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Short Title: Estate Planning/Uniform Trust Code.

(Public)

Sponsors:

Referred to:

March 19, 2015

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

5 The General Assembly of North Carolina enacts:

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

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

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

14 "Article 21.

15 "Standby Guardianship.

16 **"§ 35A-1370. Definitions.**

17 For purposes of this Article:

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



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

1 ...

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

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

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

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

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

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

49 (e) The petitioner's appearance at the hearing shall not be required if the petitioner is
50 medically unable to appear, unless the clerk determines that the petitioner is able with

1 reasonable accommodation to appear and that the interests of justice require that the petitioner
2 be present at the hearing.

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

18 ...
19 **"§ 35A-1374. Appointment by written designation; form.**

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

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

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

37 (c) The authority of the standby guardian under a designation shall commence upon the
38 same conditions as set forth in G.S. 35A-1373(i) through ~~(4)-(1)~~, as if the order referred to
39 therein was a written description under this section.

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

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

- 1 (4) Proof of death of the designator, such as a copy of a death certificate or a
2 funeral home receipt.
- 3 (e) The standby guardian shall file a petition pursuant to subsection (d) of this section
4 within 90 days of the date of the commencement of the standby guardian's authority under this
5 section, or the standby guardian's authority shall lapse after the expiration of those 90 days, to
6 recommence only upon filing of the petition.
- 7 (f) A petition filed pursuant to subsection (d) of this section shall:
- 8 (1) Append the written designation of such person as standby guardian; and
9 (2) Append a copy of either (i) the determination of incapacity of the designator;
10 (ii) the determination of debilitation of the designator and the written
11 consent of the designator; (iii) the designator's consent; or (iv) proof of death
12 of the designator, such as a copy of a death certificate or a funeral home
13 receipt; and
- 14 (3) If the petition is by a person designated as an alternate standby guardian,
15 state that the person designated as the standby guardian is unwilling or
16 unable to act as standby guardian, and the basis for that statement; and
- 17 (4) State whether there are any lawsuits, in this State or any other jurisdiction,
18 involving the minor child or incompetent adult and, if so, identify the
19 parties, the case numbers, and the states and counties where filed; and
- 20 (5) Be verified by the standby guardian or alternate standby guardian in front of
21 a notary public or another person authorized to administer oaths.
- 22 (g) A copy of the petition and written notice of the time, date, and place set for a
23 hearing shall be served upon any biological or adoptive parent of the minor child who is not a
24 ~~designator, designator~~ (if the petition concerns a minor child), on such persons as would be
25 required if the petition was filed as a motion in the cause under G.S. 35A-1207 (if the petition
26 concerns an incompetent adult), and on any other person the clerk may direct, including the
27 minor child. Service—child or incompetent adult. If the petition concerns a minor child, service
28 shall be made pursuant to Rule 4 of the Rules of Civil Procedure, unless the clerk directs
29 otherwise. If the petition concerns an incompetent adult, service shall be made pursuant to Rule
30 5 of the Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by
31 the sheriff, the sheriff shall make such service without demanding his fees in advance. Parties
32 may waive their right to notice of the hearing and the clerk may proceed to consider the petition
33 upon determining that all necessary parties are before the court and agree to have the petition
34 considered.
- 35 (h) If at or before the hearing any parent entitled to notice under subsection (c) of this
36 section presents to the clerk a written claim for custody of the minor child, the clerk shall stay
37 further proceedings under this Article pending the filing of a complaint for custody of the
38 minor child under Chapter 50 of the General Statutes and, upon the filing of such a complaint,
39 shall dismiss the petition. If no such complaint is filed within 30 days after the claim is
40 presented, the clerk shall conduct a hearing and enter an order as provided for in this section.
- 41 (i) At the hearing, the clerk shall receive evidence necessary to determine whether the
42 requirements of this section have been satisfied. The clerk shall enter an order appointing the
43 standby guardian or alternate standby guardian as guardian of the person or general guardian of
44 the minor child or incompetent adult if the clerk finds that:
- 45 (1) The person was duly designated as a standby guardian or alternate standby
46 guardian;
- 47 (2) That (i) there has been a determination of ~~incapacity; incapacity of the~~
48 designator; (ii) there has been a determination of debilitation and the
49 designator has consented to the commencement of the standby guardian's
50 authority; (iii) the designator has consented to that commencement; or (iv)

1 the designator has died, such information coming from a document, such as
2 a copy of a death certificate or a funeral home receipt;

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

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

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

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

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

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

20 ...

