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Short Title: Estate Planning/Uniform Trust Code.

(Public)

Sponsors:

Referred to:

March 19, 2015

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

5 The General Assembly of North Carolina enacts:

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

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

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

14 "Article 21.

15 "Standby Guardianship.

16 **"§ 35A-1370. Definitions.**

17 For purposes of this Article:

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



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

1 event may be the death of a petitioner or designator, incapacity of a
2 petitioner or designator, debilitation of a petitioner or designator with the
3 petitioner's or designator's consent, or the consent of the petitioner or
4 designator, whichever occurs first.

5 ...

6 **"§ 35A-1373. Appointment by petition of standby guardian; petition, notice, hearing,
7 order.**

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

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

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

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

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

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

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

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

22 ...
23 **"§ 35A-1374. Appointment by written designation; form.**

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

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

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

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

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

- 51 (1) A copy of a determination of incapacity made pursuant to G.S. 35A-1375;

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

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

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

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

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

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

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

- 49 (1) The person was duly designated as a standby guardian or alternate standby
50 guardian;

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

24 ...

25 "**§ 35A-1376. Restoration of capacity or ability; suspension of guardianship.**

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

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

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

48 ...

49 "**§ 35A-1379. Appointment of guardian ad litem.**

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

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

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

12 ...

13 **"§ 35A-1382. Termination.**

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

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

19 (2) Revocation pursuant to this Article.

20 (3) Renunciation pursuant to this Article.

21 (b) A standby guardianship shall terminate, and the authority of the standby guardian
22 designated pursuant to G.S. 35A-1374 or of a guardian of the person or general guardian
23 appointed pursuant to this Article shall cease, upon the entry of an order of the district court
24 granting custody of the minor child to any other person."
25

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

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

31 "Article 2B.

32 "Living Probate.

33 **"§ 28A-2B-1. Establishment before death that a will or codicil is valid.**

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

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

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

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

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

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

5 **"§ 28A-2B-2. Venue.**

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

8 **"§ 28A-2B-3. Contents of petition for will validity.**

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

11 (1) A statement that the petitioner is a resident of North Carolina and specifying
12 the county of the petitioner's residence.

13 (2) Allegations that the will was prepared and executed in accordance with
14 North Carolina law and a statement that the will was executed with
15 testamentary intent.

16 (3) A statement that the petitioner had testamentary capacity at the time the will
17 was executed.

18 (4) A statement that the petitioner was free from undue influence and duress and
19 executed the will in the exercise of the petitioner's free will.

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

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

27 **"§ 28A-2B-4. Declaration by court; bar to caveat.**

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

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

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

1 that revocation, unless that revocation is also declared valid in a proceeding under this Article
2 in which the interested person was a party.

3 **"§ 28A-2B-5. Confidentiality.**

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

8 (1) The petitioner named in the petition.

9 (2) The attorney for the petitioner.

10 (3) Any court of competent jurisdiction hearing or reviewing the matter.

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

15 **"§ 28A-2B-6. Costs and attorneys' fees.**

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

21
22 **PART III. ENACT THE UNIFORM POWERS OF APPOINTMENT ACT**

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

25 **"Chapter 31D.**

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

27 **"Article 1.**

28 **"General Provisions and Definitions.**

29 **"§ 31D-1-101. Short title.**

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

31 **"§ 31D-1-102. Definitions.**

32 The following definitions apply in this Chapter:

33 (1) "Appointee" means a person to whom a power holder makes an appointment
34 of appointive property.

35 (2) "Appointive property" means the property or property interest subject to a
36 power of appointment.

37 (3) "Blanket-exercise clause" means a clause in an instrument which exercises a
38 power of appointment and is not a specific-exercise clause. The term
39 includes a clause that:

40 a. Expressly uses the words "any power" in exercising any power of
41 appointment the power holder has.

42 b. Expressly uses the words "any property" in appointing any property
43 over which the power holder has a power of appointment.

44 c. Disposes of all property subject to disposition by the power holder.

45 (4) "Donor" means a person who creates a power of appointment.

