other Liens Against Heir or Devisee. – The  
43 interest of any heir or devisee and any person claiming through or against any heir or devisee,  
44 including a person holding a docketed judgment or other lien against an heir or devisee, is  
45 subject to the personal representative's right to sell, exchange, give options upon, partition,  
46 lease, mortgage, or otherwise dispose of the real property of the decedent, either under  
47 G.S. 28A-13-3.1 or under Article 17 of this Chapter; however, the proceeds from any such sale  
48 or other disposition shall be available to satisfy or reduce the amount of any valid judgment  
49 outstanding against an heir or devisee to the extent that the proceeds are distributable to that  
50 heir or devisee. Any sale, exchange, option, partition, lease, mortgage, or other disposition of  
51 the real property of the decedent, either under G.S. 28A-13-3.1 or under Article 17 of this

1 Chapter, shall be free and clear of the interest of any person claiming through or against an heir  
2 or devisee, and any interest in the decedent's real property acquired by the recipient of a sale,  
3 exchange, option, lease, mortgage, or other disposition shall not be subject to the interest of any  
4 person claiming through or against any heir or devisee."

5 **SECTION 4.(e)** G.S. 28A-22-1 reads as rewritten:

6 "**§ 28A-22-1. Scheme of distribution; testate and intestate estates.**

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

13 **SECTION 4.(f)** G.S. 28A-23-3(b) reads as rewritten:

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

20 **SECTION 4.1** G.S. 30-3.3A(e) reads as rewritten:

21 "(e) Partial or Contingent Interest Property. – The valuation of partial and contingent  
22 property interests, outright or in trust, which are limited to commence or terminate upon the  
23 death of one or more persons, upon the expiration of a period of time, or upon the occurrence of  
24 one or more contingencies, shall be determined by computations based upon the mortality and  
25 annuity tables set forth in G.S. 8-46 and G.S. 8-47, and by using a presumed rate of return of  
26 six percent (6%) of the value of the underlying property in which those interests are ~~limited~~.  
27 limited, unless upon good cause shown by one of the parties, the clerk determines that the use  
28 of such tables or rate of return is not appropriate, then the value of such interests shall be  
29 determined under subsection (f) of this section. However, in valuing partial and contingent  
30 interests passing to the surviving spouse, the following special rules apply:

- 31 (1) The value of the beneficial interest of a spouse shall be the entire fair market  
32 value of any property held in trust if the decedent was the settlor of the trust,  
33 if the trust is held for the exclusive benefit of the surviving spouse during the  
34 surviving spouse's lifetime, and if the terms of the trust meet the following  
35 requirements:
- 36 a. During the lifetime of the surviving spouse, the trust is controlled by  
37 one or more nonadverse trustees.
  - 38 b. The trustee shall distribute to or for the benefit of the surviving  
39 spouse either (i) the entire net income of the trust at least annually or  
40 (ii) the income of the trust in such amounts and at such times as the  
41 trustee, in its discretion, determines necessary for the health,  
42 maintenance, and support of the surviving spouse.
  - 43 c. The trustee shall distribute to or for the benefit of the surviving  
44 spouse out of the principal of the trust such amounts and at such  
45 times as the trustee, in its discretion, determines necessary for the  
46 health, maintenance, and support of the surviving spouse.
  - 47 d. In exercising discretion, the trustee may be authorized or required to  
48 take into consideration all other income assets and other means of  
49 support available to the surviving spouse.
- 50 (2) To the extent that the partial or contingent interest is dependent upon the  
51 occurrence of any contingency that is not subject to the control of the

1 surviving spouse and that is not subject to valuation by reference to the  
2 mortality and annuity tables set forth in G.S. 8-46 and G.S. 8-47, the  
3 contingency will be conclusively presumed to result in the lowest possible  
4 value passing to the surviving spouse. However, a life estate or income  
5 interest that will terminate upon the surviving spouse's death or remarriage  
6 will be valued without regard to the possibility of termination upon  
7 remarriage.

