
SPECIAL REPORT OF THE
GENERAL STATUTES COMMISSION

ON

AN ACT TO ADD TO THE GENERAL STATUTES
CHAPTER 28A TO BE ENTITLED
"ESTATES OF MISSING PERSONS"

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TO THE GENERAL ASSEMBLY OF NORTH CAROLINA:

In the regular biennial report of the General Statutes Commission to the 1965 General Assembly, it was stated that a special report would be submitted concerning the recommended bill to add to the General Statutes a chapter entitled "Estates of Missing Persons".

This Act was prepared by a special committee composed of Mr. Norman A. Wiggins, Professor of Law, Wake Forest College Law School; Mr. Fred B. McCall, Professor of Law, University of North Carolina Law School; and Mr. W. Bryan Bolich, Professor of Law, Duke University Law School.

With this letter of transmittal, the Commission submits for consideration by the General Assembly:

(1) A letter from the special Drafting Committee to the General Statutes Commission, setting out the background of this work and explaining the same in general terms; and

(2) A copy of the text of this Act, together with the Drafting Committee's comments thereon.

In submitting this special report, the General Statutes Commission wishes to make grateful acknowledgment of the outstanding services of the Drafting Committee in undertaking and completing this project. The Commission recommends the enactment of this Act.

This the 5th day of February, 1965.

Respectfully submitted,

Frank W. Hanft, Chairman
E. C. Bryson, Vice-Chairman
Hugh W. Divine
W. Reid Thompson
Wilbur M. Jolly
Carl V. Venters
H. Gardner Hudson
Robin L. Hinson
Richard S. Clark

Harold L. Waters
Revisor of Statutes
Ex officio Secretary

February 5, 1965.

TO THE GENERAL STATUTES COMMISSION:

In continuing its study and seeking to improve the North Carolina laws relating to the Administration of Estates, the General Statutes Commission's Drafting Committee, composed of Mr. W. Bryan Bolich, Mr. Frederick B. McCall and Mr. Norman A. Wiggins, undertook to consolidate, revise and rewrite our present statutory provisions governing estates of missing persons. This work was initiated pursuant to the request of the General Statutes Commission, that body being cognizant of the fact that many people often disappear and are never heard from again, and that a need exists for a practical statutory procedure by which the property of such missing persons may be administered, managed and ultimately disposed of properly and equitably.

The Committee's review revealed that presently the various provisions in our law are scattered throughout Chapters 28 and 33 of the General Statutes and a close study showed that several of these provisions are overlapping and in some instances contradictory to each other. Those statutory sections affected by this revision include: §28-2.1, §28-2.2, §28-25, §28-166, §28-167, §28-193 through §28-201 and §33-56 through §33-66. As a result of this study, it was concluded that a mere consolidation of all these provisions into one correlated statutory compilation would fall far short of North Carolina's needs.

A revision of the present statutes aimed at eliminating inadequate and inequitable provisions, the retention of those sections which properly deal with present and probable future situations and the addition of certain new sections deemed necessary, became the primary objectives of the Committee. In effecting these objectives various legal texts, cases and the statutes of other states were carefully studied. Included in these sources were such materials as the Model Probate Code, Uniform Absence as Evidence of Death and Absentees' Property Act (9 ULA 1), and the study made by the 1939

Commission on Revision of the Laws of North Carolina Relating to Estates. As a result of its study the Committee concluded that the statutory provisions on this subject should constitute a separate Chapter in our General Statutes. Therefore, the Committee submits Chapter 28A entitled "Estates of Missing Persons".

Respectfully submitted,

Norman A. Wiggins, Chairman

W. Bryan Bolich

Frederick B. McCall

Harold L. Waters

Revisor of Statutes

COMMENTARY

CHAPTER 28A

ESTATES OF MISSING PERSONS

Briefly, this Act provides for the management, preservation and disposition of the property of a person who has disappeared from his place of residence and has remained unheard of for a period of thirty (30) days or more. The basic legal remedy utilized is an equity receivership administered by the Judge of the Superior Court. The opening procedure calls for a temporary receiver to take custody and control of the absentee's property upon the filing of a complaint by an interested party. By directing the temporary receiver to act immediately, the property is preserved and managed before it has time to suffer loss.

Thereafter, if good cause is shown and the absentee has not returned after being given adequate legal notice, the property is put into the hands of a permanent receiver. This receiver manages and preserves the property, provides for the support and maintenance of the absentee's dependents and generally administers the equity receivership under the supervision of the Superior Court, pending final disposition of the absentee's property.

If the absentee returns before the running of the period of limitation created by this Act, his property is returned to him, less certain costs. If the absentee is proved dead, to the satisfaction of a jury, the receivership is terminated and his property is administered and distributed by the Clerk of the Superior Court as in the case of any other decedent. If there is not sufficient proof to establish death and yet the absentee cannot be found and does not, in fact, return within the period of limitation created by this Act, the Judge of the Superior Court may by decree, order that the absentee's property be distributed. Pursuant to such an order, the permanent receiver makes a distribution to those entitled and the equity receivership is terminated.

CAROLINA BY ADDING THERETO CHAPTER 28A, ENTITLED "ESTATES OF MISSING PERSONS".

The General Assembly of North Carolina do enact:

Section 1. The General Statutes of North Carolina are hereby amended by adding a new Chapter immediately following Chapter 28 to be numbered Chapter 28A, and to read as follows:

Chapter 28A

Estates of Missing Persons

§ 28A-1. Death not presumed from seven years absence; exposure to peril to be considered.—(a) Death not to be presumed from mere absence. In any action under this Chapter, where the death of a person and the date thereof, or either, is in issue the fact that he has been absent from his place of residence, unheard of for seven years, or for any other period, creates no presumption requiring the Judge or the jury to find that he is now deceased. The issue shall be decided by the Judge or jury as one of fact upon the evidence.

(b) Exposure to specific peril to be considered. If during such absence the person has been exposed to a specific peril of death, this fact shall be considered by the Judge; or if there be a jury, shall be sufficient evidence to be submitted to the jury.

COMMENT:

Presently North Carolina recognizes the common law doctrine of the presumption of death of a person missing and unheard of, after diligent inquiry, for a period of 7 years. This doctrine has also found its way into several sections of our General Statutes. For instances, G. S. 28-193 provides that a petition for an administrator may be filed and granted when it shall be made to appear that a person has been absent from his place of residence and unheard of for a period of 7 years. In the section that follows (G. S. 28-194) a presumption is raised that the absentee is dead, if after 20 days from the publication of notice to the absentee no evidence is produced as to his continuing life. After the presumption is raised, the clerk may thereafter declare the absentee dead. There are several other sections throughout Chapters 28 and 33 which refer to a person who has disappeared and remained unheard of for a period of 7 years.

This proposed section abrogates the common law doctrine of 7 years' presumption of death for the purposes of this Chapter and establishes the rule that death shall not be presumed from 7 years' absence, or any other period for that matter, and that the issue of a person's death in case of unexplained absence shall go to the jury (or judge if there be no jury) as a question of fact to be determined upon the evidence. In addition, it is the purpose of this section to direct that each case shall be determined on its merits, with any exposure to a specific peril to be taken into consideration in the

determination of the issues.