46 (5) "Exclusionary power of appointment" means a power of appointment
47 exercisable in favor of any one or more of the permissible appointees to the
48 exclusion of the other permissible appointees.

49 (6) "General power of appointment" means a power of appointment exercisable
50 in favor of the power holder, the power holder's estate, a creditor of the
51 power holder, or a creditor of the power holder's estate.

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

41 **"§ 31D-1-103. Governing law.**

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

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

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

3 **"§ 31D-2-206. Power to revoke or amend.**

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

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

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

9 "Article 3.

10 "Exercise of Power of Appointment.

11 **"§ 31D-3-301. Requisites for exercise of power of appointment.**

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

14 (1) The instrument exercising the power is valid under applicable law.

15 (2) The terms of the instrument exercising the power manifest the power
16 holder's intent to exercise the power.

17 (3) Subject to the provisions of G.S. 31D-3-304, the terms of the instrument
18 exercising the power satisfy the requirements of exercise, if any, imposed by
19 the donor.

20 **"§ 31D-3-302. Intent to exercise; determining intent from residuary clause.**

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

24 (1) The terms of the instrument containing the residuary clause (including any
25 valid codicil or amendment to the instrument) do not manifest a contrary
26 intent.

27 (2) The power is a general power exercisable in favor of the power holder's
28 estate.

29 (3) There is no gift-in-default clause or the clause is ineffective.

30 (4) The power holder did not release the power.

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

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

34 (1) If the power holder is not also the donor of the power, a blanket-exercise
35 clause in the instrument extends to a power acquired by the power holder
36 after executing the instrument containing the clause.

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

42 **"§ 31D-3-304. Substantial compliance with donor-imposed formal requirement.**

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

47 (1) The power holder knows of and intends to exercise the power.

48 (2) The power holder's manner of attempted exercise of the power does not
49 impair a material purpose of the donor in imposing the requirement.

50 **"§ 31D-3-305. Permissible appointment.**

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

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

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

10 (1) Make an appointment in any form, including an appointment in trust, in
11 favor of a permissible appointee.

12 (2) Create a general power in a permissible appointee.

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

16 **"§ 31D-3-306. Appointment to deceased appointee.**

17 An appointment to a deceased appointee is ineffective.

18 **"§ 31D-3-307. Impermissible appointment.**

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

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

23 **"§ 31D-3-308. Selective allocation doctrine.**

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

27 **"§ 31D-3-309. Capture doctrine; disposition of ineffectively appointed property under**
28 **general power.**

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

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

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

35 a. To the power holder if the power holder is a permissible appointee
36 and living.

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

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

42 **"§ 31D-3-310. Disposition of unappointed property under released or unexercised general**
43 **power.**

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

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

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

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

10 **"§ 31D-3-311. Disposition of unappointed property under released or unexercised**
11 **nongeneral power.**

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

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

25 **"§ 31D-3-312. Disposition of unappointed property if partial appointment to taker in**
26 **default.**

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

30 **"§ 31D-3-313. Appointment to taker in default.**

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

35 **"§ 31D-3-314. Power holder's authority to revoke or amend exercise.**

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

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

43 "Article 4.

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

45 **"§ 31D-4-401. Disclaimer.**

46 Consistent with Chapter 31B of the General Statutes:

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

50 **"§ 31D-4-402. Authority to release.**

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

3 **"§ 31D-4-403. Method of release.**

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

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

8 (2) If the terms of the instrument creating the power do not provide a method or
9 the method provided in the terms of the instrument is not expressly made
10 exclusive, by an instrument manifesting the power holder's intent by clear
11 and convincing evidence.

12 **"§ 31D-4-404. Revocation or amendment of release.**

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

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

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

18 **"§ 31D-4-405. Power to contract; presently exercisable power of appointment.**

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

20 (1) Not to exercise the power.

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

23 **"§ 31D-4-406. Power to contract; power of appointment not presently exercisable.**

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

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

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

28 **"§ 31D-4-407. Remedy for breach of contract to appoint or not to appoint.**

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

32 "Article 5.