- 8 (3) ~~To the extent that the valuation of a partial or contingent interest is~~  
9 ~~dependent upon the life expectancy of the surviving spouse, that life~~  
10 ~~expectancy shall be conclusively presumed to be no less than 10 years,~~  
11 ~~regardless of the actual attained age of the surviving spouse at the decedent's~~  
12 ~~death."~~

13  
14 **PART V. AMEND THE LAW PROVIDING FOR CONVEYANCE OF TENANCY BY**  
15 **THE ENTIRETIES TO A TRUST**

16 **SECTION 5.** G.S. 39-13.7 reads as rewritten:

17 **"§ 39-13.7. Tenancy by the entireties trusts in real property.**

18 (a) Any real property held by a husband and wife as a tenancy by the entireties and  
19 conveyed to their joint revocable or irrevocable trust, or to their separate revocable or  
20 irrevocable trusts, shall have the same immunity from the claims of the spouses' separate  
21 creditors as would exist if the spouses had continued to hold the property as a tenancy by the  
22 entireties, so long as (i) the spouses remain husband and wife, (ii) the real property continues to  
23 be held in the trust or trusts, and (iii) the spouses remain the beneficial owners of the real  
24 property to (i) a joint trust or (ii) in equal shares to two separate trusts; shall no longer be held  
25 by the husband and wife as tenants by the entirety and shall be disposed of by the terms of the  
26 trust or trusts, but, subject to the provisions of subsection (b) of this section, the real property  
27 shall have the same immunity from the claims of the separate creditors of the husband and wife  
28 as would exist if the spouses had continued to hold the property as tenants by the entireties.

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

- 31 (1) The husband and wife remain married.  
32 (2) The real property continues to be held in the trust or trusts as provided in  
33 subsection (a) of this section.  
34 (3) Both husband and wife are current beneficiaries of the joint trust if the real  
35 property is conveyed to that trust or of each separate trust if the real property  
36 is conveyed in equal shares to their separate trusts.

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

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

47 (e) For purposes of this section:

- 48 (1) The reference to the real property conveyed to or held in the trust shall be  
49 deemed to include the proceeds arising from the involuntary conversion of  
50 the real property.

- 1           (2)    The reference to a "joint trust" means a revocable or irrevocable trust of  
2           which both the husband and wife are the settlors, and the reference to  
3           "separate trusts" means revocable or irrevocable trusts of which the husband  
4           is the settlor of one trust and the wife is the settlor of the other trust.  
5           (3)    The husband and wife are "beneficiaries" of a trust if they are distributees or  
6           permissible distributees of the income or principal of the trust whether or not  
7           other persons are also current or future beneficiaries of the trust."  
8

9   **PART VI. UNIFORM TRUST CODE; AMEND THE STATUTE OF LIMITATIONS**  
10 **AGAINST A TRUSTEE**

11           **SECTION 6.** G.S. 36C-10-1005(b) reads as rewritten:

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

- 15           (1)    On the date that any limitation starts running as to a person with respect to a  
16           claim held by the person involving a trust, the limitation also shall start  
17           running as to all other persons the person would be entitled to represent  
18           under Article 3 of this Chapter, whether or not the person consented to serve  
19           as a representative.  
20           (2)    G.S. 1-17 of the General Statutes shall not apply to toll the running of the  
21           limitation as to the persons described in subdivision (1) of this subsection.  
22           Those persons shall be treated as if they were under no disability on the date  
23           that the limitation starts running."  
24

25   **PART VII. UNIFORM TRUST CODE; CLARIFY APPLICABILITY OF DEFAULT**  
26 **AND MANDATORY RULES GOVERNING POWER HOLDERS**

27           **SECTION 7.** G.S. 36C-1-105 reads as rewritten:

28    "**§ 36C-1-105. Default and mandatory rules.**

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

33           (b)    The terms of a trust prevail over any provision of this Chapter except:

- 34           (1)    The requirements for creating a trust.  
35           (2)    The duty of a trustee or a power holder under Article 8A of this Chapter  
36           to act in good faith and in accordance with the terms and purposes of the trust  
37           and the interests of the ~~beneficiaries.~~beneficiaries, except as otherwise  
38           provided in subsection (c) of this section.  
39           (3)    The requirement that a trust and its terms be for the benefit of its  
40 beneficiaries, and that the trust have a purpose that is lawful, not contrary to  
41 public policy, and possible to achieve.  
42           (4)    The power of the court to modify or terminate a trust under G.S. 36C-4-410  
43           through G.S. 36C-4-416.  
44           (5)    The effect of a spendthrift provision and the rights of certain creditors and  
45 assignees to reach a trust as provided in Article 5 of this Chapter.  
46           (6)    The effect of an exculpatory term under  
47 ~~G.S. 36C-10-1008.~~G.S. 36C-10-1008, except as otherwise provided in  
48 subsection (c) of this section.  
49           (7)    The rights under G.S. 36C-10-1010 through G.S. 36C-10-1013 of a person  
50 other than a trustee or beneficiary.  
51           (8)    Periods of limitation for commencing a judicial proceeding.



