

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2013

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SENATE DRS85067-LL-59 (02/06)

Short Title: Estates/Trusts/Guardianship Amendments. (Public)

Sponsors: Senators Hartsell and Barringer (Primary Sponsors).

Referred to:

1 A BILL TO BE ENTITLED  
2 AN ACT TO UPDATE AND CLARIFY PROVISIONS OF THE LAWS GOVERNING  
3 ESTATES, TRUSTS, GUARDIANSHIPS, POWERS OF ATTORNEY, AND OTHER  
4 FIDUCIARIES.

5 The General Assembly of North Carolina enacts:

6  
7 **PART I. PROTECTION OF RIGHTS TO DIGITAL ASSETS**

8 **SECTION 1.(a)** G.S. 28A-13-3(a) reads as rewritten:

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

17 ...  
18 (34) To access, take control of, handle, conduct, continue, distribute, dispose of,  
19 or terminate any digital assets, as defined in G.S. 28A-13-11(d)(3), and  
20 digital accounts, as defined in G.S. 28A-13-11(d)(2), owned by the decedent  
21 at death."

22 **SECTION 1.(b)** Article 13 of Chapter 28A of the General Statutes is amended by  
23 adding a new section to read:

24 **"§ 28A-13-11. Access to digital assets and accounts by personal representative.**

25 (a) A custodian shall provide to a personal representative access to any digital accounts  
26 of the decedent operated by the custodian and copies of any digital assets of the decedent stored  
27 by the custodian, upon receipt by the custodian of either of the following:

28 (1) A written request for access to digital accounts and digital assets made by  
29 the personal representative, accompanied by a copy of the death certificate  
30 and a copy of the personal representative's letters testamentary or letters of  
31 administration.

32 (2) An order of the clerk of superior court having jurisdiction over the  
33 decedent's estate or an order of a court having probate jurisdiction over the  
34 decedent's estate.



1       **(b)** A custodian shall not destroy, disable, or dispose of any digital account or digital  
2 asset of the decedent for two years after the custodian receives a request or order under  
3 subsection (a) of this section, unless directed to do so by the personal representative.

4       **(c)** Nothing in this section shall be construed to require a custodian to disclose or grant  
5 access to:

6           **(1)** Any digital asset or digital account in violation of any applicable federal  
7 law.

8           **(2)** Any digital asset or digital account to which the decedent would not have  
9 been permitted access in the ordinary course of business by the custodian.

10       **(d)** The following definitions apply in this section:

11           **(1)** "Custodian" means any person who electronically stores the digital assets of  
12 another person or who operates the digital accounts of another person.

13           **(2)** "Digital accounts" means, but is not limited to, e-mail accounts, software  
14 licenses, social network accounts, social media accounts, file sharing  
15 accounts, financial management accounts, domain registration accounts,  
16 domain name service accounts, Web hosting accounts, tax preparation  
17 service accounts, online stores, affiliate programs, and other online accounts  
18 that currently exist or may exist as technology develops or such comparable  
19 items as technology develops.

20           **(3)** "Digital assets" means, but is not limited to, files, including, but not limited  
21 to, e-mails, documents, images, audio, video, and similar digital files that  
22 currently exist or may exist as technology develops or such comparable  
23 items as technology develops, stored on digital devices, including, but not  
24 limited to, desktops, laptops, tablets, peripherals, storage devices, mobile  
25 telephones, smartphones, and any similar digital device that currently exists  
26 or may exist as technology develops or such comparable items as technology  
27 develops, regardless of the ownership of the physical device upon which the  
28 digital asset is stored."

29       **SECTION 1.(c)** G.S. 32-27 reads as rewritten:

30 **"§ 32-27. Powers which may be incorporated by reference in trust instrument.**

31       The following powers may be incorporated by reference as provided in G.S. 32-26:

32       ...

33       **(30a)** Control Digital Assets and Accounts. – To access, take control of, handle,  
34 conduct, continue, distribute, dispose of, or terminate any digital assets, as  
35 defined in G.S. 32-29(d)(3), and digital accounts, as defined in  
36 G.S. 32-29(d)(2).

37       ...."

38       **SECTION 1.(d)** Article 3 of Chapter 32 of the General Statutes is amended by  
39 adding a new section to read:

40 **"§ 32-29. Access to digital assets and accounts by fiduciary.**

41       **(a)** A custodian shall provide a fiduciary access to any digital accounts of the decedent  
42 or settlor operated by the custodian and copies of any digital assets of the decedent or settlor  
43 stored by the custodian, upon receipt by the custodian of either of the following:

44           **(1)** A written request for access to digital accounts and digital assets made by  
45 the fiduciary, accompanied by a copy of the instrument creating the fiduciary  
46 relationship or certification thereof.

47           **(2)** An order of the clerk of superior court having jurisdiction over the estate or  
48 trust involved or an order of a court having jurisdiction over the estate or  
49 trust involved.

(b) A custodian shall not destroy, disable, or dispose of any digital account or digital asset for two years after the custodian receives a request or order under subsection (a) of this section, unless directed to do so by the fiduciary.

(c) Nothing in this section shall be construed to require a custodian to disclose or grant access to:

(1) Any digital asset or digital account in violation of any applicable federal law.

(2) Any digital asset or digital account to which the decedent or the settlor would not have been permitted access in the ordinary course of business by the custodian.

(d) The following definitions apply in this section:

(1) "Custodian" means any person who electronically stores the digital assets of another person or who operates the digital accounts of another person.

(2) "Digital accounts" means, but is not limited to, e-mail accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name service accounts, Web hosting accounts, tax preparation service accounts, online stores, affiliate programs, and other online accounts that currently exist or may exist as technology develops or such comparable items as technology develops.

