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THE GENERAL STATUTES OF NORTH CAROLINA

1977 SUPPLEMENT

JAN 24 1978

**Annotated, under the Supervision of the Department
of Justice, by the Editorial Staff of the Publishers**

UNDER THE DIRECTION OF

W. M. WILLSON, J. H. VAUGHAN AND SYLVIA FAULKNER

Volume 2A

1976 Replacement

Annotated through 292 N.C. 643 and 33 N.C. App. 240. For complete
scope of annotations, see scope of volume page.

**Place in Pocket of Corresponding Volume of Main Set.
This Supersedes Previous Supplement, Which
May Be Retained for Reference Purposes.**

THE MICHIE COMPANY

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1977

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Preface

This Supplement to Replacement Volume 2A contains the general laws of a permanent nature enacted at the 1977 Session of the General Assembly which are within the scope of such volume, and brings to date the annotations included therein.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show all sections except catchlines carried for the purpose of notes only. An index to all statutes codified herein appears in Replacement Volumes 4B, 4C and 4D.

A majority of the Session Laws are made effective upon ratification but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after thirty days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

The General Statutes of North Carolina
1977 Supplement

Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1977 Session of the General Assembly affecting Chapters 28A through 52A of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

- North Carolina Reports volumes 289 (p. 620) - 292 (p. 643).
- North Carolina Court of Appeals Reports volumes 29 (p. 187) - 33 (p. 240).
- Federal Reporter 2nd Series volumes 531 - 554 (p. 1074).
- Federal Supplement volumes 408 (p. 969) - 431 (p. 434).
- Federal Rules Decisions volumes 69 (p. 609) - 74 (p. 213).
- United States Reports volume 423 (pp. 161-1336).
- Supreme Court Reporter volumes 96 (p. 1691) - 97 (p. 2204).
- North Carolina Law Review volume 55 (pp. 1-750).
- Wake Forest Intramural Law Review volumes 8-13 (p. 269).
- Duke Law Journal volumes 3 (p. 485) - 6 (p. 1395).
- North Carolina Central Law Journal volume 2 (pp. 1-164), volume 3 (pp. 123-268), volume 7 (pp. 201-413), volume 8 (pp. 1-122).
- Opinions of the Attorney General.

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ARTICLE 2.

Jurisdiction for Probate of Wills and Administration of Estates of Decedents.

§ 28A-2-1. Clerk of superior court.

Allocation of Jurisdiction between Clerk and Judge. — Section 7A-241 does not say that concurrent jurisdiction in probate matters is

vested in the clerk and the judge of the superior court. It says that probate jurisdiction is vested in the superior court division to be exercised by

the superior court and the clerk according to the practice and procedure provided by law. The law, that is, the statutes specifying this practice and procedure, has allocated the jurisdiction between the clerk and the judge. By this section the clerk is given exclusive original jurisdiction of "the administration, settlement and distribution of estates of decedents" except in cases where the clerk is disqualified to act under § 28A-2-3. When the clerk is disqualified to exercise his jurisdiction, the judge has equal authority to perform the clerk's probate duties and, in that sense, he exercises concurrent jurisdiction of probate matters. In all other instances, however, the judge's probate jurisdiction is, in effect, that of an appellate

court pursuant to § 7A-251. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Jurisdiction Exclusive. —

Sections 28A-2-1 through 28A-2-3 of Chapter 28, as did the former law, vest in the clerk of superior court exclusive jurisdiction of the probate of wills, administration, settlement and distribution of the decedents' estates, the granting of letters, testamentary and of administration, or other letters of authority. Unlike the former law, the jurisdiction of the clerk is no longer limited by such considerations as where the decedent died, left property or was domiciled. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

§ 28A-2-3. Jurisdiction where clerk interested.

Stated in In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

ARTICLE 3.

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§ 28A-3-1. Proper county.

Cited in In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

ARTICLE 4.

Qualification and Disqualification for Letters Testamentary and Letters of Administration.

§ 28A-4-2. Persons disqualified to serve as personal representative.

A testator has the right to name the person who shall administer his estate after his death, provided his designate is not disqualified by law. In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

The person testator names as executor has the right to administer the estate. In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

And he can be deprived of that right only by his refusal or neglect to probate the will or to take out letters, or by his inability or unsuitableness to execute the trust. In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

Statutory specifications of disqualifications for service as a personal representative cannot be superseded by the broad general policy of the law which gives effect to the desires of a

testator and sees that his intentions are carried out so far as they can be ascertained. In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

Personal Interests Antagonistic to Estate as Grounds for Disqualification. — When it appears that the personal interests of the prospective executor are so antagonistic to the interests of the estate and those entitled to its distribution that the same person cannot fairly represent both, the testator's nominee is unsuitable and disqualified as a matter of law. This is especially true where the conflict is one which the testator did not know or foresee. In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

ARTICLE 5.

*Renunciation by Personal Representative.***§ 28A-5-1. Renunciation by executor.**

Cited in *In re Estate of Moore*, 292 N.C. 58,
231 S.E.2d 849 (1977).

ARTICLE 6.

*Appointment of Personal Representative.***§ 28A-6-4. Right to contest appointment; procedure.**

The right of interested persons to contest the appointment of a decedent's personal representative and the procedure for doing so under the former law, §§ 28-30 and 28-32,

remains substantially unchanged under the present law. *In re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976).

ARTICLE 8.

*Bond.***§ 28A-8-1. Bond required before letters issue; when bond not required. —**

(a) Except as otherwise provided in subsection (b), every personal representative, before letters are issued, shall give bond, conditioned as provided in G.S. 28A-8-2.

(b) No bond shall be required of:

- (1) A resident executor, unless the express terms of the will require him to give bond;
- (2) A nonresident executor (or a resident executor who moves from this State subsequent to his appointment) who has appointed a resident agent to accept service of process as provided in G.S. 28A-4-2(a) [28A-4-2(4)], when the express terms of the will excuse him from giving bond;
- (3) A nonresident executor, when there is a resident executor named who has qualified as coexecutor unless the express terms of the will require them to give bond, or the clerk of superior court finds that such bond is necessary for the protection of the estate; or
- (4) A personal representative appointed solely for the purpose of bringing an action for the wrongful death of the deceased until such time as the personal representative shall receive property into the estate of the deceased; or
- (5) A personal representative that is a national banking association having its principal place of business in this State or a State bank acting pursuant to G.S. 53-159;
- (6) A personal representative who resides in the State of North Carolina when all of the heirs of the decedent are over 18 years of age and file with the clerk of superior court a written waiver instrument agreeing to relieve the personal representative from the necessity of giving bond; or

- (7) A personal representative when he is the sole heir and or devisee of the decedent. (C. C. P., ss. 467, 468; 1870-1, c. 93; Code, ss. 1387, 1388, 2169; Rev., s. 29; C. S., s. 39; 1923, c. 56; 1967, c. 41, s. 1; 1973, c. 1329, s. 3; 1975, c. 300, s. 3; 1977, c. 29.)

Editor's Note. —

The 1977 amendment, applicable to the estates of all decedents dying on or after Oct. 1, 1975, added subdivisions (6) and (7) to subsection (b).

§ 28A-8-1.1. Deposited money; exclusion in computing amount of bond. — Notwithstanding the provisions of G.S. 28A-8-1, in any proceeding for the determination of the amount of bond to be required of the personal representative or testamentary trustee, whether at the time of appointment or subsequently, when it appears that the estate of the decedent or the testamentary trust includes money which has been or will be deposited in a bank or banks in this State, or money which has been or will be invested in an account or accounts in an insured savings and loan association or associations upon condition that such money will not be withdrawn except on authorization of the court, the court may, in its discretion, order such money so deposited or so invested and shall exclude such deposited money from the computation of the amount of such bond or reduce the amount of bond to be required in respect of such money to such an amount as it may deem reasonable.

The petitioner for letters testamentary, of administration, or of trusteeship may deliver to any such bank or association any such money in his possession, or may allow such bank to retain any such money already in its possession, or may allow such association to retain any such money already invested with it; and, in either event, the petitioner shall secure and file with the court a written receipt including the agreement of the bank or association that such money shall not be allowed to be withdrawn except on authorization of the court. In so receiving and retaining such money, the bank or association shall be protected to the same extent as though it had received the same from a person to whom letters testamentary, of administration, or of trusteeship had been issued.

The term "account in an insured savings and loan association" as used in this section means an account insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation or by a mutual deposit guaranty association authorized by Article 7A of Chapter 54 of the General Statutes of North Carolina.

The term "money" as used in this section means the principal of the decedent's estate and does not include the income earned by the principal of the decedent's estate which may be withdrawn without any authorization of the court. (1977, c. 870, s. 1.)

Editor's Note. — Session Laws 1977, c. 870, s. 2, makes this section effective July 1, 1977.

ARTICLE 9.

Revocation of Letters.

§ 28A-9-1. Revocation after hearing.

Adverse Interest. —

The finding that respondent-administrator c.t.a. and petitioner are tenants in common of certain real property of the estate which is liable

for debts of the estate to the extent that the personal property is insufficient to pay such debts does not support the conclusion that respondent had a private interest that might

tend to hinder or be adverse to a fair and proper administration of the estate. In re Will of Taylor, 32 N.C. App. 742, 234 S.E.2d 11 (1977). Cited in In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

§ 28A-9-2. Summary revocation.

Cited in In re Will of Taylor, 32 N.C. App. 742, 234 S.E.2d 11 (1977).

ARTICLE 11.

Collectors.

§ 28A-11-5. **Compensation.** — A collector shall be compensated in accordance with Article 23 of this Chapter. (1977, c. 814, s. 4.)

Editor's Note. — Session Laws 1977, c. 814, s. 10, makes this section effective Jan. 1, 1978.

ARTICLE 12.

Public Administrator.

§ 28A-12-8. **Compensation.** — A public administrator shall be compensated in accordance with Article 23 of this Chapter. (1977, c. 814, s. 5.)

Editor's Note. — Session Laws 1977, c. 814, s. 10, makes this section effective Jan. 1, 1978.

ARTICLE 13.

Representative's Powers, Duties and Liabilities.

§ 28A-13-3. Powers of personal representative.

(a) Except as qualified by express limitations imposed in a will of the decedent, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative shall have absolute discretion to make the election as to which items of the decedent's personal and household effects shall be excluded from the carry over basis provision of the federal income tax law and such election shall be conclusive and binding on all concerned.

(b) Any question arising out of the powers conferred by subsections (a) and (a) above shall be determined in accordance with the provisions of Article 18 of this Chapter.

(c) Prior to the personal representative exercising possession, custody or control over real property of the estate he shall petition the clerk of court to obtain an order authorizing such possession, custody or control. The petition shall include:

- (1) A description of the real property which is the subject of the petition;
- (2) The names, ages, and addresses, if known, of the devisees and heirs of the decedent;

- (3) A statement by the personal representative that he has determined that such possession, custody or control is in the best interest of the administration of the estate.

The devisees and heirs will be made parties to the proceeding by service of summons in the manner prescribed by law. If the clerk of court determines that it is in the best interest of the administration of the estate to authorize the personal representative to take possession, custody or control he shall grant an order authorizing that power. (1868-9, c. 113, ss. 73, 77; Code, ss. 1501, 1505; Rev., ss. 85, 159; C. S., ss. 170, 171; 1925, c. 86; 1933, cc. 161, 196, 498; 1973, c. 1329, s. 3; 1975, c. 19, s. 9; c. 371, s. 4; 1977, c. 556.)

Editor's Note. —

The 1977 amendment added subsection (a1) and substituted "subsections (a) and (a1)" for "subsection (a)" in subsection (b).

As the rest of the section was not changed by the amendment, only subsections (a1) and (b) are set out.

§ 28A-13-6. Exercise of powers of joint personal representatives by one or more than one.

(e) Subject to the provisions of subsections (b), (c) and (d) of this section, all other acts and duties must be performed by both of the personal representatives if there are two, and by a majority of them if there are more than two. No personal representative who has not joined in exercising a power shall be liable for the consequences of such exercise, nor shall a dissenting personal representative be liable for the consequences of an act in which he joins at the direction of the majority of the personal representatives, if he expressed his dissent in writing to any other personal representative at or before the time of such joinder.

(1977, c. 446, s. 1.)

Editor's Note. — The 1977 amendment, effective Sept. 1, 1977, added the second sentence of subsection (e).

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the

estates of persons who die on or after the effective date of this act."

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

ARTICLE 14.

Notice to Creditors.

§ 28A-14-1. Advertisement for claims. — Every personal representative and collector within 20 days after the granting of letters shall notify all persons, firms and corporations having claims against the decedent to present the same to such personal representative or collector, on or before a day to be named in such notice, which day must be at least six months from the day of the first publication or posting of such notice. The notice shall set out a mailing address for the personal representative or collector. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. If there is no newspaper published in the county, but there is a newspaper having general circulation in the county, then at the option of the personal representative, or collector, the notice shall be published once a week for four consecutive weeks in the newspaper having general circulation in the county and posted at the courthouse or the notice shall be posted at the courthouse and four other public places in the county. Personal representatives are not required to publish notice

to creditors if the only asset of the estate consists of a claim for damages arising from death by wrongful act. (1868-9, c. 113, s. 29; 1881, c. 278, s. 2; Code, ss. 1421, 1422; Rev., s. 39; C. S., s. 45; 1945, c. 635; 1949, c. 47; c. 63, s. 1; 1955, c. 625; 1961, c. 26, s. 1; c. 741, s. 1; 1973, c. 1329, s. 3; 1977, c. 446, s. 1.)

Editor's Note. — The 1977 amendment, effective Sept. 1, 1977, inserted "at least" in the first sentence and added the present second sentence.

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

Date Named in Notice. — This section does require that the date contained in the body of a notice to creditors be exactly six months from the day of first publication or posting of such notice. Opinion of Attorney General to Mr. F. Piercy Carter, Chief Assistant Clerk of Court, Buncombe County, 46 N.C.A.G. 1 (1976).

§ 28A-14-3. Personal notice to creditors. — For a claim to be barred under the provisions of G.S. 28A-19-3, the personal representative or collector shall by certified or registered mail forward to the claimant a statement that the claim shall be barred unless presented in the time and manner set out in Article 19 of this Chapter. A claim not barred by G.S. 28A-19-3 because of the failure to mail the statement may be paid from any undistributed assets of the estate.

Nothing in this section shall be construed to require a personal representative to mail the statement; nor shall a personal representative be liable for failure to mail the statement. In an action brought on a claim that was not barred by G.S. 28A-19-3 because of the failure to mail the statement, the personal representative or collector shall not be chargeable for any assets that he may have paid in satisfaction of any debts, legacies, or distributive shares before such action was commenced; nor shall any costs be recovered in such action against the personal representative or collector. (1868-9, c. 113, s. 32; Code, s. 1424; 1885, c. 96; Rev., s. 41; C. S., s. 47; 1961, c. 741, s. 2; 1973, c. 1329, s. 3; 1977, cc. 446, s. 1, 798.)

Editor's Note. — Session Laws 1977, c. 446, s. 1, as amended by Session Laws 1977, c. 798, rewrote this section. Session Laws 1977, c. 446, s. 6, makes the act effective September 1, 1977, and Session Laws 1977, c. 446, s. 5, pro-

vides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

ARTICLE 15.

Assets; Discovery of Assets.

§ 28A-15-1. Assets of the estate generally.

The direction from the testator that certain property in the estate not be applied to payment of estate liabilities cannot operate to

prevent payment of debts, taxes and costs of administration which are justly owed. Combs v. Eller, 30 N.C. App. 30, 226 S.E.2d 197 (1976).

ARTICLE 18.