- 1 (9) The power of the court to take any action and exercise any jurisdiction as  
2 may be necessary in the interests of justice.
- 3 (10) The subject-matter jurisdiction of the court and venue for commencing a  
4 proceeding as provided in G.S. 36C-2-203 and G.S. 36C-2-204.
- 5 (11) The requirement that the exercise of the powers described in  
6 G.S. 36C-6-602.1(a) shall not alter the designation of beneficiaries to receive  
7 property on the settlor's death under that settlor's existing estate plan.
- 8 (12) The power of a trustee to renounce an interest in or power over property  
9 under G.S. 36C-8-816(32).

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

14  
15 **PART VIII. UNIFORM TRUST CODE; AMEND THE LAW GOVERNING**  
16 **DECANTING FROM A TRADITIONAL TRUST TO A SUPPLEMENTAL NEEDS**  
17 **TRUST**

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

19 **"§ 36C-8-816.1. Trustee's special power to appoint to a second trust.**

20 (a) For purposes of this section, the following definitions apply:

- 21 (1) Current beneficiary. – A person who is a permissible distributee of trust  
22 income or principal.
- 23 (2) Original trust. – A trust established under an irrevocable trust instrument  
24 pursuant to the terms of which a trustee has a discretionary power to  
25 distribute principal or income of the trust to or for the benefit of one or more  
26 current beneficiaries of the trust.
- 27 (3) Second trust. – A trust established under an irrevocable trust instrument, the  
28 current beneficiaries of which are one or more of the current beneficiaries of  
29 the original trust. The second trust may be a trust created under the same  
30 trust instrument as the original trust or under a different trust instrument.

31 (b) A trustee of an original trust may, without authorization by the court, exercise the  
32 discretionary power to distribute principal or income to or for the benefit of one or more current  
33 beneficiaries of the original trust by appointing all or part of the principal or income of the  
34 original trust subject to the power in favor of a trustee of a second trust. The trustee of the  
35 original trust may exercise this power whether or not there is a current need to distribute  
36 principal or income under any standard provided in the terms of the original trust. The trustee's  
37 special power to appoint trust principal or income in further trust under this section includes the  
38 power to create the second trust. The second trust may have a duration that is longer than the  
39 duration of the first trust.

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

- 41 (1) The beneficiaries of the second trust may include only beneficiaries of the  
42 original trust.
- 43 (2) A beneficiary who has only a future beneficial interest, vested or contingent,  
44 in the original trust cannot have the future beneficial interest accelerated to a  
45 present interest in the second trust.
- 46 (3) The terms of the second trust may not reduce any fixed income, annuity, or  
47 unitrust interest of a beneficiary in the assets of the original trust if that  
48 interest has come into effect with respect to the beneficiary.
- 49 (4) If any contribution to the original trust qualified for a marital or charitable  
50 deduction for federal income, gift, or estate tax purposes under the Internal  
51 Revenue Code, then the second trust shall not contain any provision that, if