(3) "Digital assets" means, but is not limited to, files, including, but not limited to, e-mails, documents, images, audio, video, and similar digital files that currently exist or may exist as technology develops or such comparable items as technology develops, stored on digital devices, including, but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device that currently exists or may exist as technology develops or such comparable items as technology develops, regardless of the ownership of the physical device upon which the digital asset is stored."

**SECTION 1.(e)** G.S. 32A-1 reads as rewritten:

**"§ 32A-1. Statutory Short Form of General Power of Attorney.**

The use of the following form in the creation of a power of attorney is lawful, and, when used, it shall be construed in accordance with the provisions of this Chapter.

**"NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE DEFINED IN CHAPTER 32A OF THE NORTH CAROLINA GENERAL STATUTES WHICH EXPRESSLY PERMITS THE USE OF ANY OTHER OR DIFFERENT FORM OF POWER OF ATTORNEY DESIRED BY THE PARTIES CONCERNED.**

State of \_\_\_\_\_.

County of \_\_\_\_\_.

I \_\_\_\_\_, appoint \_\_\_\_\_ to be my attorney-in-fact, to act in my name in any way which I could act for myself, with respect to the following matters as each of them is defined in Chapter 32A of the North Carolina General Statutes. (DIRECTIONS: Initial the line opposite any one or more of the subdivisions as to which the principal desires to give the attorney-in-fact authority.)

- (1) Real property transactions..... \_\_\_\_\_
- (2) Personal property transactions ..... \_\_\_\_\_
- (3) Bond, share, stock, securities and commodity transactions ..... \_\_\_\_\_
- (4) Banking transactions ..... \_\_\_\_\_
- (5) Safe deposits ..... \_\_\_\_\_
- (6) Business operating transactions ..... \_\_\_\_\_

- 1 (7) Insurance transactions .....
- 2 (8) Estate transactions.....
- 3 (9) Personal relationships and affairs.....
- 4 (10) Social security and unemployment .....
- 5 (11) Benefits from military service.....
- 6 (12) Tax matters.....
- 7 (13) Employment of agents.....
- 8 (14) Gifts to charities, and to individuals other than the
- 9 attorney-in-fact.....
- 10 (15) Gifts to the named attorney-in-fact .....
- 11 (16) Renunciation of an interest in or power over property to
- 12 benefit persons other than the attorney-in-fact.....
- 13 (17) Renunciation of an interest in or power over property
- 14 to benefit persons including the attorney-in-fact .....
- 15 (18) Digital assets and accounts .....

16 (If power of substitution and revocation is to be given, add: 'I also give to such person full  
17 power to appoint another to act as my attorney-in-fact and full power to revoke such  
18 appointment.')

19 (If period of power of attorney is to be limited, add: "This power terminates \_\_\_\_, \_\_")

20 (If power of attorney is to be a durable power of attorney under the provision of Article 2 of  
21 Chapter 32A and is to continue in effect after the incapacity or mental incompetence of the  
22 principal, add: 'This power of attorney shall not be affected by my subsequent incapacity or  
23 mental incompetence.')

24 (If power of attorney is to take effect only after the incapacity or mental incompetence of  
25 the principal, add: 'This power of attorney shall become effective after I become incapacitated  
26 or mentally incompetent.')

27 (If power of attorney is to be effective to terminate or direct the administration of a  
28 custodial trust created under the Uniform Custodial Trust Act, add: 'In the event of my  
29 subsequent incapacity or mental incompetence, the attorney-in-fact of this power of attorney  
30 shall have the power to terminate or to direct the administration of any custodial trust of which  
31 I am the beneficiary.')

32 (If power of attorney is to be effective to determine whether a beneficiary under the  
33 Uniform Custodial Trust Act is incapacitated or ceases to be incapacitated, add: 'The  
34 attorney-in-fact of this power of attorney shall have the power to determine whether I am  
35 incapacitated or whether my incapacity has ceased for the purposes of any custodial trust of  
36 which I am the beneficiary.')

37 Dated \_\_\_\_\_, \_\_\_\_\_ .

38 \_\_\_\_\_ (Seal)

39 \_\_\_\_\_ Signature

40 STATE OF \_\_\_\_\_ COUNTY OF \_\_\_\_\_

41 On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, personally appeared before me, the said  
42 named \_\_\_\_\_ to me known and known to me to be the person described in and who executed  
43 the foregoing instrument and he (or she) acknowledged that he (or she) executed the same and  
44 being duly sworn by me, made oath that the statements in the foregoing instrument are true.

45 My Commission Expires \_\_\_\_\_.

46 \_\_\_\_\_

47 (Signature of Notary Public)

48 Notary Public (Official Seal)"

49 SECTION 1.(f) G.S. 32A-2 reads as rewritten:

50 "§ 32A-2. Powers conferred by the Statutory Short Form Power of Attorney set out in  
51 G.S. 32A-1.

1 The Statutory Short Form Power of Attorney set out in G.S. 32A-1 confers the following  
2 powers on the attorney-in-fact named therein:

3 ...  
4 (18) Control of Digital Assets and Accounts. – To access, take control of, handle,  
5 conduct, continue, distribute, dispose of, or terminate any digital assets, as  
6 defined in G.S. 32A-4(d)(3), and digital accounts, as defined in  
7 G.S. 32A-4(d)(2), which the principal owns at the time of execution or may  
8 thereafter acquire, under such terms and conditions, and under such  
9 covenants, as said attorney-in-fact shall deem proper."

