

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2015

SESSION LAW 2015-205  
SENATE BILL 336

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

The General Assembly of North Carolina enacts:

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

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

**"SUBCHAPTER IV. STANDBY GUARDIANS FOR MINOR CHILDREN, GUARDIANS.**

"Article 21.

"Standby Guardianship.

**"§ 35A-1370. Definitions.**

For purposes of this Article:

- (1) "Alternate standby guardian" means a person identified in either a petition or designation to become the guardian of the person or, when appropriate, the general guardian of a minor ~~child, child or incompetent adult~~, pursuant to G.S. 35A-1373 or to G.S. 35A-1374, when the person identified as the standby guardian and the designator or petitioner has identified an alternate standby guardian.
- (2) "Attending physician" means the physician who has primary responsibility for the treatment and care of the parent or legal guardian. When more than one physician shares this responsibility, or when a physician is acting on the primary physician's behalf, any such physician may act as the attending physician pursuant to this section. When no physician has this responsibility, a physician who is familiar with the petitioner's medical condition may act as the attending physician pursuant to this Article.
- (3) "Debilitation" means a chronic and substantial inability, as a result of a physically debilitating illness, disease, or injury, to care for one's minor ~~child, child~~ or to satisfy his or her duties as guardian of the person or as general guardian of an incompetent adult.
- (4) "Designation" means a written document voluntarily executed by the designator pursuant to this Article.
- (5) "Designator" means a person who suffers from a progressive chronic illness or an irreversible fatal illness and who is (i) the biological or adoptive parent, the guardian of the person, or the general guardian of a minor ~~child, child~~ or (ii) the guardian of the person or the general guardian of an incompetent adult. A designation under this Article may be made on behalf of a designator by the guardian of the person or the general guardian of the designator.
- (6) "Determination of debilitation" means a written determination made by the attending physician which contains the physician's opinion to a reasonable degree of medical certainty regarding the nature, cause, extent, and probable duration of the debilitation of the petitioner or designator.



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

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

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

- (b) A petition for the judicial appointment of a standby guardian ~~of a minor child~~ shall:
- (1) Identify the petitioner, the minor ~~child~~, child or incompetent adult, the person designated to be the standby guardian, and the person designated to be the alternate standby guardian, if any;
  - (2) State that the authority of the standby guardian is to become effective upon the death of the petitioner, upon the incapacity of the petitioner, upon the debilitation of the petitioner with the consent of the petitioner, or upon the petitioner's signing of a written consent stating that the standby guardian's authority is in effect, whichever occurs first;
  - (3) State that the petitioner suffers from a progressively chronic illness or an irreversible fatal illness, and the basis for such a statement, such as the date

and source of a medical diagnosis, without requiring the identification of the illness in question;

- (4) State whether there are any lawsuits, in this or any other jurisdiction, involving the minor child or incompetent adult and, if so, identify the parties, the case numbers, and the states and counties where filed; and
- (5) Be verified by the petitioner in front of a notary public or another person authorized to administer oaths.

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

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

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

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

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

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

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

- (1) Becomes incapacitated;

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

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

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

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

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

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

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

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

(h) If at or before the hearing any parent entitled to notice under subsection (c) of this section presents to the clerk a written claim for custody of the minor child, the clerk shall stay further proceedings under this Article pending the filing of a complaint for custody of the minor child under Chapter 50 of the General Statutes and, upon the filing of such a complaint,

shall dismiss the petition. If no such complaint is filed within 30 days after the claim is presented, the clerk shall conduct a hearing and enter an order as provided for in this section.