- 1 included in the original trust, would have prevented the original trust from  
2 qualifying for the deduction or that would have reduced the amount of the  
3 deduction.
- 4 (5) If contributions to the original trust have been excluded from the gift tax by  
5 the application of section 2503(b) and section 2503(c) of the Internal  
6 Revenue Code, then the second trust shall provide that the beneficiary's  
7 remainder interest in the contributions shall vest and become distributable no  
8 later than the date upon which the interest would have vested and become  
9 distributable under the terms of the original trust.
- 10 (6) If any beneficiary of the original trust has a power of withdrawal over trust  
11 property, then either:
- 12 a. The terms of the second trust must provide a power of withdrawal in  
13 the second trust identical to the power of withdrawal in the original  
14 trust; or
- 15 b. Sufficient trust property must remain in the original trust to satisfy  
16 the outstanding power of withdrawal.
- 17 (7) If a trustee of an original trust exercises a power to distribute principal or  
18 income that is subject to an ascertainable standard by appointing property to  
19 a second trust, then the power to distribute income or principal in the second  
20 trust must be subject to the same ascertainable standard as in the original  
21 trust and must be exercisable in favor of the same current beneficiaries to  
22 whom such distribution could be made in the original trust.
- 23 (8) The second trust may confer a power of appointment upon a beneficiary of  
24 the original trust to whom or for the benefit of whom the trustee has the  
25 power to distribute principal or income of the original trust. The permissible  
26 appointees of the power of appointment conferred upon a beneficiary may  
27 include persons who are not beneficiaries of the original or second trust. The  
28 power of appointment conferred upon a beneficiary shall be subject to the  
29 provisions of G.S. 41-23 specifying the permissible period allowed for the  
30 suspension of the power of alienation of the original trust and the time from  
31 which that permissible period is computed.
- 32 (9) The terms of the second trust shall not contain any provisions that would  
33 jeopardize (i) the qualification of a transfer as a direct skip under section  
34 2642(c) of the Code, (ii) if the first trust owns subchapter S Corporation  
35 stock, the election to treat a corporation as a subchapter S Corporation under  
36 section 1362 of the Code, (iii) if the first trust owns an interest in property  
37 subject to the minimum distribution rules of section 401(a)(9) of the Code, a  
38 favorable distribution period by shortening the minimum distribution period,  
39 or (iv) any other specific tax benefit for which a contribution originally  
40 qualified for income, gift, estate, or generation-skipping transfer tax  
41 purposes. In this subdivision, "tax benefit" means a federal or State tax  
42 deduction, exemption, exclusion, or other benefit not otherwise listed in this  
43 section, except for the benefit from having the settlor considered the owner  
44 under sections 671 through 679 of the Code. Subject to clause (ii) above, the  
45 second trust may be a trust as to which the settlor is not considered the  
46 owner under sections 671 through 679 of the Code even if the settlor is  
47 considered the owner of the first trust, and the second trust may be a trust as  
48 to which the settlor of the first trust is considered the owner under sections  
49 671 through 679 of the Code, even if the settlor is not considered the owner  
50 of the first trust.

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

- a. A "supplemental needs trust" means a trust that is a discretionary trust under G.S. 36C-5-504 and relative to the original trust contains either lesser or greater restrictions on the trustee's power to distribute income or principal, and which the trustee believes would, if implemented, allow the disabled beneficiary to receive greater governmental benefits than the disabled beneficiary would receive if the power to appoint principal and income had not been exercised.
- b. "Governmental benefits" means medical assistance, financial aid, or services from any local, State, or federal agency or department.
- c. A "disabled beneficiary" means a current beneficiary of the original trust who the trustee determines has a condition that substantially impairs the beneficiary's ability to provide for his or her own support, care, or custody whether or not the beneficiary has been adjudicated a "disabled person" by any government agency or department.
- d. The second supplemental needs trust shall not be liable to pay or reimburse the State or any government or public agency for medical assistance, financial aid, or services provided to the disabled beneficiary except as provided in the second supplemental needs trust.

...."

## **PART IX. UNIFORM TRUST CODE; PROVIDE PERMISSIBLE BENEFICIARIES FOR CERTAIN IRREVOCABLE INTER VIVOS TRUSTS**

### **SECTION 9. 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. 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. 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. 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. 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 inter vivos 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 inter vivos 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 X. UNIFORM TRUST CODE; CLARIFY STANDARD OF LIABILITY OF DIRECTED COTRUSTEE**

**SECTION 10.** 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 compliance with the direction unless compliance with the direction constitutes intentional misconduct on the part of the directed cotrustee.~~

b. ~~If the terms of the trust confer upon the cotrustee any other power, the excluded trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the action taken by the cotrustee.~~

e. ~~The excluded trustee has no duty to monitor the conduct of the cotrustee, provide advice to the cotrustee, or consult with or request directions from the cotrustee. The excluded trustee is not required to give notice to any beneficiary of any action taken or not taken by the cotrustee whether or not the excluded trustee agrees with the result. Administrative actions taken by the excluded trustee for the purpose of implementing directions of the cotrustee, including confirming that the directions of the cotrustee have been carried out, do not constitute monitoring of the cotrustee nor do they constitute participation in decisions within the scope of the cotrustee's authority.~~