10 **SECTION 1.(g)** Article 1 of Chapter 32A of the General Statutes is amended by  
11 adding a new section to read:

12 **"§ 32A-4. Access to digital assets and accounts by attorney-in-fact.**

13 (a) A custodian shall provide an attorney-in-fact access to any digital accounts operated  
14 by the custodian and copies of any digital assets stored by the custodian that the principal owns  
15 at the time of execution or may thereafter acquire. A custodian shall provide access to the  
16 digital accounts and copies of the digital assets upon receipt by the custodian of either of the  
17 following:

- 18 (1) A written request for access to digital accounts and digital assets made by  
19 the attorney-in-fact, accompanied by a copy of the power of attorney.  
20 (2) An order of the clerk of superior court having jurisdiction over the power of  
21 attorney or an order of a court having jurisdiction over the power of attorney.

22 (b) A custodian shall not destroy, disable, or dispose of any digital account or digital  
23 asset for two years after the custodian receives a request or order under subsection (a) of this  
24 section, unless directed to do so by the attorney-in-fact.

25 (c) Nothing in this section shall be construed to require a custodian to disclose or grant  
26 access to:

- 27 (1) Any digital asset or digital account in violation of any applicable federal  
28 law.  
29 (2) Any digital asset or digital account to which the principal would not have  
30 been permitted access in the ordinary course of business by the custodian.

31 (d) The following definitions apply in this section:

- 32 (1) "Custodian" means any person who electronically stores the digital assets of  
33 another person or who operates the digital accounts of another person.  
34 (2) "Digital accounts" means, but is not limited to, e-mail accounts, software  
35 licenses, social network accounts, social media accounts, file sharing  
36 accounts, financial management accounts, domain registration accounts,  
37 domain name service accounts, Web hosting accounts, tax preparation  
38 service accounts, online stores, affiliate programs, and other online accounts  
39 that currently exist or may exist as technology develops or such comparable  
40 items as technology develops.  
41 (3) "Digital assets" means, but is not limited to, files, including, but not limited  
42 to, e-mails, documents, images, audio, video, and similar digital files that  
43 currently exist or may exist as technology develops or such comparable  
44 items as technology develops, stored on digital devices, including, but not  
45 limited to, desktops, laptops, tablets, peripherals, storage devices, mobile  
46 telephones, smartphones, and any similar digital device that currently exists  
47 or may exist as technology develops or such comparable items as technology  
48 develops, regardless of the ownership of the physical device upon that the  
49 digital asset is stored."

50 **SECTION 1.(h)** G.S. 35A-1251 reads as rewritten:

51 **"§ 35A-1251. Guardian's powers in administering incompetent ward's estate.**

1 In the case of an incompetent ward, a general guardian or guardian of the estate has the  
2 power to perform in a reasonable and prudent manner every act that a reasonable and prudent  
3 person would perform incident to the collection, preservation, management, and use of the  
4 ward's estate to accomplish the desired result of administering the ward's estate legally and in  
5 the ward's best interest, including but not limited to the following specific powers:

- 6 ...  
7 (25) To access, take control of, handle, conduct, continue, distribute, dispose of,  
8 or terminate any digital assets, as defined in G.S. 35A-1254(d)(3), and  
9 digital accounts, as defined in G.S. 35A-1254(d)(2), owned by the ward."

10 **SECTION 1.(i)** G.S. 35A-1252 reads as rewritten:

11 **"§ 35A-1252. Guardian's powers in administering minor ward's estate.**

12 In the case of a minor ward, a general guardian or guardian of the estate has the power to  
13 perform in a reasonable and prudent manner every act that a reasonable and prudent person  
14 would perform incident to the collection, preservation, management, and use of the ward's  
15 estate to accomplish the desired result of administering the ward's estate legally and in the  
16 ward's best interest, including but not limited to the following specific powers:

- 17 ...  
18 (18) To access, take control of, handle, conduct, continue, distribute, dispose of,  
19 or terminate any digital assets, as defined in G.S. 35A-1254(d)(3), and  
20 digital accounts, as defined in G.S. 35A-1254(d)(2), owned by the ward but  
21 absent a court order with respect to a minor; this power shall be no greater  
22 than the power of a natural guardian."

23 **SECTION 1.(j)** Article 9 of Chapter 35A is amended by adding a new section to

24 read:

25 **"§ 35A-1254. Access to digital assets and accounts by guardian of the estate.**

26 (a) A custodian shall provide a general guardian or guardian of the estate access to any  
27 digital accounts and copies of any digital assets owned by the ward and operated by the  
28 custodian. A custodian shall provide access to the digital accounts and digital assets upon  
29 receipt by the custodian of either of the following:

- 30 (1) A written request for access to digital accounts and digital assets made by  
31 the general guardian or guardian of the estate, accompanied by a copy of the  
32 general guardian or guardian of the estate's letters of appointment as general  
33 guardian or guardian of the estate.  
34 (2) An order of the clerk of superior court having jurisdiction over the ward or  
35 an order of a court having jurisdiction over the ward.

36 (b) A custodian shall not destroy, disable, or dispose of any digital account or digital  
37 asset for two years after the custodian receives a request or order under subsection (a) of this  
38 section, unless directed to do so by the guardian.

39 (c) Nothing in this section shall be construed to require a custodian to disclose or grant  
40 access to:

- 41 (1) Any digital asset or digital account in violation of any applicable federal  
42 law.  
43 (2) Any digital asset or digital account to which the ward would not have been  
44 permitted access in the ordinary course of business by the custodian.

45 (d) The following definitions apply in this section:

- 46 (1) "Custodian" means any person who electronically stores the digital assets of  
47 another person or who operates the digital accounts of another person.  
48 (2) "Digital accounts" means, but is not limited to, e-mail accounts, software  
49 licenses, social network accounts, social media accounts, file sharing  
50 accounts, financial management accounts, domain registration accounts,  
51 domain name service accounts, Web hosting accounts, tax preparation

1 service accounts, online stores, affiliate programs, and other online accounts  
 2 that currently exist or may exist as technology develops or such comparable  
 3 items as technology develops.