21 **"§ 35A-1376. Restoration of capacity or ability; suspension of guardianship.**

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

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

34 (2) Be in writing; and

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

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

44 ...

45 **"§ 35A-1379. Appointment of guardian ad litem.**

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

49 (b) The duties of the guardian ad litem, when appointed, shall be to make an
50 investigation to determine the facts, the needs of the minor child or incompetent adult and the
51 available resources within the family to meet those needs, and to protect and promote the best

1 interests of the minor child or incompetent adult until formally relieved of the responsibility by
2 the clerk.

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

6 ...

7 **"§ 35A-1382. Termination.**

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

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

13 (2) Revocation pursuant to this Article.

14 (3) Renunciation pursuant to this Article.

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

19
20 **PART II. AUTHORIZE LIVING PROBATE PROCEDURE ALLOWING A PERSON**
21 **TO PETITION THE PROBATE COURT FOR AN ORDER CONFIRMING THE**
22 **VALIDITY OF THAT PERSON'S WILL**

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

25 "Article 2B.

26 "Living Probate.

27 **"§ 28A-2B-1. Establishment before death that a will or codicil is valid.**

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

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

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

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

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

47 **"§ 28A-2B-2. Venue.**

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

50 **"§ 28A-2B-3. Contents of petition for will validity.**

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

3 (1) A statement that the individual is a resident of North Carolina and specifying
4 the county of the individual's residence.

5 (2) Allegations that the will was prepared and executed in accordance with
6 North Carolina law and a statement that the will was executed with
7 testamentary intent.

8 (3) A statement that the individual had testamentary capacity at the time the will
9 was executed.

10 (4) A statement that the individual was free from undue influence and duress
11 and executed the will in the exercise of the individual's free will.

12 (5) A statement identifying the individual, and all persons believed by the
13 petitioner to have an interest in the proceeding, including, for any interested
14 parties who are minors, information regarding the minor's appropriate
15 representative.

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

19 **"§ 28A-2B-4. Declaration by court; bar to caveat.**

20 (a) If the court enters a judgment declaring a will or codicil to be valid, such judgment
21 shall be binding upon all parties to the proceeding, including any persons represented in the
22 proceeding pursuant to the provisions of G.S. 28A-2-7, and no party bound by the judgment
23 shall have any further right to, and shall be barred from filing, a caveat to the will or codicil
24 once that will or codicil is entered into probate following the individual's death. If a party
25 shows, by clear and convincing evidence, that before and during the hearing, the testator was
26 subject to financial or physical duress or coercion which was so significant that the testator
27 would not have reasonably disclosed it at the hearing, the party may make a motion to the
28 superior court that the party be permitted to file a caveat, notwithstanding the entry of the
29 judgment.

30 (b) If the court declares a will or codicil to be valid, upon the motion of the petitioner or
31 the court, the court may order that the will or codicil cannot be revoked and that no subsequent
32 will or codicil will be valid unless the revocation or the subsequent will or codicil is declared
33 valid in a proceeding under this Article. If the court enters such an order, any subsequent
34 revocation of the will or codicil not declared valid in a proceeding under this Article shall be
35 void and any subsequent will or codicil not declared valid in a proceeding under this Article
36 shall be void and shall not be admitted to probate.