*Actions and Proceedings.***§ 28A-18-2. Death by wrongful act of another; recovery not assets.****I. IN GENERAL.****No Such Right Existed at Common Law. —**

In accord with 1st paragraph in original. See *Christenbury v. Hedrick*, 32 N.C. App. 708, 234 S.E.2d 3 (1977).

Construction. —

In accord with original. See *Christenbury v. Hedrick*, 32 N.C. App. 708, 234 S.E.2d 3 (1977).

For case construing "person" in former § 28-173, etc. —

In accord with original. See *Yow v. Nance*, 29 N.C. App. 419, 224 S.E.2d 292, cert. denied, 290 N.C. 312, 225 S.E.2d 833 (1976).

For case calling for legislative action, etc. —

In accord with original. See *Yow v. Nance*, 29 N.C. App. 419, 224 S.E.2d 292, cert. denied, 290 N.C. 312, 225 S.E.2d 833 (1976).

The right of action for wrongful death, etc.

This section makes it a condition precedent to a right of action in a personal representative that the death of the intestate was caused by a wrongful act, neglect or default of the manufacturer "such as would, if the injured person had lived, have entitled him to an action for damages therefor." *Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976).

The condition precedent, "such as would, if the injured person had lived, have entitled him to an action for damages therefor," to the maintenance of an action under this section does not, by its express terms, include a time limitation but, upon its face, relates to the nature of the "wrongful act, neglect or default" which caused the death and to the legal capacity of the decedent to sue therefor had he lived. *Raftery v.*

Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

Applied in *Pinkston v. Baldwin, Lima, Hamilton Co.*, 292 N.C. 260, 232 S.E.2d 431 (1977).

III. PARTIES TO THE ACTION.**Action by Administrator of Employee Covered by Workmen's Compensation Act. —**

The administrator of an employee within the Workmen's Compensation Act cannot sue the employer for the wrongful death of the employee since the employee could not have sued the employer for his injury had he lived. *Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976).

Action by Administrator of Child against Parents. — Except as § 1-539.21 now provides, the administrator of an unemancipated minor child cannot bring an action for wrongful death against the child's negligent parent. *Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976).

V. DAMAGES RECOVERABLE.**As to measure of damages under former statute. —**

See *Mosley v. United States*, 538 F.2d 555 (4th Cir. 1976).

Subsection (b)(6) supplies a statutory basis, etc. —

In accord with 1st paragraph in original. See *Lentz v. Gardin*, 30 N.C. App. 379, 226 S.E.2d 839, cert. granted, 290 N.C. 777, 229 S.E.2d 33 (1976).

ARTICLE 19.

Claims against the Estate.

§ 28A-19-1. Manner of presentation of claims. — (a) A claim against a decedent's estate must be in writing and state the amount or item claimed, or other relief sought, the basis for the claim, and the name and address of the claimant; and must be presented by one of the following methods:

- (1) By delivery to the personal representative or collector. Such claim will be deemed to have been presented from the time of such delivery.
- (2) By mailing, first-class mail, to the personal representative or collector at the address set out in the general notice to creditors. Such claim will be deemed to have been presented from the time of deposit of the claim enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care of the United States Postal Service.

(b) In an action commenced after the death of the decedent against his personal representative or collector as such, the commencement of the action in the court in which such personal representative or collector qualified will constitute the presentation of a claim and no further presentation is necessary. In an action filed in any other court such claim will be deemed to have been presented at the time of the completion of service of process on such personal representative or collector.

(c) In an action pending against the decedent at the time of his death, which action survives at law, the substitution of the personal representative or collector for the decedent or motion therefor will constitute the presentation of a claim and no further presentation is necessary. Such claim will be deemed to have been presented from the time of the substitution, or motion therefor. (1973, c. 1329, s. 3; 1977, c. 446, s. 1.)

Editor's Note. — The 1977 amendment, effective Sept. 1, 1977, rewrote this section. estates of persons who die on or after the effective date of this act.”

Session Laws 1977, c. 446, s. 5, provides: “This act shall apply only to the administration of the

§ 28A-19-2. Further information or affidavit of claim may be required. —

(a) If the personal representative or collector so elects, he may demand any or all of the following prior to taking action on the claim:

- (1) If the claim is not yet due, that the date when it will become due be stated;
- (2) If the claim is contingent or unliquidated, that the nature of the uncertainty be stated;
- (3) If the claim is secured, that the security be described.

(b) Upon any claim being presented against the estate in the manner prescribed in G.S. 28A-19-1, the personal representative or collector may require the affidavit of the claimant or other satisfactory evidence that such claim is justly due, that no payments have been made thereon, and that there are no offsets against the same, to the knowledge of the claimant; or if any payments have been made, or any offsets exist that their nature and amount be shown by the evidence or stated in the affidavit. (1868-9, c. 113, s. 33; Code, s. 1425; Rev., s. 91; C. S., s. 98; 1973, c. 1329, s. 3; 1977, c. 446, s. 1.)

Editor's Note. — The 1977 amendment, effective Sept. 1, 1977, designated the former provisions of this section as subsection (b) and added subsection (a).

Session Laws 1977, c. 446, s. 5, provides: “This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act.”

§ 28A-19-3. Limitations on presentation of claims. — (a) All claims against a decedent's estate which arose before the death of the decedent, except contingent claims based on any warranty made in connection with the conveyance of real estate and claims of the United States and tax claims of the State of North Carolina and subdivisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis, which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 by the date specified in the general notice to creditors as provided for in G.S. 28A-14-1 are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.

(b) All claims against a decedent's estate which arise at or after the death of the decedent, except claims of the United States and tax claims of the State of North Carolina and subdivisions thereof whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on

contract, tort, or other legal basis are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent unless presented to the personal representative or collector as follows:

- (1) With respect to any claim based on a contract with the personal representative or collector, within six months after the date on which performance by the personal representative or collector is due;
- (2) With respect to any claim other than a claim based on a contract with the personal representative or collector, within six months after the date on which the claim arises.

(d) All claims of creditors upon whom there has been personal service of notice as provided in G.S. 28A-14-3 are forever barred unless presented to the personal representative or collector within the time and manner set out in this Article.

(e) Unless a claim has been presented pursuant to G.S. 28A-19-1 giving notice of an action or special proceeding pending against a decedent at the time of his death and surviving under G.S. 28A-18-1 by the date specified in the general notice to creditors as provided in G.S. 28A-14-1, no recovery may be had upon any judgment obtained in any such action or proceeding against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.

(1977, c. 446, s. 1.)

Editor's Note. — The 1977 amendment effective Sept. 1, 1977, in subsection (a), inserted "against a decedent's estate which arose before the death of the decedent" and "tax claims of" and substituted "real estate and claims" for "real estate, against the decedent's estate which arose before the death of the decedent, including claims" and "by the date specified in" for "within six months after the day of the first publication or posting of." In subsection (b), the amendment substituted "except claims of the United States and tax claims of" for "which arise at or after the death of the decedent, including claims of the United States and" in the introductory paragraph, substituted "With respect to any claim" for "A claim" in subdivision (1), inserted "the date on which" in subdivision (1), added "with respect to" to the beginning of subdivision (2), and inserted "the date on which" in subdivision (2). In subsection (d), the amendment substituted "the time and manner set out in this Article" for "three months

from the date of such service" at the end and deleted the former second sentence, which read "Nothing herein contained, however, shall be construed as extending the period provided by subsections (a) and (b) hereof." In subsection (e), the amendment substituted "a claim has been presented pursuant to G.S. 28A-19-1 giving notice of an action or special proceeding" for "notice of actions or special proceedings" and "by the date specified in" for "is presented to the personal representative or collector within six months after the day of the first publication or posting of" and added "against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent" to the end.

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

As the rest of the section was not changed by the amendment, only subsections (a), (b), (d), and (e) are set out.

§ 28A-19-4. Payment of claims and charges. — As soon as the personal representative or collector is possessed of sufficient means over and above the other costs of administration, he shall pay the year's allowances in the amounts and in the manner prescribed in G.S. 30-15 to 30-33. Prior to the date specified in the general notice to creditors as provided for in G.S. 28A-14-1, the personal representative or collector may pay such other claims and charges as he deems in the best interest of the estate if the total assets are sufficient to pay all claims and charges against the estate. (1973, c. 1329, s. 3; 1977, c. 446, s. 1.)

Editor's Note. — The 1977 amendment, effective Sept. 1, 1977, substituted "the date specified in" for "expiration of six months after the day of the first publication or posting of" in the second sentence.

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

ARTICLE 21.

Accounting.

§ 28A-21-1. **Annual accounts.** — Until the final account has been filed pursuant to G.S. 28A-21-2, the personal representative or collector shall, within 30 days after the expiration of one year from the date of his qualification and annually, so long as any of the property of the estate remains in his control, custody or possession, file in the office of the clerk of superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year. He must produce vouchers for all payments. The clerk of superior court may examine, under oath, such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate. He must carefully review and audit such account and, if he approves the account, he must endorse his approval thereon, which shall be prima facie evidence of correctness, and cause the same to be recorded. (C. C. P., s. 478; 1871-2, c. 46; Code, s. 1399; Rev., s. 99; C. S., s. 105; 1957, c. 783, s. 5; 1973, c. 1329, s. 3; 1977, c. 446, s. 1.)

Editor's Note. — The 1977 amendment, effective Sept. 1, 1977, substituted "Until the final account has been filed" for "If an extension of time to file the final account has been granted by the clerk of superior court" at the beginning of the section.

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

§ 28A-21-2. **Final accounts.**

(b) Except as provided in subsection (a), after the date specified in the general notice to creditors as provided for in G.S. 28A-14-1, if all of the debts and other claims against the estate of the decedent duly presented and legally owing have been paid in the case of a solvent estate or satisfied pro rata according to applicable statutes in the case of an insolvent estate, the personal representative or collector may file his final account to be reviewed, audited and recorded by the clerk of superior court. Nothing in this subsection shall be construed as limiting the right of the surviving spouse or minor children to file for allowances under G.S. 30-15 through 30-18 and the right of a surviving spouse to file for property rights under G.S. 29-30. (C. C. P., s. 481; Code, s. 1402; Rev., s. 103; C. S., s. 109; 1973, c. 1329, s. 3; 1975, c. 637, s. 5; 1977, c. 446, s. 1.)

Editor's Note. —

The 1977 amendment, effective Sept. 1, 1977, substituted "after the date specified in" for "upon the expiration of six months after the day of the first publication or posting of" near the beginning of the first sentence of subsection (b).

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die or after the effective date of this act."

As subsection (a) was not changed by the amendment, it is not set out.

ARTICLE 22.

Distribution.

§ 28A-22-8. **Executor or trustee; discretion over distributions.** — Unless otherwise restricted by the terms of the will or trust, an executor or trustee shall have absolute discretion to make distributions in cash or in specific property, real

or personal, or an undivided interest therein or partly in cash or partly in such property, and to do so without regard to the income tax basis for federal tax purposes of specific property allocated to any beneficiary. (1977, c. 740.)

ARTICLE 23.

Settlement.

§ 28A-23-1. Settlement after final account filed. — When the personal representative or collector has paid or otherwise satisfied or provided for all claims against the estate, has distributed the remainder of the estate pursuant to G.S. 28A-22-1 and has filed his final account for settlement pursuant to G.S. 28A-21-2, if the clerk of superior court, after review of the personal representative's or collector's final account, approves the same, he shall enter an order discharging the personal representative or collector from further liability. (1973, c. 1329, s. 3; 1977, c. 446, s. 1.)

Editor's Note. —

The 1977 amendment, effective Sept. 1, 1977, substituted "G.S. 28A-21-2" for "G.S. 28A-22-5" near the middle of the section.

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

§ 28A-23-3. Commissions allowed personal representatives; representatives guilty of misconduct or default. — (a) Personal representatives, collectors or public administrators shall be entitled to commissions to be fixed in the discretion of the clerk of superior court not to exceed five percent (5%) upon the amounts of receipts, including the value of all personal property when received, and upon the expenditures made in accordance with law, which commissions shall be charged as a part of the costs of administration and, upon allowance, may be retained out of the assets of the estate against creditors and all other persons claiming an interest in the estate. Provided, however, when the gross value of an estate is two thousand dollars (\$2,000) or less, the clerk of superior court is authorized and empowered to fix the commission to be received by the personal representative, collector or public administrator in an amount as he, in his discretion, deems just and adequate.

(e) No personal representative, collector or public administrator, who has been guilty of such default or misconduct in the due execution of his office resulting in the revocation of his appointment under the provisions of G.S. 28A-9-1, shall be entitled to any commission under the provisions of this section.

(f) For the purpose of computing commissions whenever any portion of the dividends, interest, rents or other amounts payable to a personal representative, collector or public administrator is required by any law of the United States or other governmental unit to be withheld for income tax purposes by the person, corporation, organization or governmental unit paying the same, the amount so withheld shall be deemed to have been received and expended. (1868-9, c. 113, s. 95; 1869-70, c. 189; Code, s. 1524; Rev., s. 149; C. S., s. 157; 1941, c. 124; 1953, c. 855; 1959, c. 622; c. 879, s. 8; 1961, cc. 362, 575; 1973, c. 1329, s. 3; 1977, c. 814, s. 2.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, substituted "collectors or public administrators" for "testamentary trustees, collectors, or other fiduciaries" in the first sentence of subsection (a) and substituted "collector or public administrator" for "testamentary trustee, collector or other

fiduciary" in the second sentence of subsection (a) and in subsection (e) and for "trustee, collector or other fiduciary" in subsection (f).

As the rest of the section was not changed by the amendment, only subsections (a), (e) and (f) are set out.

§ 28A-23-4. Counsel fees allowable to attorneys serving as representatives.

— The clerk of superior court, in his discretion, is authorized and empowered to allow counsel fees to an attorney serving as a personal representative, collector or public administrator (in addition to the commissions allowed him as such representative, collector or public administrator) where such attorney in behalf of the estate he represents renders professional services, as an attorney, which are beyond the ordinary routine of administration and of a type which would reasonably justify the retention of legal counsel by any such representative, collector or public administrator not himself licensed to practice law. (1957, c. 375; 1973, c. 1329, s. 3; 1977, c. 814, s. 3.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, substituted "collector or public administrator" for "testamentary

trustee, collector, or other fiduciary" and for "or fiduciary" in two places and deleted "or trust" following "in behalf of the estate."

Chapter 29.

Intestate Succession.

Article 6.

Illegitimate Children.

Sec.

29-19. Succession by, through and from illegitimate children.

Sec.

29-21. Share of surviving spouse.

29-22. Shares of others than the surviving spouse.

ARTICLE 1.

General Provisions.

§ 29-7. Collateral succession limited.

Effect of Section as to Escheat under § 29-12. — This section has no application to escheat under § 29-12 unless the common ancestor of the collateral kin and the decedent is a parent or grandparent of the decedent. In such an event the main clause in this section operates to exclude a collateral kinsman of a sixth or higher degree from succeeding to the estate, even though he is a lineal descendent of the

decedent's parents or grandparents. The proviso in this section, in order to prevent the escheat of the decedent's estate, provides for unlimited succession by collateral kinsmen who are descendants of the decedent's parents or grandparents when there is no such collateral kinsman within the fifth degree. *Newlin v. Gill*, 32 N.C. App. 392, 232 S.E.2d 213 (1977).

§ 29-12. Escheats.

Effect of § 29-7 as to Escheat under This Section. — Section 29-7 has no application to escheat under this section unless the common ancestor of the collateral kin and the decedent is a parent or grandparent of the decedent. In such an event the main clause in § 29-7 operates to exclude a collateral kinsman of a sixth or higher degree from succeeding to the estate, even though he is a lineal descendent of the

decedent's parents or grandparents. The proviso in § 29-7 in order to prevent the escheat of the decedent's estate provides for unlimited succession by collateral kinsmen who are descendants of the decedent's parents or grandparents when there is no such collateral kinsman within the fifth degree. *Newlin v. Gill*, 32 N.C. App. 392, 232 S.E.2d 213 (1977).