4 (3) "Digital assets" means, but is not limited to, files, including, but not limited  
 5 to, e-mails, documents, images, audio, video, and similar digital files that  
 6 currently exist or may exist as technology develops or such comparable  
 7 items as technology develops, stored on digital devices, including, but not  
 8 limited to, desktops, laptops, tablets, peripherals, storage devices, mobile  
 9 telephones, smartphones, and any similar digital device that currently exists  
 10 or may exist as technology develops or such comparable items as technology  
 11 develops, regardless of the ownership of the physical device upon that the  
 12 digital asset is stored."

13 **SECTION 1.(k)** G.S. 36C-8-816 reads as rewritten:

14 **"§ 36C-8-816. Specific powers of trustee.**

15 Without limiting the authority conferred by G.S. 36C-8-815, a trustee may:

16 ...  
 17 (33) Access in accordance with G.S. 32-29, take control of, handle, conduct,  
 18 continue, distribute, dispose of, or terminate any digital assets and digital  
 19 accounts held as part of the trust property or received as trust property from  
 20 a settlor or any other person."

21  
 22 **PART II. UPDATE AND CLARIFY LAWS GOVERNING WILLS AND ESTATES**

23  
 24 **CLARIFY NOTICE TO CREDITORS/LIMITED PERSONAL REPRESENTATIVES**

25 **SECTION 2.(a)** G.S. 28A-29-1 reads as rewritten:

26 **"§ 28A-29-1. Notice to creditors without estate administration.**

27 When (i) a decedent dies testate or intestate leaving no personal property subject to ~~probate~~,  
 28 probate and no real property devised to the personal representative; (ii) a decedent's estate is  
 29 being administered by collection by affidavit pursuant to Article 25 of this Chapter; (iii) a  
 30 decedent's estate is being administered under the summary administration provisions of Article  
 31 28 of this Chapter; (iv) a decedent's estate consists solely of a motor vehicle that can be  
 32 transferred by the procedure authorized by G.S. 20-77(b); or (v) a decedent has left assets that  
 33 may be treated as assets of an estate for limited purposes as described in G.S. 28A-15-10, and  
 34 no application or petition for appointment of a personal representative is pending or has been  
 35 granted in this State, any person otherwise qualified to serve as personal representative of the  
 36 estate pursuant to Article 4 of this Chapter or the trustee then serving under the terms of a  
 37 revocable trust created by the decedent may file a petition to be appointed as a limited personal  
 38 representative to provide notice to creditors without administration of an estate before the clerk  
 39 of superior court of the county where the decedent was domiciled at the time of death. This  
 40 procedure is not available if the decedent's will provides that it is not available. A limited  
 41 personal representative shall have the rights and obligations provided for in this Article."

42 **SECTION 2.(b)** G.S. 28A-29-2(a) reads as rewritten:

43 "(a) The application for appointment as limited personal representative shall be in the  
 44 form of an affidavit sworn to before an officer authorized to administer oaths, signed by the  
 45 applicant or the applicant's attorney, which may be supported by other proof under oath in  
 46 writing, all of which shall be recorded and filed by the clerk of superior court, and shall allege  
 47 all of the following facts:

- 48 (1) The name and domicile of the decedent at the time of death.  
 49 (2) The date and place of death of the decedent.  
 50 (3) That, so far as is known or can with reasonable diligence be ascertained,~~the~~  
 51 decedent's property is not subject to probate. (i) the decedent left no personal

1 property subject to probate and no real property devised to the personal  
2 representative; (ii) the decedent's estate is being administered by collection  
3 by affidavit pursuant to Article 25 of this Chapter; (iii) the decedent's estate  
4 is being administered under the summary administration provisions of  
5 Article 28 of this Chapter; (iv) the decedent's estate consists solely of a  
6 motor vehicle that can be transferred by the procedure authorized by G.S.  
7 20-77(b); or (v) the decedent left assets that may be treated as assets of an  
8 estate for limited purposes as described in G.S. 28A-15-10.

- 9 (4) That no application or petition for appointment of a personal representative  
10 is pending or has been granted in this State."  
11

## 12 ELECTIVE SHARE CHANGE

13 SECTION 2.(c) G.S. 30-3.1 reads as rewritten:

### 14 "§ 30-3.1. Right of elective share.

15 (a) Elective Share. – The surviving spouse of a decedent who dies domiciled in this  
16 State has a right to claim an "elective share", which means an amount equal to (i) the applicable  
17 share of the Total Net Assets, as defined in G.S. 30-3.2(4), less (ii) the value of Net Property  
18 Passing to Surviving Spouse, as defined in G.S. 30-3.2(2c). The applicable share of the Total  
19 Net Assets is as follows:

- 20 (1) If the surviving spouse was married to the decedent is not survived by any  
21 lineal descendants, one-half for less than five years, fifteen percent (15%) of  
22 the Total Net Assets.  
23 (2) If the surviving spouse was married to the decedent is survived by one child,  
24 or lineal descendants of one deceased child, one-half for at least five years  
25 but less than 10 years, twenty-five percent (25%) of the Total Net Assets.  
26 (3) If the surviving spouse was married to the decedent is survived by two or  
27 more children, or by one or more children and the lineal descendants of one  
28 or more deceased children, or by the lineal descendants of two or more  
29 deceased children, one-third for at least 10 years but less than 15 years,  
30 thirty-three percent (33%) of the Total Net Assets.  
31 (4) If the surviving spouse was married to the decedent for 15 years or more,  
32 fifty percent (50%) of the Total Net Assets.