37 (c) If a will or codicil judicially declared valid is revoked or modified by a subsequent
38 will or codicil, nothing in this section shall bar an interested person from contesting the validity
39 of that subsequent will or codicil, unless that subsequent will or codicil is also declared valid in
40 a proceeding under this Article in which the interested person was a party. If a will or codicil
41 judicially declared valid is revoked by a method other than the execution of a subsequent will
42 or codicil, nothing in this section shall bar an interested person from contesting the validity of
43 that revocation, unless that revocation is also declared valid in a proceeding under this Article
44 in which the interested person was a party.

45 **"§ 28A-2B-5. Confidentiality.**

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

50 (1) The petitioner named in the petition.

51 (2) The testator of the will.

- 1 (3) Interested persons who appeared in the proceedings, interested persons who
 2 have otherwise submitted to the jurisdiction of the court, and the attorneys
 3 and guardians of the interested persons.
 4 (4) The attorney for the petitioner.
 5 (5) The judge hearing or reviewing the matter.

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

8 **"§ 28A-2B-6. Costs and attorneys' fees.**

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

15 **PART III. ENACT THE UNIFORM POWERS OF APPOINTMENT ACT**

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

18 **"Chapter 31D.**

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

20 **"Article 1.**

21 **"General Provisions and Definitions.**

22 **"§ 31D-1-101. Short title.**

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

24 **"§ 31D-1-102. Definitions.**

25 The following definitions apply in this Chapter:

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

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

34 **"§ 31D-1-103. Governing law.**

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

1 the relevant time, then the law of the jurisdiction of the power holder's
 2 domicile at the relevant time.

3 **"§ 31D-1-104. Common law and principles of equity.**

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

6 "Article 2.

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

8 **"§ 31D-2-201. Creation of power of appointment.**

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

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

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

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

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

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

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

21 **"§ 31D-2-202. Nontransferability.**

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

24 **"§ 31D-2-203. Presumption of unlimited authority.**

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

27 (1) Presently exercisable.

28 (2) Exclusionary.

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

30 **"§ 31D-2-204. Exception to presumption of unlimited authority.**

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

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

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

37 **"§ 31D-2-205. Rules of classification.**

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

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

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

46 **"§ 31D-2-206. Power to revoke or amend.**

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

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

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

"Article 3."Exercise of Power of Appointment.**"§ 31D-3-301. Requisites for exercise of power of appointment.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 1 (1) Make an appointment in any form, including an appointment in trust, in
2 favor of a permissible appointee.
3 (2) Create a general power in a permissible appointee.
4 (d) The terms of the instrument may permit the power holder of a nongeneral power to
5 create a nongeneral power in any person to appoint to one or more of the permissible
6 appointees of the original nongeneral power.

7 **"§ 31D-3-306. Appointment to deceased appointee.**

8 An appointment to a deceased appointee is ineffective.

9 **"§ 31D-3-307. Impermissible appointment.**

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

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

14 **"§ 31D-3-308. Selective allocation doctrine.**

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

18 **"§ 31D-3-309. Capture doctrine; disposition of ineffectively appointed property under**
19 **general power.**

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

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

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

26 a. To the power holder if the power holder is a permissible appointee
27 and living.

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

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

33 **"§ 31D-3-310. Disposition of unappointed property under released or unexercised general**
34 **power.**

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

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

44 (1) To the power holder if the power holder is a permissible appointee and
45 living.

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

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

1 **"§ 31D-3-311. Disposition of unappointed property under released or unexercised**
2 **nongeneral power.**

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

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

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

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

10 1. The permissible appointees are defined and limited.

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

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

16 **"§ 31D-3-312. Disposition of unappointed property if partial appointment to taker in**
17 **default.**

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

21 **"§ 31D-3-313. Appointment to taker in default.**

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

26 **"§ 31D-3-314. Power holder's authority to revoke or amend exercise.**

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

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

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

34 "Article 4.

