

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2013

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SENATE BILL 279  
PROPOSED COMMITTEE SUBSTITUTE S279-PCS75293-TG-29

Short Title: Estates/Trusts/Guardianship Amendments.

(Public)

Sponsors:

Referred to:

March 13, 2013

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. UPDATE AND CLARIFY LAWS GOVERNING WILLS AND ESTATES**

8  
9 **CLARIFY WRONGFUL DEATH STATUTE**

10 **SECTION 1.(a)** G.S. 28A-18-2(a) reads as rewritten:

11 "**§ 28A-18-2. Death by wrongful act of another; recovery not assets.**

12 (a) When the death of a person is caused by a wrongful act, neglect or default of  
13 another, such as would, if the injured person had lived, have entitled the injured person to an  
14 action for damages therefor, the person or corporation that would have been so liable, and ~~or~~  
15 ~~her~~ the personal representatives or collectors of the person or corporation that would have been  
16 so liable, shall be liable to an action for damages, to be brought by the personal representative  
17 or collector of the decedent; and this notwithstanding the death, and although the wrongful act,  
18 neglect or default, causing the death, amounts in law to a felony. The personal representative or  
19 collector of the decedent who pursues an action under this section may pay from the assets of  
20 the estate the reasonable and necessary expenses, not including attorneys' fees, incurred in  
21 pursuing the action. At the termination of the action, any amount recovered shall be applied  
22 first to the reimbursement of the estate for the expenses incurred in pursuing the action, then to  
23 the payment of attorneys' fees, and shall then be distributed as provided in this section. The  
24 amount recovered in such action is not liable to be applied as assets, in the payment of debts or  
25 devises, except as to burial expenses of the deceased, and reasonable hospital and medical  
26 expenses not exceeding four thousand five hundred dollars (\$4,500) incident to the injury  
27 resulting in death, except that the amount applied for hospital and medical expenses shall not  
28 exceed fifty percent (50%) of the amount of damages recovered after deducting attorneys' fees,  
29 but shall be disposed of as provided in the Intestate Succession Act. The limitations on  
30 recovery for hospital and medical expenses under this subsection do not apply to subrogation  
31 rights exercised pursuant to ~~G.S. 135-45.1~~ G.S. 135-48.37. All claims filed for ~~such services~~  
32 shall be approved by burial expenses of the decedent and reasonable hospital and medical  
33 expenses shall be subject to the approval of the clerk of the superior court and any party  
34 adversely affected by any decision of said clerk as to said claim may appeal to the superior  
35 court in term time."



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

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

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

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

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

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

(1) The name and domicile of the decedent at the time of death.

(2) The date and place of death of the decedent.

(3) That, so far as is known or can with reasonable diligence be ascertained, ~~the decedent's property is not subject to probate.~~ (i) the decedent left no personal property subject to probate and no real property devised to the personal representative; (ii) the decedent's estate is being administered by collection by affidavit pursuant to Article 25 of this Chapter; (iii) the decedent's estate is being administered under the summary administration provisions of Article 28 of this Chapter; (iv) the decedent's estate consists solely of a motor vehicle that can be transferred by the procedure authorized by G.S. 20-77(b); or (v) the decedent left assets that may be treated as assets of an estate for limited purposes as described in G.S. 28A-15-10.

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

**ELECTIVE SHARE CHANGE**

**SECTION 1.(d)** G.S. 30-3.1 reads as rewritten:

**"§ 30-3.1. Right of elective share.**

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

(1) If the surviving spouse was married to the decedent is not survived by any lineal descendants, one-half for less than five years, fifteen percent (15%) of the Total Net Assets.