The presumption of death from seven years unexplained absence as the same presently exists in North Carolina has long ceased to suffice for dealing practically with the problems involved. It uses an ancient rule of thumb (the seven year period) which has no relation to the facts of human experience in modern conditions and it applies a single rule to different situations which should require different treatment. The person disappearing may have been aboard an airplane or ship which was lost at sea, no survivors or victims ever being found; or he may have embarked on a personal expedition in a perilous country. He may have been on a vacation or business trip. He may have had a happy home; or he may have had a disagreeable domestic condition from which anyone would be glad to escape. He may have been an unobtrusive easy-going citizen, or he may have been an aggressive leader with many enemies. He may have been old or young; he may have been carrying money or valuables worth robbery, or he may have had only the usual traveler's outfit. He may have recently insured his life for a large sum, or he may have been carrying a modest amount of insurance for decades past. He may have had awaiting him large and sure gains in a prosperous enterprise or he may have been on the brink of insolvency. He may have left behind him written clues to his state of mind, or there may be no clue of the sort - suicide - amnesia - kidnapping - robbery - accident - which was it? In such a variety of combinations of circumstances, how can any fixed rule of time period apply equally to all cases and to all possibilities? In short, the seven years' absence, unheard-from rule is arbitrary, impractical, anachronistic and obstructive. In years past, when methods of communication, travel and search were primitive and slow, such a rule of thumb may have been appropriate with regard to the rights of all concerned. However, in modern times with more scientific and rapid means of communication, travel, search and investigation the element of time should no longer be the governing factor. The circumstances of each case should be the basis for decision, and there should be no fixed or universal rule which has neither logic nor convenience to justify it.

Source:

Existing statutory provisions affected in whole or in part by the proposed statute are: G. S. 28-2.1; 28-167; and 28-193 through 28-201. See also WIGMORE ON EVIDENCE, Sec. 2531(b).

§ 28A-2. Action for receiver.—(a) Action for receiver to be instituted in the Superior Court. If any person domiciled in this State and having an interest in any property in this State disappears and is absent from his place of residence and after diligent inquiry his whereabouts remains unknown to those persons most likely to know the same, for a period of thirty days or more, or is a person in the military service of the United States who has been officially reported as missing in action, anyone who would be entitled to administer the estate of such absentee if he were deceased, or any interested person, may commence a civil action and file a duly verified complaint in the Superior Court of either the county of such absentee's domicile, or the county where any of his property is situated.

(b) Contents of the complaint. The complaint shall contain the following:

- (1) The name, age, occupation, and last known residence or address of such absentee;
- (2) The date and circumstances of his disappearance;
- (3) So far as known, a schedule of all his property within this State, including property in which he has an interest as tenant by the entirety and other property in which he is co-owner with or without the right of survivorship;
- (4) The names and addresses of the persons who would have an interest in the estate of such absentee if he were deceased;
- (5) The names and addresses of all persons known to the complainant to claim an interest in the absentee's property; and
- (6) A prayer, that ancillary to the principal action, a receiver be appointed by virtue of the provisions of this Chapter to take custody and control of such property of the absentee and to preserve and manage the same pending final disposition of the action as provided in G. S. 28A-11.

(c) Parties to the action. The absentee, all persons who would have an interest in the estate of such absentee if he were deceased, all persons known to claim an interest in the absentee's property, and all known insurers of the life of the absentee shall be made parties to the action. A guardian ad litem shall be appointed for the absentee, and shall file an answer in his behalf.

COMMENT:

Presently in North Carolina there are inconsistent statutes providing for the appointment of: (1) administrators for the estates of persons missing for 7 years (G. S. 28-2.1); (2) collectors of property of persons whose death cannot be determined readily because of disappearance (G. S. 28-25); (3) guardians ad litem for missing persons (G. S. 28-194); and (4) conservators of estates of missing persons (G. S. 33-63 through 33-66). With such a variety of statutes, clerks of the Superior Court in whom the jurisdiction is now vested, find it difficult to determine precisely under which statute to act in cases concerning missing persons. The purpose of this Chapter is to eradicate overlapping and contradictory statutes and to establish one adequate procedure for all situations which may so arise.

This section provides for the filing of a complaint in an action to establish the absentee's status and to appoint a receiver to take custody and control of his property. The complaint constitutes the

commencement of a civil action in the Superior Court in the nature of an equity receivership. Due to the absence of jurisdiction in the Clerk of the Superior Court over matters in equity, jurisdiction over the action provided for herein is placed in the Judge of the Superior Court, a Court of general jurisdiction, rather than the Clerk of the Superior Court who has only a limited jurisdiction. While the property is in all cases carefully managed by the permanent receiver a chain of events occurs which, under Section 28A-11, results in either (1) if he has been found alive, the restoration of the erstwhile absentee's property to him, or (2) if he has been declared dead by the Court, the administration and distribution of the absentee's estate in a probate proceeding before the Clerk of the Superior Court, or (3) even though he has not been found alive or judicially declared dead, because of his prolonged absence, the absentee's property is distributed by a decree of the Superior Court to his heirs, devisees or legatees as provided in Sections 28A-11(3), 28A-12(3) and 28A-13.

The complaint must set forth information which identifies the absentee, his property, the circumstances surrounding his disappearance, his beneficiaries, and a prayer that a receiver be appointed after a finding of disappearance. The absentee, all known insurers of his life, and all persons who would be his beneficiaries if he were in fact deceased are made parties to the action. A guardian ad litem must be appointed and file an answer in behalf of the absentee.

When the requirements of this section are met the Judge of the Superior Court has facts before him sufficient to warrant an equity receivership under which the property of the absentee may be managed and his dependents supported. Thus, this section provides the machinery for the establishment by the Judge, of an equity receivership. As provided in Section 28A-1, there is no longer a presumption of death from 7 years unexplained absence. Therefore, to justify such taking of an absentee's property, a verified complaint and court action are deemed necessary. The filing of the complaint in Section 28A-2 initiates that action.

Source:

Vide supra, Source, Sec. 28A-1. See also Chapter 33, Arts. 9 and 10 N. C. General Statutes. See McIntosh, Sections 2251, 2252, 2253 and 2254.

§ 28A-3. Procedure on complaint. Upon the filing of the complaint referred to in G. S. 28A-2, the Judge may for cause shown appoint a temporary receiver to take charge of the property of the absentee to conserve it pending hearing on the complaint. Such temporary receiver shall qualify by giving bond in an amount and with surety approved by the Judge and shall exercise only the powers specified by the Judge. Within thirty (30) days after the date of his appointment, he shall file an inventory of the property taken in charge. If a permanent receiver is appointed the temporary receiver shall transfer and deliver to the permanent receiver all property in his custody and control, less such only as may be necessary to cover his expenses and compensation as allowed by the Judge, and shall file his final account, and upon its approval be discharged. If the prayer

for a permanent receiver is denied, the temporary receiver shall transfer and deliver to those entitled thereto all property in his custody and control less such only as may be necessary to cover his expenses and compensation as allowed by the Judge, and shall file his final account, and upon its approval be discharged. If the prayer for a permanent receiver is denied the expenses and compensation of the temporary receiver may in the discretion of the Judge be taxed as costs of the action to be paid by the complainant, but if the Judge finds that the complaint was brought in good faith and upon reasonable grounds, he may charge such costs against the property of the absentee.

COMMENT:

Presently there are, as stated in the comments to Section 28A-2, several procedural statutes dealing with the estates of missing persons. These provisions differ greatly in substance, though they all are primarily aimed at the same end. The purpose of this section is to establish one procedure by which the Judge may appoint a temporary receiver to take immediate control of the property of the absentee pending its final disposition.