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

36 **"§ 31D-4-401. Disclaimer.**

37 Consistent with Chapter 31B of the General Statutes:

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

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

41 **"§ 31D-4-402. Authority to release.**

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

44 **"§ 31D-4-403. Method of release.**

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

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

49 (2) If the terms of the instrument creating the power do not provide a method or
50 the method provided in the terms of the instrument is not expressly made

1 exclusive, by an instrument manifesting the power holder's intent by clear
2 and convincing evidence.

3 **"§ 31D-4-404. Revocation or amendment of release.**

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

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

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

9 **"§ 31D-4-405. Power to contract; presently exercisable power of appointment.**

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

11 (1) Not to exercise the power.

12 (2) To exercise the power if the contract when made does not confer a benefit on
13 an impermissible appointee.

14 **"§ 31D-4-406. Power to contract; power of appointment not presently exercisable.**

15 A power holder of a power of appointment that is not presently exercisable may contract to
16 exercise or not to exercise the power only if the power holder both:

17 (1) Is also the donor of the power.

18 (2) Has reserved the power in a revocable trust.

19 **"§ 31D-4-407. Remedy for breach of contract to appoint or not to appoint.**

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

23 "Article 5.

24 "Rights of Power Holder's Creditors in Appointive Property.

25 **"§ 31D-5-501. Creditor claim; general power created by power holder.**

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

29 (b) Appointive property subject to a general power of appointment created by the power
30 holder is subject to a claim of a creditor of the power holder or of the power holder's estate to
31 the extent provided in the Uniform Voidable Transactions Act, Chapter 39 of the General
32 Statutes.

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

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

41 (1) The power holder, to the same extent as if the power holder owned the
42 appointive property, if the power is presently exercisable.

43 (2) The power holder's estate, to the extent that the estate is insufficient to
44 satisfy the claim and subject to the right of a decedent to direct the source
45 from which liabilities are paid, if the power is exercisable at the power
46 holder's death.

47 **"§ 31D-5-502. Creditor claim; general power not created by power holder.**

48 (a) Except as otherwise provided in subsection (b) of this section, and only when and to
49 the extent that the power holder exercises the power, appointive property subject to a general
50 power of appointment created by a person other than the power holder is subject to a claim of a
51 creditor of:

1 (1) The power holder, to the extent the power holder's property is insufficient, if
2 the power is presently exercisable.

3 (2) The power holder's estate, to the extent the estate is insufficient, subject to
4 the right of a decedent to direct the source from which liabilities are paid.

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

10 **"§ 31D-5-503. Power to withdraw.**

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

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

16 **"§ 31D-5-504. Creditor claim; nongeneral power.**

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

20 (b) Appointive property subject to a nongeneral power of appointment is subject to a
21 claim of a creditor of the power holder or the power holder's estate to the extent that the power
22 holder owned the property and, reserving the nongeneral power, transferred the property in
23 violation of the Uniform Voidable Transactions Act, Article 3A of Chapter 39 of the General
24 Statutes.

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

28 "Article 6.

29 "Miscellaneous Provisions.

30 **"§ 31D-6-601. Uniformity of application and construction.**

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

33 **"§ 31D-6-602. Relation to Electronic Signatures in Global and National Commerce Act.**

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

38 **"§ 31D-6-603. Application to existing relationships.**

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

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

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

45 (3) This Chapter applies to a judicial proceeding concerning a power of
46 appointment commenced before the effective date of this Chapter unless the
47 court finds that application of a particular provision of this Chapter would
48 interfere substantially with the effective conduct of the judicial proceeding
49 or prejudice a right of a party, in which case the particular provision of this
50 Chapter does not apply and the superseded law applies.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 39 (1) A description of the real property which is the subject of the petition;
40 (2) The names, ages, and addresses, if known, of the devisees and heirs of the
41 decedent;
42 (3) A statement by the personal representative that the personal representative
43 has determined that such possession, custody or control is in the best interest
44 of the administration of the estate.