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

34 **"§ 31D-5-501. Creditor claim; general power created by power holder.**

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

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

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

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

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

- 1 (2) This Chapter applies to a judicial proceeding concerning a power of
2 appointment commenced on or after the effective date of this Chapter.
- 3 (3) This Chapter applies to a judicial proceeding concerning a power of
4 appointment commenced before the effective date of this Chapter unless the
5 court finds that application of a particular provision of this Chapter would
6 interfere substantially with the effective conduct of the judicial proceeding
7 or prejudice a right of a party, in which case the particular provision of this
8 Chapter does not apply and the superseded law applies.
- 9 (4) A rule of construction or presumption provided in this Chapter applies to an
10 instrument executed before the effective date of this Chapter unless there is a
11 clear indication of a contrary intent in the terms of the instrument or unless
12 application of that rule of construction or presumption would impair
13 substantial rights of a party created under North Carolina law in effect prior
14 to the effective date of this Chapter, in which case that rule of construction
15 or presumption does not apply and the superseded rule of construction or
16 presumption applies.
- 17 (5) Except as otherwise provided in subdivisions (1) through (4) of this
18 subsection, an action taken before the effective date of this Chapter is not
19 affected by this Chapter.

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

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

24

25 **PART IV. AMEND THE ELECTIVE SHARE STATUTES REGARDING VALUATION**
26 **OF PARTIAL OR CONTINGENT INTEREST PROPERTY**

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

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

- 38 (1) The value of the beneficial interest of a spouse shall be the entire fair market
39 value of any property held in trust if the decedent was the settlor of the trust,
40 if the trust is held for the exclusive benefit of the surviving spouse during the
41 surviving spouse's lifetime, and if the terms of the trust meet the following
42 requirements:
- 43 a. During the lifetime of the surviving spouse, the trust is controlled by
44 one or more nonadverse trustees.
- 45 b. The trustee shall distribute to or for the benefit of the surviving
46 spouse either (i) the entire net income of the trust at least annually or
47 (ii) the income of the trust in such amounts and at such times as the
48 trustee, in its discretion, determines necessary for the health,
49 maintenance, and support of the surviving spouse.
- 50 c. The trustee shall distribute to or for the benefit of the surviving
51 spouse out of the principal of the trust such amounts and at such

1 times as the trustee, in its discretion, determines necessary for the
2 health, maintenance, and support of the surviving spouse.

3 d. In exercising discretion, the trustee may be authorized or required to
4 take into consideration all other income assets and other means of
5 support available to the surviving spouse.

6 (2) To the extent that the partial or contingent interest is dependent upon the
7 occurrence of any contingency that is not subject to the control of the
8 surviving spouse and that is not subject to valuation by reference to the
9 mortality and annuity tables set forth in G.S. 8-46 and G.S. 8-47, the
10 contingency will be conclusively presumed to result in the lowest possible
11 value passing to the surviving spouse. However, a life estate or income
12 interest that will terminate upon the surviving spouse's death or remarriage
13 will be valued without regard to the possibility of termination upon
14 remarriage.

15 (3) ~~To the extent that the valuation of a partial or contingent interest is~~
16 ~~dependent upon the life expectancy of the surviving spouse, that life~~
17 ~~expectancy shall be conclusively presumed to be no less than 10 years,~~
18 ~~regardless of the actual attained age of the surviving spouse at the decedent's~~
19 ~~death."~~
20

21 PART V. AMEND THE LAW PROVIDING FOR CONVEYANCE OF TENANCY BY 22 THE ENTIRETIES TO A TRUST

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

24 "§ 39-13.7. Tenancy by the entireties trusts in real property.

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

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

38 (1) The husband and wife remain married.

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

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

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

49 (d) The trustee acting under the express provisions of a trust instrument or with the
50 written consent of both the husband and wife may waive the immunity from the claims of
51 separate creditors provided under this section as to any specific creditor or any specifically

1 described property including all separate creditors of a husband and wife or all former tenancy
2 by the entirety property conveyed to the trustee.