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

- (1) The person was duly designated as a standby guardian or alternate standby guardian;
  - (2) That (i) there has been a determination of ~~incapacity~~; incapacity of the designator; (ii) there has been a determination of debilitation and the designator has consented to the commencement of the standby guardian's authority; (iii) the designator has consented to that commencement; or (iv) the designator has died, such information coming from a document, such as a copy of a death certificate or a funeral home receipt;
  - (3) That the best interests of the minor child or incompetent adult will be promoted by the appointment of the person designated as standby guardian or alternate standby guardian as guardian of the person or general guardian of the minor ~~child~~; child or incompetent adult;
  - (4) That the standby guardian or alternate standby guardian is fit to serve as guardian of the person or general guardian of the minor ~~child~~; child or incompetent adult; and
  - (5) That, if the petition is by a person designated as an alternate standby guardian, the person designated as standby guardian is unwilling or unable to serve as standby guardian.
- (j) The designator may revoke a standby guardianship created under this section by:
- (1) Notifying the standby guardian in writing of the intent to revoke the standby guardianship prior to the filing of the petition under this section; or
  - (2) Where the petition has already been filed, by executing a written revocation, filing it in the office of the clerk with whom the petition was filed, and promptly providing the standby guardian with a copy of the written revocation.

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

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

- (1) Be made by the attending physician to a reasonable degree of medical certainty;
- (2) Be in writing; and
- (3) Contain the attending physician's opinion regarding the cause and nature of the parent's or legal guardian's restoration to capacity or ability.

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

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

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

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

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

...  
**"§ 35A-1382. Termination.**

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

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

(2) Revocation pursuant to this Article.

(3) Renunciation pursuant to this Article.

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

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

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

"Article 2B.

"Living Probate.

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

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

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

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

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

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

(d) For purposes of this Article only, a "petitioner" is a person who requests a judicial declaration that confirms the validity of that person's will or codicil.

**"§ 28A-2B-2. Venue.**

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

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

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

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

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

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

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

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

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

**"§ 28A-2B-5. Confidentiality.**

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

- (1) The petitioner named in the petition.
- (2) The attorney for the petitioner.
- (3) Any court of competent jurisdiction hearing or reviewing the matter.

For good cause shown, the court may order the records that are confidential under this section to be made available to a person who is not listed in this section. Following the petitioner's death, a sealed file shall be unsealed upon the request of any interested person for the purpose of probate or other estate proceedings.

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

Costs, including reasonable attorneys' fees, incurred by a party in a proceeding under this Article shall be taxed against any party, or apportioned among the parties, in the discretion of

the court, except that the court shall allow attorneys' fees for the attorneys of a party contesting the proceeding only if the court finds that the party had reasonable grounds for contesting the proceeding."

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

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

#### **"Chapter 31D.**

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

#### **"Article 1.**

#### **"General Provisions and Definitions.**

#### **"§ 31D-1-101. Short title.**

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

#### **"§ 31D-1-102. Definitions.**

The following definitions apply in this Chapter:

- (1) "Appointee" means a person to whom a power holder makes an appointment of appointive property.
- (2) "Appointive property" means the property or property interest subject to a power of appointment.
- (3) "Blanket-exercise clause" means a clause in an instrument which exercises a power of appointment and is not a specific-exercise clause. The term includes a clause that:
  - a. Expressly uses the words "any power" in exercising any power of appointment the power holder has.
  - b. Expressly uses the words "any property" in appointing any property over which the power holder has a power of appointment.
  - c. Disposes of all property subject to disposition by the power holder.
- (4) "Donor" means a person who creates a power of appointment.
- (5) "Exclusionary power of appointment" means a power of appointment exercisable in favor of any one or more of the permissible appointees to the exclusion of the other permissible appointees.
- (6) "General power of appointment" means a power of appointment exercisable in favor of the power holder, the power holder's estate, a creditor of the power holder, or a creditor of the power holder's estate.
- (7) "Gift-in-default clause" means a clause identifying a taker in default of appointment.
- (8) "Impermissible appointee" means a person that is not a permissible appointee.
- (9) "Instrument" means a writing.
- (10) "Nongeneral power of appointment" means a power of appointment that is not a general power of appointment.
- (11) "Permissible appointee" means a person in whose favor a power holder may exercise a power of appointment.
- (12) "Person" means an individual, estate, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, instrumentality, or other legal entity.
- (13) "Power holder" means a person in whom a donor creates a power of appointment.
- (14) "Power of appointment" means a power that enables a power holder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. The power of appointment may be general or nongeneral and presently exercisable or not presently exercisable. The term does not include a power of attorney.
- (15) "Presently exercisable power of appointment" means a power of appointment exercisable by the power holder at the relevant time. The term:
  - a. Includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard relating to an individual's health, education, and support or maintenance within the meaning of section 2041(b)(1)(A) or section