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

1 "

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

4 **"§ 28A-13-3.1. Power of personal representative to deal with real property without a**
5 **court order.**

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

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

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

14 (3) An express power granted to the personal representative in the will when
15 title to the real property is not devised to the personal representative if (i) the
16 decedent specifically indicates an intent that the power applies to real
17 property and (ii) the personal representative determines that exercise of the
18 power with respect to the real property complies with an express standard set
19 forth by the decedent in the will or, if no such standard is set forth, is in the
20 best interest of the estate. For purposes of this section, provisions in the will
21 stating that the power applies to the real property "whether or not title is
22 devised to the personal representative" or "even though title is not devised to
23 the personal representative" or other similar language is sufficient to indicate
24 such an intent.

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

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

34 **"§ 28A-13-3.2. Notice of exercise of power with respect to real property not devised to**
35 **personal representative.**

36 (a) If in accordance with G.S. 28A-13-3.1(a)(3) a personal representative intends to
37 exercise a power with respect to real property of the decedent not devised to the personal
38 representative, the personal representative shall give written notice of the personal
39 representative's intent to exercise that power to the devisees of the real property. The notice
40 shall include a description of the real property that is the subject of the notice and a summary of
41 the power the personal representative intends to exercise. The notice shall further include a
42 statement that the devisees of the real property have 30 days from the service date of the notice
43 to file a petition before the clerk under G.S. 28A-2-6 contesting the authority of the personal
44 representative under G.S. 28A-13-3.1(a)(3) to exercise the power the personal representative
45 intends to exercise.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 43 (1) The value of the beneficial interest of a spouse shall be the entire fair market
44 value of any property held in trust if the decedent was the settlor of the trust,
45 if the trust is held for the exclusive benefit of the surviving spouse during the
46 surviving spouse's lifetime, and if the terms of the trust meet the following
47 requirements:
- 48 a. During the lifetime of the surviving spouse, the trust is controlled by
49 one or more nonadverse trustees.
 - 50 b. The trustee shall distribute to or for the benefit of the surviving
51 spouse either (i) the entire net income of the trust at least annually or

- 1 (ii) the income of the trust in such amounts and at such times as the
2 trustee, in its discretion, determines necessary for the health,
3 maintenance, and support of the surviving spouse.
- 4 c. The trustee shall distribute to or for the benefit of the surviving
5 spouse out of the principal of the trust such amounts and at such
6 times as the trustee, in its discretion, determines necessary for the
7 health, maintenance, and support of the surviving spouse.
- 8 d. In exercising discretion, the trustee may be authorized or required to
9 take into consideration all other income assets and other means of
10 support available to the surviving spouse.
- 11 (2) To the extent that the partial or contingent interest is dependent upon the
12 occurrence of any contingency that is not subject to the control of the
13 surviving spouse and that is not subject to valuation by reference to the
14 mortality and annuity tables set forth in G.S. 8-46 and G.S. 8-47, the
15 contingency will be conclusively presumed to result in the lowest possible
16 value passing to the surviving spouse. However, a life estate or income
17 interest that will terminate upon the surviving spouse's death or remarriage
18 will be valued without regard to the possibility of termination upon
19 remarriage.
- 20 (3) ~~To the extent that the valuation of a partial or contingent interest is~~
21 ~~dependent upon the life expectancy of the surviving spouse, that life~~
22 ~~expectancy shall be conclusively presumed to be no less than 10 years,~~
23 ~~regardless of the actual attained age of the surviving spouse at the decedent's~~
24 ~~death."~~

26 PART V. AMEND THE LAW PROVIDING FOR CONVEYANCE OF TENANCY BY 27 THE ENTIRETIES TO A TRUST

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

29 "§ 39-13.7. Tenancy by the entireties trusts in real property.

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

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

43 (1) The husband and wife remain married.

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

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

49 (c) After the death of the first of the husband and wife to die, all property held in trust
50 that was immune from the claims of their separate creditors under subsection (a) of this section
51 immediately prior to the individual's death shall continue to have immunity from the claims of

1 the decedent's separate creditors as would have existed if the husband and wife continued to
2 hold the property conveyed in trust as tenants by the entirety.