3 (e) For purposes of this section:

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

7 (2) The reference to a "joint trust" means a revocable or irrevocable trust of
8 which both the husband and wife are the settlors, and the reference to
9 "separate trusts" means revocable or irrevocable trusts of which the husband
10 is the settlor of one trust and the wife is the settlor of the other trust.

11 (3) The husband and wife are "beneficiaries" of a trust if they are distributees or
12 permissible distributees of the income or principal of the trust whether or not
13 other persons are also current or future beneficiaries of the trust."
14

15 **PART VI. UNIFORM TRUST CODE; AMEND THE STATUTE OF LIMITATIONS** 16 **AGAINST A TRUSTEE**

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

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

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

26 (2) G.S. 1-17 of the General Statutes shall not apply to toll the running of the
27 limitation as to the persons described in subdivision (1) of this subsection.
28 Those persons shall be treated as if they were under no disability on the date
29 that the limitation starts running."
30

31 **PART VII. UNIFORM TRUST CODE; CLARIFY APPLICABILITY OF DEFAULT** 32 **AND MANDATORY RULES GOVERNING POWER HOLDERS**

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

34 "**§ 36C-1-105. Default and mandatory rules.**

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

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

40 (1) The requirements for creating a trust.

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

45 (3) The requirement that a trust and its terms be for the benefit of its
46 beneficiaries, and that the trust have a purpose that is lawful, not contrary to
47 public policy, and possible to achieve.

48 (4) The power of the court to modify or terminate a trust under G.S. 36C-4-410
49 through G.S. 36C-4-416.

50 (5) The effect of a spendthrift provision and the rights of certain creditors and
51 assignees to reach a trust as provided in Article 5 of this Chapter.

- 1 (6) The effect of an exculpatory term under
2 ~~G.S. 36C-10-1008~~. G.S. 36C-10-1008, except as otherwise provided in
3 subsection (c) of this section.
4 (7) The rights under G.S. 36C-10-1010 through G.S. 36C-10-1013 of a person
5 other than a trustee or beneficiary.
6 (8) Periods of limitation for commencing a judicial proceeding.
7 (9) The power of the court to take any action and exercise any jurisdiction as
8 may be necessary in the interests of justice.
9 (10) The subject-matter jurisdiction of the court and venue for commencing a
10 proceeding as provided in G.S. 36C-2-203 and G.S. 36C-2-204.
11 (11) The requirement that the exercise of the powers described in
12 G.S. 36C-6-602.1(a) shall not alter the designation of beneficiaries to receive
13 property on the settlor's death under that settlor's existing estate plan.
14 (12) The power of a trustee to renounce an interest in or power over property
15 under G.S. 36C-8-816(32).

16 (c) The provisions of subdivisions (2) and (6) of subsection (b) of this section shall not
17 apply to a power holder described in Article 8A of this Chapter with respect to powers
18 conferred upon the power holder in a nonfiduciary capacity under G.S. 36C-8A-3(a) or under
19 the terms of the trust."
20

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

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

25 **"§ 36C-8-816.1. Trustee's special power to appoint to a second trust.**

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

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

37 (b) A trustee of an original trust may, without authorization by the court, exercise the
38 discretionary power to distribute principal or income to or for the benefit of one or more current
39 beneficiaries of the original trust by appointing all or part of the principal or income of the
40 original trust subject to the power in favor of a trustee of a second trust. The trustee of the
41 original trust may exercise this power whether or not there is a current need to distribute
42 principal or income under any standard provided in the terms of the original trust. The trustee's
43 special power to appoint trust principal or income in further trust under this section includes the
44 power to create the second trust. The second trust may have a duration that is longer than the
45 duration of the first trust.

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

- 47 (1) The beneficiaries of the second trust may include only beneficiaries of the
48 original trust.
49 (2) A beneficiary who has only a future beneficial interest, vested or contingent,
50 in the original trust cannot have the future beneficial interest accelerated to a
51 present interest in the second trust.