As previously stated this proposed statute utilizes an action in the nature of an equity receivership instituted before and administered by the Superior Court. Being an adversary proceeding in the Superior Court, a certain amount of time must necessarily elapse before the matter comes on for hearing and final determination. Without a statute similar to this one, providing for interim custody and management, the property of the missing person, which may be a going business enterprise needing immediate and constant attention, or other property which, without proper management could suffer serious monetary loss or physical deterioration, and might lie unattended pending final determination by the Judge. To prevent such loss or deterioration, this statute allows the Judge, for cause shown, to appoint a person to act as temporary receiver. He must make a return to the order issued by the Judge which commanded him to take custody and control of the property set forth in the complainant's original schedule, and subsequent amendments thereto, along with his schedule of such property taken. For the protection of the property of the missing person, the temporary receiver must give bond and upon the termination of his duties render an accounting to the Judge.

Should the prayer for a permanent receiver be granted, the temporary receiver must transfer to the permanent receiver all of the missing person's property which he has in his custody and control. Should the prayer for the permanent receiver be denied, the temporary receiver must return the property to those from whom it was obtained. In both instances, an amount in the discretion of the Judge, is deducted from the property to defray the expenses of the temporary receivership and to compensate the temporary receiver, except that in the case of a denial of the prayer of the complaint, the Judge may, in his discretion, tax such expenses and compensation as costs to be paid by the complainant. This exception is added to the section to deter fraudulent or frivolous actions.

This section is essential to the successful operation of this proposed statute because it allows the Judge to take immediate steps to preserve and manage the property of a person who has disappeared.

And even if the absentee returns before a final determination of his absence is made, this section performs an invaluable service because it preserves his property and prevents loss or deterioration, which might otherwise occur during his absence.

Source:

Vide supra, Source, Sections 28A-1 and 28A-2. See also 25 N.C. L.R. 423; and 1939 Report by Commission on Revision of Laws of N. C. Relating to Estates, p. 62.

§ 28A-4. Notice to interested persons. Upon the filing of the inventory by the temporary receiver, the Judge shall issue a notice reciting the substance of the complaint and the appointment and action of the temporary receiver. This notice shall be addressed to such absentee, to all persons who would have an interest in the estate of such absentee if he were deceased, to all persons alleged in the complaint to claim an interest in the absentee's property, and to all whom it may concern. It shall direct them to file in the Court within a time fixed by the Judge a written statement of the nature and extent of the interest claimed in the property, and to appear at a time and place named and show cause why a permanent receiver of the absentee's property should not be appointed to hold and dispose of the property under the provisions of this Chapter. The return day of the notice shall be not less than thirty nor more than sixty days after its date unless otherwise ordered by the Judge.

§ 28A-5. Service of Notices. All notices required under this Chapter shall be served on all parties to the action and on all other persons entitled to such notice in the manner now prescribed by G. S. 1-585 through G. S. 1-592, and in addition thereto the absentee shall be served by publication once in each of four successive weeks in one or more newspapers in the county where the proceeding is pending, and one copy shall be posted in a conspicuous place upon each parcel of land shown in the temporary receiver's inventory, and one copy shall be sent by registered mail with return receipt requested to the last known address of such absentee. The Judge may in his discretion cause other and further notice to be given within or without the county.

COMMENT:

Sections 28A-4 and 28A-5 are perhaps the most critical provisions in the entire Act. They must meet the constitutional tests of the courts for the proposed statute to be valid, the constitutionality of most state statutes concerning missing persons having been so tested.

Under a statute of this kind, the courts are dealing with the property of a person who may not be dead, and therefore constitutional safeguards must be adequate. Every opportunity available, within reason, must be offered to the missing person to come into court and show cause why management and distribution of his property should not occur. Without proper legal notification the court is not affording this opportunity, and thus may deny him due process of the law. Therefore the statute, to stand the test of constitutionality, must provide adequate notice to the absent person and also to all interested persons. To meet the test of due process the Act provides for ordinary notice under G. S. 1-585 through G. S. 1-592 to the missing person and all interested parties. In addition thereto the Act provides for special notice to the missing person who is made a party to the action.

Several leading cases involving the validity of statutes invoked to bar a returning absentee of his property, have established certain guidelines. In SCOTT v. McNEAL, 154 U. S. 34 (1894), the U. S. Supreme Court reversed a decision of the Supreme Court of Washington giving conclusive effect to the action of a Washington Probate Court which ordered the administration and distribution of the estate of a person absent for over seven years but not in fact dead. The Court held that the whole proceeding in the Probate Court was a nullity and open to collateral attack, because the death of the person is the only foundation for such a probate proceeding. [Acc., SPRINGER v. SHAVENDER, 116 N. C. 12, 21 SE 397 (1895), petition for rehearing dismissed, 118 N. C. 33, 23 SE 976 (1896)]. From this case, some concluded that every distribution of an absentee's property would be unconstitutional if the absentee were in fact alive. This interpretation, which gave rise to thorough studies of the problem of constitutionality, seems to be erroneous in view of the later case of CUNNIUS v. READING SCHOOL DIST., 198 U. S. 458 (1905) in which Justice White disposed of SCOTT v. McNEAL as follows: "That the opinion was not intended to and did not imply that the States were wholly devoid of power to endow their courts with jurisdiction under proper conditions to administer upon the estate of absentees, even though they might be alive, by special and appropriate proceedings applicable to that condition as distinct from the general power to administer the estate of deceased persons, is conclusively shown by the opinion in SCOTT v. McNEAL."

The following is an abridged statement of the governing laws as set forth in Lees, Property Rights of Persons Who Have Disappeared, 9 Minn. Law Rev., at page 93: "The right of a state to make regulations concerning property within its jurisdiction is an attribute of government essential to the performance of the purposes for which government exists. The right has ever been recognized both in the common and in the civil law. It may be exercised by means of legislation conferring jurisdiction on a state court to entertain special proceeding for the administration and care of the property of an absentee irrespective of the fact of death, and a statute making provision for such a proceeding will be sustained if it safeguards the interests of the absentee in case he returns. The reasoning of the court is convincing, although it would seem at first blush that there is no great difference between seizing and disposing of a man's property on the erroneous supposition that he is dead and doing the same thing because he has abandoned the property and gone beyond the boundaries of the state where it is situated. The distinction between the two cases supposed is this: In the first, the power of the state over property within its boundaries is being exercised on the assumption that the owner is dead. His death is the only foundation for the jurisdiction of a probate court to distribute his estate in the usual course of administration. The foundation for the proceeding being destroyed, everything that was done goes for naught. In the second

case, jurisdiction does not depend upon the fact of death at all but upon the absence of the owner of the property from the state with no one lawfully in charge of the property. The reason for sustaining the jurisdiction of the courts in such a case is well stated by the supreme court of Pennsylvania in CUNNIUS v. SCHOOL DISTRICT, where in substance this was said:

'Property without a known owner should be conserved by the state having jurisdiction over it. Hence the state is justified in stepping in and taking charge of it when the owner has abandoned it. If he be really dead, the proceeding under which this is done is unimpeachable. If not dead and his right to re-establish his claim has been protected so far as practicable, a proceeding to conserve the property should not be open to attack on jurisdictional grounds. By abandoning the property the owner exposes it to the danger of loss or destruction and the state is interested in protecting it for the benefit of its citizens and has a duty to perform in that regard.'