33 (b) ~~Reduction of Applicable Share.—In those cases in which the surviving spouse is a~~  
34 ~~second or successive spouse, and the decedent has one or more lineal descendants surviving~~  
35 ~~who are not lineal descendants of the decedent's marriage to the surviving spouse but there are~~  
36 ~~no lineal descendants surviving by the surviving spouse, the applicable share as determined in~~  
37 ~~subsection (a) of this section shall be reduced by one-half."~~  
38

## 39 ATTORNEY'S FEES ON YEAR'S ALLOWANCE

40 SECTION 2.(d) G.S. 30-31 reads as rewritten:

### 41 "§ 30-31. Amount of allowance.

42 The clerk of superior court may assign to the petitioner a value sufficient for the support of  
43 petitioner according to the estate and condition of the decedent and without regard to the  
44 limitations set forth in this Chapter; but the value allowed shall be fixed with due consideration  
45 for other persons entitled to allowances for year's support from the decedent's estate; and the  
46 total value of all allowances shall not in any case exceed the one half of the average annual net  
47 income of the deceased for three years next preceding the deceased's death. Attorneys' fees and  
48 costs awarded the petitioner under G.S. 6-21 shall be paid as an administrative expense of the  
49 estate."  
50

## 51 OUT-OF-STATE WILL PROBATE AND MILITARY WILLS



SECTION 2.(e) G.S. 31-11.6 reads as rewritten:

"§ 31-11.6. How attested wills may be made self-proved.

(a) Any will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form: form, or in a similar form showing the same intent:

"I, \_\_\_\_\_, the testator, sign my name to this instrument this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_ and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

\_\_\_\_\_  
Testator

We \_\_\_\_\_, \_\_\_\_\_, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

THE STATE OF \_\_\_\_\_.  
COUNTY OF \_\_\_\_\_.

Subscribed, sworn to and acknowledged before me by \_\_\_\_\_ the testator and subscribed and sworn to before me by \_\_\_\_\_ and \_\_\_\_\_, witnesses, this \_\_\_\_ day of \_\_\_\_\_

(SEAL)

(SIGNED) \_\_\_\_\_  
(OFFICIAL CAPACITY OF OFFICER)"

(b) An attested written will executed as provided by G.S. 31-3.3 may at any time subsequent to its execution be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the attesting witnesses, each made before an officer authorized to administer oaths under the laws of this State, and evidenced by the officer's certificate, under official seal, attached or annexed to the will in form and content substantially as follows:

"STATE OF NORTH CAROLINA  
"COUNTY/CITY OF \_\_\_\_\_

"Before me, the undersigned authority, on this day personally appeared \_\_\_\_\_, and \_\_\_\_\_, known to me to be the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn. The testator, declared to me and to the witnesses in my presence: That said instrument is his last will; that he had willingly signed or directed another to sign the same for him, and executed it in the presence of said witnesses as his free and voluntary act for the purposes therein expressed; or, that the testator signified that the instrument was his instrument by acknowledging to them his signature previously affixed thereto.

1 The said witnesses stated before me that the foregoing will was executed and acknowledged  
2 by the testator as his last will in the presence of said witnesses who, in his presence and at his  
3 request, subscribed their names thereto as attesting witnesses and that the testator, at the time of  
4 the execution of said will, was over the age of 18 years and of sound and disposing mind and  
5 memory.

6 \_\_\_\_\_  
7 Testator

8 \_\_\_\_\_  
9 Witness

10 \_\_\_\_\_  
11 Witness

12 \_\_\_\_\_  
13 Witness

14 Subscribed, sworn and acknowledged before me by \_\_\_\_\_, the testator, subscribed and  
15 sworn before me by \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ witnesses, this \_\_\_\_ day of \_\_\_\_\_,  
16 A.D. \_\_\_\_\_

17 (SEAL)

18 (SIGNED) \_\_\_\_\_

19  
20 (OFFICIAL CAPACITY OF OFFICER)"

21  
22 (c) The sworn statement of any such witnesses taken as herein provided shall be  
23 accepted by the court as if it had been taken before such court.

24 (d) Any will executed in another state and made self-proved under the laws of that state  
25 shall be considered as self-proved. A document that appears on its face to be a will that was  
26 executed, attested, and notarized under the laws of another state is rebuttably presumed to be  
27 self-proved under the laws of that state.

28 (e) A military testamentary instrument executed in accordance with the provisions of 10  
29 U.S.C. § 1044d(d) or any successor or replacement statute shall be considered as self-proved."

30 **SECTION 2.(f)** G.S. 31-46 reads as rewritten:

31 **"§ 31-46. Validity of will; which laws govern.**

32 A will is valid if it meets the requirements of the applicable provisions of law in effect in  
33 this State either at the time of its execution or at the time of the death of the ~~testator-testator, or~~  
34 if (i) its execution complies with the law of the place where it is executed at the time of  
35 execution; (ii) its execution complies with the law of the place where the testator is domiciled  
36 at the time of execution or at the time of death; or (iii) it is a military testamentary instrument  
37 executed in accordance with the provisions of 10 U.S.C. § 1044d or any successor or  
38 replacement statute."

39 **SECTION 2.(g)** G.S. 28A-2A-17 reads as rewritten:

40 **"§ 28A-2A-17. Certified copy of will of nonresident recorded.**

41 (a) Subject to the provisions of subsection (b) of this section, if the will of a citizen or  
42 subject of another state or country is probated in accordance with the laws of that jurisdiction  
43 and a duly certified copy of the will and the probate proceedings are produced before a clerk of  
44 superior court of any county wherein the testator had property, the copy of the will shall be  
45 probated as if it were the original. If the jurisdiction is within the United States, the copy of the  
46 will and the probate proceedings shall be certified by the clerk of the court wherein the will was  
47 probated. If the jurisdiction is outside the United States, the copy of the will and probate  
48 proceedings shall be certified by any ambassador, minister, consul or commercial agent of the  
49 United States under his official seal.