- 1           (2)    If the surviving spouse was married to the decedent is survived by one child,  
 2            ~~or lineal descendants of one deceased child, one-half for at least five years~~  
 3            but less than 10 years, twenty-five percent (25%) of the Total Net Assets.  
 4           (3)    If the surviving spouse was married to the decedent is survived by two or  
 5            ~~more children, or by one or more children and the lineal descendants of one~~  
 6            ~~or more deceased children, or by the lineal descendants of two or more~~  
 7            ~~deceased children, one-third for at least 10 years but less than 15 years,~~  
 8            thirty-three percent (33%) of the Total Net Assets.  
 9           (4)    If the surviving spouse was married to the decedent for 15 years or more,  
 10           fifty percent (50%) of the Total Net Assets.

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

## 17 ATTORNEYS' FEES ON YEAR'S ALLOWANCE

18           SECTION 1.(e) G.S. 30-31 reads as rewritten:

### 19 "§ 30-31. Amount of allowance.

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

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

30           SECTION 1.(f) G.S. 31-11.6 reads as rewritten:

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

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

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

43           \_\_\_\_\_  
 44           Testator

45           We \_\_\_\_\_, \_\_\_\_\_, the witnesses, sign our names to this instrument, being first duly  
 46           sworn, and do hereby declare to the undersigned authority that the testator signs and executes  
 47           this instrument as his last will and that he signs it willingly (or willingly directs another to sign  
 48           for him), and that each of us, in the presence and hearing of the testator, hereby signs this will  
 49           as witness to the testator's signing, and to the best of our knowledge the testator is eighteen  
 50           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.

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

Testator

Witness

Witness

Witness

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

(SEAL)

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

(OFFICIAL CAPACITY OF OFFICER)"

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

1       (d) Any will executed in another state and shown by the propounder to have been made  
2 self-proved under the laws of that state shall be considered as self-proved.

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

5               **SECTION 1.(g)** G.S. 31-46 reads as rewritten:

6 **"§ 31-46. Validity of will; which laws govern.**

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

14               **SECTION 1.(h)** G.S. 28A-2A-17 reads as rewritten:

15 **"§ 28A-2A-17. Certified copy of will of nonresident recorded.**

16       (a) Subject to the provisions of subsection (b) of this section, if the will of a citizen or  
17 subject of another state or country is probated in accordance with the laws of that jurisdiction  
18 and a duly certified copy of the will and the probate proceedings are produced before a clerk of  
19 superior court of any county wherein the testator had property, the copy of the will shall be  
20 probated as if it were the original. If the jurisdiction is within the United States, the copy of the  
21 will and the probate proceedings shall be certified by the clerk of the court wherein the will was  
22 probated. If the jurisdiction is outside the United States, the copy of the will and probate  
23 proceedings shall be certified by any ambassador, minister, consul or commercial agent of the  
24 United States under his official seal.

25       (b) For a copy of a will probated under the provisions of subsection (a) of this section to  
26 be valid to pass title to or otherwise dispose of real estate in this State, the execution of said  
27 will according to the laws of this State either at the time of its execution or at the time of the  
28 death of the testator, or as otherwise recognized as valid under the provisions of G.S. 31-46,  
29 must appear affirmatively, to the satisfaction of the clerk of the superior court of the county in  
30 which such will is offered for probate, from the testimony of a witness or witnesses to such  
31 will, or from findings of fact or recitals in the order of probate, or otherwise in such certified  
32 copy of the will and probate proceedings.

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

39       (d) Any copy of a will of a nonresident heretofore allowed, filed and recorded in this  
40 State in compliance with the foregoing shall be valid to pass title to or otherwise dispose of real  
41 estate in this State."  
42

## 43 **PART II. UPDATE TO AND CLARIFICATIONS OF LAWS GOVERNING TRUSTS**

### 44 **INSURABLE INTEREST OF TRUSTEE**

45               **SECTION 2.(a)** Article 1 of Chapter 36C of the General Statutes is amended by  
46 adding a new section to read:

47 **"§ 36C-1-114. Insurable interest of trustee.**

48       (a) As used in this section, the term "settlor" means a person that executes a trust  
49 instrument. The term includes a person for whom a fiduciary or agent is acting.  
50

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

3           **(1)** The insured is either of the following:

4               **a.** A settlor of the trust.