"The CUNNIUS CASE has been cited repeatedly in sustaining statutes authorizing courts to appoint some one, variously designated as administrator, receiver, curator or agent, to take charge of property abandoned by absentees. Such statutes usually provide for published notice of the time and place of hearing the application for the appointment of a custodian of the property, authorize the person appointed to sell it and pay the debts of the absentee and then distribute the residue of the funds in his hands among those who would take as heirs of the absent owner if he were dead. This is but little different from the usual administration and distribution of the estate of a deceased person, but in cases of that sort the court proceeds on the assumption of death and not on the assumption that there is a living owner of the property who has abandoned it," [or upon the basis of his absence, with no one lawfully in charge of his property].

The Wisconsin Supreme Court in the case of Guardianship of Reeve, 176 Wisc. 579, 186 NW 736 (1922) expressly approved this interpretation of SCOTT v. McNEAL by declaring "the distinction between such attempted administration proceedings, absolutely void because the individual whose estate is attempted to be administered is alive, and the statutory proceedings provided for in Pennsylvania under the police power, whereby the property of absentees is conveyed and in some measure distributed, is clearly pointed out in CUNNIUS v. READING SCHOOL DISTRICT." The SCOTT case is further qualified, if not tacitly overruled by BLINN v. NELSON, 222 U. S. 1 (1911), upholding a Massachusetts statute barring the absentee after 14 years. The elements of notice, coupled with the reasonableness of the policy behind the special statute of limitations in the Massachusetts act were held adequately to meet the requirements of due process. The Wisconsin statute similarly provides for notice by publication and is framed as a special statute of limitation.

It seems clear that the BLINN case is based neither upon the presence of technical notice, which is bound to give little practical protection, nor upon the fact that the statute was framed as a statute of limitations. The question is simply whether the legislation meets the usual due process test; i.e., whether the procedure is fair and reasonably appropriate to cope with a problem within the proper scope of the Legislature. There can be little serious doubt today but that the United States Supreme Court would sustain such legislation on due process grounds.

The Drafting Committee in framing these two sections and other relevant provisions kept in mind the above mentioned studies, cases and decisions. The Committee believes that these two sections provide for ample notice and procedure and should stand the tests of the Courts.

Source:

See Karl Drechsler, Absentee's Property Act, 1942 Wisc. Law Rev. at page 280; American Law of Property, Sec. 14.3 and 14.4; note, 43 Harvard Law Review 485; note, 1941 Columbia Law Review 744; BLINN v. NELSON, 222 U. S. 1 (1911); CARTER v. LILLY, 227 N. C. 435 (1947); SPRINGER v. SHAVENDER, 116 N. C. 12, 21 SE 397 (1895), petition for rehearing dismissed, 118 N. C. 33, 23 SE 976 (1896); CUNNIUS v. READING SCHOOL DISTRICT, 198 U. S. 458 (1905); and SCOTT v. McNEAL, 154 U. S. 34 (1894). Vide supra, Source, Sections 28A-1 through 28A-3.

§ 28A-6. Procedure after notice. The absentee or any person entitled to notice as provided in G. S. 28A-4 may appear and show cause why a permanent receiver of the absentee's property should not be appointed to hold and dispose of the property under the provisions of this Chapter. The Judge may, after the hearing, either dismiss the complaint and order that the property in the custody and control of the temporary receiver be returned to the persons entitled thereto or he may make a finding that the absentee disappeared as of a stated date and appoint a permanent receiver of the absentee's property.

COMMENT:

This section prescribes the procedural steps which result from the hearing of the complaint on the merits. Until now the Judge in administering this equity receivership has been acting on the verified complaint alone. This section authorizes the Judge, having all interested parties before him, either to dismiss the action if satisfied that the complaint is without merit, or grant the prayer of the complaint and make a judicial finding that the person named in the complaint as the absentee, did, in fact disappear as of a stated date. If the latter decision is made, the Judge appoints a permanent receiver.

Source:

Vide supra, Source, Sections 28A-1 through 28A-5. See McIntosh, Section 2258.

§ 28A-7. Property transferred to permanent receiver; recordation. Upon the permanent receiver giving bond as required by G. S. 28A-16 and its approval by the Judge, the Judge shall order the temporary receiver to transfer and deliver to the permanent receiver custody and control of the absentee's property, and the permanent receiver shall file with the Court an inventory of the property received by him. A copy of this order as it affects any real property shall be issued by the Judge and delivered to the permanent receiver who shall cause the same to be recorded in the office of the Register

of Deeds of each county wherein such real property is situated.

COMMENT:

This section prescribes the formalities incident to the transfer of the property of the absentee from the temporary receiver to the permanent receiver after the hearing on the complaint on the merits, and a judicial finding that the missing person is an absentee within the meaning of this Act. These formalities include: (1) the permanent receiver's giving bond, (2) filing a schedule of the property received, and (3) recording the order under which he acts in the local registry when any real property is involved.

The bond required by this section is for the protection of the persons having an interest in the property. The property schedule required by this section permits the Judge and all interested persons to know exactly what property is in the hands of the permanent receiver. And the requirement that the Court order, as it affects any real property, be recorded in the Office of the Register of Deeds, puts it in the chain of title of subsequent purchasers and creditors of the property.

Source:

Vide supra, Source, Sections 28A-1 through 28A-5.

§ 28A-8. Powers and duties of permanent receiver. The permanent receiver shall under the direction of the Judge administer the absentee's property as an equity receivership with the following powers:

- (1) to take custody and control of all property of the absentee wherever situated,
- (2) to collect all debts due to the absentee and to pay all debts owed by him,
- (3) to bring and defend suits,
- (4) to pay insurance premiums,
- (5) with the approval of the Judge in each instance, to continue to operate and manage any business enterprise, farm or farming operations, and to make necessary contracts with reference thereto,
- (6) with the approval of the Judge in each instance, to renew notes and other obligations, obtain loans on life insurance policies, and pledge or mortgage property for loans necessary in carrying on or liquidating the affairs of such absentee,
- (7) with the approval of the Judge in each instance, to partition property owned by the absentee and another as joint tenants

- or tenants in common, with or without the right of survivorship,
- (8) with the approval of the Judge in each instance, to sell, lease, invest and reinvest any or all property, its income, or its proceeds,
- (9) to pay over or apply the proceeds of loans and sales of such portion, or all of the property or the income thereof as may be necessary for the maintenance and support of the absentee's dependents; and if the income from the property of the absentee is not sufficient to pay all his debts and to provide for the maintenance and support of his dependents, the permanent receiver may apply to the Judge for an order to sell or mortgage so much of the real or personal property as may be necessary therefor; each such sale or mortgage shall be reported to the Judge, and if approved and confirmed by the Judge, the receiver shall execute the required conveyances or mortgages of such property to the purchaser or lender upon his complying with the terms of sale or mortgage.

The Judge may, in his discretion, by written order modify, add to or subtract from the statutory powers granted in this section.

COMMENT:

The purpose of this section is to prescribe the powers and duties of the permanent receiver and to define his office.

Obviously, the reasons for the powers and duties set out in this section are to preserve the property of the absentee, carry on normal operations with regard to any business in which the absentee may have been engaged, and to utilize the absentee's property for the maintenance and support of his dependents. In effect, this section makes the permanent receiver a sort of court trustee of the absentee's property. The Judge will carefully scrutinize all the transactions of the permanent receiver to see that they are fair and equitable to the absentee, his dependents, and all other interested parties.