(2) ~~Except as otherwise provided in sub-subdivision a. of subdivision (1) of this subsection, the cotrustee holding the power to take certain actions with~~

1 respect to the trust shall be liable to the beneficiaries with respect to the  
 2 exercise of the power as if the excluded trustee were not in office and has the  
 3 exclusive obligation to account to the beneficiaries and defend any action  
 4 brought by the beneficiaries with respect to the exercise of the power.

5 (f) Repealed by Session Laws 2007-106, s. 27, effective October 1, 2007.

6 (g) A trustee Except as provided in subsection (g1) and (h) of this section, each  
 7 cotrustee shall exercise reasonable care in connection with matters for which the trustee is  
 8 given authority under the terms of a trust to:

9 (1) Avoid enabling a cotrustee to commit a serious breach of trust; and

10 (2) Compel a cotrustee to redress a serious breach of trust.

11 (g1) If the terms of the trust confer upon a cotrustee, to the exclusion of another  
 12 cotrustee, the power to take certain actions with respect to the trust:

13 (1) The excluded cotrustee is not liable, directly or indirectly, for the action  
 14 taken by the cotrustee holding the exclusive power.

15 (2) The excluded cotrustee has no duty to monitor the conduct of the cotrustee  
 16 holding the exclusive power, provide advice to that cotrustee, or consult with  
 17 or request directions from that cotrustee. The excluded trustee is not required  
 18 to give notice to any beneficiary of any action taken or not taken by that  
 19 cotrustee.

20 (3) The cotrustee holding the exclusive power to take certain actions with  
 21 respect to the trust:

22 a. Shall be liable to the beneficiaries with respect to the exercise of the  
 23 power as if the excluded trustee were not in office.

24 b. Has the exclusive obligation to account to the beneficiaries and  
 25 defend any action brought by the beneficiaries with respect to the  
 26 exercise of the power.

27 (h) Notwithstanding subsection (g) of this section, a cotrustee is not liable for the action  
 28 of a majority of the other trustees if either of the following apply: If the terms of the trust confer  
 29 the power to take actions on both or all cotrustees but under the terms of the trust or this  
 30 Chapter the decision of one or more of the cotrustees controls in the event of a disagreement,  
 31 then, unless the dissenting cotrustee had actual knowledge that the action constituted a serious  
 32 breach of trust, a cotrustee who dissents from the action taken by one or more of the other  
 33 cotrustees is not liable for the action if either of the following apply:

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

36 (2) The dissenting trustee-cotrustee joins in an-the action necessary to carry out  
 37 the decision of the majority of the trustees and notifies in writing the other  
 38 cotrustee or cotrustees and gives notice of the dissent to the other cotrustee  
 39 or cotrustees at or before joining in the action, unless the trustee had  
 40 knowledge that the action taken involved intentional misconduct or was  
 41 taken with an intention to directly or indirectly provide an improper personal  
 42 benefit to one or more trustees approving the action.

43 ...."

## 44 PART XI. COMMENTS AND EFFECTIVE DATES

45 **SECTION 11.(a)** The Revisor of Statutes shall cause to be printed, as annotations  
 46 to the published General Statutes, all relevant portions of the Official Commentary to the  
 47 Uniform Powers of Appointment Act and of the Official Commentary to the Uniform Trust  
 48 Code and all explanatory comments of the drafters of those acts, as the Revisor may deem  
 49 appropriate.  
 50

1           **SECTION 11.(b)** Section 4 of this act becomes effective January 1, 2016, and  
2 applies to estates of persons dying on or after that date. Sections 6, 7, 8, 9, and 10 of this act  
3 become effective October 1, 2015, and apply to (i) all trusts created before, on, or after that  
4 date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or  
5 after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts  
6 commenced before that date, unless the court finds that application of a particular provision of  
7 these sections would substantially interfere with the effective conduct of the judicial  
8 proceedings or prejudice the rights of the parties, in which case the law as it existed on  
9 September 30, 2015, applies. The remainder of this act is effective when it becomes law.