50 (b) For a copy of a will probated under the provisions of subsection (a) of this section to  
51 be valid to pass title to or otherwise dispose of real estate in this State, the execution of said

1 will according to the laws of this State either at the time of its execution or at the time of the  
2 death of the testator, or as otherwise recognized as valid under the provisions of G.S. 31-46,  
3 must appear affirmatively, to the satisfaction of the clerk of the superior court of the county in  
4 which such will is offered for probate, from the testimony of a witness or witnesses to such  
5 will, or from findings of fact or recitals in the order of probate, or otherwise in such certified  
6 copy of the will and probate proceedings.

7 (c) If the execution of the will in accordance with the laws of this State either at the  
8 time of its execution or at the time of the death of the testator, or as otherwise recognized as  
9 valid under the provisions of G.S. 31-46, does not appear as required by subsection (b) of this  
10 section, the clerk before whom the copy is exhibited shall have power to take proof as  
11 prescribed in G.S. 28A-2A-16, and the will may be adjudged duly proved, and if so proved, the  
12 will shall be recorded as herein provided.

13 (d) Any copy of a will of a nonresident heretofore allowed, filed and recorded in this  
14 State in compliance with the foregoing shall be valid to pass title to or otherwise dispose of real  
15 estate in this State."  
16

### 17 PART III. UPDATE TO AND CLARIFICATIONS OF LAWS GOVERNING TRUSTS

#### 18 INSURABLE INTEREST OF TRUSTEE

19 **SECTION 3.(a)** Article 1 of Chapter 36C of the General Statutes is amended by  
20 adding a new section to read:

#### 21 **"§ 36C-1-114. Insurable Interest of Trustee.**

22 (a) As used in this section, the term "settlor" means a person that executes a trust  
23 instrument. The term includes a person for whom a fiduciary or agent is acting.

24 (b) A trustee of a trust has an insurable interest in the life of an individual insured under  
25 a life insurance policy that is trust property if, as of the date the policy is issued:

26 (1) The insured is either of the following:

27 a. A settlor of the trust.

28 b. An individual in whom a settlor of the trust has, or would have had if  
29 living at the time the policy was issued, an insurable interest.

30 (2) The life insurance proceeds are primarily for the benefit of one or more trust  
31 beneficiaries that have an insurable interest in the life of the insured.

32 (c) This section does not limit or abridge any insurable interest or right to insure now  
33 existing at common law or by statute and shall be construed liberally to sustain insurable  
34 interests, whether as a declaration of existing law or as an extension of or addition to existing  
35 law."  
36  
37

#### 38 UNIFORM TRUST CODE CLARIFICATION AS TO SETTLOR'S SPOUSE

39 **SECTION 3.(b)** G.S. 36C-5-505(c) reads as rewritten:

40 "(c) Subject to Article 3A of Chapter 39 of the General Statutes, for purposes of this  
41 section, if the settlor is a beneficiary of the following trusts after the death of the settlor's  
42 spouse, the property of the trusts shall, after the death of the settlor's spouse, be deemed to have  
43 been contributed by the settlor's spouse and not by the settlor:

44 (1) An irrevocable intervivos marital trust that is treated as a general power of  
45 appointment trust described in section 2523(e) of the Internal Revenue Code.

46 (2) An irrevocable intervivos marital trust that is treated as qualified terminable  
47 interest property under section 2523(f) of the Internal Revenue Code.

48 (3) An irrevocable intervivos trust of which the settlor's spouse is the sole  
49 beneficiary during the lifetime of the settlor's spouse but which does not  
50 qualify for the federal gift tax marital deduction.

- (4) 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.

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

**DECANTING STATUTE IMPROVEMENTS**

**SECTION 3.(c)** G.S. 36C-8-816.1(c) and (e) read as rewritten:

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

- ...
  - (c) The terms of the second trust shall be subject to all of the following:
    - ...
      - (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~~ trust if that interest has come into effect with respect to the beneficiary.
      - ...
        - (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 ~~covering the time at which the permissible period of the rule against perpetuities and suspension of power of alienation begins and the law that determines the permissible period of the rule against perpetuities and suspension of power of alienation of the original trust.~~ 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.
  - ...
    - (e) The exercise of the power to appoint principal or income under subsection (b) of this section:
      - (1) Shall be considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate; and
      - (2) Shall be subject to the provisions of G.S. 41-23 ~~covering the time at which the permissible period of the rule against perpetuities and suspension of power of alienation begins and the law that determines the permissible period of the rule against perpetuities and suspension of power of alienation of the original trust;~~ 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; and
      - (3) Is not prohibited by a spendthrift provision or by a provision in the original trust instrument that prohibits amendment or revocation of the trust.

**PART IV. MISCELLANEOUS UPDATES AND CLARIFICATIONS**

**CLARIFY INHERITED IRA CREDITOR EXEMPTION**

**SECTION 4.(a)** G.S. 1C-1601(a) reads as rewritten:

"(a) Exempt property. – Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of creditors:

...

- (9) Individual retirement plans as defined in the Internal Revenue Code and any plan treated in the same manner as an individual retirement plan under the Internal Revenue Code, including individual retirement accounts and Roth retirement accounts as described in section 408(a) and section 408A of the Internal Revenue Code, individual retirement annuities as described in section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in section 408(c) of the Internal Revenue Code. Any money or other assets or any interest in any such plan remains exempt after an individual's death if held by one or more subsequent beneficiaries by reason of a direct transfer or eligible rollover that is excluded from gross income under the Internal Revenue Code, including, but not limited to, a direct transfer or eligible rollover to an inherited individual retirement account as defined in section 408(d)(3) of the Internal Revenue Code.

...."