It will be noted that several of the powers and duties set out in this section are the same as those statutory powers and duties of administrators as provided in Chapter 28 of the General Statutes.

The last paragraph of this section gives the Judge discretionary authority to add to, subtract from or modify the powers set forth in the section. This is designed to add the flexibility needed in the administration of such an equity receivership.

Source:

Vide supra, Source, Sections 28A-1 through 28A-5. See McIntosh, Section 2259.

§ 28A-9. Search for Absentee. The Judge shall by order direct the receiver to make a search for the absentee. The order shall specify the manner in which the search is to be conducted in order to insure that, in the light of the circumstances of the particular case, a diligent and reasonable effort be made to locate the

absentee. The order may prescribe any methods of search deemed advisable by the Judge, but must require, as a minimum, the following:

(1) Inquiry of persons at the absentee's home, his last known residence, the place where he was last known to have been, and other places where information would likely be obtained or where the absentee would likely have gone;

(2) Inquiry of relatives, friends and associates of the absentee, or other persons who should be most likely to hear from or of him;

(3) Insertion of a notice in one or more appropriate papers, periodicals or other news media requesting information from any person having knowledge of the absentee's whereabouts; and

(4) Notification of local, state and national offices which should be most likely to know or learn of the absentee's whereabouts.

COMMENT:

This section requires a minimum search for the absentee which is deemed adequate to meet legal requirements. It will be noted that in addition to giving the receiver the statutory duty to make inquiry, it also allows the Judge to impose specialized requirements of search as the need arises in particular cases.

This section also provides a means by which evidence of the whereabouts or disappearance may be obtained for presentation at a subsequent hearing. As will be noted later, the expense of the search is borne by the property of the absentee rather than by his family, which in many cases, may be hard put for funds during this period of crisis.

Source:

Vide supra, Source, Sections 28A-1 through 28A-5, and Annot., 99 ALR 2d 307 (1965).

§ 28A-10. Claims against the absentee. Immediately upon the appointment of a permanent receiver under this Chapter, the permanent receiver shall publish a notice addressed to all persons having claims against the absentee informing them of the action taken and requiring them to file their claims under oath with the permanent receiver. If any claimant fails to file his sworn claim within six months from the date of the first publication of such notice the receiver may plead this fact in bar of his claim. Such notice shall be published in the same manner as that now prescribed by statute (G. S. 28-47) for claims against the estate of a decedent. Any party in

interest may contest the validity of any claim before the Judge, on due notice given to the permanent receiver and the person whose claim is contested.

COMMENT:

As in the administration of a decedent's estate, this absentee statute makes provision for claims against the absentee by his creditors and others. It directs the permanent receiver to publish this

notice in the same manner as now prescribed in G. S. 28-47. Failure to file notice of a claim with the permanent receiver within the six-month period may be pleaded by the permanent receiver in bar of the creditor's claim.

Source:

Vide supra, Source, Sections 28A-1 through 28A-5.

§ 28A-11. Final hearing and finding. (1) At any time, during the receivership proceedings, upon application to the Judge by any party in interest and presentation of satisfactory evidence of the absentee's death, the Judge may make a final finding and decree that the absentee is dead; in which event the decree and a transcript of all of the receivership proceedings shall be certified to the Clerk of the Superior Court for any administration as may be required by law upon the estate of a decedent, and the Judge shall proceed no further except for the purposes hereinafter set forth in G. S. 28A-12, subsections (1) and (4); or

(2) at any time during the receivership proceedings, upon application to the Judge by any party in interest and presentation of satisfactory evidence of the absentee's existence and whereabouts, except as provided in G. S. 28A-20, the Judge may by decree revoke his finding that he is an absentee, and the Judge shall proceed no further except for the purposes hereinafter set forth in G. S. 28A-12, subsections (2) and (4); or

(3) after the lapse of five years from the date of the finding of disappearance provided for in G. S. 28A-6, if the absentee has not appeared and no finding and decree have been made in accordance with the provisions of either subsections (1) or (2) above, and subject to the provisions of G. S. 28A-14, the Judge may proceed to take further evidence and thereafter make a final finding of such absence and enter a decree declaring that all interest of the absentee in his property, including property in which he has an interest as tenant by the entirety, and other property in which he is co-owner with or without the right of survivorship, has ceased and devolved upon others by reason of his failure to appear and make claim.

COMMENT:

This section provides for three alternative decrees by the Judge of the Superior Court. He may: (1) decree that the absentee is dead;

or (2) decree that the absentee is alive; or (3) decree that due to his prolonged absence, the absentee has lost all rights in his property.

(1) As provided in Section 28A-1(b) of this proposed Act, any exposure to a specific peril may be considered by the Judge or jury in determining the status of the absentee. The first paragraph of the section now under consideration directs that such facts may be offered as evidence of the death of the absentee. This is the first point in the receivership proceedings where a final determination of the status of the absentee is made. Up to this point, the proceedings have been directed toward the preservation and management of the property and a search for the absentee. Now, if any interested party wishes, he may apply to the Judge for a final hearing and determination of the status of the absentee. The filing of such application is in effect a motion that the case be docketed for trial of this issue. At the hearing evidence will be presented and the issues decided as in other civil cases.

If the jury, or the Judge sitting without a jury, makes a finding that the absentee is dead and such decree is entered, the transcript of the entire proceedings shall be certified to the Clerk of the Superior Court, who then administers on the estate of the absentee as if he were a decedent. Thereafter, upon compliance with Section 28A-12 (1) and (4) the equity receivership is terminated. If it is determined that there is not sufficient evidence to establish a finding of death, the receivership proceedings shall continue.

(2) As in subsection (1), this subsection of the proposed Section 28A-11 allows any interested party to apply to the Judge to be heard with regard to the existence and whereabouts of the absentee. As in subsection 1 the hearing takes the form of an ordinary civil case, with the existing rules of evidence, etc. applying.

If after hearing the evidence the jury, or the Judge sitting without a jury, finds as a matter of fact that the absentee is living and his whereabouts are known, a decree shall be entered establishing these findings, and revoking any past findings to the contrary. Upon the rendition of such a decree, the receivership proceedings shall be terminated subject to compliance with Section 28A-12 (2) and (4).

If it is decided that there is not sufficient evidence to establish a finding of the existence and whereabouts of the absentee, the receivership proceedings shall continue.

An exception to this subsection fixes the status of persons imprisoned in foreign countries. In such cases, the absentee's whereabouts may be known, but he is still unable to appear either in person or by attorney and claim and manage his property. (See Section 28A-20, *infra*)

(3) This proposed subsection allows for the termination of the receivership although no decree has been made either declaring the absentee dead or declaring his whereabouts known. With no final decrees having been made, the Judge may, after a lapse of five years, call for a final hearing and take evidence as in any other civil case. Upon this evidence it will be decided whether or not the absentee should be barred from any interest in his property due to his prolonged absence. If proper notice has been given and diligent inquiry made in accordance with the provisions respectively of Sections 28A-4 and 28A-9, the Judge may decree that the absentee has lost all interest in his property and that the right to such property has devolved upon others by reason of his failure to appear. The absentee is then precluded from recovering any part of his property after the entrance of such finding and decree, but he may, in a proper case, have resort to the Insurance Fund provided in Section 28A-19.