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

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

9       **(c)** This section does not limit or abridge any insurable interest or right to insure now  
 10 existing at common law or by statute and shall be construed liberally to sustain insurable  
 11 interests, whether as a declaration of existing law or as an extension of or addition to existing  
 12 law."

## 13 **UNIFORM TRUST CODE CLARIFICATION AS TO SETTLOR'S SPOUSE**

14           **SECTION 2.(b)** G.S. 36C-5-505(c) reads as rewritten:

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

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

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

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

26           **(4)** Another trust, to the extent that the property of the other trust is attributable  
 27 to property passing from a trust described in subdivision (1), (2), or (3) of  
 28 this subsection.  
 29

30       For purposes of this subsection, the settlor is a beneficiary whether so named under the  
 31 initial trust instrument or through the exercise of a limited or general power of  
 32 ~~appointment~~ appointment, and the "settlor's spouse" refers to the person to whom the settlor  
 33 was married at the time the irrevocable intervivos trust was created, notwithstanding a  
 34 subsequent dissolution of the marriage."  
 35

## 36 **TRUSTEE POWERS CLARIFICATION**

37           **SECTION 2.(c)** G.S. 36C-8-816(16) reads as rewritten:

38 **"§ 36C-8-816. Specific powers of trustee.**

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

40       ...

41           **(16)** Exercise elections with respect to federal, state, and local ~~taxes;~~ taxes  
 42 including, but not limited to, considering discretionary distributions to a  
 43 beneficiary as being made from capital gains realized during the year;

44       ...."

## 45 **DECANTING STATUTE IMPROVEMENTS**

46           **SECTION 2.(d)** G.S. 36C-8-816.1(c) and (e) read as rewritten:

47 **"§ 36C-8-816.1. Trustee's special power to appoint to a second trust.**

48       ...

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

50       ...

- 1 (3) The terms of the second trust may not reduce any fixed income, annuity, or  
 2 unitrust interest of a beneficiary in the assets of the original ~~trust~~trust if that  
 3 interest has come into effect with respect to the beneficiary.  
 4 ...  
 5 (8) The second trust may confer a power of appointment upon a beneficiary of  
 6 the original trust to whom or for the benefit of whom the trustee has the  
 7 power to distribute principal or income of the original trust. The permissible  
 8 appointees of the power of appointment conferred upon a beneficiary may  
 9 include persons who are not beneficiaries of the original or second trust. The  
 10 power of appointment conferred upon a beneficiary shall be subject to the  
 11 provisions of G.S. 41-23 ~~covering the time at which the permissible period~~  
 12 ~~of the rule against perpetuities and suspension of power of alienation begins~~  
 13 ~~and the law that determines the permissible period of the rule against~~  
 14 ~~perpetuities and suspension of power of alienation of the original~~  
 15 ~~trust~~specifying the permissible period allowed for the suspension of the  
 16 power of alienation of the original trust and the time from which that  
 17 permissible period is computed.  
 18 ...  
 19 (e) The exercise of the power to appoint principal or income under subsection (b) of  
 20 this section:  
 21 (1) Shall be considered the exercise of a power of appointment, other than a  
 22 power to appoint to the trustee, the trustee's creditors, the trustee's estate, or  
 23 the creditors of the trustee's estate; and  
 24 (2) Shall be subject to the provisions of G.S. 41-23 ~~covering the time at which~~  
 25 ~~the permissible period of the rule against perpetuities and suspension of~~  
 26 ~~power of alienation begins and the law that determines the permissible~~  
 27 ~~period of the rule against perpetuities and suspension of power of alienation~~  
 28 ~~of the original trust~~specifying the permissible period allowed for the  
 29 suspension of the power of alienation of the original trust and the time from  
 30 which that permissible period is computed; and  
 31 (3) Is not prohibited by a spendthrift provision or by a provision in the original  
 32 trust instrument that prohibits amendment or revocation of the trust."  
 33