- 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 if that
3 interest has come into effect with respect to the beneficiary.
- 4 (4) If any contribution to the original trust qualified for a marital or charitable
5 deduction for federal income, gift, or estate tax purposes under the Internal
6 Revenue Code, then the second trust shall not contain any provision that, if
7 included in the original trust, would have prevented the original trust from
8 qualifying for the deduction or that would have reduced the amount of the
9 deduction.
- 10 (5) If contributions to the original trust have been excluded from the gift tax by
11 the application of section 2503(b) and section 2503(c) of the Internal
12 Revenue Code, then the second trust shall provide that the beneficiary's
13 remainder interest in the contributions shall vest and become distributable no
14 later than the date upon which the interest would have vested and become
15 distributable under the terms of the original trust.
- 16 (6) If any beneficiary of the original trust has a power of withdrawal over trust
17 property, then either:
18 a. The terms of the second trust must provide a power of withdrawal in
19 the second trust identical to the power of withdrawal in the original
20 trust; or
21 b. Sufficient trust property must remain in the original trust to satisfy
22 the outstanding power of withdrawal.
- 23 (7) If a trustee of an original trust exercises a power to distribute principal or
24 income that is subject to an ascertainable standard by appointing property to
25 a second trust, then the power to distribute income or principal in the second
26 trust must be subject to the same ascertainable standard as in the original
27 trust and must be exercisable in favor of the same current beneficiaries to
28 whom such distribution could be made in the original trust.
- 29 (8) The second trust may confer a power of appointment upon a beneficiary of
30 the original trust to whom or for the benefit of whom the trustee has the
31 power to distribute principal or income of the original trust. The permissible
32 appointees of the power of appointment conferred upon a beneficiary may
33 include persons who are not beneficiaries of the original or second trust. The
34 power of appointment conferred upon a beneficiary shall be subject to the
35 provisions of G.S. 41-23 specifying the permissible period allowed for the
36 suspension of the power of alienation of the original trust and the time from
37 which that permissible period is computed.
- 38 (9) The terms of the second trust shall not contain any provisions that would
39 jeopardize (i) the qualification of a transfer as a direct skip under section
40 2642(c) of the Code, (ii) if the first trust owns subchapter S Corporation
41 stock, the election to treat a corporation as a subchapter S Corporation under
42 section 1362 of the Code, (iii) if the first trust owns an interest in property
43 subject to the minimum distribution rules of section 401(a)(9) of the Code, a
44 favorable distribution period by shortening the minimum distribution period,
45 or (iv) any other specific tax benefit for which a contribution originally
46 qualified for income, gift, estate, or generation-skipping transfer tax
47 purposes. In this subdivision, "tax benefit" means a federal or State tax
48 deduction, exemption, exclusion, or other benefit not otherwise listed in this
49 section, except for the benefit from having the settlor considered the owner
50 under sections 671 through 679 of the Code. Subject to clause (ii) above, the
51 second trust may be a trust as to which the settlor is not considered the

owner under sections 671 through 679 of the Code even if the settlor is considered the owner of the first trust, and the second trust may be a trust as to which the settlor of the first trust is considered the owner under sections 671 through 679 of the Code, even if the settlor is not considered the owner of the first trust.

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

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

...."

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

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

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

- (1) If the settlor is a beneficiary after the death of the settlor's spouse:
 - a. An irrevocable intervivos marital trust that is treated as a general power of appointment trust described in section 2523(e) of the Internal Revenue Code.

1 (2)b. An irrevocable inter vivos marital trust that is treated as a qualified
2 terminable interest ~~property-trust~~ under section 2523(f) of the
3 Internal Revenue Code.

4 (3)c. An irrevocable inter vivos trust of which the settlor's spouse is ~~the~~
5 sole-a beneficiary during the spouse's lifetime ~~of the settlor's spouse~~
6 but which does not qualify for the federal gift tax marital
7 ~~deduction-deduction~~, and during the lifetime of the settlor's spouse (i)
8 the settlor's spouse is the only beneficiary or (ii) the settlor's spouse
9 and the settlor's issue are the only beneficiaries.

