



# SENATE BILL 336: Estate Planning/Uniform Trust Code

2015-2016 General Assembly

<b>Committee:</b>	Senate Re-ref to Judiciary I. If fav, re-ref to Finance	<b>Date:</b>	April 16, 2015
<b>Introduced by:</b>	Sens. Hartsell, Barringer	<b>Prepared by:</b>	Brad Krehely
<b>Analysis of:</b>	PCS to First Edition S336-CSRN-10		Committee Counsel

**SUMMARY:** *Senate Bill 336 is a recommendation of the North Carolina Bar Association that amends the law governing estate planning and fiduciaries, amends the Uniform Trust Code, and establishes the Uniform Power of Appointment Act. The Proposed Committee Substitute (PCS) deletes former Part II of the bill (amending income taxation of trusts and estates), adds Section 4.1 (modifying the valuation of life estates and contingent interests in property under the elective share statute), makes other technical and clarifying changes, and includes the two amendments adopted in committee on April 14, 2015.*

## BILL ANALYSIS:

### Part I. Standby and Successor Guardian for Incompetent Adults-

Current law allows the appointment of a standby guardian for a minor child during a parent's period of incapacity or debilitation upon petition to the clerk or by written designation.

**Section 1** amends the standby guardian statute to provide for the appointment of standby guardians for incompetent adults. It creates a new definition for "incompetent adult" and provides that a proceeding for a standby guardian for an incompetent adult commences by filing a petition with the clerk of superior court in the county where the guardianship is docketed. It provides that for incompetent adults, a copy of the petition, date, and place of hearing be sent to those who would be required to get notice if the petition was filed as a motion in the cause under G.S. 35A-1207 and that service of process be made pursuant to Rule 5 of the Rules of Civil Procedure unless the clerk directs otherwise. This Part also makes similar changes to the statutes dealing with designating a standby guardian by written designation and makes other conforming changes.

This section is effective when it becomes law.

### 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

Under current law, a will's validity can only be determined after the testator's death.

**Section 2** would allow an individual to petition the court for an order confirming the validity of a will or codicil. It would provide that the following persons may seek such a declaration: (1) the individual, (2) the individual's attorney-in-fact acting under a power of attorney, (3) the individual's general guardian or

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guardian of the estate, and (4) any interested person with the written consent of the individual, the individual's attorney-in-fact, or the individual's general guardian of the estate.

The petition must be filed with the clerk of superior court in the county in which the individual whose will or codicil is the subject of the petition is domiciled. The petitioner must present evidence to establish that the will or codicil would be probated if the individual was deceased. If an interested party contests the will or codicil, that person must file a written challenge before the hearing or must object at the hearing. Upon such a challenge, the clerk must transfer the matter to superior court. If no interested party challenges the will or codicil and the clerk determines that it would be admitted to probate, then the clerk must enter an order adjudging the will or codicil to be valid.

The petitioner must file the original will or codicil with the petition. The must be verified and must contain:

- A statement that the person is a resident of North Carolina and specifying the county of residence.
- Allegations that the will was prepared and executed in accordance with State law and a statement that the will was executed with testamentary intent.
- A statement that the individual had testamentary capacity at the time the will was executed.
- A statement that the individual was free from undue influence and executed the will with free will.
- A statement identifying the individual, and all persons believed by the petitioner to have an interest in the proceeding, including any minor's appropriate representative.

If the court determines a will to be valid, that judgment is binding on all parties to the proceeding, and a party is barred from filing a caveat to the will once it is entered into probate after the individual's death. Also, upon motion by the individual, the individual's attorney-in-fact, the general guardian/guardian of the estate, or the court, the court may order that the will or codicil not be revoked and no subsequent will or codicil will be valid unless the revocation or subsequent will is declared valid under a proceeding.

If a will or codicil judicially declared valid is revoked or modified by a subsequent will or codicil, nothing 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 and 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 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 and the interested person was a party.

Upon a motion of the party, the clerk must seal the contents of the file and keep the contents confidential. The contents must not be released, except by a court order, to anyone other than those individuals named in G.S. 28A-2-B-5. However, for good cause shown, the court may order that the confidential records be made available to any person not listed in this section.

This section is effective when it becomes law.