**CLARIFICATION AS TO DIRECTED FIDUCIARIES**

**SECTION 4.(b)** G.S. 32-72(d) reads as rewritten:

"(d) The following provisions apply to an instrument creating a fiduciary relationship other than a trust instrument to which Chapter 36C of the General Statutes applies and to a fiduciary other than a trustee:

- (1) The terms of the instrument may confer upon a person ~~the power to direct or consent to certain actions of the fiduciary with respect to~~ certain powers with respect to the actions of a fiduciary, including, but not limited to, the following:

- a. Investments, including retention, purchase, sale, exchange, or other transaction affecting the ownership of investments with respect to all or any one or more assets.
- b. Any other ~~administrative~~ matter.

- (2) When the terms of the instrument confer upon a person ~~the power to direct or consent to certain actions of the fiduciary,~~ any power with respect to the actions of a fiduciary, the duty and liability of the fiduciary are as follows:

- a. If the terms of the instrument confer upon the person the power to direct certain actions of the fiduciary, the fiduciary 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 fiduciary.
- b. If the terms of the instrument confer upon a person the power to consent to certain actions of the fiduciary, and the power holder does not provide consent within a reasonable time after the fiduciary has made a timely request for the power holder's consent, the fiduciary is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the fiduciary's failure to take any action that required the power holder's consent.

- b1. If the terms of the instrument confer upon a person a power other than the power to direct or consent to actions of the fiduciary, the

fiduciary is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the exercise or nonexercise of the power.

c. The fiduciary has no duty to monitor the conduct of the power holder, provide advice to the power holder, or consult with the power holder. The fiduciary is not required to give notice to any beneficiary of any action taken or not taken by the power holder whether or not the fiduciary agrees with the result. Administrative actions taken by the fiduciary for the purpose of implementing directions of the power holder, including confirming that the directions of the power holder have been carried out, do not constitute monitoring of the power holder or other participation in decisions within the scope of the power holder's authority.

(3) A person who holds a power ~~to direct or consent~~ with respect to the actions of a fiduciary is a fiduciary who, as such, is required to act in good faith with regard to the purposes of the estate, or other relationship between the fiduciary and beneficiaries, and the interests of the beneficiaries, except that if a beneficiary is a person with such a power to direct or consent, with respect to the actions of a fiduciary, the beneficiary is not a fiduciary with respect to the following:

a. A power that constitutes a power of ~~appointment~~ appointment held by a beneficiary under the instrument.

b. A power the exercise or nonexercise of which affects only the interests of the beneficiary holding the power and no other beneficiary.

c. A power to remove and appoint a fiduciary.

The holder of the power ~~to direct or consent~~ with respect to the actions of a fiduciary is liable for any loss that results from breach of a fiduciary duty occurring as a result of the exercise or nonexercise of the power."

## GUARDIANSHIP GIFTING

SECTION 4.(c) G.S. 35A-1336.1 reads as rewritten:

### "§ 35A-1336.1. Prerequisites to approval by judge of gifts to individuals.

The judge shall not approve gifts from income to individuals unless it appears to the judge's satisfaction that both the following requirements are met:

(1) After making the gifts and paying federal and State income taxes, the remaining income of the incompetent will be reasonable and adequate to provide for the support, maintenance, comfort, and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and those dependents in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life;

(2) The judge determines that either:

a. The incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by the laws of North Carolina for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent, and each donee is entitled to one or more specific devises, or distributions of specific amounts of money, income, or property under the paper-writing or the revocable trust or both or is a

1 residuary devisee or beneficiary designated in the paper-writing or  
2 revocable trust or both; or

3 b. That so far as is known the incompetent has not, prior to being  
4 declared incompetent, executed a will which could be probated upon  
5 the death of the incompetent, and each donee is a person who would  
6 share in the incompetent's estate, if the incompetent died  
7 contemporaneously with the signing of the order of the approval of  
8 the gifts; or

9 c. The donee is the spouse, parent, descendent of the incompetent, or  
10 descendant of the incompetent's parent, and ~~the amount of the gift~~  
11 ~~does not exceed the federal annual gift tax exclusion.~~the gift qualifies  
12 either for the federal annual gift tax exclusion under Internal  
13 Revenue Code, section 2503(b), or is a qualified transfer for tuition  
14 or medical expenses under Internal Revenue Code, section 2503(e).

15 The judge may order that the gifts be made in cash or in specific assets and may order that  
16 the gifts be made outright, in trust, under the North Carolina Uniform Transfers to Minors Act,  
17 under the North Carolina Uniform Custodial Trust Act, or otherwise. The judge may also order  
18 that the gifts be treated as an advancement of some or all of the amount the donee would  
19 otherwise receive at the incompetent's death."

20 **SECTION 4.(d)** G.S. 35A-1341.1 reads as rewritten:

21 "**§ 35A-1341.1. Prerequisites to approval by judge of gifts to individuals.**

22 The judge shall not approve gifts from principal to individuals unless it appears to the  
23 judge's satisfaction that all of the following requirements have been met:

24 (1) Making the gifts will not leave the incompetent's remaining principal estate  
25 insufficient to provide reasonable and adequate income for the support,  
26 maintenance, comfort, and welfare of the incompetent in order to maintain  
27 the incompetent and any dependents legally entitled to support from the  
28 incompetent in the manner to which the incompetent and those dependents  
29 are accustomed and in keeping with their station in life.

30 (2) The making of the gifts will not jeopardize the rights of any existing creditor  
31 of the incompetent.

32 (3) It is improbable that the incompetent will recover competency during his or  
33 her lifetime.

34 (4) The judge determines that either a., b., c., or d. applies.

35 a. All of the following apply:

36 1. The incompetent, prior to being declared incompetent,  
37 executed a paper-writing with the formalities required by the  
38 laws of North Carolina for the execution of a valid will,  
39 including a paper-writing naming as beneficiary a revocable  
40 trust created by the incompetent.