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

8 (e) For purposes of this section:

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

12 (2) The reference to a "joint trust" means a revocable or irrevocable trust of
13 which both the husband and wife are the settlors, and the reference to
14 "separate trusts" means revocable or irrevocable trusts of which the husband
15 is the settlor of one trust and the wife is the settlor of the other trust.

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

20 **PART VI. UNIFORM TRUST CODE; AMEND THE STATUTE OF LIMITATIONS** 21 **AGAINST A TRUSTEE**

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

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

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

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

36 **PART VII. UNIFORM TRUST CODE; CLARIFY APPLICABILITY OF DEFAULT** 37 **AND MANDATORY RULES GOVERNING POWER HOLDERS**

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

39 **"§ 36C-1-105. Default and mandatory rules.**

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

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

45 (1) The requirements for creating a trust.

46 (2) The duty of a trustee or a power holder under Article 8A of this Chapter
47 to act in good faith and in accordance with the terms and purposes of the trust
48 and the interests of the ~~beneficiaries.~~ beneficiaries, except as otherwise
49 provided in subsection (c) of this section.

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

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

27
28 **PART VIII. UNIFORM TRUST CODE; AMEND THE LAW GOVERNING**
29 **DECANTING FROM A TRADITIONAL TRUST TO A SUPPLEMENTAL NEEDS**
30 **TRUST**

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

32 **"§ 36C-8-816.1. Trustee's special power to appoint to a second trust.**

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

- 34 (1) Current beneficiary. – A person who is a permissible distributee of trust
35 income or principal.
- 36 (2) Original trust. – A trust established under an irrevocable trust instrument
37 pursuant to the terms of which a trustee has a discretionary power to
38 distribute principal or income of the trust to or for the benefit of one or more
39 current beneficiaries of the trust.
- 40 (3) Second trust. – A trust established under an irrevocable trust instrument, the
41 current beneficiaries of which are one or more of the current beneficiaries of
42 the original trust. The second trust may be a trust created under the same
43 trust instrument as the original trust or under a different trust instrument.

44 (b) A trustee of an original trust may, without authorization by the court, exercise the
45 discretionary power to distribute principal or income to or for the benefit of one or more current
46 beneficiaries of the original trust by appointing all or part of the principal or income of the
47 original trust subject to the power in favor of a trustee of a second trust. The trustee of the
48 original trust may exercise this power whether or not there is a current need to distribute
49 principal or income under any standard provided in the terms of the original trust. The trustee's
50 special power to appoint trust principal or income in further trust under this section includes the

1 power to create the second trust. The second trust may have a duration that is longer than the
2 duration of the first trust.