## **Part III. Enact Uniform Power of Appointment Act-**

**Section 3** enacts the Uniform Powers of Appointment Act in Chapter 31D of the General Statutes.

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Article 1 of Chapter 31D creates definitions and specifies three roles. A "donor" is a person who creates a power of appointment. A "powerholder" is a person in whom a donor creates a power of appointment. A "permissible appointee" is a person in whose favor a powerholder may exercise a power of appointment. A "power of appointment" is "a power that enables a powerholder 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."

Article 2 of Chapter 31D sets out the creation, revocation, and amendment of powers of appointment. G.S. 31D-2-201 provides that the power of appointment must be in a valid instrument that transfers the appointive property and must show the donor's intent to create a power to appoint property. A power is nontransferable. Article 2 also addresses presumptions as to the extent of the power of appointment if the terms of the power are not clear. The power of appointment may be revoked or amended if either of the following apply: (1) the instrument creating the power is revocable or (2) the donor reserves a power of revocation or amendment.

Article 3 addresses the exercise of the power of appointment. G.S. 31D-3-301 provides that a power of appointment is exercised only if the instrument exercising the power manifests the powerholder's intent to exercise the power. G.S. 31D-3-302 provides that the residuary clause of a will that does not contain an exercise clause shows the intent to exercise a power of appointment only if (1) the terms do not manifest a contrary intent, (2) the power is exercisable in favor of the powerholder's estate, (3) there is a no gift-in-default clause or the clause is ineffective, and (4) the powerholder did not release the power. Other sections govern appointments to deceased or impermissible appointees, disposition of unappointed property, and a powerholder's ability to revoke or amend an exercise of power.

In Article 4, G.S. 31D-4-401 provides that North Carolina's law on disclaimers and reunciations applies to powerholders and permissible appointees. A powerholder may release a power unless prohibited by the donor. Other provisions address releasing powers of appointment, rules for revoking or amending a release, and contracts to exercise or not exercise a power of appointment.

Articles 5 and 6 govern creditor claims and include other miscellaneous provisions. This section is effective when it becomes law.

## **Part IV. Authority of Personal Representative to Take Action With Respect to Real Property of Decedent**

**Section 4.(a)** provides a personal representative or fiduciary's powers to take possession, custody, or control of a decedent's real property is subject to the provisions of G.S. 28A-13-3(c) or G.S. 28A-13-3.1. It also provides that if the personal representative determines that such custody, possession, or control of the real property is not necessary (standard was, not in the best interest) to administer the estate, then the real property may be left with or surrendered to the heir or devisee presumptively entitled to the real property.

It amends G.S. 28A-13-3(c) to require the personal representative to petition the clerk of court for an order authorizing possession, custody, or control of the real property, unless the authority to take possession, custody, or control of real property is granted to the personal representative under new G.S. 28A-13-3.1.

**Section 4.(b)** creates the following new statutes, G.S. 28A-13-3.1 (which would allow a personal representative to deal with real property without a court order under certain circumstances), G.S. 28A-

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13-3.2 (requiring a personal representative to give written notice of his or her intent exercise a power related to real estate that was not devised to the personal representative), and G.S. 28A-13-3.3 (which would allow a devisee to receive reimbursement for carrying costs incurred before the personal representative took control of the real property when the personal representative sells real property not devised to the personal representative).

**Section 4.(c)** provides that a personal representative is not required to institute a special proceeding for the disposition of real property under G.S. 28A-13-3.1.

**Section 4.(d)** provides that if a decedent's will gives the personal representative the power to transfer the real property by sale, exchange, or partition, the transfer of the title vests title in the grantee of the instrument. It also provides that an option, lease, or mortgage encumbers the devisee or heir's title upon recordation of the instrument.

**Section 4.(e)** provides that assets remaining from the sale of real property by the personal representative retain the character of real property for purposes of distribution to the devisee or heir, or persons having liens against the devisee or heir only.

**Section 4.(f)** provides that when real property is sold for reasons other than to pay debts or devisees, the proceeds from the sale are not to be considered in computing the commission for the personal representative.

Section 4 is effective January 1, 2016, and applies to estates of persons dying on or after that date.