### 34 PART III. MISCELLANEOUS UPDATES AND CLARIFICATIONS

#### 35 CLARIFY INHERITED IRA CREDITOR EXEMPTION

##### 36 SECTION 3.(a) G.S. 1C-1601(a) reads as rewritten:

37 "(a) Exempt property. – Each individual, resident of this State, who is a debtor is entitled  
 38 to retain free of the enforcement of the claims of creditors:  
 39

- 40 ...  
 41 (9) Individual retirement plans as defined in the Internal Revenue Code and any  
 42 plan treated in the same manner as an individual retirement plan under the  
 43 Internal Revenue Code, including individual retirement accounts and Roth  
 44 retirement accounts as described in section 408(a) and section 408A of the  
 45 Internal Revenue Code, individual retirement annuities as described in  
 46 section 408(b) of the Internal Revenue Code, and accounts established as  
 47 part of a trust described in section 408(c) of the Internal Revenue Code. Any  
 48 money or other assets or any interest in any such plan remains exempt after  
 49 an individual's death if held by one or more subsequent beneficiaries by  
 50 reason of a direct transfer or eligible rollover that is excluded from gross  
 51 income under the Internal Revenue Code, including, but not limited to, a

1 direct transfer or eligible rollover to an inherited individual retirement  
2 account as defined in section 408(d)(3) of the Internal Revenue Code.

3 ...."  
4

### 5 **CLARIFICATION AS TO DIRECTED FIDUCIARIES**

6 **SECTION 3.(b)** G.S. 32-72(d) reads as rewritten:

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

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

14 a. Investments, including retention, purchase, sale, exchange, or other  
15 transaction affecting the ownership of investments with respect to all  
16 or any one or more assets.

17 b. Any other ~~administrative~~ matter.

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

21 a. If the terms of the instrument confer upon the person the power to  
22 direct certain actions of the fiduciary, the fiduciary must act in  
23 accordance with the direction and is not liable, individually or as a  
24 fiduciary, for any loss resulting directly or indirectly from  
25 compliance with the direction unless compliance with the direction  
26 constitutes intentional misconduct on the part of the fiduciary.

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

34 b1. If the terms of the instrument confer upon a person a power other  
35 than the power to direct or consent to actions of the fiduciary, the  
36 fiduciary is not liable, individually or as a fiduciary, for any loss  
37 resulting directly or indirectly from the exercise or nonexercise of the  
38 power.

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

49 (3) A person who holds a power ~~to direct or consent with respect to the actions~~  
50 of a fiduciary is a fiduciary who, as such, is required to act in good faith with  
51 regard to the purposes of the estate, or other relationship between the



1 fiduciary and beneficiaries, and the interests of the beneficiaries, except that  
2 if a beneficiary is a person with such a power ~~to direct or consent~~, with  
3 respect to the actions of a fiduciary, the beneficiary is not a fiduciary with  
4 respect to the following:

- 5 a. A power that constitutes a power of ~~appointment~~ appointment held  
6 by a beneficiary under the instrument.
- 7 b. A power the exercise or nonexercise of which affects only the  
8 interests of the beneficiary holding the power and no other  
9 beneficiary.

10 c. A power to remove and appoint a fiduciary.