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

- 4 (1) The beneficiaries of the second trust may include only beneficiaries of the
5 original trust.
- 6 (2) A beneficiary who has only a future beneficial interest, vested or contingent,
7 in the original trust cannot have the future beneficial interest accelerated to a
8 present interest in the second trust.
- 9 (3) The terms of the second trust may not reduce any fixed income, annuity, or
10 unitrust interest of a beneficiary in the assets of the original trust if that
11 interest has come into effect with respect to the beneficiary.
- 12 (4) If any contribution to the original trust qualified for a marital or charitable
13 deduction for federal income, gift, or estate tax purposes under the Internal
14 Revenue Code, then the second trust shall not contain any provision that, if
15 included in the original trust, would have prevented the original trust from
16 qualifying for the deduction or that would have reduced the amount of the
17 deduction.
- 18 (5) If contributions to the original trust have been excluded from the gift tax by
19 the application of section 2503(b) and section 2503(c) of the Internal
20 Revenue Code, then the second trust shall provide that the beneficiary's
21 remainder interest in the contributions shall vest and become distributable no
22 later than the date upon which the interest would have vested and become
23 distributable under the terms of the original trust.
- 24 (6) If any beneficiary of the original trust has a power of withdrawal over trust
25 property, then either:
- 26 a. The terms of the second trust must provide a power of withdrawal in
27 the second trust identical to the power of withdrawal in the original
28 trust; or
- 29 b. Sufficient trust property must remain in the original trust to satisfy
30 the outstanding power of withdrawal.
- 31 (7) If a trustee of an original trust exercises a power to distribute principal or
32 income that is subject to an ascertainable standard by appointing property to
33 a second trust, then the power to distribute income or principal in the second
34 trust must be subject to the same ascertainable standard as in the original
35 trust and must be exercisable in favor of the same current beneficiaries to
36 whom such distribution could be made in the original trust.
- 37 (8) The second trust may confer a power of appointment upon a beneficiary of
38 the original trust to whom or for the benefit of whom the trustee has the
39 power to distribute principal or income of the original trust. The permissible
40 appointees of the power of appointment conferred upon a beneficiary may
41 include persons who are not beneficiaries of the original or second trust. The
42 power of appointment conferred upon a beneficiary shall be subject to the
43 provisions of G.S. 41-23 specifying the permissible period allowed for the
44 suspension of the power of alienation of the original trust and the time from
45 which that permissible period is computed.
- 46 (9) The terms of the second trust shall not contain any provisions that would
47 jeopardize (i) the qualification of a transfer as a direct skip under section
48 2642(c) of the Code, (ii) if the first trust owns subchapter S Corporation
49 stock, the election to treat a corporation as a subchapter S Corporation under
50 section 1362 of the Code, (iii) if the first trust owns an interest in property
51 subject to the minimum distribution rules of section 401(a)(9) of the Code, a

1 favorable distribution period by shortening the minimum distribution period,
 2 or (iv) any other specific tax benefit for which a contribution originally
 3 qualified for income, gift, estate, or generation-skipping transfer tax
 4 purposes. In this subdivision, "tax benefit" means a federal or State tax
 5 deduction, exemption, exclusion, or other benefit not otherwise listed in this
 6 section, except for the benefit from having the settlor considered the owner
 7 under sections 671 through 679 of the Code. Subject to clause (ii) above, the
 8 second trust may be a trust as to which the settlor is not considered the
 9 owner under sections 671 through 679 of the Code even if the settlor is
 10 considered the owner of the first trust, and the second trust may be a trust as
 11 to which the settlor of the first trust is considered the owner under sections
 12 671 through 679 of the Code, even if the settlor is not considered the owner
 13 of the first trust.

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

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

31 b. "Governmental benefits" means medical assistance, financial aid, or
 32 services from any local, State, or federal agency or department.

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

38 d. The second supplemental needs trust shall not be liable to pay or
 39 reimburse the State or any government or public agency for medical
 40 assistance, financial aid, or services provided to the disabled
 41 beneficiary except as provided in the second supplemental needs
 42 trust.

43"

44
 45 **PART IX. UNIFORM TRUST CODE; PROVIDE PERMISSIBLE BENEFICIARIES**
 46 **FOR CERTAIN IRREVOCABLE INTER VIVOS TRUSTS**

47 **SECTION 9.** G.S. 36C-5-505(c) reads as rewritten:

48 "(c) Subject to the Uniform Voidable Transactions Act, Article 3A of Chapter 39 of the
 49 General Statutes, for purposes of this section, if the settlor is a beneficiary of the following
 50 trusts after the death of the settlor's spouse, the property of the trusts shall, after the death of the
 51 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.~~

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

1 ~~or cotrustees at or before joining in the action, unless the trustee had~~
2 ~~knowledge that the action taken involved intentional misconduct or was~~
3 ~~taken with an intention to directly or indirectly provide an improper personal~~
4 ~~benefit to one or more trustees approving the action.~~

5 "

6
7 **PART XI. COMMENTS AND EFFECTIVE DATES**

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

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