10 (4)d. Another trust, to the extent that the property of the other trust is
11 attributable to property passing from a trust described in ~~subdivision~~
12 ~~(1), (2), or (3) of this subsection.~~sub-subdivisions a., b., and c. of this
13 subdivision.

14 For purposes of this ~~subsection,~~subdivision, notwithstanding the
15 provisions of G.S. 36C-1-103(3), the settlor is a beneficiary whether so
16 named under the initial trust instrument or through the exercise of a limited
17 or general power of ~~appointment, and appointment.~~

18 (2) An irrevocable inter vivos trust for the benefit of a person if the settlor is the
19 person's spouse, regardless of whether or when that person was a settlor of
20 an irrevocable inter vivos trust for the benefit of the person's spouse.

21 For purposes of this subsection, the "settlor's spouse" refers to the person to whom the
22 settlor was married at the time the irrevocable inter vivos trust was created, notwithstanding a
23 subsequent dissolution of the marriage."
24

25 **PART X. UNIFORM TRUST CODE; CLARIFY STANDARD OF LIABILITY OF** 26 **DIRECTED COTRUSTEE**

27 **SECTION 10.** G.S. 36C-7-703 reads as rewritten:

28 "**§ 36C-7-703. Cotrustees.**

29 ...

30 ~~(e1) If the terms of a trust confer upon a cotrustee, to the exclusion of another cotrustee,~~
31 ~~the power to take certain actions with respect to the trust, including the power to direct or~~
32 ~~prevent certain actions of the trustees, the following apply:~~

33 (1) ~~The duty and liability of the excluded trustee is as follows:~~

34 a. ~~If the terms of a trust confer upon the cotrustee the power to direct~~
35 ~~certain actions of the excluded trustee, the excluded trustee must act~~
36 ~~in accordance with the direction and is not liable, individually or as a~~
37 ~~fiduciary, for any loss resulting directly or indirectly from~~
38 ~~compliance with the direction unless compliance with the direction~~
39 ~~constitutes intentional misconduct on the part of the directed~~
40 ~~cotrustee.~~

41 b. ~~If the terms of the trust confer upon the cotrustee any other power,~~
42 ~~the excluded trustee is not liable, individually or as a fiduciary, for~~
43 ~~any loss resulting directly or indirectly from the action taken by the~~
44 ~~cotrustee.~~

45 c. ~~The excluded trustee has no duty to monitor the conduct of the~~
46 ~~cotrustee, provide advice to the cotrustee, or consult with or request~~
47 ~~directions from the cotrustee. The excluded trustee is not required to~~
48 ~~give notice to any beneficiary of any action taken or not taken by the~~
49 ~~cotrustee whether or not the excluded trustee agrees with the result.~~
50 ~~Administrative actions taken by the excluded trustee for the purpose~~
51 ~~of implementing directions of the cotrustee, including confirming~~

1 that the directions of the cotrustee have been carried out, do not
 2 constitute monitoring of the cotrustee nor do they constitute
 3 participation in decisions within the scope of the cotrustee's
 4 authority.

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

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

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

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

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

- 19 (1) The excluded cotrustee is not liable, directly or indirectly, for the action
 20 taken by the cotrustee holding the exclusive power.
 21 (2) The excluded cotrustee has no duty to monitor the conduct of the cotrustee
 22 holding the exclusive power, provide advice to that cotrustee, or consult with
 23 or request directions from that cotrustee. The excluded trustee is not required
 24 to give notice to any beneficiary of any action taken or not taken by that
 25 cotrustee.
 26 (3) The cotrustee holding the exclusive power to take certain actions with
 27 respect to the trust:
 28 a. Shall be liable to the beneficiaries with respect to the exercise of the
 29 power as if the excluded trustee were not in office.
 30 b. Has the exclusive obligation to account to the beneficiaries and
 31 defend any action brought by the beneficiaries with respect to the
 32 exercise of the power.

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

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

49"

50
 51 **PART XI. COMMENTS AND EFFECTIVE DATES**

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

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