2514(c)(1) of the Internal Revenue Code, as amended, or the passage of a specified time only after one of the following:

1. The occurrence of the specified event.
  2. The satisfaction of the ascertainable standard.
  3. The passage of the specified time.
- b. Does not include a power exercisable only at the power holder's death.
- (16) "Specific-exercise clause" means a clause in an instrument which specifically refers to and exercises a particular power of appointment.
- (17) "Taker in default of appointment" means a person who takes all or part of the appointive property to the extent the power holder does not effectively exercise the power of appointment.
- (18) "Terms of the instrument" means the manifestation of the intent of the maker of the instrument regarding the instrument's provisions as expressed in the instrument or as may be established in a judicial proceeding.

**"§ 31D-1-103. Governing law.**

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

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

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

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

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

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

"Article 2.

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

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

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

- (1) The instrument creating the power is valid under applicable law.
- (2) Except as otherwise provided in subsection (b) of this section, the instrument creating the power transfers the appointive property.
- (3) The terms of the instrument creating the power manifest the donor's intent to create in a power holder a power of appointment over the appointive property exercisable in favor of a permissible appointee.

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

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

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

**"§ 31D-2-202. Nontransferability.**

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

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

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

- (1) Presently exercisable.

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

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

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

- (1) The power is exercisable only at the power holder's death.
- (2) The permissible appointees of the power are a defined and limited class that does not include the power holder's estate, the power holder's creditors, or the creditors of the power holder's estate.

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

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

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

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

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

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

- (1) The instrument creating the power is revocable by the donor.
- (2) The donor reserves a power of revocation or amendment in the instrument 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) Make an appointment in any form, including an appointment in trust, in favor of a permissible appointee.
- (2) Create a general power in a permissible appointee.

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

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

An appointment to a deceased appointee is ineffective.

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

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

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

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

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

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

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

- (1) The gift-in-default clause controls the disposition of the ineffectively appointed property.
- (2) If there is no gift-in-default clause or to the extent the clause is ineffective, the ineffectively appointed property passes as follows:
  - a. To the power holder if the power holder is a permissible appointee and living.
  - b. If the power holder is an impermissible appointee or deceased, to the power holder's estate if the estate is a permissible appointee.
  - c. If the power holder is an impermissible appointee or deceased and if the estate is not a permissible appointee, under a reversionary interest to the donor or the donor's transferee or successor in interest.

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

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

(b) To the extent a power holder fails to exercise a general power of appointment other than a power to withdraw property from, revoke, or amend a trust, the gift-in-default clause

controls the disposition of the unappointed property. If there is no gift-in-default clause or to the extent the clause is ineffective, the unappointed property passes as follows:

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

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

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

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

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

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

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

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

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

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

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

"Article 4.

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

**"§ 31D-4-401. Disclaimer.**

Consistent with Chapter 31B of the General Statutes:

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

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

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

**"§ 31D-4-403. Method of release.**

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

- (1) By substantial compliance with a method provided in the terms of the instrument creating the power.
- (2) If the terms of the instrument creating the power do not provide a method or the method provided in the terms of the instrument is not expressly made

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

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

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

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

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

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

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

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

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

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

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

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

"Article 5.

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

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

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

(b) Appointive property subject to a general power of appointment created by the power holder is subject to a claim of a creditor of the power holder or of the power holder's estate to the extent provided in the Uniform Voidable Transactions Act, Article 3A of Chapter 39 of the General Statutes.