41 2. Each donee is entitled to one or more specific devises, or  
42 distributions of specific amounts of money, income, or  
43 property under either the paper-writing or revocable trust or  
44 both or is a residuary devisee or beneficiary designated in the  
45 paper-writing or revocable trust or both.

46 3. The making of the gifts will not jeopardize any specific  
47 devise, or distribution of specific amounts of money, income,  
48 or property.

49 b. That so far as is known the incompetent has not, prior to being  
50 declared incompetent, executed a will which could be probated upon  
51 the death of the incompetent, and each donee is a person who would

- 1 share in the incompetent's intestate estate, if the incompetent died  
2 contemporaneously with the signing of the order of approval of the  
3 gifts.
- 4 c. The donee is a person who would share in the incompetent's  
5 nonprobate estate, if the incompetent died contemporaneously with  
6 the signing of the order of approval.
- 7 d. The donee is the spouse, parent, descendant of the incompetent, or  
8 descendant of the incompetent's parent, and ~~the amount of the gift does not~~  
9 ~~exceed the federal annual gift tax exclusion.~~ the gift qualifies either for the  
10 federal annual gift tax exclusion under Internal Revenue Code, section  
11 2503(b), or is a qualified transfer for tuition or medical expenses under  
12 Internal Revenue Code, section 2503(e).
- 13 (5) If the incompetent, prior to being declared incompetent, executed a  
14 paper-writing with the formalities required by the laws of North Carolina for  
15 the execution of a valid will, including a paper-writing naming as  
16 beneficiary a revocable trust created by the incompetent; then all residuary  
17 devisees and beneficiaries designated in the paper-writing or revocable trust  
18 or both, who would take under the paper-writing or revocable trust or both if  
19 the incompetent died contemporaneously with the signing of the order of  
20 approval of the gifts and the paper-writing was probated as the incompetent's  
21 will, the spouse, if any, of the incompetent and all persons identified in  
22 G.S. 35A-1341.1(7) have been given at least 10 days' written notice that  
23 approval for the gifts will be sought and that objection may be filed with the  
24 clerk of superior court of the county in which the guardian was appointed,  
25 within the 10-day period.
- 26 (6) If so far as is known, the incompetent has not, prior to being declared  
27 incompetent, executed a will which could be probated upon the death of the  
28 incompetent, all persons who would share in the incompetent's estate, if the  
29 incompetent died contemporaneously with the signing of the order of  
30 approval, have been given at least 10 days' written notice that approval for  
31 the gifts will be sought and that objection may be filed with the clerk of the  
32 superior court of the county in which the guardian was appointed, within the  
33 10-day period.
- 34 (7) If the gift for which approval is sought is of a nonprobate asset, all persons  
35 who would share in that nonprobate asset if the incompetent died  
36 contemporaneously with the signing of the order of approval have been  
37 given at least 10 days' written notice that approval for the gifts will be sought  
38 and that objection may be filed with the clerk of the superior court of the  
39 county in which the guardian was appointed within the 10-day period. This  
40 notice requirement shall be in addition to the notice requirements contained  
41 in G.S. 35A-1341.1(5) and (6) above.

42 The judge may order that the gifts be made in cash or in specific assets and may order that  
43 the gifts be made outright, in trust, under the North Carolina Uniform Transfers to Minors Act,  
44 under the North Carolina Uniform Custodial Trust Act, or otherwise. The judge may also order  
45 that the gifts be treated as an advancement of some or all of the amount the donee would  
46 otherwise receive at the incompetent's death."

47 **SECTION 4.(e)** G.S. 35A-1251 reads as rewritten:

48 "**§ 35A-1251. Guardian's powers in administering incompetent ward's estate.**

49 In the case of an incompetent ward, a general guardian or guardian of the estate has the  
50 power to perform in a reasonable and prudent manner every act that a reasonable and prudent  
51 person would perform incident to the collection, preservation, management, and use of the



1 ward's estate to accomplish the desired result of administering the ward's estate legally and in  
2 the ward's best interest, including but not limited to the following specific powers:

3 ...

4 (24) To petition the court for approval of the exercise of any of the following  
5 powers with respect to a revocable trust that the ward, if competent, could  
6 exercise as settlor of the revocable trust:

- 7 a. Revocation of the trust.  
8 b. Amendment of the trust.  
9 c. Additions to the trust.  
10 d. Direction to dispose of property of the trust.  
11 e. The creation of the trust, notwithstanding the provisions of  
12 G.S. 36C-4-402(a)(1) and (2).

13 The exercise of the powers described in this subdivision (i) shall not alter  
14 the designation of beneficiaries to receive property on the ward's death under  
15 that ward's existing estate ~~plan~~; plan, but may incorporate tax planning or  
16 public benefits planning into the ward's existing estate plan, which may  
17 include leaving beneficial interests in trust rather than outright, and (ii) shall  
18 be subject to the provisions of Articles 17, 18, and 19 of this Chapter  
19 concerning gifts."  
20

## 21 PART V. DIRECTIVES TO REVISOR OF STATUTES

22 SECTION 5. The Revisor of Statutes shall cause to be printed, as annotations to  
23 the published General Statutes, all relevant portions of the Official Comments to the North  
24 Carolina Uniform Trust Code and all explanatory comments of the drafters of this act, as the  
25 Revisor may deem appropriate.  
26

## 27 PART VI. EFFECTIVE DATE

28 SECTION 6. Sections 1 and 2(c) of this act become effective October 1, 2013, and  
29 apply to estates of decedents dying on or after that date. The remainder of this act is effective  
30 when it becomes law Section 4(a) of this act clarifies existing law and the changes apply to all  
31 inherited individual retirement accounts without regard to the date an account was created.