ARTICLE 2.

Shares of Persons Who Take upon Intestacy.

§ 29-14. Share of surviving spouse.

Cited in *Newlin v. Gill*, 32 N.C. App. 392, 232 S.E.2d 213 (1977).

§ 29-15. Shares of others than surviving spouse.

Applied in *Forester v. Marler*, 31 N.C. App. 84, 228 S.E.2d 646 (1976).

Cited in *Newlin v. Gill*, 32 N.C. App. 392, 232

S.E.2d 213 (1977); *Christenbury v. Hedrick*, 32 N.C. App. 708, 234 S.E.2d 3 (1977).

ARTICLE 6.

*Illegitimate Children.***§ 29-19. Succession by, through and from illegitimate children.**

(b) For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:

- (1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;
- (2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

Notwithstanding the above provisions, no person shall be entitled to take hereunder unless he has given written notice of the basis of his claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors.

(1977, c. 375, s. 6; c. 591; c. 757, s. 3.)

Editor's Note. —

The first 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 52-10(b)" for "G.S. 52-6(c)" in subdivision (2) of subsection (b).

The second 1977 amendment inserted "and the child's lifetime" in two places in subdivision (2) of subsection (b).

The third 1977 amendment, effective as to estates of decedents dying on or after Sept. 1,

1977, substituted "finally adjudged" for "judicially determined" and inserted "G.S. 49-1 through 49-9 or the provisions of" in subdivision (1) of subsection (b).

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

As the rest of the section was not changed by the amendments, only subsection (b) is set out.

§ 29-21. Share of surviving spouse. — The share of the surviving spouse of an illegitimate intestate shall be the same as provided in G.S. 29-14 for the surviving spouse of a legitimate person. In determining whether the illegitimate intestate is survived by one or more parents as provided in G.S. 29-14(3), any person identified as the father under G.S. 29-19(b)(1) or (b)(2) shall be regarded as a parent. (1959, c. 879, s. 1; 1977, c. 757, s. 1.)

Editor's Note. —

The 1977 amendment, effective as to estates of decedents dying on or after Sept. 1, 1977,

deleted the exceptions from the end of the first sentence and added the second sentence.

§ 29-22. Shares of others than the surviving spouse. — Those persons surviving the illegitimate intestate, other than the surviving spouse, shall take that share of the net estate provided in G.S. 29-15. In determining whether the illegitimate intestate is survived by one or more parents or their collateral

kindred as provided in G.S. 29-15, any person identified as the father under G.S. 29-19(b)(1) or (b)(2) shall be regarded as a parent. (1959, c. 879, s. 1; 1977, c. 757, s. 2.)

Editor's Note. — The 1977 amendment, effective as to estates of decedents dying on or after Sept. 1, 1977, rewrote this section.

Chapter 30.

Surviving Spouses.

ARTICLE 1.

Dissent from Will.

§ 30-1. Right of dissent.

Assignment of Reason for Dissent Not Required. — The widow in the exercise of the right to dissent from her husband's will is not

required to assign any reason therefor. In re Estate of Cox, 32 N.C. App. 765, 233 S.E.2d 926 (1977).

§ 30-2. Time and manner of dissent.

This section is a statute of limitation, etc. —

This section is limitation as to the time when the spouse must dissent and is not conditioned on her right to dissent which may be determined either before or after the estate is appraised pursuant to § 30-1(c). In re Estate of Cox, 32 N.C. App. 765, 233 S.E.2d 926 (1977).

When Dissent Timely. — So long as the dissent is filed within six months after the issuance of letters testamentary, or extended pursuant to subsection (a), it is timely, regardless of whether the appraisal has been conducted. In re Estate of Cox, 32 N.C. App. 765, 233 S.E.2d 926 (1977).

SIGNED

(OFFICIAL CAPACITY OF OFFICER)

Chapter 31.**Wills.****Article 2.****Revocation of Will.**

Sec.

31-5.4. Revocation by divorce.

Article 4.**Depository for Wills.**

31-11.1 to 31-11.5. [Reserved.]

Article 4A.**Self-Proved Wills.**

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

Article 5.**Probate of Will.**

Sec.

31-18.1. Manner of probate of attested written will.

31-31.1. Validation of probates of wills when witnesses examined before notary public; acts of deputy clerks validated.

ARTICLE 1.*Execution of Will.***§ 31-4. Execution of power of appointment by will.**

Stated in *First Union Nat'l Bank v. Moss*, 32 N.C. App. 499, 233 S.E.2d 88 (1977).

ARTICLE 2.*Revocation of Will.*

§ 31-5.4. Revocation by divorce. — Dissolution of marriage by absolute divorce after making a will does not revoke the will of any testator but, unless otherwise specifically provided in the will, it revokes all provisions in the will in favor of the testator's spouse so divorced, including, but not by way of limitation, the appointment of such spouse as executor or executrix. (1953, c. 1098, s. 6; 1977, c. 74, s. 3.)

Editor's Note. — The 1977 amendment, effective July 1, 1977, inserted "unless otherwise specifically provided in the will."

Session Laws 1977, c. 74, s. 5, provides: "This act shall not affect pending litigation."

ARTICLE 4.

Depository for Wills.

§§ 31-11.1 to 31-11.5: Reserved for future codification purposes.

ARTICLE 4A.

Self-Proved Wills.

§ 31-11.6. **How attested wills may be made self-proved.** — An attested written will executed as provided by G.S. 31-3.3 may at the time of its execution or at any subsequent date be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the attesting witnesses, each made before an officer authorized to administer oaths under the laws of this State, and evidenced by the officer's certificate, under official seal, attached or annexed to the will in form and content substantially as follows:

"STATE OF NORTH CAROLINA

"COUNTY/CITY OF

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

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

.....
Testator
.....
Witness
.....
Witness
.....
Witness

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

(SEAL)

SIGNED
(OFFICIAL CAPACITY OF OFFICER)"

The sworn statement of any such witnesses taken as herein provided shall be
accepted by the court as if it had been taken before such court. (1977, c. 795, s.
1.)

Editor's Note. — Session Laws 1977, c. 795, s. 4, makes this Article effective Oct. 1, 1977. existence on or executed after the effective date of this act.”

Session Laws 1977, c. 795, s. 3, provides: “This act shall apply to any attested written will in

ARTICLE 5.

Probate of Will.

§ 31-15. Clerk may compel production of will.

Applied in *In re Estate of Moore*, 292 N.C. 58, 231 S.E.2d 849 (1977).

§ 31-18.1. Manner of probate of attested written will. — (a) An attested written will, executed as provided by G.S. 31-3.3, may be probated in the following manner:

- (1) Upon the testimony of at least two of the attesting witnesses; or
 - (2) If the testimony of only one attesting witness is available, then
 - a. Upon the testimony of such witness, and
 - b. Upon proof of the handwriting of at least one of the attesting witnesses who is dead or whose testimony is otherwise unavailable, and
 - c. Upon proof of the handwriting of the testator, unless he signed by his mark, and
 - d. Upon proof of such other circumstances as will satisfy the clerk of the superior court as to the genuineness and due execution of the will.
 - (3) If the testimony of none of the attesting witnesses is available, then
 - a. Upon proof of the handwriting of at least two of the attesting witnesses whose testimony is unavailable, and
 - b. Upon compliance with paragraphs c and d of subsection (a)(2) of this section.
 - (4) Upon a showing that the will has been made self-proved in accordance with the provisions of G.S. 31-11.6.
- (1977, c. 795, s. 2.)

Editor's Note. —

The 1977 amendment, effective Oct. 1, 1977, added subdivision (4) to subsection (a). Session Laws 1977, c. 795, s. 3, provides: “This act shall apply to any attested written will in existence on

or executed after the effective date of this act.”

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 31-31.1. Validation of probates of wills when witnesses examined before notary public; acts of deputy clerks validated. — Whenever any last will and testament has been probated, based upon the examination of the subscribing witness or the subscribing witnesses, taken before a notary public in the county in which the will is probated, or taken before a notary public of any other county, it is hereby in all respects validated and shall be sufficient to pass the title to all real and personal property purported to be transferred thereby.

All acts heretofore performed by deputy clerks of the superior court in taking acknowledgments, examining witnesses and probate of any wills, deeds and other instruments required or permitted by law to be recorded, are hereby validated. Nothing herein contained shall affect pending litigation. (1945, c. 822; 1973, c. 445; 1977, c. 734, s. 1.)

Editor's Note. — The 1977 amendment reenacted this section without change.

Session Laws 1977, c. 734, s. 2, provides that nothing contained in the act shall affect pending litigation.

Session Laws 1977, c. 734, s. 3, provides: "This act shall become effective upon ratification [June 24, 1977] and shall apply only to those acts performed on or before May 15, 1977.

ARTICLE 7.

Construction of Will.

§ 31-41. Will relates to death of testator.

Construction of Will as to Identity of Devisee or Legatee. —

In accord with original. See *Palmer v. Ketner*, 29 N.C. App. 187, 223 S.E.2d 913 (1976).

§ 31-42. Failure of devises and legacies by lapse or otherwise; renunciation.

Applied in *Forester v. Marler*, 31 N.C. App. 84, 228 S.E.2d 646 (1976).

§ 31-43. General gift by will an execution of power of appointment.

Residuary Devise Executes Power, etc. —

This section creates a statutory presumption in favor of exercise of a power of appointment by a residuary clause, and on its face bars any other result unless an intention contrary to exercise

can be inferred from the will. *Planters Nat'l Bank & Trust Co. v. United States*, 425 F. Supp. 1179 (E.D.N.C. 1977).

Stated in *First Union Nat'l Bank v. Moss*, 32 N.C. App. 499, 233 S.E.2d 88 (1977).

Chapter 31A.

Acts Barring Property Rights.

ARTICLE 1.

Rights of Spouse.

§ 31A-1. Acts barring rights of spouse.

Editor's Note. —

For a note on forfeitures of property rights by slayers, see 12 Wake Forest L. Rev. 448 (1976).

ARTICLE 2.

Parents.

§ 31A-2. Acts barring rights of parents.

Editor's Note. — For a note on forfeitures of property rights by slayers, see 12 Wake Forest L. Rev. 448 (1976).

ARTICLE 3.

Willful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

Editor's Note. — For a note on forfeitures of property rights by slayers, see 12 Wake Forest L. Rev. 448 (1976).

§ 31A-4. Slayer barred from testate or intestate succession and other rights.

Editor's Note. — For a note on forfeitures of property rights by slayers, see 12 Wake Forest L. Rev. 448 (1976).

Chapter 32.

Fiduciaries.

Article 1.

Uniform Fiduciaries Act.

Sec.

32-4. [Repealed.]

Article 3.

Powers of Fiduciaries.

32-27. Powers which may be incorporated by reference in trust instrument.

Article 4.

Restrictions on Exercise of Power for Fiduciary's Benefit.

32-35 to 32-49. [Reserved.]

Article 5.

Compensation.

Sec.

32-50. Compensation.

32-51. Counsel fees allowable to attorneys serving as fiduciaries.

32-52. Applicability.

ARTICLE 1.

Uniform Fiduciaries Act.

§ 32-4: Repealed by Session Laws 1977, c. 814, s. 8, effective January 1, 1978.

ARTICLE 3.

Powers of Fiduciaries.

§ 32-27. **Powers which may be incorporated by reference in trust instrument.** — The following powers may be incorporated by reference as provided in G.S. 32-26.

(29) Apportion and Allocate Receipts and Expenses. — Where not otherwise provided by the Principal and Income Act of 1973, as contained in Chapter 37 of the General Statutes, to determine:

- a. What is principal and what is income of any estate or trust and to allocate or apportion receipts and expenses as between principal and income in the exercise of the fiduciary's discretion, and, by way of illustration and not limitation of the fiduciary's discretion, to charge premiums on securities purchased at a premium against principal or income or partly against each;
- b. Whether to apply stock dividends and other noncash dividends to income or principal or apportion them as the fiduciary shall deem advisable; and
- c. What expenses, costs, taxes (other than estate, inheritance, and succession taxes and other governmental charges) shall be charged against principal or income or apportioned between principal and income and in what proportions.

(1977, c. 30.)

Editor's Note. — The 1977 amendment substituted "Principal and Income Act of 1973" for "Uniform Principal and Income Act" in the introductory language in subdivision (29).

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (29) are set out.

ARTICLE 4.

Restrictions on Exercise of Power for Fiduciary's Benefit.

§§ 32-35 to 32-49: Reserved for future codification purposes.

ARTICLE 5.

Compensation.

§ 32-50. **Compensation.** — (a) Express Trust in Writing. — Unless otherwise provided in the instrument creating the trust relationship, a trustee under an express trust in writing, either inter vivos or testamentary, shall receive compensation for serving as a trustee as follows:

- (1) Income Compensation. — An annual charge on gross income of:
 - a. Five percent (5%) on the first five thousand dollars (\$5,000) of income;
 - b. Four percent (4%) on the next seven thousand five hundred dollars (\$7,500) of income;
 - c. Three percent (3%) on the next twelve thousand five hundred dollars (\$12,500) of income;
 - d. Two and one-half percent (2½%) on the next twenty-five thousand dollars (\$25,000) of income;
 - e. Two percent (2%) on all income over fifty thousand dollars (\$50,000).
- (2) Compensation on Principal Consisting of Personal Property. — An annual charge on the current value of that portion of the principal consisting of personal property, of:
 - a. Four-tenths ($\frac{4}{10}$) of one percent (1%) on the first twenty-five thousand dollars (\$25,000) of principal;
 - b. Three-tenths ($\frac{3}{10}$) of one percent (1%) on the next twenty-five thousand dollars (\$25,000) of principal;
 - c. Two-tenths ($\frac{2}{10}$) of one percent (1%) on the next fifty thousand dollars (\$50,000) of principal;
 - d. One-tenth ($\frac{1}{10}$) of one percent (1%) on the next one hundred thousand dollars (\$100,000) of principal;
 - e. One-twentieth ($\frac{1}{20}$) of one percent (1%) on all principal over two hundred thousand dollars (\$200,000).
- (3) Maximum Compensation. — In addition to the minimum compensation set out in (1) and (2) above, the clerk of superior court at the written request of the trustee may in his discretion allow additional compensation in those cases where the trustee has rendered services beyond the routine services expected by a trustee but in no event shall the total annual aggregate compensation exceed five percent (5%) upon the gross income and the expenditures made in accordance with law, and five-tenths ($\frac{5}{10}$) of one percent (1%) upon the current value of principal, both real and personal property, held as assets of the trust. In determining the amount of such additional compensation, if any, the clerk of superior court shall consider the time, responsibility, and skill involved in the management activities of the trustee.

For purposes of determining the annual compensation on principal, the current value of the principal shall be determined as of the date of the first annual accounting and each year thereafter on the anniversary of that date by an appraisal of the trustee and certified to the clerk of superior court.

When computing the current value of real property for purposes of subdivision (3) of this subsection (a) the value of a usual dwelling house occupied by a beneficiary and lands reasonably necessary to the use and enjoyment thereof shall not be included.

This section is not applicable to trustees under bond issues, trustees of corporate trusts, employee benefit trusts, deeds of trusts of real property used for purposes of securing loans, or trusts for similar purposes.

(b) Effect of Provisions in the Instrument. — Nothing in the provisions of this section shall be interpreted to prevent a corporate trustee from applying its regularly adopted schedule of compensation in effect and applicable at the time of performance of such services where the settlor or testator in the instrument creating the trust has so stipulated. In those instances where the compensation provision in the instrument creating the trust relationship provides that the compensation shall not exceed the maximum allowed by law this shall be construed as an expression of intention that the compensation shall not exceed the maximum compensation as provided in G.S. 32-50(a)(3), above.