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

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

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

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

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

- (1) The power holder, to the extent the power holder's property is insufficient, if the power is presently exercisable.
- (2) The power holder's estate, to the extent the estate is insufficient, subject to the right of a decedent to direct the source from which liabilities are paid.

(b) Subject to the provisions of G.S. 31D-5-504(c), a power of appointment created by a person other than the power holder which is subject to an ascertainable standard relating to an individual's health, education, support, or maintenance within the meaning of section

2041(b)(1)(A) or section 2514(c)(1) of the Internal Revenue Code, as amended, is treated for purposes of this Article as a nongeneral power.

**"§ 31D-5-503. Power to withdraw.**

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

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

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

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

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

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

"Article 6.

"Miscellaneous Provisions.

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

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

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

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

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

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

- (1) This Chapter applies to a power of appointment created before, on or after the effective date of this Chapter.
- (2) This Chapter applies to a judicial proceeding concerning a power of appointment commenced on or after the effective date of this Chapter.
- (3) This Chapter applies to a judicial proceeding concerning a power of appointment commenced before the effective date of this Chapter unless the court finds that application of a particular provision of this Chapter would interfere substantially with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the particular provision of this 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. AMEND THE ELECTIVE SHARE STATUTES REGARDING VALUATION OF PARTIAL OR CONTINGENT INTEREST PROPERTY**

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

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

- (1) The value of the beneficial interest of a spouse shall be the entire fair market value of any property held in trust if the decedent was the settlor of the trust, if the trust is held for the exclusive benefit of the surviving spouse during the surviving spouse's lifetime, and if the terms of the trust meet the following requirements:
  - a. During the lifetime of the surviving spouse, the trust is controlled by one or more nonadverse trustees.
  - b. The trustee shall distribute to or for the benefit of the surviving spouse either (i) the entire net income of the trust at least annually or (ii) the income of the trust in such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse.
  - c. The trustee shall distribute to or for the benefit of the surviving spouse out of the principal of the trust such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse.
  - d. In exercising discretion, the trustee may be authorized or required to take into consideration all other income assets and other means of support available to the surviving spouse.
- (2) To the extent that the partial or contingent interest is dependent upon the occurrence of any contingency that is not subject to the control of the surviving spouse and that is not subject to valuation by reference to the mortality and annuity tables set forth in G.S. 8-46 and G.S. 8-47, the contingency will be conclusively presumed to result in the lowest possible value passing to the surviving spouse. However, a life estate or income interest that will terminate upon the surviving spouse's death or remarriage will be valued without regard to the possibility of termination upon remarriage.
- (3) ~~To the extent that the valuation of a partial or contingent interest is dependent upon the life expectancy of the surviving spouse, that life expectancy shall be conclusively presumed to be no less than 10 years, regardless of the actual attained age of the surviving spouse at the decedent's death."~~

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

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

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

(a) ~~Any real property held by a husband and wife as a tenancy by the entireties and conveyed to their joint revocable or irrevocable trust, or to their separate revocable or irrevocable trusts, shall have the same immunity from the claims of the spouses' separate creditors as would exist if the spouses had continued to hold the property as a tenancy by the entireties, so long as (i) the spouses remain husband and wife, (ii) the real property continues to be held in the trust or trusts, and (iii) the spouses remain the beneficial owners of the real property to (i) a joint trust or (ii) in equal shares to two separate trusts; shall no longer be held by the husband and wife as tenants by the entirety and shall be disposed of by the terms of the~~

trust or trusts, but, subject to the provisions of subsection (b) of this section, the real property shall have the same immunity from the claims of the separate creditors of the husband and wife as would exist if the spouses had continued to hold the property as tenants by the entireties.

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

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

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

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

(e) For purposes of this section:

- (1) The reference to the real property conveyed to or held in the trust shall be deemed to include the proceeds arising from the involuntary conversion of the real property.
- (2) The reference to a "joint trust" means a revocable or irrevocable trust of which both the husband and wife are the settlors, and the reference to "separate trusts" means revocable or irrevocable trusts of which the husband is the settlor of one trust and the wife is the settlor of the other trust.
- (3) The husband and wife are "beneficiaries" of a trust if they are distributees or permissible distributees of the income or principal of the trust whether or not other persons are also current or future beneficiaries of the trust."