11 The holder of the power ~~to direct or consent~~ with respect to the actions of a  
12 fiduciary is liable for any loss that results from breach of a fiduciary duty  
13 occurring as a result of the exercise or nonexercise of the power."  
14

## 15 GUARDIANSHIP GIFTING

16 SECTION 3.(c) G.S. 35A-1336.1 reads as rewritten:

### 17 "§ 35A-1336.1. Prerequisites to approval by judge of gifts to individuals.

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

- 20 (1) After making the gifts and paying federal and State income taxes, the  
21 remaining income of the incompetent will be reasonable and adequate to  
22 provide for the support, maintenance, comfort, and welfare of the  
23 incompetent and those legally entitled to support from the incompetent in  
24 order to maintain the incompetent and those dependents in the manner to  
25 which the incompetent and those dependents are accustomed and in keeping  
26 with their station in life;
- 27 (2) The judge determines that either:
- 28 a. The incompetent, prior to being declared incompetent, executed a  
29 paper-writing with the formalities required by the laws of North  
30 Carolina for the execution of a valid will, including a paper-writing  
31 naming as beneficiary a revocable trust created by the incompetent,  
32 and each donee is entitled to one or more specific devises, or  
33 distributions of specific amounts of money, income, or property  
34 under the paper-writing or the revocable trust or both or is a  
35 residuary devisee or beneficiary designated in the paper-writing or  
36 revocable trust or both; or
- 37 b. That so far as is known the incompetent has not, prior to being  
38 declared incompetent, executed a will which could be probated upon  
39 the death of the incompetent, and each donee is a person who would  
40 share in the incompetent's estate, if the incompetent died  
41 contemporaneously with the signing of the order of the approval of  
42 the gifts; or
- 43 c. The donee is the spouse, parent, descendent of the incompetent, or  
44 descendant of the incompetent's parent, and ~~the amount of the gift~~  
45 ~~does not exceed the federal annual gift tax exclusion~~ the gift qualifies  
46 either for the federal annual gift tax exclusion under section 2503(b)  
47 of the Internal Revenue Code or is a qualified transfer for tuition or  
48 medical expenses under section 2503(e) of the Internal Revenue  
49 Code.

50 The judge may order that the gifts be made in cash or in specific assets and may order that  
51 the gifts be made outright, in trust, under the North Carolina Uniform Transfers to Minors Act,

1 under the North Carolina Uniform Custodial Trust Act, or otherwise. The judge may also order  
2 that the gifts be treated as an advancement of some or all of the amount the donee would  
3 otherwise receive at the incompetent's death."

4 **SECTION 3.(d)** G.S. 35A-1341.1 reads as rewritten:

5 **"§ 35A-1341.1. Prerequisites to approval by judge of gifts to individuals.**

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

- 8 (1) Making the gifts will not leave the incompetent's remaining principal estate  
9 insufficient to provide reasonable and adequate income for the support,  
10 maintenance, comfort, and welfare of the incompetent in order to maintain  
11 the incompetent and any dependents legally entitled to support from the  
12 incompetent in the manner to which the incompetent and those dependents  
13 are accustomed and in keeping with their station in life.
- 14 (2) The making of the gifts will not jeopardize the rights of any existing creditor  
15 of the incompetent.
- 16 (3) It is improbable that the incompetent will recover competency during his or  
17 her lifetime.
- 18 (4) The judge determines that either a., b., c., or d. applies.
  - 19 a. All of the following apply:
    - 20 1. The incompetent, prior to being declared incompetent,  
21 executed a paper-writing with the formalities required by the  
22 laws of North Carolina for the execution of a valid will,  
23 including a paper-writing naming as beneficiary a revocable  
24 trust created by the incompetent.
    - 25 2. Each donee is entitled to one or more specific devises, or  
26 distributions of specific amounts of money, income, or  
27 property under either the paper-writing or revocable trust or  
28 both or is a residuary devisee or beneficiary designated in the  
29 paper-writing or revocable trust or both.
    - 30 3. The making of the gifts will not jeopardize any specific  
31 devise, or distribution of specific amounts of money, income,  
32 or property.
  - 33 b. That so far as is known the incompetent has not, prior to being  
34 declared incompetent, executed a will which could be probated upon  
35 the death of the incompetent, and each donee is a person who would  
36 share in the incompetent's intestate estate, if the incompetent died  
37 contemporaneously with the signing of the order of approval of the  
38 gifts.
  - 39 c. The donee is a person who would share in the incompetent's  
40 nonprobate estate, if the incompetent died contemporaneously with  
41 the signing of the order of approval.
  - 42 d. The donee is the spouse, parent, descendant of the incompetent, or  
43 descendant of the incompetent's parent, and ~~the amount of the gift~~  
44 ~~does not exceed the federal annual gift tax exclusion.~~ the gift qualifies  
45 either for the federal annual gift tax exclusion under section 2503(b)  
46 of the Internal Revenue Code or is a qualified transfer for tuition or  
47 medical expenses under section 2503(e) of the Internal Revenue  
48 Code.
- 49 (5) If the incompetent, prior to being declared incompetent, executed a  
50 paper-writing with the formalities required by the laws of North Carolina for  
51 the execution of a valid will, including a paper-writing naming as