(c) Other Fiduciary Relationships. — Unless otherwise provided, fiduciaries other than trustees under express trusts shall be entitled to compensation fixed in the discretion of the clerk of superior court not to exceed five percent (5%) upon the amounts of receipts, including the value of all personal and real property when received, and upon the expenditures made in accordance with law. In determining the amount of such compensation, both upon the property received and upon expenditures made, the clerk of superior court shall consider the time, responsibility, trouble and skill involved in the management of such property. The clerk of superior court may allow compensation from time to time during the course of the management but the total amount allowed shall be determined on final settlement and shall not exceed the limit fixed in this subsection.

(d) Opening Charge. — Unless otherwise provided in the instrument, a successor trustee or a trustee of a testamentary trust who did not serve as a personal representative for the estate, may make a written request to the clerk of superior court for an allowance of an opening charge for his services as a trustee. The clerk of superior court may in his discretion allow such opening charge not to exceed one percent (1%) of the value of the principal, both real and personal, received. In determining the amount of such charge, if any, the clerk of superior court shall consider the time, responsibility, and skill involved in the opening of the trust or other fiduciary relationship.

(e) Closing Charge. — Unless otherwise provided in the instrument, a trustee of an express trust or other fiduciary may make a written request to the clerk of superior court for the allowance of a closing charge. If the clerk of superior court makes a written finding of fact that there are unusual circumstances supporting such a request he may in his discretion allow a closing charge not to exceed one percent (1%) of the principal, both real and personal. In determining the amount of such charge, if any, the clerk of superior court shall consider the time, responsibility, and skill involved in the closing of the trust or other fiduciary relationship.

(f) Oral Trust Agreements. — Unless otherwise provided in the oral trust agreement, a trustee under a valid oral trust agreement shall receive compensation in accordance with subsection (a).

(g) Principal Less than Ten Thousand Dollars (\$10,000). — Notwithstanding subsections (a), (b) and (c) above, when the gross value of the principal is ten thousand dollars (\$10,000) or less, the clerk of superior court is authorized and empowered to fix the compensation to be received by the trustee or fiduciary in an amount as the clerk in his discretion, deems just and adequate.

(h) **Compensation Considered Costs of Management.** — All compensation, whether allocated to income or principal shall be charged as part of the costs of management and, upon allowance, may be retained out of the assets against creditors and all other persons claiming an interest.

(i) **Charges for Management; Appeals.** — Nothing in this section shall be construed:

- (1) To prevent the clerk of superior court from allowing reasonable sums for necessary charges and disbursements incurred in the management of the principal; or
- (2) To abridge the right of any interested party to appeal an order of the clerk.

(j) **Default or Misconduct.** — No fiduciary or trustee who has been guilty of default or misconduct in the due execution of his office resulting in the revocation of his appointment shall be entitled to any compensation under the provisions of this Article.

(k) **Income Tax Withholding.** — For the purpose of computing the compensation whenever any portion of the dividends, interest, rents or other amounts payable to a fiduciary or trustee is required by any law of the United States or other governmental unit to be withheld for income tax purposes by the person, corporation, organization or governmental unit paying the same, the amount so withheld shall be deemed to be income. (1977, c. 814, s. 1.)

Editor's Note. — Session Laws 1977, c. 814, s. 10, makes this Article effective Jan. 1, 1978.

§ 32-51. Counsel fees allowable to attorneys serving as fiduciaries. — The clerk of superior court, in his discretion, is authorized and empowered to allow counsel fees to an attorney serving as a fiduciary or trustee (in addition to the compensation allowed him as a fiduciary or trustee) where such attorney in behalf of the trust or fiduciary relationship renders professional services, as an attorney, which are beyond the ordinary routine of management and of a type which would reasonably justify the retention of legal counsel by any fiduciary or trustee not himself licensed to practice law. (1977, c. 814, s. 1.)

§ 32-52. Applicability. — The provisions of this Article shall apply to all trusts and fiduciary relationships created on or after January 1, 1978, and to all express trusts in writing existing on January 1, 1978 if the instrument does not contain any provision relating to compensation. (1977, c. 814, s. 1.)

Chapter 33.

Guardian and Ward.

Article 1.

Creation and Termination of Guardianship.

Sec.

33-2. Appointment by parents.

Article 2.

Guardian's Bond.

33-13-2. Deposited money; exclusion in computing amount of bond.

Article 5.

Returns and Accounting.

33-43. Commissions.

Article 6.

Public Guardians.

33-47.1. Article applicable only to minors.

Article 11.

Guardians of Children of Servicemen.

Sec.

33-67. Clerk of superior court to act as temporary guardian to receive and disburse allotments and allowances.

Article 12.

Gifts of Securities and Money to Minors.

33-68. Definitions.

33-74. Resignation, death or removal of custodian; bond; appointment of successor custodian.

ARTICLE 1.

Creation and Termination of Guardianship.

§ 33-1. Jurisdiction in clerk of superior court.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 4, effective March 1, 1978, will amend this section to read as follows:

“§ 33-1. **Jurisdiction in clerk of superior court.** — The clerks of the superior court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, incompetents or inebriates: Provided, that guardians shall be appointed by the clerks of the superior courts in the counties in which the infants, incompetents or inebriates reside, unless the guardians be the next of kin of such incompetents or a person designated by such next of kin in writing filed with the clerk, in which case, guardians may be appointed by the clerk of the superior court in any county in which is located a substantial part of the estates belonging to such incompetents, or unless an infant resides with an individual who is

domiciled in the State of North Carolina and who is guardian of such infant's estate, in which case a guardian of the person of such infant may be appointed by the clerk of the superior court in the county in which the guardian of such infant's estate is domiciled. Provided, further, where any adult person is declared incompetent in connection with his commitment to a mental hospital or is found to be incompetent from want of understanding to manage his affairs by reason of physical and mental weakness on account of old age, disease, or other like infirmities, the clerk may appoint a trustee in lieu of a guardian for said persons. The trustee so appointed shall be subject to the laws now or which hereafter may be enacted for the control and handling of estates by guardians.”

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Cited in *In re Thomas*, 290 N.C. 410, 226 S.E.2d 371 (1976).

§ 33-2. **Appointment by parents.** — Parents are presumed to know the best interest of their children, and any parent may by last will and testament recommend disposition of the custody and tuition of any of his or her unmarried minor children, whether born at the parent's death or en ventre sa mere, for such time as the children may remain under 18 years of age, or for any less time. Such

will may be made without regard to whether the testator is an adult or minor. Any parent who willfully abandons a child or children shall relinquish the right of appointment. Any will containing such provision shall be a strong guide to the court in awarding custody in the absence of a surviving parent, subject to the provisions of G.S. 50-13.1 through 50-13.8, and shall control where there is no dispute, and, if both parents make such recommendations, the will with the latest date shall, in absence of other relevant factors, prevail. Every such appointment shall be good and effectual against any person claiming the custody and tuition of such child or children. Every guardian by will shall have the same powers and rights and be subject to the same liabilities and regulations as other guardians: Provided, however, that in the event it is so specifically directed in said will such guardian so appointed shall be permitted to qualify and serve without giving bond, unless the clerk of the superior court having jurisdiction of said guardianship shall find as a fact and adjudge that the interest of such minor or incompetent would be best served by requiring such guardian to give bond. (1762, c. 69; R. C., c. 54; 1868-9, c. 201; 1881, c. 64; Code, ss. 1562, 1563, 1564; Rev., ss. 1762, 1763, 1764; 1911, c. 120; C. S., s. 2151; Ex. Sess. 1920, c. 21; 1941, c. 26; 1945, c. 73, s. 20; 1947, c. 413, ss. 1, 2; 1971, c. 1231, s. 1; 1977, c. 713.)

Editor's Note. —

The 1977 amendment rewrote this section.

§ 33-6. Separate appointment for person and estate; yearly support specified; payments allowed in accounting.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 4, effective March 1, 1978, will amend this section to read as follows:

“§ 33-6. Separate appointment for person and estate; yearly support specified; payments allowed in accounting. — Instead of granting general guardianship to one person, the clerk of the superior court may commit the tuition and custody of the person to one and the charge of his estate to another, whenever at any time it appears most conducive to the proper care of the ward's estate, and to his suitable maintenance, nurture and education. In such cases the clerk must order what yearly sums of money or other provisions shall be allowed for the support and education of the orphan, or for the maintenance of the incompetent or inebriate, and must

prescribe the time and manner of paying the same; but such allowance may, upon application and satisfactory proof made, be reduced or enlarged, or otherwise modified, as the ward's condition in life and the kind and value of his estate may require. All payments made by the guardian of the estate to the tutor of the person, according to any such order, shall be deemed just disbursements and be allowed in the settlement of his accounts; but for the payment thereof by the one and the receipt thereof by the other merely, no commissions shall be allowed to either, though commissions may be allowed to the tutor of the person on his disbursements only.”

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-7. Proceedings on application for guardianship.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 4, effective March 1, 1978, will amend this section to read as follows:

“§ 33-7. Proceedings on application for guardianship. — On application to any clerk of the superior court for the custody and guardianship of any infant or incompetent, it is the duty of such clerk to inform himself of the circumstances of the case on the oath of the applicant, or of any other person, and if none of the relatives of the infant or incompetent are

present at such application, the clerk must assign, or for any other good cause he may assign, a day for the hearing; and he shall thereupon direct notice thereof to be given to such of the relatives and to such other persons, if any, as he may deem it proper to notify. On the hearing he shall ascertain, on oath, the amount of the property, real and personal, of the infant or incompetent, and the value of the rents and profits of the real estate, and he may grant or refuse the application, or commit the guardianship to some other person, as he may

think best for the interest of the infant or incompetent.”

Session Laws 1977, c. 725, s. 8, provides in part

that the act shall apply only to appointments made on or after March 1, 1978.

ARTICLE 2.

Guardian's Bond.

§ 33-12. Bond to be given before receiving property.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 4, effective March 1, 1978, will amend this section to read as follows:

“§ 33-12. **Bond to be given before receiving property.** — No guardian appointed for an infant or incompetent shall be permitted to receive property of the infant or incompetent until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court; provided, however, that when a guardian is appointed for an infant or incompetent for the purpose of bringing an action on behalf of that

infant or incompetent and when there are no other assets in the ward's estate or other assets belonging to the minor in the State of North Carolina, such guardian shall not be required to give sufficient security until such time as the property is turned over to such guardian, at which time the guardian shall give sufficient security approved by a judge or the court to account for and apply the same under the directions of the court.”

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-13. Terms and conditions of bond; increased on sale of realty.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 4, effective March 1, 1978, will substitute “infant or incompetent” for “infant, idiot, lunatic or insane person” in the fourth sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-13.2. Deposited money; exclusion in computing amount of bond. — Notwithstanding the provisions of G.S. 33-13, in any proceeding for the determination of the amount of bond to be required of a guardian, whether at the time of the appointment or subsequently, when it appears that the estate of the ward includes money which has been or will be deposited in a bank or banks in this State, or money which has been or will be invested in an account or accounts in an insured savings and loan association or associations upon condition that such money or securities will not be withdrawn except on authorization of the court, the court may, in its discretion, order such money so deposited or so invested and shall exclude such deposited money from the computation of the amount of such bond or reduce the amount of bond to be required in respect of such money to such an amount as it may deem reasonable.

The petitioner for letters of guardianship may deliver to any such bank any such money in his possession or may deliver to any such association any such money in his possession or may allow such bank to retain any such money already in its possession or may allow such association to retain any such money already invested with it; and, in either event, the petitioner shall secure and file with the court a written receipt including the agreement of the bank or association that such money shall not be allowed to be withdrawn except on authorization of the court. In so receiving and retaining such money, the bank or association shall be protected to the same extent as though it had received the same from a person to whom letters of guardianship had been issued.

The term "account in an insured savings and loan association" as used in this section means any account in a savings and loan association which is insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation or by a mutual deposit guaranty association authorized by Article 7A of Chapter 54 of the General Statutes of North Carolina.

The term "money" as used in this section means the principal of the ward's estate and does not include the income earned by the principal of the ward's estate which may be withdrawn without any authorization of the court. (1977, c. 992, s. 1.)

Editor's Note. — Session Laws 1977, c. 992, s. 2, makes this section effective July 1, 1977.

§ 33-15. Where several wards with estate in common, one bond sufficient.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 4, effective March 1, 1978, will substitute "minors or incompetents" for "minors, idiots, lunatics or insane persons."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-18. Liability of clerk for taking insufficient bond.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 4, effective March 1, 1978, will substitute "infant, incompetent or inebriate" for "infant, idiot, lunatic, insane person or inebriate."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

ARTICLE 3.

Powers and Duties of Guardian.

§ 33-25. Guardians and other fiduciaries authorized to buy real estate foreclosed under mortgages executed to them.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 4, effective March 1, 1978, will delete "of any idiot, inebriate, lunatic, non compos mentis or any person incompetent from want of understanding to manage his own affairs for any cause or reason, or any minor or infant, or any other person for

whom such guardian or fiduciary has been appointed" following "guardian or other fiduciary" near the beginning of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-27. Personal representative of guardian to pay over to clerk.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 4, effective March 1, 1978, will amend this section to read as follows:

"§ 33-27. **Personal representative of guardian to pay over to clerk.** — In all cases where a guardian dies, it is competent for the executor or administrator of such deceased guardian, at any time after the grant of letters testamentary or of administration, to pay into

the office of the clerk of the superior court of the county where such deceased guardian was appointed, any moneys belonging to the ward and any such payment shall have the effect to discharge the estate of said deceased guardian and his sureties upon his guardian bond to the extent of the amount so paid."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

ARTICLE 4.

Sales of Ward's Estate.

§ 33-31. Special proceedings to sell; judge's approval required.

Proof Required. —

The "satisfactory proof" required under this section must be some proof in addition to the

guardian's petition and must show the necessity for the proposed sale. In re Thomas, 209 N.C. 410, 226 S.E.2d 371 (1976).

ARTICLE 5.

Returns and Accounting.

§ 33-43. Commissions. — The superior court shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors under the provisions of G.S. 28A-23-3. (1762, c. 69, ss. 18, 19; R. C., c. 54, s. 28; 1868-9, c. 201, s. 50; Code, s. 1613; Rev., s. 1809; C. S., s. 2190; 1977, c. 814, s. 7.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, added "under the provisions of G.S. 28A-23-3" to the end of the section.

ARTICLE 6.

Public Guardians.

§ 33-47. When letters issue to public guardian.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 4, effective March 1, 1978, will amend subdivision (1) to read as follows:

"(1) When a period of six months has elapsed from the discovery of any

property belonging to any minor, incompetent or inebriate, without guardian."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-47.1. Article applicable only to minors. — This Article shall not apply to adults found incompetent under Article 1A, Chapter 35 of the General Statutes. (1977, c. 725, s. 4.)

Editor's Note. — Session Laws 1977, c. 725, s. 8, provides: "This act shall become effective on March 1, 1978, and shall apply only to appointments made on or after that date."

ARTICLE 7.

*Foreign Guardians.***§ 33-48. Right to removal of infant's or ward's personalty from State.**

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 4, effective March 1, 1978, will amend this section to read as follows:

“§ 33-48. Right to removal of infant's or ward's personalty from State. — Where any ward residing in another state or territory, or in the District of Columbia, or Canada, or other foreign country, is entitled to any personal estate in this State, or personal property substituted for realty by decree of court, or to any money arising from the sale of real estate whether the same be in the hands of any guardian residing in this State, or of any executor, administrator or other person holding for the ward or if the same (not being adversely held and claimed) be not in the lawful possession or control of any person, the guardian or trustee

of the ward duly appointed at the place where such ward resides, or in the event no guardian or trustee has been appointed the court or officer of the court authorized by the laws of the state or territory or for the District of Columbia or Canada or other foreign country to receive moneys belonging to any ward when no guardian or trustee has been appointed for such person, may apply to have such estate removed to the residence of the ward by petition filed before the clerk of the superior court of the county in which the property or some portion thereof is situated which shall be proceeded with as in other cases of special proceedings.”