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

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

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

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

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

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

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

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

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

- (1) The requirements for creating a trust.

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

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

## **PART VIII. UNIFORM TRUST CODE; AMEND THE LAW GOVERNING DECANTING FROM A TRADITIONAL TRUST TO A SUPPLEMENTAL NEEDS TRUST**

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

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

- (a) For purposes of this section, the following definitions apply:
  - (1) Current beneficiary. – A person who is a permissible distributee of trust income or principal.
  - (2) Original trust. – A trust established under an irrevocable trust instrument pursuant to the terms of which a trustee has a discretionary power to distribute principal or income of the trust to or for the benefit of one or more current beneficiaries of the trust.
  - (3) Second trust. – A trust established under an irrevocable trust instrument, the current beneficiaries of which are one or more of the current beneficiaries of the original trust. The second trust may be a trust created under the same trust instrument as the original trust or under a different trust instrument.
- (b) A trustee of an original trust may, without authorization by the court, exercise the discretionary power to distribute principal or income to or for the benefit of one or more current beneficiaries of the original trust by appointing all or part of the principal or income of the original trust subject to the power in favor of a trustee of a second trust. The trustee of the original trust may exercise this power whether or not there is a current need to distribute principal or income under any standard provided in the terms of the original trust. The trustee's special power to appoint trust principal or income in further trust under this section includes the power to create the second trust. The second trust may have a duration that is longer than the duration of the first trust.
- (c) The terms of the second trust shall be subject to all of the following:
  - (1) The beneficiaries of the second trust may include only beneficiaries of the original trust.

- (2) A beneficiary who has only a future beneficial interest, vested or contingent, in the original trust cannot have the future beneficial interest accelerated to a present interest in the second trust.
- (3) The terms of the second trust may not reduce any fixed income, annuity, or unitrust interest of a beneficiary in the assets of the original trust if that interest has come into effect with respect to the beneficiary.
- (4) If any contribution to the original trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code, then the second trust shall not contain any provision that, if included in the original trust, would have prevented the original trust from qualifying for the deduction or that would have reduced the amount of the deduction.
- (5) If contributions to the original trust have been excluded from the gift tax by the application of section 2503(b) and section 2503(c) of the Internal Revenue Code, then the second trust shall provide that the beneficiary's remainder interest in the contributions shall vest and become distributable no later than the date upon which the interest would have vested and become distributable under the terms of the original trust.
- (6) If any beneficiary of the original trust has a power of withdrawal over trust property, then either:
  - a. The terms of the second trust must provide a power of withdrawal in the second trust identical to the power of withdrawal in the original trust; or
  - b. Sufficient trust property must remain in the original trust to satisfy the outstanding power of withdrawal.
- (7) If a trustee of an original trust exercises a power to distribute principal or income that is subject to an ascertainable standard by appointing property to a second trust, then the power to distribute income or principal in the second trust must be subject to the same ascertainable standard as in the original trust and must be exercisable in favor of the same current beneficiaries to whom such distribution could be made in the original trust.
- (8) The second trust may confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal or income of the original trust. The permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of the original or second trust. The power of appointment conferred upon a beneficiary shall be subject to the provisions of G.S. 41-23 specifying the permissible period allowed for the suspension of the power of alienation of the original trust and the time from which that permissible period is computed.
- (9) The terms of the second trust shall not contain any provisions that would jeopardize (i) the qualification of a transfer as a direct skip under section 2642(c) of the Code, (ii) if the first trust owns subchapter S Corporation stock, the election to treat a corporation as a subchapter S Corporation under section 1362 of the Code, (iii) if the first trust owns an interest in property subject to the minimum distribution rules of section 401(a)(9) of the Code, a favorable distribution period by shortening the minimum distribution period, or (iv) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes. In this subdivision, "tax benefit" means a federal or State tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for the benefit from having the settlor considered the owner under sections 671 through 679 of the Code. Subject to clause (ii) above, the second trust may be a trust as to which the settlor is not considered the owner under sections 671 through 679 of the Code even if the settlor is considered the owner of the first trust, and the second trust may be a trust as to which the settlor of the first trust is considered the owner under sections 671 through 679 of the Code, even if the settlor is not considered the owner of the first trust.