The principles underlying statutes of limitation are fully as applicable to an absent person as they are to a person having a known

place of abode within the State. For example, everyone who has property knows that he is subject to lose it if he does not pay the taxes assessed upon it within a certain period. In North Carolina, upon the liquidation of a corporation, the portion of assets distributable to a creditor or shareholder who is unknown or cannot be found, is reduced to cash, deposited with the Clerk of Superior Court and held for three months. If said cash is not claimed within the three-month period, it escheats to the University of North Carolina. Our law also provides that after 5 years, unclaimed bank deposits likewise escheat. Such statutes are too numerous to elaborate at this time. The point made is that all these statutes are statutes of limitation which allow the taking of a person's property without his consent, illustrating the fact that the creation of this statute of limitation is not the establishment of some new and radical procedure unknown to the people of North Carolina. (See generally G. S. 116 as to escheat, and G. S. 1 as to particular statutes of limitation).

The period of time established by this statute of limitations (5 years) is, in the opinion of the draftsmen, a reasonable length of time when compared to North Carolina's present periods of limitation, and when compared to periods of limitation provided for in missing persons' property acts of other states. For example, Connecticut has a 5 year statute of limitation when dealing with estates of missing persons (Section 45-199, Conn. Gen. Stat.), Indiana uses a 3 year period (Sec. 7-2306, Ind. Stat.), Michigan a 1 or 3 year period (Ch. 705.10, Compiled Laws of Mich.), and Oregon uses a 5 year period of limitation (Ch. 120, Sec. 370, Oregon Revised Stat.). These periods, which were established prior to 1930, were considered by the various states to be reasonable then, and there is no reason to believe that today, with even more modern and scientific methods of search and communication, the same period would not also be reasonable in North Carolina.

It is well settled as a matter of probate jurisdiction that where the estate of a person actually alive, although declared dead, has been administered by the probate court, the letters of administration are void. Two reasons are given for such a holding. First, it is settled that the death of an individual for whom administration proceedings are initiated, is an essential element of jurisdiction in the probate court. Second, it is stated that to dispose of a man's property in an action to which he is not a party, and of which he had no notice, is a denial of due process. The proposed legislation is based, not upon probate jurisdiction, but upon the police power of the state and constitutes a reasonable provision by the State to take care of the property and dependents of a missing person. Thorough study indicates that the proposed statute is sanctioned by the landmark cases dealing with the constitutionality of this type of legislation because it provides for (1) reasonable search for the absentee (Sec. 28A-9); (2) the absentee is made a party to the proceeding and reasonable notice is given him (Secs. 28A-4 and 28A-5); (3) a reasonable finding of death upon satisfactory evidence thereof (Secs. 28A-1 and 28A-11; and (4) reasonable safeguards if the absentee returns (Secs. 28A-15 and 28A-19). Vide supra Commentary to Sections 28A-4 and 28A-5, and infra Commentary to Section 28A-15.

This proposed Act is similar to those of Mass., Wisc., Penn. and many of the acts of other states which have proven to be constitutionally sound.

Source:

Vide supra, Source, Sections 28A-4 and 28A-5.

§ 28A-12. Termination of receivership and disposition of the property of the absentee. Upon the entry of any final finding and

decree as provided in G. S. 28A-11, the Judge shall proceed to wind up the receivership and terminate the proceedings:

(1) In the case of a decree under G. S. 28A-11, subsection (1), that the absentee is dead:

- a. By satisfying all outstanding expenses and costs of the receivership, and
- b. By then deducting for the insurance fund provided in G. S. 28A-19 a sum equal to 5% of the total value of the property remaining for distribution upon settlement of the absentee's estate, including amounts paid to the estate from policies of insurance on the absentee's life, and
- c. By then certifying the proceedings to the Clerk of the Superior Court subject to an order by the Judge administering the receivership, or

(2) In the case of a decree under G. S. 28A-11, subsection (2), revoking the finding that the missing person is an absentee:

- a. By satisfying all outstanding expenses and costs of the receivership, and
- b. By then returning his remaining property to him and rendering an accounting for that property not returned; or

(3) In the case of a decree under G. S. 28A-11, subsection (3), declaring that all interest of the absentee in his property has ceased:

- a. By satisfying all outstanding expenses and costs of the receivership, and
- b. By then satisfying all outstanding taxes, other debts and charges, and
- c. By then deducting for the insurance fund provided in G. S. 28A-19 a sum equal to 5% of the total value of the property remaining, including amounts paid to the receivership estate from policies of insurance on the absentee's life, and
- d. By transferring or distributing the remaining property as provided in G. S. 28A-13; and

(4) In all three cases by requiring the receiver's account,

and upon its approval, discharging him and his bondsmen and entering a final decree terminating the receivership.

COMMENT:

This section of the proposed Act sets forth three alternative procedures by which the receivership is terminated. When the death of the absentee is established subsection (1) directs, in addition to paying the costs of the receivership, that the proceedings shall be certified to the probate court and handled as any other decedent's estate. It will be noted that there is a deduction for an insurance fund as provided in Section 28A-19. When the absentee is found to be alive and his whereabouts known, subsection (2) directs that his property shall be restored to him and an accounting rendered for any property not returned. When the absentee's whereabouts continue unknown, subsection (3) provides that the receiver shall satisfy all claims against the estate, and then make a distribution of the property of the absentee as provided in Section 28A-13.

In all three cases the permanent receiver renders his final account and is discharged upon its approval and a decree is filed terminating the receivership.

Source:

Vide supra, Source, Sections 28A-4 and 28A-5.

§ 28A-13. Distribution of property of absentee. The property remaining for distribution in accordance with the provisions of G. S. 28A-12, subsection (3) (d) shall be transferred or distributed by the receiver in accordance with the Judge's decree to those persons who would be entitled thereto under the applicable laws of intestate succession as though the absentee died intestate on the day five years after the date of his disappearance as determined by the Judge in his final finding and decree; or, if the absentee leaves a document which, had he died, might have been admissible to probate as his will, the Judge administering the receivership shall cause citations to issue to all persons entitled to notice upon the probate of wills in solemn form and determine whether the will would have been admitted to probate, and, if it shall be so determined, the transfer and distribution shall be according to the provisions of the document as of the date of the decree under G. S. 28A-12, subsection (3) (d), subject, however, to the right of the spouse of such absentee, or others, to claim whatever property they would have been entitled by law to claim in derogation of the terms of the will as if the absentee had actually died testate on the day five years after the date of his disappear-

ance as determined by the Judge in his final finding and decree.

COMMENT:

This section provides for final distribution of the property remaining after the payment of all claims, expenses, and taxes. Under the supervision and authority of the Judge the receiver makes the distribution. If no document is found which could be interpreted as a will, the distribution is in accordance with the laws of intestate succession. If a document is found which would qualify as a will, the distribution is made in accordance with that document.

Source:

Vide supra, Source, Sections 28A-1, 28A-3, 28A-4 and 28A-5.

§ 28A-14. Additional limitation. If, at the time of the hearing in G. S. 28A-6 wherein a permanent receiver is appointed by the Judge after a finding of disappearance as of a stated date, the date of disappearance so found is more than four years prior to the date of such hearing, the time limited for accounting for or fixed for transferring or distributing the property or its proceeds, or for barring actions by or on behalf of the absentee relative thereto, shall be not less than two years after the date of the appointment of the permanent receiver instead of the five years provided in G. S. 28A-11(3).

Provided, however, that the time limited for accounting for or fixed for transferring and distributing any additional property or its proceeds within the State coming into the custody and control of the permanent receiver during such two-year period, or for barring actions by or on behalf of the absentee relative thereto, shall be not more than one year after the expiration of said two-year period.