beneficiary a revocable trust created by the incompetent; then all residuary devisees and beneficiaries designated in the paper-writing or revocable trust or both, who would take under the paper-writing or revocable trust or both if the incompetent died contemporaneously with the signing of the order of approval of the gifts and the paper-writing was probated as the incompetent's will, the spouse, if any, of the incompetent and all persons identified in G.S. 35A-1341.1(7) have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of superior court of the county in which the guardian was appointed, within the 10-day period.

(6) If so far as is known, the incompetent has not, prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent, all persons who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of the superior court of the county in which the guardian was appointed, within the 10-day period.

(7) If the gift for which approval is sought is of a nonprobate asset, all persons who would share in that nonprobate asset if the incompetent died contemporaneously with the signing of the order of approval have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of the superior court of the county in which the guardian was appointed within the 10-day period. This notice requirement shall be in addition to the notice requirements contained in G.S. 35A-1341.1(5) and (6) above.

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

**SECTION 3.(e)** G.S. 35A-1251 reads as rewritten:

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

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

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

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

The exercise of the powers described in this subdivision (i) shall not alter the designation of beneficiaries to receive property on the ward's death under that ward's existing estate ~~plan~~; plan but may incorporate tax ~~planning~~ or

1 public benefits planning into the ward's existing estate plan, which may  
 2 include leaving beneficial interests in trust rather than outright, and (ii) shall  
 3 be subject to the provisions of Articles 17, 18, and 19 of this Chapter  
 4 concerning gifts."  
 5

## 6 **UPDATE NORTH CAROLINA INVESTMENT ADVISERS ACT**

7 **SECTION 3.(f)** G.S. 78C-2(1)k. reads as rewritten:

### 8 **"§ 78C-2. Definitions.**

9 When used in this Chapter, the definitions of G.S. 78A-2 shall apply along with the  
 10 following, unless the context otherwise requires:

11 (1) "Investment adviser" means any person who, for compensation, engages in  
 12 the business of advising others, either directly or through publications or  
 13 writings, as to the value of securities or as to the advisability of investing in,  
 14 purchasing, or selling securities, or who, for compensation and as part of a  
 15 regular business, issues or promulgates analyses or reports concerning  
 16 securities. "Investment adviser" also includes financial planners and other  
 17 persons who, as an integral component of other financially related services,  
 18 provide the foregoing investment advisory services to others for  
 19 compensation and as a part of a business or who hold themselves out as  
 20 providing the foregoing investment advisory services to others for  
 21 compensation. "Investment adviser" does not include:

22 ...

23 k. Any person excepted from the definition of investment adviser under  
 24 the Investment Advisers Act of 1940 or any rule or regulation  
 25 promulgated under that act.~~Repealed by Session Laws 2003-413, s.~~  
 26 ~~16, effective August 14, 2003."~~

27 **SECTION 3.(g)** G.S. 78C-8(d) reads as rewritten:

### 28 **"§ 78C-8. Advisory activities.**

29 ...