**Section 4.1** amends the valuation of life estates and contingent interests in property under the elective share statute to reflect the principle that the value used should be the fair market value. (Effective when it becomes law).

## **Part V. Amend the Law Providing for a Conveyance of Tenancy by the Entireties to a Trust**

**Section 5** provides that any real property held by a husband and wife as a tenancy by the entireties and conveyed to a joint trust or in equal shares to two separate trusts are no longer held by the husband and wife as tenants by the entirety and must be disposed of by the terms of the trust or trusts. The real property has the same immunity from the claims of the separate creditors as would exist if the spouses had continued to hold the property as tenants by the entireties if all of the following apply:

- The husband and wife remain married.
- The real property continues to be held in the trust or trusts.
- The 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.

The trustee may waive immunity if acting under the express provisions of the trust or with the written consent of the husband and wife.

This section is effective when it becomes law.

## **Part VI. Uniform Trust Code: Amend Statute of Limitations Against a Trustee**

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Under current law, persons under 18 years of age (or insane or incompetent) are under a disability for purposes of statutes of limitations. When a person turns 18 or the disability is removed, the person may commence an action within three years after the removal of the disability and at no time thereafter.

**Section 6** provides that for purposes of statutes of limitations against a trustee, both of the following apply:

- 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 whether or not the person consented to serve as a representative.
- Provisions allowing the statute of limitations for people under a disability would not apply. These persons are to be treated as if they were under no disability on the date that the limitation starts running.

This section becomes effective on October 1, 2015, and applies to trusts created before, on, or after that date.

## **Part VII. Uniform Trust Code: Clarify Applicability of Default and Mandatory Rules Governing Power Holders**

**Section 7** amends G.S. 36C-1-105 to specifically refer to a power holder, but provides that the requirement that a power holder act in good faith and the effect of an exculpatory term do not apply to a power holder for powers given to a power holder in a non-fiduciary capacity. This section becomes effective on October 1, 2015, and applies to trusts created before, on, or after that date.

## **Part VIII. Uniform Trust Code: Amend the Law Governing Decanting from a Traditional Trust to a Supplemental Needs Trust**

**Section 8** amends G.S. 36C-8-816.1 regarding a trustee's power to appoint a second trust. It clarifies that a second trust may have a duration that is longer than the duration of the first trust. This section creates new definitions and ensures that any trust decanted under North Carolina law does not inadvertently jeopardize an existing tax election or benefit. This section becomes effective on October 1, 2015, and applies to trusts created before, on, or after that date.

## **Part IX. Uniform Trust Code: Provide Permissible Beneficiaries for Certain Irrevocable Intervivos Trusts-**

**Section 9** makes organizational and clarifying changes to G.S. 36C-5-505 regarding permissible beneficiaries for certain irrevocable intervivos trusts. This section becomes effective on October 1, 2015, and applies to trusts created before, on, or after that date.

## **Part X. Uniform Trust Code: Clarify Standard of Liability of Directed Cotrustee**

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**Section 10** amends the statutes addressing the standard of liability for cotrustees. It provides that generally, each cotrustee must exercise reasonable care to avoid enabling a cotrustee to commit a serious breach of trust and to compel a cotrustee to redress a breach of trust. However, if the terms of the trust give a cotrustee, to the exclusion of another cotrustee, the power to take certain actions:

- The excluded cotrustee is not liable for the action taken by the cotrustee holding the power.
- 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 that cotrustee. The excluded trustee is not required to give notice to any beneficiary of any action taken or not taken by that cotrustee.

The cotrustee holding exclusive power is liable to the beneficiaries with respect to the exercise of the power as if the excluded trustee were not in office, and the cotrustee must account to the beneficiaries and defend any action brought by the beneficiaries. This section becomes effective on October 1, 2015, and applies to trusts created before, on, or after that date.

## Part XI. Comments And Effective Dates

**Section 11.(a)** gives the Revisor of Statutes authority to print relevant portions of the Official Commentary to the Uniform Powers of Appointment Act and the Uniform Trust Code.

**Section 11.(b)** sets out the effective date which is noted in each corresponding section of this summary. Changes to the Uniform Trust Code, which are set out in Sections 6-10 of the bill, apply to (1) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (2) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date, unless the court finds that this 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).