COMMENT:

As provided in Section 28A-11, a missing person may be judicially found to be (1) dead or, (2) alive, or (3) neither dead nor alive, but merely missing. This section modifies the procedure under Section 28A-11(3) as to alternative (3) above. It provides that if in the decree rendered after a hearing pursuant to Section 28A-6, the date of disappearance so found in such decree is more than four years prior to the date of such hearing, then the time limited for barring the absentee by a final decree shall be not less than two years from the date of the appointment of the permanent receiver.

It is possible that due to longer periods of search and other circumstances, the matter will not get before the court for several years. This proposed section foresees such cases and proposes to care for them. For example, John Doe disappears on January 1, 1960 but

due to certain circumstances there is some hope that he may be found. The family of John Doe continues for 6 years to search for their lost relative. Finally, in November, 1966 a member of the family or some other interested party who would qualify under this act, brings the matter to the attention of the Court by filing a complaint for the appointment of a receiver. After proper notice has been filed as required and after all other requirements are met, the Judge under Section 28A-6 makes a judicial finding on January 1, 1967 that the absentee disappeared on January 1, 1960, and appoints a permanent receiver to administer the equity receivership. Thereafter application is made for a final finding by the Judge. Evidence is received, and the Judge finds that there is not sufficient evidence to declare the absentee dead. At this point, without Section 28A-14, it would be necessary to wait 5 years from the date of the hearing and appointment of the permanent receiver provided for in Section 28A-6 before any final finding could be made under Section 28A-11(3). Therefore, it would be January, 1972 before the Judge could declare by a decree that all interest of the absentee in his property has ceased and devolved upon others by reason of his failure to appear. In such a case, 12 years is far too long a period to have to wait before any distribution of the property could be made. For this reason, and to take care of similar situations Section 28A-14 is inserted in this proposed Act. In the illustration above it would not be necessary to wait the additional five years from the date of the hearing and appointment if it can be shown that the date of disappearance found by the Court when appointing the permanent receiver was more than four years prior to the time of the appointment. Since John Doe disappeared on January 1, 1960 and the hearing at which this date of disappearance was established and a permanent receiver was appointed was held in January, 1967, Section 28A-14 requires that the permanent receiver wait not less than 2 years before applying to the Judge for a final finding under Section 28A-11(3). As to any additional property acquired by the receiver during the two-year period provided for in Section 28A-14, the maximum time extension is one year.

Source:

See 1939 Commission on Revision of the Laws of North Carolina Relating to Estates.

§ 28A-15. Claim of Absentee Barred. No action shall be brought by an absentee to recover any portion of the property which is the subject of this proceeding after a final finding and decree as provided for in G. S. 28A-11(1) or G. S. 28A-11(3).

COMMENT:

The application of this section as it relates to Section 28A-11 (1) results in preventing the absentee from bringing any action to recover any part of the property, if by some strange quirk of fate such absentee should survive the peril to which he was exposed and on which the jury returned a finding of death. The absentee in such a case, would resort to the Absentee Insurance Fund for any compensation due him.

The application of this section as it relates to Section 28A-11 (3) is in effect the barring clause of the 5 year statute of limitation created in this Chapter. The application of this section to both Sections 28A-11(1) and 28A-11(3) are constitutional and follow the pattern set forth in the leading cases dealing with the subject. It will be noted that the CUNNIUS CASE (supra) held that a state had

legislative jurisdiction under its police power to regulate the property of absentees, but that such a statute would not be constitutional if it created "an arbitrary and unreasonable presumption of death resulting from absence for a brief period", or if it "did not provide adequate notice as prerequisite to proceedings for the administration of the estate of an absentee", or if it "contained no adequate safeguards concerning the property, and amounted therefore simply to authorizing the transfer of the property of the absentee to others" (See 198 U. S. 458, 476). The Court upheld the Pennsylvania statute involved on the basis of a presumed abandonment of the property by the negligence of the owner in being away without communicating with anyone for more than a specified period of time. BLINN v. NELSON went further in interpreting a Massachusetts statute which provides for the appointment of a receiver of the absentee's property after notice and if he failed to appear and claim his property within a certain time, the barring of his title and distribution of the property to the persons entitled. This was augmented by AMERICAN LAND CO. v. ZEISS, 219 U. S. 47 (1911) which held that by statute, if reasonable notice is given, the title of an absentee can be barred by a properly conducted judicial proceeding, without provision that such title be altered if the absentee later appeared and claimed it.

Source:

Vide supra, Source, Section 28A-4, 28A-5 and 28A-11.

§ 28A-16. Laws of Administration of Estates applicable. Except as otherwise provided in this Chapter, the laws of this State applicable to administration of decedents' estates as to the amount and type of bond, inventories, reports, priority of creditors, compensation and Court costs shall govern receivers appointed under this Chapter.

COMMENT:

In order to insure uniformity with regard to certain administrative details the same laws which govern the administration of decedents' estates are made applicable to the equity receivership created by this proposed Act.

Source:

Vide supra, Comment to Section 28A-2 and 28A-3.

§ 28A-17. Estates of less than \$1000. Whenever a receiver is to be appointed under this Chapter, and it is found by the Judge that the fair value of the estate involved is less than \$1000, the Judge shall appoint the public administrator as such receiver, if there be one for the county. In case such public administrator is appointed, he shall act as receiver under his official bond as public administrator which shall be liable for any default, and no other bond shall

be required.

COMMENT:

The purpose of this section is to reduce unnecessary delay and expense to small estates by utilizing the office of public administrators which provides an inexpensive means of disposing of such estates.

Source:

Vide supra, Source, Section 28A-2.

§ 28A-18. Insurance policies. (a) At the time of the distribution under G. S. 28A-13 the Judge may direct the payment of any sums as they become due on any policies of insurance upon the life of the absentee, to the proper parties as their interest may appear.

(b) If the insurer refuses payment, the Judge, upon the filing of appropriate supplemental pleadings in the pending action, shall determine all issues arising upon the pleadings, provided that all issues of fact shall be tried by a jury, unless trial by jury is waived.

(c) Where the required survival of a beneficiary is not established the provisions of this Act shall apply as if the proceeds of the insurance were a part of the estate of the absentee, unless the absentee retained no interest in the policy.

(d) If in any proceeding under subsection (b) it is determined that the absentee is not dead and the policy provides for a surrender value, the receiver or an otherwise entitled beneficiary acting through the receiver, may demand the payment of the surrender value or obtain a policy loan. The receiver's receipt for such payment of surrender value shall be a release to the insurer of all claims under the policy. The receiver shall pay over to such beneficiary any money so received, first reserving only an amount allowed by the Judge as costs of the proceedings under this section and that amount required by G. S. 28A-12(3)(b).