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-49.1. Transfer of guardianship.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 4, effective March 1, 1978, will delete “mental defective, mentally disordered person” in two places in the first sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

ARTICLE 8.

*Estates without Guardian.***§ 33-54. When receiver to pay over estate.**

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 4, effective March 1, 1978, will substitute “incompetent person” for “idiot, lunatic or insane person” near the end of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

ARTICLE 11.

Guardians of Children of Servicemen.

§ 33-67. Clerk of superior court to act as temporary guardian to receive and disburse allotments and allowances. — In all cases where a citizen of this State is serving in the armed forces of the United States and has made an allotment or allowance to his child, children or other minor dependents as

provided by the wartime allowances to Service Men's Dependents Act or any other act of Congress, and the other parent of said child, children or other minor dependents or other person of lawful age designated in said allowance or allotment to receive such moneys and disburse them for the benefit of said minor dependents shall die or become mentally incompetent, and such person so serving in the armed forces of the United States shall be reported as missing in action or as a prisoner of war and shall be unable to designate another person to receive and disburse said allotment or allowance to said minor dependents; then and in such event the clerk of the superior court of the county of the legal residence of said serviceman or person serving in the armed forces of the United States, is hereby authorized and empowered to act as temporary guardian of such minor dependents for the purpose of receiving and disbursing such allotments and allowance funds for the benefit of such minor dependents. (1945, c. 735; 1977, c. 714.)

Editor's Note. — The 1977 amendment substituted "other parent" for "mother" near the middle of the section.

ARTICLE 12.

Gifts of Securities and Money to Minors.

§ 33-68. **Definitions.** — In this Article, unless the context otherwise requires:

- (11) A "member" of a "minor's family" means any of the minor's parents, grandparents, great-grandparents, brothers, sisters, uncles and aunts, whether of the whole blood or the half blood, or by or through legal adoption or the adult spouse of a brother, sister, aunt or uncle. (1977, c. 463, s. 1.)

Editor's Note. — The 1977 amendment added "or the adult spouse of a brother, sister, aunt or uncle" at the end of subdivision (11).

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (11) are set out.

§ 33-74. **Resignation, death or removal of custodian; bond; appointment of successor custodian.**

(g) A custodian who is the donor may resign in the manner provided in G.S. 33-74(c) and, notwithstanding the provisions of G.S. 33-74(a), may designate as a successor custodian any person of his selection. (1955, c. 1061; 1959, c. 1166, s. 1; 1971, c. 1231, s. 1; 1977, c. 463, s. 2.)

Editor's Note. — The 1977 amendment added subsection (g).

As the rest of the section was not changed by the amendment, only subsection (g) is set out.

Chapter 35.

Persons with Mental Diseases and Incompetents.

Article 1.

Definitions.

Sec.

35-1.2 to 35-1.5. [Reserved.]

Article 1A.

Guardianship of Incompetent Adults.

Part 1. Legislative Purpose.

35-1.6. Legislative purpose.

Part 2. Definitions.

35-1.7. Definitions.

Part 3. Jurisdiction and Venue.

35-1.8. Jurisdiction and venue; exclusive procedure.

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Part 4. Proceedings before Clerk.

35-1.10. Petition before clerk.

35-1.11. Costs in action.

35-1.12. Contents of petition.

35-1.13. Service of petition.

35-1.14. Subsequent service.

35-1.15. Appointment of interim guardian.

35-1.16. Rights to counsel, evaluation, and jury; hearing on petition.

35-1.17. Hearing before clerk on appointment of guardian.

35-1.18. Clerk to issue letters of appointment.

35-1.19. Bond.

35-1.20. Appeals from clerk's orders.

35-1.21 to 35-1.27. [Reserved.]

Part 5. Qualifications, Priorities, Duties, and Liabilities of Guardians.

35-1.28. Qualifications of guardians.

Sec.

35-1.29. Priorities for appointment.

35-1.30. Rule-making power of Secretary of Human Resources.

35-1.31. Status reports.

35-1.32. Duties of designated agency.

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35-1.34. General powers and duties of guardians with respect to the person.

35-1.35. Powers and duties of guardians with respect to the estate.

35-1.36. Reports filed with designated agency.

35-1.37. Clerk's continuing jurisdiction over guardians.

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35-1.39. Subsequent hearings.

35-1.40. [Reserved.]

Part 6. Testamentary Appointment of Guardians.

35-1.41. Testamentary appointment.

Article 2.

Guardianship and Management of Estates of Incompetents.

35-7. [Repealed.]

Article 3.

Sales of Estates.

35-13. Spouse of incompetent husband or wife entitled to special proceeding for sale of property.

Article 5.

Surplus Income and Advancements.

35-19. Income of incompetent surviving spouse used for children's support.

ARTICLE 1.

Definitions.

§ 35-1.1. Definitions of mental disease, mental defective, etc.

The definition of mental illness contained in this section is virtually the same definition contained in § 122-36(d). In re Salem, 31 N.C. App. 57, 228 S.E.2d 649 (1976).

Applied in North Carolina Ass'n for Retarded

Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

Cited in In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976).

§§ 35-1.2 to 35-1.5: Reserved for future codification purposes.

ARTICLE 1A.

Guardianship of Incompetent Adults.

Part 1. Legislative Purpose.

§ 35-1.6. **Legislative purpose.** — The General Assembly of North Carolina recognizes that:

- (1) Some incompetent adults, regardless of where they are living, require the assistance of a guardian in order to help them exercise their rights, including the management of their property and personal affairs.
- (2) Those individuals not able to act effectively on their own behalf have a right to a responsible, impartial guardian.
- (3) The essential purpose of guardianship is to replace an individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.
- (4) Limiting the rights of the individual by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights.
- (5) Guardianship should seek to preserve for the incompetent individual the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent individual should be permitted to participate as fully as possible in all decisions that will affect him. (1977, c. 725, s. 1.)

Cross References. — For provisions relating to guardians and wards, see § 33-1 et seq. As to social services officials and employees as public guardians, see § 108-102. As to the provision of protective services to disabled adults who lack the capacity to consent to such services, see § 108-106.2. As to mental health officials and

employees as public guardians, see § 122-24.1.

Editor's Note. — Session Laws 1977, c. 725, s. 8, provides: "This act shall become effective on March 1, 1978, and shall apply only to appointments made on or after that date."

Part 2. Definitions.

§ 35-1.7. **Definitions.** — When used in this Article:

- (1) The term "accounting" refers to the financial or status reports filed with the clerk, designated agency, respondent, or other person or party with whom such reports are required to be filed.
- (2) The term "clerk" means the clerk of the superior court of the county in which proceedings under this Article are brought or filed.
- (3) The term "designated agency" means the State or local human resources agency designated by the clerk in his order to prepare, cause to be prepared, or assemble the multidisciplinary evaluation and to receive, comment upon, and certify receipt of a financial or status report or to perform other functions as the clerk may order. A designated agency includes, without limitation, State, local, regional or area mental health, mental retardation, vocational rehabilitation, public health, diagnostic evaluation centers, social service, and developmental disabilities agencies.

- (4) The term “disinterested public agent” means an adult officer, agent, or employee of a State human resources agency who has no immediate responsibilities for providing services to a ward or the director or assistant directors of a local human resources agency. The fact that a disinterested public agent is employed by a State or local human resources agency that provides financial assistance to a ward does not disqualify that person from being appointed a guardian.
- (5) The term “department” means the Department of Human Resources, unless the context requires otherwise.
- (6) The term “financial report” means the report filed by the guardian concerning all financial transactions, including receipts and expenditures of money of the ward, sale of the ward’s property, or other transactions involving the ward’s property.
- (7) The term “general guardian” means a guardian of both the estate and the person.
- (8) The term “guardian ad litem” means a guardian appointed pursuant to G.S. 1A-1, Rules of Civil Procedure, Rule 17(b) and (c).
- (9) The term “guardian of the estate” means a guardian appointed solely for the purpose of managing the property, estate, or business affairs of a ward.
- (10) The term “guardian of the person” means a legal guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward.
- (11) The term “incompetent adult” means an adult who lacks sufficient capacity to make or communicate important decisions concerning his person, family, or property because of mental illness, mental retardation, epilepsy, cerebral palsy, or autism.
The term “incompetent child” means a minor who, other than by reason of his minority, is impaired to the extent that he lacks sufficient capacity to make or communicate important decisions concerning his person, family, or property because of mental illness, mental retardation, epilepsy, cerebral palsy, or autism.
- (12) The term “important decisions concerning his person, family, or property” means decisions by a ward concerning the furnishing of the necessities of life, including without limitation food, shelter, clothing, and medical care, for himself and his family, if any.
- (13) The term “indigent” refers to a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action brought under this Article.
- (14) The term “interested person” means any individual who has an interest or stake in the personal well-being or in the estate, property, or business affairs of a ward.
- (15) The term “interim guardian” means a guardian appointed under the provisions of G.S. 35-1.15.
- (16) The terms “legal guardian” or “guardian” mean the guardian appointed by the clerk.
- (17) The term “mental health professional” has the same meaning as set out in G.S. 122-36(h).
- (18) The term “mental retardation professional” has the same meaning as set out in G.S. 122-36(i).
- (19) The term “multidisciplinary evaluation” means an evaluation of the respondent that is required to contain current medical, psychological, and social work evaluations and that may contain current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications-disorders. The evaluations are current if made not more than one

- year from the date on which a petition for guardianship is filed. The evaluation shall set forth the nature and extent of the ward's disability, and recommend a guardianship plan and program.
- (20) The term "person in loco parentis" means a person, other than a parent or legal, interim, or successor guardian, who has assumed the responsibility for the care, custody, and control of the ward. It includes, without limitation, foster parents, other persons having temporary or permanent care, custody, and control, and State or local government departments of social services or the Department or any of its divisions having such care, custody, and control.
 - (21) The term "physician" means a medical doctor who is duly licensed by this State to practice medicine.
 - (22) The term "psychologist" means a person who is duly licensed by this State as a psychologist or is employed as a psychologist by the Department of Human Resources or any State or local agency under the Department's supervision, operation or control.
 - (23) The term "treatment facility" means the same as the term "treatment facility" means under the provisions of G.S. 122-36(g) and G.S. 122-56.2(b), and it includes group homes, halfway houses and other community-based residential facilities for impaired adults.
 - (24) The term "status report" means the report required by G.S. 35-1.31 to be filed by the guardian of the ward. A status report shall include a report of a recent medical and dental examination of the ward by one or more physicians or dentists, a report on the legal guardian's performance of his duties as set forth by this Article and in the order of the clerk authorizing the appointment of a legal guardian, and a report on the ward's condition, needs, and development. It also may contain, without limitation, reports of mental health or mental retardation professionals, psychologists, social workers, persons in loco parentis, a member of a multidisciplinary evaluation team, a designated agency, a disinterested public agent or agency, a guardian ad litem, a guardian of the estate, an interim guardian, a successor guardian, an officer, official, employee or agent of the Department, or any other interested person, including reports from group home parents or supervisors if the ward lives in a group home, a report from an employer if the ward is employed in competitive employment, a sheltered workshop, a work activities center or in any other working capacity, and a report of a member of the staff of a treatment facility if the ward is a resident patient of one or an outpatient client of one.
 - (25) The term "testamentary guardian" means a guardian appointed by the last will and testament of a parent of a ward.
 - (26) The term "ward" means the adult person for whom a guardian has been appointed or is sought to be appointed. (1977, c. 725, s. 1.)

Part 3. Jurisdiction and Venue.

§ 35-1.8. Jurisdiction and venue; exclusive procedure. — (a) The clerks of superior court have original jurisdiction of proceedings brought or filed under this Article. Venue for such proceedings is in the county where the proposed ward resides, has property, or is present or if the proposed ward is an inpatient or resident of a treatment facility, venue shall include the county in which the resident resided when admitted to the facility.

(b) This Article establishes the exclusive procedure for adjudicating the following adults to be incompetent, appointing guardians for them, and adjudicating the restoration of their competency: mentally retarded, epileptic,

cerebral palsied or autistic persons. This Article also establishes an alternative procedure, in addition to those established by General Statutes Chapter 35, Article 2, for adjudicating mentally ill persons to be incompetent and for appointing guardians for them. (1977, c. 725, s. 1.)

§ 35-1.9. Change of venue. — Upon a petition of any of the parties or any interested person and upon a finding by the clerk before whom a proceeding under this Article was originally filed that, from all the facts and circumstances of the case, no hardship or prejudice will result to the proposed ward from a change of venue and that a change of venue will be convenient for all parties, or that the clerk is not disinterested in the proceedings, the clerk may order a change of venue. (1977, c. 725, s. 1.)

Part 4. Proceedings before Clerk.

§ 35-1.10. Petition before clerk. — Any person may file a verified petition for the appointment of a guardian for any adult person by filing the same with the clerk. (1977, c. 725, s. 1.)

§ 35-1.11. Costs in action. — Costs shall be assessed, as in special proceedings, to the respondent in any action brought under this Article unless the respondent is indigent, in which case costs shall be borne by the Administrative Office of the Courts. (1977, c. 725, s. 1.)

§ 35-1.12. Contents of petition. — The petition shall set forth, to the extent known:

- (1) The name, age, address, and county of residence of the proposed ward;
- (2) The name, address, and county of residence of the petitioner, and his interest in the action;
- (3) A general statement of the proposed ward's property, or that the ward is indigent, with an estimate of the value of any property, including any compensation, insurance, pension, or allowance to which he is entitled;
- (4) A statement of the reason or reasons why the appointment of a guardian is sought;
- (5) The name, address, and county of residence of the proposed ward's spouse, or, if none, adult children or next of kin, or, if none, person or persons acting in loco parentis;
- (6) The name, address, and county of residence of all persons who may have any financial interest in the proceedings. (1977, c. 725, s. 1.)

§ 35-1.13. Service of petition. — A copy of the petition and the written notice of the time, date, and place set for a hearing on the petition shall be served by the sheriff on the proposed ward and on the person or persons designated in G.S. 35-1.12(5). Service shall be made as provided by G.S. 1A-1, Rules of Civil Procedure, Rule 4. A copy of the petition and the written notice of the time, date, and place set for a hearing on the petition shall be mailed by the court to all persons designated in G.S. 35-1.12(6). The clerk, on his own motion, may order notice to be served on any other person by mail. (1977, c. 725, s. 1.)

§ 35-1.14. Subsequent service. — Unless otherwise provided, all subsequent notices shall be served as provided by G.S. 1A-1, Rules of Civil Procedure, Rule 5. (1977, c. 725, s. 1.)

§ 35-1.15. **Appointment of interim guardian.** — (a) The petitioner or the person or persons designated in G.S. 35-1.12(5) may also file a verified petition with the clerk for the appointment of an interim guardian.

(b) The petition shall set forth facts tending to show that there exists an emergency constituting an imminent danger to the physical well-being of the proposed ward.

(c) Immediately upon receiving the petition for the appointment of an interim guardian, the clerk shall appoint counsel or guardian ad litem to represent the proposed ward if the petition alleges the ward is indigent. The clerk shall also immediately set a time, date, and place for a hearing on the petition. The petition and the order appointing counsel or guardian ad litem and setting the time, date, and place for the hearing shall be promptly served on the proposed ward and on his counsel or guardian ad litem, if any. The hearing shall be set for a date no later than 15 days after the petition has been served on the proposed ward.