30 (c) Except as may be permitted by rule or order of the Administrator, it is unlawful for  
 31 any investment adviser to enter into, extend, or renew any investment advisory contract unless  
 32 it provides in writing:

33 (1) That the investment adviser shall not be compensated on the basis of a share  
 34 of capital gains upon or capital appreciation of the funds or any portion of  
 35 the funds of the client (unless otherwise provided by subsection (d) or (f)  
 36 below);

37 ...

38 (d) Subdivision (c)(1) does not apply to any person who is exempt from registration  
 39 ~~under the Investment Advisers Act of 1940 by operation of Section 203(b)(3) of said act or by~~  
 40 ~~operation of any rule or regulation promulgated by the United States Securities and Exchange~~  
 41 ~~Commission under or related to said Section 203(b)(3) provided that any reference in this~~  
 42 ~~subsection (d) to any statute, rule or regulation shall be deemed to incorporate said statute, rule~~  
 43 ~~or regulation (and any statute, rule or regulation referenced therein) as in effect on June 1,~~  
 44 ~~1988. G.S. 78C-16(a)(4) or to the performance, renewal, or extension of any advisory contract~~  
 45 entered into by an investment advisor at a time when such investment advisor was exempt from  
 46 registration under G.S. 78C-16(a)(4). Subdivision (c)(1) does not prohibit an investment  
 47 advisory contract which provides for compensation based upon the total value of a fund  
 48 averaged over a definite period, or as of definite dates or taken as of a definite date.  
 49 "Assignment," as used in subdivision (c)(2), includes any direct or indirect transfer or  
 50 hypothecation of an investment advisory contract by the assignor or of a controlling block of  
 51 the assignor's outstanding voting securities by a security holder of the assignor; but, if the

1 investment adviser is a partnership, no assignment of an investment advisory contract is  
2 considered to result from the death or withdrawal of a minority of the members of the  
3 investment adviser having only a minority interest in the business of the investment adviser, or  
4 from the admission to the investment adviser of one or more members who, after admission,  
5 will be only a minority of the members and will have only a minority interest in the business."

6 **SECTION 3.(h)** G.S. 78C-16(a)(4) reads as rewritten:

7 "**§ 78C-16. Registration and notice filing requirement.**

8 (a) It is unlawful for any person to transact business in this State as an investment  
9 adviser unless:

10 ...

11 (4) The person, during the course of the preceding 12 months, has had fewer  
12 than 15 clients, and neither holds himself or herself out generally to the  
13 public as an investment adviser nor acts as an investment adviser to any  
14 investment company registered under the Investment Company Act of 1940,  
15 or a company that has elected to be a business development company  
16 pursuant to section 54 of the Investment Company Act of 1940.~~The person is~~  
17 ~~exempt from registration under the Investment Advisers Act of 1940 by~~  
18 ~~operation of section 203(b)(3) of that act or by operation of any rule or~~  
19 ~~regulation promulgated by the United States Securities and Exchange~~  
20 ~~Commission under or related to section 203(b)(3) provided that any~~  
21 ~~reference in this subsection to any statute, rule, or regulation shall be deemed~~  
22 ~~to incorporate the statute, rule, or regulation (and any statute, rule, or~~  
23 ~~regulation referenced therein) as in effect June 1, 1988."~~

#### 24 25 **PART IV. DIRECTIVES TO REVISOR OF STATUTES**

26 **SECTION 4.** The Revisor of Statutes shall cause to be printed, as annotations to  
27 the published General Statutes, all relevant portions of the Official Comments to the North  
28 Carolina Uniform Trust Code and all explanatory comments of the drafters of this act, as the  
29 Revisor may deem appropriate.

#### 30 31 **PART V. EFFECTIVE DATE**

32 **SECTION 5.** Section 1(d) of this act becomes effective October 1, 2013, and  
33 applies to estates of decedents dying on or after that date. The remainder of this act is effective  
34 when it becomes law. Section 3(a) of this act applies to all inherited individual retirement  
35 accounts without regard to the date an account was created.