COMMENT:

Section 28A-11(3) provides that the Judge may decree that the missing person's continuous absence for a period of five years or

more has caused him to lose all interest in his property. Section 28A-12(3) provides that the Judge, upon a finding under Section 28A-11(3), shall proceed to wind up the receivership and terminate the proceeding. Section 28A-13 provides the manner in which the absentee's property shall be distributed when the receivership is terminated. The purpose of Section 28A-18 is to cover those situations when insurance is an asset of the missing person's estate. Subsection (a) of this section authorizes the Judge to order the payment of any then payable proceeds under any life insurance policies on the life of the absentee. In these cases it is foreseeable that an insurer may refuse payment. In anticipation of this, subsections (b) and (d) were inserted. Subsection (b) vests jurisdiction in the Judge to determine all issues arising under the pleadings, subject to the proviso that all issues of fact shall be tried by a jury, unless trial by jury is duly waived as provided by G. S. 1-172. If the insured's death is established and all other issues are resolved in favor of the beneficiary, the proceeds shall be paid pursuant to the judgment. However, if in such proceedings, the insured's death is not established, payment of the full amount of the policy cannot be decreed. The fact remains that the insured has disappeared and his whereabouts unknown for more than 5 years and that under the terms of this Act his property is distributable as though he were dead. When the full amount cannot be paid to the estate or a beneficiary, subsection (d) provides that the receiver, or a beneficiary acting through the receiver, may in appropriate cases demand the payment of the cash surrender value, or obtain a loan on the policy. Subsection (c) governs situations wherein the insured absentee has an interest in the policy, but the required survival of a beneficiary is not established. In this case proceeds of the insurance are considered a part of the absentee's estate in applying the provisions of this Act. The decree of the Judge stating that the absentee's property is distributable as though he were dead shall be sufficient authorization for the insurer to make payment and the receiver's receipt shall constitute a release and discharge the insurer from all liability under the policy.

Source:

Vide supra, Source, Sections 28A-1, 28A-4 and 28A-5.

§ 28A-19. Absentee Insurance Fund. (a) In each case of termination of the receivership, as provided in G. S. 28A-12, subsections (1) and (3), the Judge shall set aside the sum therein named for the Absentee Insurance Fund and direct its payment by the receiver to the Treasurer of the State, who shall be liable therefor upon his official bond as for other monies received by him in his official capacity.

(b) The Treasurer shall retain, invest and reinvest all funds thus paid in a separate account entitled the "Absentee Insurance Fund", and add thereto as received the interest or other earnings.

(c) If at any time thereafter, a person declared an absentee whose estate has been distributed under a final finding and decree made as provided in G. S. 28A-13 shall personally appear before the Treasurer and make claim for reimbursement from such fund, the Superior Court may in an action commenced in the Superior Court of Wake

County by such person against the Treasurer, enter a judgment ordering payment to the claimant of such part of the accumulated fund from all sources as in its opinion is found to be fair, adequate and reasonable under the circumstances, taking into account the disposition made of his property, the reasons for his absence, and any other relevant matters.

(d) An action for compensation from the Absentee Insurance Fund shall be begun within three years from the time of the absentee's return. In cases of infancy or other disability recognized by law, persons under such disability shall have one year after the removal of such disability within which to begin the action.

(e) If the Absentee Insurance Fund shall be insufficient at any time to comply with a judgment as provided for in subsection (c) of this section, the Treasurer shall pay the same from any funds in the State Treasury not otherwise appropriated; and in such case any amount thereafter received by the Treasurer on account of the Insurance Fund shall be transferred to the general funds of the Treasury until the amount advanced shall have been repaid.

(f) The Treasurer of the State shall from time to time prescribe the rate to be charged for the "Absentee Insurance Fund" under G. S. 28A-12, subsections (1) and (3) on the basis of actuarial experience.

COMMENT:

This section provides for the rare case where a person whose property has been distributed under the terms of this proposed Act eventually returns home or his whereabouts are discovered. It sets up an insurance fund to take care of such eventuality, and at the same time constitutes a constitutional safeguard as to the legislation, and protection for a returning absentee and the distributees of the property of such absentee.

This section requires that a certain percentage of an absentee's distributable property be deposited with the State Treasurer where it is invested and retained. Then, should the absentee return, the Superior Court may in a proper proceeding brought by the absentee, order payment by the State Treasurer of an amount which in the Court's opinion is fair and equitable under the circumstances.

It is possible, though improbable, that at some time the absentee Insurance Fund may be insufficient in amount to satisfy the decree rendered by the Court in this section. To meet this possibility and to protect the returning absentee, subsection (e) is inserted.

Source:

Vide supra, Source, Sections 28A-4 and 28A-5.

§ 28A-20. Provisions for a person held incommunicado in a foreign country. As to a person who is known to be held incommunicado in a foreign country, G. S. 28A-1 through G. S. 28A-8 and G. S. 28A-10 may be applied as though such person were an absentee within the meaning of this Chapter, and if his whereabouts become unknown, the other provisions of this Chapter may be applied by such amendments to the pending proceeding as may be required.

COMMENT:

A situation often arises in our present-day life which the draftsmen believe should be handled by this proposed act. That situation is the capture or internment or other imprisonment of a U. S. Citizen in a foreign country. In many of these cases the person's whereabouts are readily known - he is imprisoned in a certain place. However, he is not allowed to communicate with friends or relatives. It is conceivable that in many of these cases the prisoner's family may need support and his property will depreciate or waste away rapidly without immediate attention. By allowing the first 8 sections and Section 28A-10 of this act to apply to those cases, a temporary receiver may be appointed to take custody and control of the property pending a hearing on the matter. After due notice a permanent receiver may then be appointed to administer the property of the interned or imprisoned individual under the authority granted him by the Judge and the statute. In addition to these powers, the permanent receiver, under Section 28A-10 may require all claims against the interned or imprisoned individual to be filed.

As long as the whereabouts of the individual are known, no final hearing or finding can be made. However, any time the person interned or imprisoned disappears or his whereabouts become unknown the other provisions of this act may be applied.

Source:

G. S. 33-63.

§ 28A-21. Agents' Acts Binding on Estate of Absentee. Acts of an agent of an absentee, carried out in good faith, prior to the appointment of a receiver under this Chapter, shall be binding on the estate of such absentee if said acts were within the scope of the agent's real or apparent authority.

COMMENT:

This section protects the agents of the absentee from possible personal liability in certain cases.

There will be cases where an agent performs some act without knowledge of the disappearance of his principal and in good faith

during the interim period between the date of disappearance and the appointment of a receiver. This section contemplates this and relieves the agent of personal liability for such acts even if it is later shown that the agency relationship was in fact revoked by the death of the absentee at a time prior to the date of the performance of the act.

Once the Judge appoints a receiver to take custody and control of the property of an absentee, the agent of such absentee loses his authority to act on behalf of his principal. Thereafter any acts by the agent shall not be binding on the absentee's property.

In addition, the provisions contained in this section are intended to apply only to those situations where the application of this Chapter is sought.

§ 28A-22. Chapter to be severable. If any provisions of this Chapter or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable.

Sec. 2. G. S. 28-25 is hereby amended by rewriting the section to read as follows:

"§ 28-25. Appointment of Collectors.—When, for any reason other than a situation provided for in Chapter 28A entitled 'Estates of Missing Persons', a delay is necessarily produced in the administration of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent."

Sec. 3. G. S. 28-166 is hereby amended by rewriting the section to read as follows:

"§ 28-166. Payment into court of fund due infant. When any balance of money or other estate which is due an infant without guardian is found in the hands of an executor, administrator or collector who has filed his petition for settlement, the court or judge may direct such money or other estate to be paid into court, to be invested upon interest, or otherwise managed under the direction of the judge, for the use of such infant."

Sec. 4. G. S. 28-2.1, G. S. 28-2.2, G. S. 28-167, G. S. 28-193 through G. S. 28-201, inclusive, G. S. 33-56 through G. S. 33-66, inclusive, and all other laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 5. This Act shall become effective upon its ratification.