(d) If at the hearing the clerk finds that the proposed ward is an incompetent adult and in an emergency constituting an imminent danger to his physical well-being, he shall appoint an interim guardian and set forth his powers and duties. The powers and duties of the interim guardian shall extend only so far as necessary to meet the emergency. The interim guardian shall be a guardian of the person and not of the estate of the ward. The interim guardian shall not be required to post a bond. The interim guardianship shall terminate upon the clerk's disposition of the petition for the appointment of a guardian filed under G.S. 35-1.10. No multidisciplinary evaluation shall be ordered in any proceedings for the appointment of an interim guardian. (1977, c. 725, s. 1.)

§ 35-1.16. **Rights to counsel, evaluation, and jury; hearing on petition.** — (a) **Right to Counsel.** — The proposed ward is entitled to be represented by counsel of his own choice or by court-appointed counsel if he is indigent.

If the petition filed under G.S. 35-1.10 alleges that the proposed ward is indigent, and no counsel or guardian ad litem has been appointed under G.S. 35-1.15, the clerk shall immediately appoint counsel to represent him unless the clerk has reason to believe he is not indigent.

If the proposed ward for whom counsel has been appointed seeks to waive the right to counsel and if the clerk determines at the hearing on the petition that he lacks capacity to waive the right to counsel but does not want counsel, the clerk shall appoint a guardian ad litem, pursuant to G.S. 1A-1, Rules of Civil Procedure, Rule 17.

The fees of court-appointed counsel and guardians ad litem shall be borne by the Administrative Office of the Courts.

(b) **Right to Multidisciplinary Evaluation.** — The clerk, the proposed ward, his counsel or the guardian ad litem, or the petitioner may require a multidisciplinary evaluation of the ward to be performed and filed in the proceedings. If no such evaluation is requested, none shall be performed.

The request by the petitioner, the proposed ward, or his counsel or guardian ad litem for a multidisciplinary evaluation shall be made in writing filed with the clerk. They shall make their request within 10 days after the petition is filed, or after counsel has filed his appearance or the guardian ad litem has been appointed, whichever is later.

If a multidisciplinary evaluation is requested, the clerk shall name a designated agency and order it to prepare or cause to be prepared or to assemble a current multidisciplinary evaluation of the proposed ward. The agency shall file the report of the evaluation with the clerk and shall send copies to the petitioner and the proposed ward not later than 30 days after the agency receives the order of the clerk. The clerk may order an extension of the 30-day period upon good cause shown by the agency.

Upon receipt of the report of the multidisciplinary evaluation, the clerk shall set a time, date, and place for a hearing to determine whether the proposed ward is incompetent and shall notify all interested parties of the time, date, and place for the hearing.

The cost of the multidisciplinary evaluation shall be borne by the respondent unless he is indigent, in which case it shall be borne by the Department.

The proposed ward may obtain other evaluations at his own expense. If the clerk finds that the proposed ward is indigent and if the proposed ward requests that he be evaluated by other mental health or mental retardation professionals, the clerk, upon good cause shown, may order that the proposed ward be so evaluated. The cost of those evaluations shall be borne by the Department.

The report of the multidisciplinary evaluation and other evidence, if any, shall be considered at the hearing held by the clerk.

If no multidisciplinary evaluation has been requested, the clerk shall set a time, date, and place for a hearing and notify all interested parties.

The hearing shall be held not less than 10 days after the notice of the hearing is served and not before the clerk receives the multidisciplinary evaluation, if any.

Upon disposition of the proceedings before the clerk or any appeal, the clerk shall send all copies of the multidisciplinary evaluation to the designated public agency, which shall file them among its records on the ward.

(c) Right to Jury Trial. — At the hearing, the proposed ward has a right, upon request by him, his counsel, or the guardian ad litem, to trial by jury. The jury shall be composed of 12 persons chosen from the jury list of the county in accordance with the provisions of Chapter 9 of the General Statutes. A jury must be requested not later than five days before the day on which the hearing is set. The proposed ward, his counsel, or the guardian ad litem may waive this right by written notice filed with the clerk and their failure to timely request trial by jury constitutes a waiver of the right.

(d) Open Hearings. — The hearing shall be open to the public unless the proposed ward, his counsel, or the guardian ad litem requests otherwise. The record of the hearing, including without limitation any documentary testimony introduced at the hearing and the report of the multidisciplinary evaluation, shall be open to the public unless, for good cause shown, the clerk, upon petition of the proposed ward, his counsel, or the guardian ad litem, orders otherwise.

(e) Right to Present Evidence. — The petitioner and the proposed ward are entitled to present oral testimony or documentary evidence at the hearing, subpoena witnesses and the production of documents, and examine and cross-examine witnesses.

(f) Clerk's Finding. — If the clerk or jury shall find by the greater weight of the evidence that the proposed ward is an incompetent adult, the clerk shall appoint a guardian. If the clerk or jury does not so find, the clerk shall dismiss the petition.

(g) Clerk's Order. — After considering all the evidence and having found the proposed ward is an incompetent adult, the clerk may enter an order setting forth:

- (1) Findings on the nature and extent of the ward's incompetency;
- (2) The powers and duties of the guardian or guardians regarding the person or the estate of the ward, or both; such powers and duties shall include, unless the clerk provides to the contrary, the powers and duties of guardians with respect to the person, as provided under G.S. 35-1.34, and with respect to the estate, as provided under G.S. 35-1.35. The clerk may order that the ward retains certain legal rights and privileges to which he was entitled before he was adjudged incompetent; and
- (3) Whether there shall be one or more guardians, his or their identity, and, if more than one, who shall be guardian of the person and who shall be guardian or guardians of the estate. (1977, c. 725, s. 1.)

§ 35-1.17. **Hearing before clerk on appointment of guardian.** — For the purposes of determining who the guardian or guardians shall be, the clerk shall receive whatever testimony is offered. (1977, c. 725, s. 1.)

§ 35-1.18. **Clerk to issue letters of appointment.** — The clerk shall issue to the guardian or guardians letters of appointment signed by him and sealed with his seal of office. In all cases, the clerk shall specify in his order whether the guardian, or, if there is more than one guardian, which of the guardians, shall be entitled to and have control of the ward's estate. (1977, c. 725, s. 1.)

§ 35-1.19. **Bond.** — The Secretary of the Department of Human Resources shall require, or purchase, in such amounts as he deems adequate and proper, individual or blanket bonds for all disinterested public agents appointed to be guardians, as provided by G.S. 35-1.28(d), and whether they serve as guardians of the estate, of the person, or of both, or one blanket bond covering all such agents, such bond or bonds to be conditioned upon faithful performance of their duties as guardians and made payable to the State. The premiums shall be paid by the State.

In all cases in which the clerk appoints a general guardian or a guardian of the person, the clerk shall require the guardian to post a bond in the minimum amount of the two thousand dollars (\$2,000). The clerk shall require the guardian of the estate to post a bond as provided by Chapter 33, Article 2. (1977, c. 725, s. 1.)

§ 35-1.20. **Appeals from clerk's orders.** — Appeals from the clerk shall be to the superior court de novo and thence to the Court of Appeals. An appeal does not stay the appointment of a guardian unless so ordered by the superior court or the Court of Appeals. The Court of Appeals may request the Attorney General to represent the petitioner on appeal. (1977, c. 725, s. 1.)

§§ 35-1.21 to 35-1.27: Reserved for future codification purposes.

Part 5. Qualifications, Priorities, Duties, and Liabilities of Guardians.

§ 35-1.28. **Qualifications of guardians.** — (a) The clerk may appoint as guardian an individual, a domestic corporation, or a disinterested public agent. The person filing the petition may submit to the clerk a name or names of potential guardians.

(b) An individual to be appointed as a guardian shall be a resident of the State of North Carolina.

(c) A corporation that serves as a guardian shall be authorized by its charter to serve as a guardian or in similar fiduciary capacities.

(d) A disinterested public agent who is appointed by the clerk to serve as a guardian is authorized and required to do so. When the person ceases to qualify as a disinterested public agent, the clerk shall appoint a successor guardian. No public agent shall be appointed guardian until exhaustive efforts have been made to find individuals or corporations to be guardians. (1977, c. 725, s. 1.)

§ 35-1.29. **Priorities for appointment.** — The clerk shall consider appointing a guardian according to the following order of priority: an individual; a corporation; or a disinterested public agent. (1977, c. 725, s. 1.)

§ 35-1.30. Rule-making power of Secretary of Human Resources. — The Secretary of the Department of Human Resources has the authority to issue rules and regulations for the implementation of the guardianship responsibilities of disinterested public agents who are appointed guardians. The rules and regulations shall provide, among other things, that disinterested public agents shall undertake or have received training concerning the powers and responsibilities of guardians. They shall also set forth uniform statewide accounting procedures for disinterested public agents appointed guardians. (1977, c. 725, s. 1.)

§ 35-1.31. Status reports. — (a) Within six months after he is appointed, a guardian shall file an initial status report with the designated agency and the ward.

(b) The guardian shall file his second status report with the designated agency and the ward one year after he is appointed, and he shall file all subsequent status reports annually thereafter.

(c) All status reports shall be filed under the oath or affirmation of the guardian that the report is complete and accurate so far as he is informed and can determine. (1977, c. 725, s. 1.)

§ 35-1.32. Duties of designated agency. — (a) Within 30 days after it receives either a financial or status report from a guardian, the designated agency shall certify to the clerk that it has reviewed the report and shall mail a copy of its certification to the guardian.

(b) At the same time, it may

- (1) Send its written comments on the report to the clerk, the guardian, or any other person who may have an interest in the ward's welfare;
- (2) Notify the guardian that it is able to help the guardian in the performance of his duties;
- (3) Petition the clerk for an order requiring the guardian to perform the duties imposed on him by the clerk or this Article if it appears that the guardian is not performing those duties;
- (4) Petition the clerk for an order modifying the terms of the guardianship or the guardianship program or plan if it appears that such should be modified;
- (5) Petition the clerk for an order removing the guardian from his duties and appointing a successor guardian if it appears that the guardian should be removed for cause;
- (6) Petition the clerk for an adjudication of restoration to competency pursuant to G.S. 35-1.38; or
- (7) Petition the clerk for any other appropriate orders.

(c) If the designated agency files such a petition, it shall cause the petition to be signed and acknowledged by the officer, official, employee, or agent who has personal knowledge of the facts set forth in the petition, and it shall set forth all facts known to it that tend to support the relief sought by the petition.

(d) The clerk shall take action upon the petition pursuant to the provisions of G.S. 35-1.37, 35-1.38, and 35-1.39. (1977, c. 725, s. 1.)

§ 35-1.33. Procedure to compel status reports. — The procedures for compelling the guardian to file status reports is the same as set forth in G.S. 35-1.35 with respect to compelling the guardian to file financial reports. (1977, c. 725, s. 1.)

§ 35-1.34. General powers and duties of guardians with respect to the person. — (a) A guardian of the person or general guardian has the following powers and duties:

- (1) To the extent that it is not inconsistent with the terms of any order by a court of competent jurisdiction relating to the admission, detention, or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of domicile within or without this State. In arranging for a place of domicile, the guardian shall give preference to places within this State over places not within this State if both in- and out-of-state places are substantially equivalent. He also shall give preference to places that are not treatment facilities; if the only available and appropriate places of domicile are treatment facilities, he shall give preference to community-based treatment facilities, such as group homes or nursing homes, over treatment facilities that are not community-based, such as residential hospitals for the mentally ill as established and provided for by Article 1 of Chapter 122 or residential centers for the mentally retarded as established and provided for by Article 9 of Chapter 122.
 - (2) He shall make provision for the care, comfort, and maintenance of his ward and shall arrange for his training, education, employment, and rehabilitation or habilitation. He shall take reasonable care of his ward's personal property.
 - (3) He may commence and defend against any judicial action in the ward's name.
 - (4) He may give any consent or approval that may be necessary to enable the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service. He also may give any other consent or approval that may be required or desirable. He may petition the clerk for the clerk's concurrence in the consent or approval.
- (b) A guardian of the person is entitled to be reimbursed out of the ward's estate for expenditures incurred in the performance of his duties.
- (c) The guardian of the person and a general guardian shall not be liable, by reason of his authorizing or giving any consent or approval necessary to enable the ward to receive legal, psychological, or other professional care, counsel, treatment, or service or other consent or approval that may be required or desirable, for damages to the ward or his estate resulting from the negligence or other acts of a third person if the guardian has acted within the limits imposed on him by this Article or the clerk or both. A guardian of the person and a general guardian shall not be liable for damages to the ward or his estate by reason of authorizing medical treatment or surgery for his ward if the guardian acted after consulting with the ward's physician, acted in good faith, was not negligent, and acted within the limits imposed on him by this Article or the clerk or both. (1977, c. 725, s. 1.)

§ 35-1.35. Powers and duties of guardians with respect to the estate. — A general guardian and a guardian of the estate shall have all the powers and duties under Articles 2, 3, 4, 5, 5A, 5B, and 5C of Chapter 35 of the General Statutes and by Articles 2, 3, 4, and 5 of Chapter 33 of the General Statutes unless the provisions of this Chapter are inconsistent therewith, in which case the provisions of this Chapter shall prevail, or unless the provisions of the order of the clerk appointing a guardian are inconsistent therewith, in which case the provisions of the clerk's order shall prevail. (1977, c. 725, s. 1.)

§ 35-1.36. Reports filed with designated agency. — A guardian shall simultaneously file with the designated agency all reports that he is required to file with the clerk. (1977, c. 725, s. 1.)

§ 35-1.37. Clerk's continuing jurisdiction over guardians. — (a) Upon appointment of a guardian, the clerk shall retain jurisdiction of the matter in

order to assure compliance with his orders and those of the superior court. He shall have authority to remove a guardian for cause and he shall appoint a successor guardian after removal, death, or resignation of a guardian. He shall have authority to determine disputes between guardians and to adjust the amount of the guardian's bond.

(b) The clerk shall follow the criteria set forth in G.S. 35-1.28 and 35-1.29 in appointing a successor guardian.

(c) Any party to the original proceeding and any other interested person may petition the clerk to exercise the authority conferred on him by this section. (1977, c. 725, s. 1.)

§ 35-1.38. Clerk's continuing jurisdiction over proceedings. — (a) Any party to the original proceeding and any other interested person may petition the clerk for modification or termination of his order or for consideration of any matter pertaining to the guardianship.

(b) He may order a multidisciplinary evaluation or other evaluation to be made.

(c) When a petition for an adjudication for restoration to competency has been filed, the clerk shall notify the ward, his guardian or guardians, and any other parties to the original proceeding that a petition has been filed, shall set a date for a hearing on the petition and give notice of that date to the aforesaid persons, afford the ward the right to trial by jury pursuant to G.S. 35-1.16(c), hold an open hearing pursuant to G.S. 35-1.16(d), afford the ward and other parties the right to present evidence pursuant to G.S. 35-1.16(e), and, upon a finding that the ward is no longer an incompetent adult, enter an order adjudicating that the ward is restored to competency and the ward's guardian or guardians are discharged. (1977, c. 725, s. 1.)

§ 35-1.39. Subsequent hearings. — (a) A hearing shall be held pursuant to a petition filed under G.S. 35-1.37 or 35-1.38. Ten days' notice shall be given to the parties to the original proceedings and may be given to any other interested persons known to the petitioner or to the clerk.

(b) Unless inconsistent with G.S. 35-1.37 or 35-1.38, the provisions of G.S. 35-1.16 through 35-1.21 shall be applicable to the hearing.

(c) If an emergency exists which threatens the physical well-being of the ward, the clerk may enter ex parte an appropriate order pending disposition of the matter at the hearing. (1977, c. 725, s. 1.)

§ 35-1.40: Reserved for future codification purposes.

Part 6. Testamentary Appointment of Guardians.