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

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

...."

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

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

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

- (1) If the settlor is a beneficiary after the death of the settlor's spouse:
  - a. An irrevocable intervivos marital trust that is treated as a general power of appointment trust described in section 2523(e) of the Internal Revenue Code.
  - (2)b. An irrevocable intervivos marital trust that is treated as a qualified terminable interest ~~property-trust~~ under section 2523(f) of the Internal Revenue Code.
  - (3)c. An irrevocable intervivos trust of which the settlor's spouse is ~~the sole~~ a beneficiary during the ~~spouse's lifetime of the settlor's spouse~~ but which does not qualify for the federal gift tax marital ~~deduction-deduction~~, and during the lifetime of the settlor's spouse (i) the settlor's spouse is the only beneficiary or (ii) the settlor's spouse and the settlor's issue are the only beneficiaries.
  - (4)d. Another trust, to the extent that the property of the other trust is attributable to property passing from a trust described in ~~subdivision (1), (2), or (3) of this subsection~~ sub-subdivisions a., b., and c. 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 inter vivos 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.~~
- c. ~~The excluded trustee has no duty to monitor the conduct of the cotrustee, provide advice to the cotrustee, or consult with or request directions from the cotrustee. The excluded trustee is not required to give notice to any beneficiary of any action taken or not taken by the cotrustee whether or not the excluded trustee agrees with the result. Administrative actions taken by the excluded trustee for the purpose of implementing directions of the cotrustee, including confirming that the directions of the cotrustee have been carried out, do not constitute monitoring of the cotrustee nor do they constitute participation in decisions within the scope of the cotrustee's authority.~~

- (2) ~~Except as otherwise provided in sub-subdivision a. of subdivision (1) of this subsection, the cotrustee holding the power to take certain actions with respect to the trust shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustee were not in office and has the exclusive obligation to account to the beneficiaries and defend any action brought by the beneficiaries with respect to the exercise of the power.~~

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

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

- (1) ~~Avoid enabling a cotrustee to commit a serious breach of trust; and~~
- (2) ~~Compel a cotrustee to redress a serious breach of trust.~~

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

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

- (2) The excluded cotrustee has no duty to monitor the conduct of the cotrustee holding the exclusive power, provide advice to that cotrustee, or consult with or request directions from that cotrustee. The excluded trustee is not required to give notice to any beneficiary of any action taken or not taken by that cotrustee.
- (3) The cotrustee holding the exclusive power to take certain actions with respect to the trust:
  - a. Shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustee were not in office.
  - b. Has the exclusive obligation to account to the beneficiaries and defend any action brought by the beneficiaries with respect to the exercise of the power.

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

- (1) ~~The trustee-dissenting cotrustee does not join in an action approved by a majority of the other trustees.~~ the action.
- (2) ~~The dissenting trustee-cotrustee joins in an the action necessary to carry out the decision of the majority of the trustees and notifies in writing the other cotrustee or cotrustees and gives notice of the dissent to the other cotrustee or cotrustees at or before joining in the action, unless the trustee had knowledge that the action taken involved intentional misconduct or was taken with an intention to directly or indirectly provide an improper personal benefit to one or more trustees approving the action.~~

...."

## **PART XI. COMMENTS AND EFFECTIVE DATES**

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

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

In the General Assembly read three times and ratified this the 5<sup>th</sup> day of August, 2015.

s/ Daniel J. Forest  
President of the Senate

s/ Tim Moore  
Speaker of the House of Representatives

s/ Pat McCrory  
Governor

Approved 1:30 p.m. this 11<sup>th</sup> day of August, 2015