§ 35-1.41. Testamentary appointment. — (a) Any person authorized by law to appoint a guardian for a minor by his last will and testament or other writing may direct that the guardian appointed by him for his incompetent child shall petition the clerk at any time during the six months before the child reaches majority for appointment of a guardian under the provisions of this Article. If so directed, the guardian shall timely file such a petition. Notwithstanding the absence of such provision, a guardian appointed by a last will and testament or other writing for an incompetent child may petition the clerk at any time during the six months before the child reaches majority, or thereafter, for the appointment of a guardian under the provisions of this Article.

(b) A testamentary guardian who files such a petition shall set forth his desire to be appointed or not as guardian. Such a guardian shall be considered by the clerk if the guardian desires to serve.

(c) Notwithstanding the appointment of a testamentary guardian for a minor, any person may petition for the appointment of a guardian for an incompetent child under this Article six months or less before the child reaches majority. (1977, c. 725, s. 1.)

ARTICLE 2.

Guardianship and Management of Estates of Incompetents.

§ 35-2. Inquisition of lunacy; appointment of guardian.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 5, effective March 1, 1978, will amend this section to read as follows:

§ 35-2. **Appointment of guardian.** — Any person, in behalf of one who is deemed an incompetent from want of understanding to manage his own affairs or inebriate by reason of the excessive use of intoxicating drinks, may file a petition before the clerk of the superior court of the county where such person resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the person, to the sheriff of the county, commanding him to summon a jury of 12 men to inquire into the state of such person. Upon the return of the sheriff summoning said jury, the clerk of the superior court shall swear and organize said jury and shall preside over said hearing, and the jury shall make return of their proceedings under their hand to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be inebriate or incompetent by inquisition of a jury, as in cases of orphans. The clerk shall appoint a guardian ad litem to represent the supposed inebriate or incompetent person.

Either the applicant or the ward may appeal from the finding of said jury to the next session of the superior court, when the matters at issue shall be regularly tried de novo before a jury, and pending such appeal, the clerk of the superior court shall not appoint a guardian for the said person, but the resident judge of the district, or the judge presiding in the district, may in his discretion appoint a temporary receiver for the alleged incompetent pending the appeal. The trial of said appeal in the superior court shall have precedence over all other causes.

The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be inebriate or incompetent by inquisition of a jury as in cases of orphans. If the person so adjudged incompetent shall be an inebriate within the definition of G.S. 35-1, the

clerk shall proceed to commit said inebriate to the department for inebriates at the State Hospital at Raleigh for treatment and cure. He shall forward to the superintendent of said State Hospital a copy of the record required herein to be made, together with the commitment, and these shall constitute the authority to said superintendent to receive and care for such said inebriate. The expenses of the care and cure of said inebriate shall constitute a charge against the estate in the care of his guardian. If, however, such estate is not large enough to pay such expenses the same shall be a valid charge against the county from which said inebriate is sent. Provided, where the person is found to be incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age and/or disease and/or other like infirmities, the clerk may appoint a trustee instead of guardian for said person. The trustee or guardian appointed shall be vested with all the powers of a guardian administering an estate for any person and shall be subject to all the laws governing the administration of estates of minors and incompetents. The clerks of the superior courts who have heretofore appointed guardians for persons described in this proviso are hereby authorized and empowered to change said appointment from guardian to trustee. The sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. And the juries of the several counties upon whom a process is served under the provisions of this section shall serve and make their returns without demanding their fees in advance."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Proceeding under § 122-58.7 and This Section Distinguished. — It is true that both the class of persons subjected to involuntary commitment proceedings under § 122-58.7 and the class of persons subjected to the appointment of a guardian under this section may have mental problems. However, it is at that point that the similarity ends. The standards

and purposes of the proceedings to commit someone who is mentally ill or an inebriate and imminently dangerous to himself or others are entirely different from the standards and purposes of the appointment of a guardian to one who is found incapable of handling his own affairs. What exists here is the State giving a jury trial to those persons for whom a guardian

is being appointed and not to those persons being involuntarily committed. There is no violation of the equal protection clause. *French v. Blackburn*, 428 F. Supp. 1351 (M.D.N.C. 1977).

Cited in *In re Thomas*, 290 N.C. 410, 226 S.E.2d 371 (1976).

§ 35-2.1. Guardian appointed when issues answered by jury in any case.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 5, effective March 1, 1978, will delete “insane or” preceding “without sufficient mental capacity” and preceding “incompetent.”

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-3. Guardian appointed on certificate from hospital for insane or training school.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 5, effective March 1, 1978, will amend this section to read as follows:

“§ 35-3. Guardian appointed on certificate. — If any person is confined in any State, territorial or governmental hospital for the mentally ill in this State or in any other state or territory, or in the District of Columbia, or in any hospital licensed and supervised by the State of North Carolina, the certificate of the superintendent of such hospital declaring such person to be mentally ill, which certificate shall be sworn to and subscribed before the clerk of the superior court or any notary public, or the clerk of any court of record in the county, in which such hospital is situated and certified under the seal of court, shall be sufficient evidence to authorize the clerk to appoint a guardian for such person. Further, the clerks of the different counties of this State are also authorized to appoint guardians for any person entitled to the benefits of the War Risk Insurance Act, as amended, and the World War

Veterans' Act of 1924, as amended, where it shall appear from the certificate of the Regional Medical Officer of the United States Veterans' Bureau of North Carolina that such veteran of the World War has been declared by the United States Government as incompetent to receive the funds to be paid to him under said acts of Congress, and such certificate shall be all the proof required as to the incapacity of said veteran to receive such funds and as to the necessity of a guardian. Guardians for such veterans shall be subject to the same provisions of law as guardians of inebriates and incompetent persons in this State.

Any guardian or trustee appointed prior to April 3, 1939, under the provisions of this section or certificate issued by the superintendent of any hospital licensed and supervised by the State of North Carolina, and any and all proceedings based thereon are hereby validated.”

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-3.1. Ancillary guardian for insane or incompetent nonresident having real property in State.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 5, effective March 1, 1978, will amend this section to read as follows:

“§ 35-3.1. Ancillary guardian for insane or incompetent nonresident having real property in State. — Whenever it shall appear by petition, application, and due proof to the satisfaction of any clerk of the superior court of North Carolina that:

- (1) There is real property situate in the county of said clerk in which a nonresident of the State of North Carolina has an interest or estate;
- (2) That said nonresident is incompetent and that a guardian has been appointed and is still serving for him or her in the state of his or her residence; and
- (3) That such incompetent nonresident has no guardian in the State of North Carolina;

Such clerk of the superior court before whom such petition, application and satisfactory proof is made shall thereupon be fully authorized and empowered to appoint in his county an ancillary guardian, which guardian shall have all the powers, duties and responsibilities which [with] respect to the estate of said incompetent, in the State of North Carolina as guardians otherwise appointed now have; and such ancillary guardian shall annually make an accounting to the court in this State and remit to the guardian in the state of the ward's residence any net rents of said real estate, or any proceeds of sale, to the guardian of the state of residence of said incompetent.

A transcript of the record of any court of record appointing a guardian of a nonresident in the state of his residence shall be conclusive

proof of the fact of incompetency and of the appointment of such guardian of the residence of the incompetent. Provided, that such transcript shall show that such guardianship is still in effect in the state of the ward's residence, and that the incompetency of the ward still exists.

Upon the appointment of an ancillary guardian in this State under this Article, the clerk of the superior court shall forthwith notify the clerk of the superior court of the county of the ward's residence, and shall also notify the guardian in the state of the ward's residence."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-6. Estates without guardian managed by clerk.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 5, effective March 1, 1978, will substitute "incompetent" for "of nonsane mind."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-7: Repealed by Session Laws 1977, c. 102, s. 1.

Editor's Note. — Session Laws 1977, c. 102, s. 4, provides: "This act shall not affect pending litigation."

§ 35-8. Renewal of obligations by guardians.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 5, effective March 1, 1978, will delete "who has been judicially declared to be an inebriate, lunatic, or incompetent from want of understanding to manage his or her own affairs by reason of the

excessive use of intoxicating drink or other causes" following "appointed for a person" near the beginning of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-9. Guardian not liable.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 5, effective March 1, 1978, will delete "of the inebriate, lunatic, or incompetent" following "by the guardian."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

ARTICLE 3.

*Sales of Estates.***§ 35-10. Clerk may order sale, renting or mortgage.**

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 5, effective March 1, 1978, in the first sentence, will delete “mental defective” following “guardian of any” and substitute “person found incompetent” for “mentally disordered person.”

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Quoted in *In re Thomas*, 290 N.C. 410, 226 S.E.2d 371 (1976).

§ 35-11. Purposes for which estate sold or mortgaged; parties; disposition of proceeds.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 5, effective March 1, 1978, will amend the first sentence of this section to read as follows:

“When it appears to the clerk, upon the petition of the guardian of any inebriate or person found incompetent, that a sale or mortgage of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance, or when the clerk is satisfied that the interest of the mental defective,

inebriate or mentally disordered person would be materially and essentially promoted by the sale or mortgage of any part of such estate; or when any part of his real estate is required for public purposes, the clerk may order a sale thereof to be made by such person, in such way and on such terms as he shall adjudge.”

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Quoted in *In re Thomas*, 290 N.C. 410, 226 S.E.2d 371 (1976).

§ 35-13. Spouse of incompetent husband or wife entitled to special proceeding for sale of property. — Every married person whose husband or wife is adjudged incompetent and is confined in a mental hospital or other institution in this State, and who was living with the incompetent spouse at the time of commitment shall, if he or she be in needy circumstances, have the right to bring a special proceeding before the clerk of the superior court to sell the property of the incompetent spouse, or so much thereof as is deemed expedient, and have the proceeds applied for support: Provided, that said proceeding shall be approved by the judge of the superior court holding the courts of the judicial district where the said property is situated. When the deed of the commissioner appointed by the court, conveying the lands belonging to the incompetent spouse is executed, probated, and registered, it conveys a good and indefeasible title to the purchaser. (1911, c. 142, ss. 1, 2; C. S., s. 2294; 1977, c. 102, s. 2.)

Editor's Note. — The 1977 amendment, in the first sentence, substituted “married person whose husband or wife is adjudged incompetent” for “woman whose husband is a lunatic or insane,” “a mental hospital or other institution” for “an asylum,” “incompetent spouse at the time of commitment shall, if he or” for “her husband at the time he was committed to such asylum, if she,” “the incompetent

spouse” for “her insane husband,” and “for support” for “to her support” and deleted “shall” following “be in needy circumstances.” In the second sentence, the amendment substituted “incompetent spouse” for “insane husband.”

Session Laws 1977, c. 102, s. 4, provides: “This act shall not affect pending litigation.”

ARTICLE 5.

Surplus Income and Advancements.

§ 35-19. Income of incompetent surviving spouse used for children's support. — When a parent dies leaving surviving minor children and a surviving spouse who is the other parent of such children, but leaving no sufficient estate for the support, maintenance and education of such minor children, and the surviving spouse is or becomes incompetent and is so declared according to law, and such incompetency continues for 12 months thereafter, and the incompetent person has an estate which is placed in the hands of a guardian or other person, as provided by law, the estate of such incompetent person shall be made liable for the support, maintenance and education of the minor children. The clerk of the superior court for the county in which the incompetent person has residence shall order that fit and proper advancements be made on behalf of the minor children. (1905, c. 546; Rev., s. 1899; C. S., s. 2295; 1977, c. 102, s. 3.)

Editor's Note. — The 1977 amendment, in the first sentence, substituted "parent" for "father," "surviving spouse who is the other parent" for "widow who is the mother," "surviving spouse is or becomes incompetent" for "mother is or becomes insane," "incompetency" for "insanity," "incompetent person" for "she" and for "insane mother," and "minor children" for "class of persons mentioned in said section to the same extent, in

the same manner and under the same rules and regulations that applies to estates of fathers thereunder," and deleted "him" following "dies leaving," "and" following "sufficient estate for the support," and "in such cases as are provided for in G.S. 35-20" preceding "be made liable for the support." The amendment also added the present second sentence.

Session Laws 1977, c. 102, s. 4, provides: "This act shall not affect pending litigation."

§ 35-20. Advancement of surplus income to certain relatives.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 5, effective March 1, 1978, will substitute "incompetent" for "nonsane" near the beginning of the first and second sentences and substitute

"incompetency" for "insanity" in two places in the second sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-21. Advancement to adult child or grandchild.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 5, effective March 1, 1978, will substitute "incompetent" for "nonsane" near the beginning of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-23. Distributees to be parties to proceeding for advancements.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 5, effective March 1, 1978, will substitute "incompetent" for "nonsane."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-24. Advancements to be equal; accounted for on death.

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 5, effective March 1, 1978, will substitute "incompetent" for "nonsane."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

ARTICLE 7.

Sterilization of Persons Mentally Ill and Mentally Retarded.

§ 35-36. Sterilization of mental defectives in State institutions.

Editor's Note. —

For note entitled "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

Article Is Constitutional. —

The legislative classification of mentally retarded persons is neither arbitrary nor capricious, but rests upon respectable medical knowledge and opinion that such persons are in fact different from the general population and may rationally be accorded different treatment for their benefit and the benefit of the public. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

All mentally retarded persons are sufficiently different from the general population to justify classification for some purposes without

meeting the compelling governmental interest test. But the right to procreate is a fundamental one and under equal protection challenge sterilization cannot be ordered short of demonstrating a compelling governmental interest. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

This Article is narrowly drawn to express only the legitimate state interest of preventing the birth of a defective child or the birth of a nondefective child that cannot be cared for by its parent, and that so viewed, the State's interest rises to the dignity of a compelling one. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

§ 35-37. Sterilization of mental defectives not in State institutions.

Editor's Note. — For note entitled "Legislative Naiveté in Involuntary Sterilization

Laws," see 12 Wake Forest L. Rev. 1064 (1976).

§ 35-39. Duty of petitioner.

Editor's Note. — For note entitled "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

Constitutionality of Section Generally. — This section is not overly broad. Although it permits initiation of the sterilization procedure against any and all members of the class, it does not contemplate that all members of the class will be sterilized. Nor is the standard of selection so vague that it cannot be comprehended and applied. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

The legislative dual purpose—to prevent the birth of a defective child or the birth of a nondefective child that cannot be cared for by its parent—reflects a compelling state interest and the classification rests upon a difference having a fair and substantial relation to the object of the

legislation and does not, therefore, violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

The legislative classification is itself narrowed as to impact so that only mentally retarded persons who are sexually active, and unwilling or incapable of controlling procreation by other contraceptive means, and who are found to be likely to procreate a defective child, or who would be unable because of the degree of retardation to be able to care for a child, may be sterilized. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

Subdivisions (1) through (3) make out a complete and sensible scheme: that the public

servant concern himself either with the best interest of the retarded person or the best interest of the public, or both, and that he act to begin the procedure only when in his opinion the retarded person would either likely procreate a defective child or would himself be unable to care for his own child or children. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

Subdivision (4) is unconstitutional as an arbitrary and capricious delegation of unbridled power and a correspondingly irrational

withdrawal or responsibility sensibly placed upon the director of the institution of the county director of social services by the other three coherent and compatible subdivisions. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

Subdivision (4) of this section is irrational and irreconcilable with the preceding three subparagraphs. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

§ 35-40. Contents of petition.

Editor's Note. — For note entitled "Legislative Naiveté in Involuntary Sterilization

Laws," see 12 Wake Forest L. Rev. 1064 (1976).

§ 35-41. Copy of petition served on patient.

Editor's Note. — For note entitled "Legislative Naiveté in Involuntary Sterilization

Laws," see 12 Wake Forest L. Rev. 1064 (1976).

§ 35-43. Hearing before the judge of district court.

Editor's Note. —

For note entitled "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

This section is procedurally adequate to survive challenge under the Due Process Clause of the Fourteenth Amendment. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

Findings of Fact Required. — Before the district court judge may enter an order requiring that the operation be performed, he must make the findings of fact required by this section, which amounts to a judicial determination that the allegations contained in the petition are true. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

This section means that the judge must find that the subject is likely to engage in sexual

activity without utilizing contraceptive devices and is therefore likely to impregnate or become impregnated. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

Burden of Proof. —

This section means that before an order of sterilization can be entered, there must be finding from evidence that is clear, strong and convincing that the subject is likely to engage in sexual activity without using contraceptive devices and that either a defective child is likely to be born or a child born that cannot be cared for by its parent. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

§ 35-44. Appeals.

Editor's Note. —

For note entitled "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

§ 35-45. Right to counsel.

Editor's Note. — For note entitled "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

Stated in *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

Chapter 36.

Trusts and Trustees.

§§ 36-1 to 36-67: Repealed by Session Laws 1977, c. 502, s. 1, effective January 1, 1978.

Cross Reference. — For present provisions as to trusts and trustees, see Chapter 36A.

Editor's Note. — Repealed § 36-23.2 was amended by Session Laws 1977, c. 760.

Chapter 36A.

Trusts and Trustees.

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- 36A-107. Trustees in wills to qualify and file inventories and accounts.

Editor's Note. — Session Laws 1977, c. 502, s. 3, provides: "Except as otherwise specifically provided, this act shall become effective January 1, 1978."

Where appropriate, the historical citations to sections in repealed Chapter 36, covering the

same subject matter as this chapter, have been added to corresponding sections in this Chapter 36A.

ARTICLE 1.

Investment and Deposit of Trust Funds.

§ 36A-1. Definition. — (a) For the purpose of this Article, the word "fiduciary" shall be construed to include a guardian, personal representative, collector, trustee, or any other person charged with the duty of acting for the benefit of another party as to matters coming within the scope of the relationship between them.

(b) As used in subsection (a) above, the word "person" shall be construed to include an individual, a corporation, or any legal or commercial entity authorized to hold property or do business in the State of North Carolina. (1977, c. 502, s. 2.)

§ 36A-2. Investment; prudent man rule. — (a) In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property for the benefit of another, a fiduciary shall observe the standard of judgment and care under the circumstances then prevailing, which an ordinarily prudent man of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary; and if the fiduciary has special skills or is named a fiduciary on the basis of representations of special skills or expertise, he is under a duty to use those skills.

(b) Within the limitations of the foregoing standard, a fiduciary is authorized to acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing, bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any

management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended. (1870-1, c. 197; Code, s. 1594; 1885, c. 389; 1889, c. 470; Rev., ss. 1792, 1793; 1917, c. 6, s. 9; c. 67, s. 1; c. 152, s. 7; c. 191, s. 1; c. 269, s. 5; C. S., ss. 4018, 4018(a), 4019; Ex. Sess. 1921, c. 63; 1931, c. 257; 1933, c. 549, s. 1; 1935, c. 449; 1937, c. 14; 1943, c. 96; c. 473, ss. 1-3; 1945, c. 713; 1953, c. 620; 1959, c. 364, s. 2; c. 1015, s. 2; 1969, c. 861; 1971, c. 528, s. 34; c. 864, s. 17; 1973, c. 239, s. 1; 1975, cc. 40, 319; 1977, c. 502, s. 2.)

§ 36A-3. Terms of creating instrument. — (a) Nothing contained in this Article shall be construed as authorizing any departure from the express terms or limitations set forth in any will, agreement, court order, or other instrument creating or defining the fiduciary's powers and duties.

(b) A fiduciary holding funds for investment who is specifically directed or authorized by an instrument creating the fiduciary relationship to retain the stock of a bank or trust company that is a member of a bank holding company currently fully registered under an act of Congress entitled Bank Holding Company Act of 1956, as the same may be amended from time to time, shall be considered as being directed or authorized to retain the stock of such bank holding company. (1973, c. 1277; 1977, c. 502, s. 2.)

§ 36A-4. Power of court not restricted. — Nothing contained in this Article shall be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any will, agreement, or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale, or management of fiduciary property. (1977, c. 502, s. 2.)

§ 36A-5. Applicability of provisions. — This Article shall govern fiduciaries acting under wills, agreements, court orders, and other instruments now existing or hereafter made. (1977, c. 502, s. 2.)

§ 36A-6. Employee trusts. — Pension, profit sharing, stock bonus, annuity, or other employee trusts established for the purpose of distributing the income and principal thereof to some or all of their employees, or the beneficiaries of such employees, shall not be invalid as violating any laws or rules against perpetuities, restraints on the power of alienation of title to property, or the accumulation of income; but such trusts may continue for such period of time as may be required by the provisions thereof to accomplish the purpose for which they were established. (1954, c. 8; 1977, c. 502, s. 2.)

§ 36A-7. Applicability. — The provisions of this Article shall apply to fiduciary relationships in existence on January 1, 1978, or thereafter established. (1977, c. 502, s. 2.)

§§ 36A-8 to 36A-12: Reserved for future codification purposes.

ARTICLE 2.

Removal of Fiduciary Funds.

§ 36A-13. Removal of fiduciary funds from this State. — Unless the creating instrument contains an express prohibition or provides a method of removal, when any personal property in this State is vested in a resident trustee, guardian, or other fiduciary, the clerk of superior court of the county in which

the fiduciary resides may, on petition filed for that purpose by the fiduciary, beneficiary, ward, or other interested person, order the said fiduciary or his personal representative to pay, transfer, and deliver the said property or any part of it, to a nonresident fiduciary appointed by a court of record in another state; provided the clerk of superior court finds that such removal is in accord with the express or implied intention of the settlor, would aid the efficient administration of the trust, or is otherwise in the best interests of the beneficiaries, and further provided that,

- (1) No such order of any clerk of superior court shall be valid and in force until approved by the resident judge of said judicial district, or the judge holding court in such district; and
- (2) No such order shall be made, in the case of a petition, until after a hearing, as to which notice of the application shall have been given to all persons interested in such property as required in other special proceedings; and
- (3) Such order may be conditioned on the appointment of a fiduciary in the state to which the property is to be removed and shall be subject to such other terms and conditions as the clerk of superior court deems appropriate for protection of the property and interests of the beneficiaries, provided any North Carolina beneficiary may require that a bond be posted prior to such removal in an amount sufficient to protect his interest, the premium for which shall be charged against his interest. (1911, c. 161, ss. 1, 2; C. S., ss. 4020, 4021; 1977, c. 502, s. 2.)

§ 36A-14. Provision for discharge of resident fiduciary. — When any trustee, guardian, or other fiduciary in this State, shall pay over, transfer, or deliver any property in his hands or vested in him, under any order or decree made in pursuance of this Article, he shall be discharged from all responsibility therefor. (1911, c. 161, s. 3; C. S., s. 4022; 1977, c. 502, s. 2.)

§ 36A-15. Removal of fiduciary funds to this State. — A clerk of superior court upon petition of a foreign trustee, guardian, or other fiduciary or of any beneficiary, ward, or other interested party may appoint a local fiduciary to receive and administer fiduciary property then being administered in another state. A fiduciary appointed pursuant to this section may be required to give bond conditioned upon the faithful performance of his duties or to meet any other conditions required by a court in the other state before permitting removal of the fiduciary property to this State. (1977, c. 502, s. 2.)

§ 36A-16. Applicability. — The provisions of this Article shall not apply to proceedings begun before January 1, 1978. (1977, c. 502, s. 2.)

§§ 36A-17 to 36A-21: Reserved for future codification purposes.

ARTICLE 3.

Resignation, Removal, and Renunciation of Trustees.

§ 36A-22. Applicability of this Article. — (a) Except when otherwise provided by law, the term “trustee,” as used in this Article, includes “trustees,” “guardians,” and other fiduciaries.

(b) The resignation, removal, and renunciation of personal representatives and collectors shall be governed by the provisions of Articles 5, 9, and 10 of Chapter 28A.

(c) The substitution of trustees in mortgages and deeds of trust shall be governed by the provisions of G.S. 45-10. (1977, c. 502, s. 2.)

§ 36A-23. Clerk's power to accept resignations. — The clerks of superior courts of this State have power and jurisdiction to accept the resignation of trustees and to appoint their successors in the manner provided by this Article. (1911, c. 39, s. 1; C. S., s. 4023; 1977, c. 502, s. 2.)

§ 36A-24. Petition; contents and verification. — When any trustee desires to resign his trust, he shall file his petition in the office of the clerk of superior court of the county in which he qualified or in which the instrument under which he claims is registered. The petition shall set forth all the facts in connection with the appointment and qualifications as such trustee, with a copy of the instrument under which he acts; shall state the names, ages, and residences of all the beneficiaries and other parties interested in the trust estate; shall contain a full and complete statement of all debts or liabilities due by the estate, and a full and complete statement of all assets belonging to said estate, and a full and complete statement of all moneys, securities, or assets in the hands of the trustee and due the estate, together with a full statement of the reasons the applicant should be permitted to resign his trust. The petition shall be verified by the oath of the applicant. (1911, c. 39, s. 2; C. S., s. 4024; 1977, c. 502, s. 2.)

§ 36A-25. Parties; hearing; successor appointed. — Upon the filing of the petition, the clerk shall docket the cause as a special proceeding, with the trustee as plaintiff and the beneficiaries as defendants, and shall issue the summons for the defendants, and the procedure shall be the same as in other special proceedings. If any of the defendants be nonresidents, summons may be served by publication; and if any be infants, a guardian ad litem must be appointed by the court to represent their interests in the manner now provided by law. The beneficiaries, creditors, or any other person interested in the trust estate, have the right to answer the petition and to offer evidence why the prayer of the petition should not be granted. The clerk shall then proceed to hear and determine the matter, and if it appears to the court that the best interests of the creditors and the beneficiaries demand that the resignation of the trustee be accepted, or if it appears to the court that sufficient reasons exist for allowing the resignation, and that the resignation can be allowed without prejudice to the rights of creditors or the beneficiaries, the clerk may, in the exercise of his discretion, allow the applicant to resign; and in such case the clerk shall proceed to appoint the successor of the petitioner in the manner provided in this Article. (1911, c. 39, s. 3; C. S., s. 4025; 1977, c. 502, s. 2.)

§ 36A-26. Resignation allowed; costs; judge's approval. — In making an order allowing the trustee to resign, the clerk shall make such order concerning the costs of the proceedings and commissions to the trustee as may be just. If there is no appeal from the decision and order of the clerk within the time prescribed by law, the proceedings shall be submitted to the judge of the superior court and approved by him before the same shall become effective. (1911, c. 39, s. 3; C. S., s. 4026; 1977, c. 502, s. 2.)

§ 36A-27. Appeal; stay effected by appeal. — Any party in interest may appeal from the decision of the clerk to the judge at chambers, and in such event the procedure shall be the same as in other special proceedings as now provided by law. If the clerk allows the resignation, and an appeal is taken from his decision, such appeal shall have the effect to stay the judgment and order the clerk until the cause is heard and determined by the judge upon the appeal taken. (1911, c. 39, s. 4; C. S., s. 4027, c. 502, s. 2.)

§ 36A-28. On appeal judge determines facts. — Upon an appeal taken from the clerk to the judge, the judge shall have the power to review the findings of fact made by the clerk and to find the facts or to take other evidence, but the facts found by the judge shall be final and conclusive upon any appeal to the appellate division. (1911, c. 39, s. 5; C. S., s. 4028; 1969, c. 44, s. 46; 1977, c. 502, s. 2.)

§ 36A-29. Final accounting before resignation. — No trustee shall be allowed or permitted to resign his trust until he shall first file with the court his final account of the trust estate, and until the court shall be satisfied that the said account is true and correct. (1911, c. 39, s. 6; C. S., s. 4029; 1977, c. 502, s. 2.)

§ 36A-30. Resignation effective on settlement with successor. — In case the resignation of the trustee is accepted by the court, the resignation shall not release or discharge the trustee from liability, until he shall have filed an account acceptable to his successor in full for all moneys, securities, property, or other assets or things of value in his possession or under his control or which should be in his possession or under his control belonging to the trust estate, and such account has been approved by the court. (1911, c. 39, s. 6; C. S., s. 4030; 1977, c. 502, s. 2.)

§ 36A-31. Court to appoint successor; when bond required. — If the court shall allow any trustee to resign his trust upon compliance with the provisions of this Article, it shall be the duty of the court to proceed to appoint some fit and suitable person as the successor of such trustee; and the court shall require the person so appointed to give bond with sufficient surety, approved by the court, in sum double the value of the personal property to come into his hands when bond is executed by a personal surety and in an amount not less than one and one-fourth times the value of all personal property of the decedent when the bond is secured by a suretyship bond executed by a corporate surety company authorized by the Commissioner of Insurance to do business in this State, provided that the clerk of superior court, when the value of the personal property exceeds one hundred thousand dollars (\$100,000), may accept bond in an amount equal to the value of the personal property plus ten percent (10%) thereof, conditioned upon the faithful performance of his duties as such trustee and for the payment to the persons entitled to receive the same of all moneys, assets, or other things of value which may come into his hands; provided, that where by the terms of the creating instrument the trustee who has resigned was not required to give bond and did not give bond and an intent is expressed in the creating instrument that a successor trustee shall serve without bond, or where the clerk, upon due investigation finds that bond is not necessary for the protection of the estate, the clerk, with the approval of the judge, upon the petition of any party in interest, may waive the requirement of a bond for the successor trustee and permit said successor trustee to serve without bond. All bonds executed under the provisions of this Article shall be filed with the clerk. (1911, c. 39, s. 7; C. S., s. 4031; 1951, c. 264; 1965, c. 1177, s. 1; 1977, c. 502, s. 2.)

§ 36A-32. Rights and duties devolve on successor. — Upon the acceptance by the court of the resignation of any trustee, and upon the appointment by the court of his successor in the manner provided by this Article, the successor trustee shall succeed to all the rights, powers, and privileges, and shall be subject to all the duties, liabilities, and responsibilities that were imposed upon the original trustee unless a contrary intent appears from the creating instrument. (1911, c. 39, s. 8; C. S., s. 4032; 1977, c. 502, s. 2.)

§ 36A-33. Appointment of successors to deceased or incapacitated trustees. — Upon the death or incapacity of a trustee, a new trustee may be appointed on application by any beneficiary, or other interested persons, by petition to the clerk of the superior court of the county in which the instrument under which the deceased or incapacitated trustee claimed is registered, making all necessary parties defendants. The clerk shall docket the cause as a special proceeding and issue summons for the defendants, and the procedure shall be the same as in other special proceedings. If any of the defendants be nonresidents, summons may be served by publication; and if any be infants, a guardian ad litem must be appointed. The beneficiaries, creditors, or any other persons interested in the trust estate shall have the right to answer the petition and to offer evidence why the prayer of the petition should not be granted. After hearing the matter, the clerk may appoint the person so named in the petition, or he may appoint some other fit and suitable person or corporation to act as the successor of the deceased or incapacitated trustee; and the clerk shall require the person so appointed to give bond as required in G.S. 36A-31; provided, that where by the terms of the instrument upon which the deceased or incapacitated trustee claimed, said trustee was not required to give bond and did not give bond and an intent is expressed in the creating instrument that a successor trustee shall serve without bond, or where the clerk upon due investigation, finds that bond is not necessary for the protection of the estate, the requirement of a bond for the successor trustee may be waived as provided in G.S. 36A-31. Any party in interest may appeal from the decision of the clerk as provided in G.S. 36A-27 and 36A-28.

Nothing in this section shall be construed to limit the authority of the clerk of superior court to appoint a successor trustee to a deceased or incapacitated trustee upon his own motion. (1953, c. 1255; 1965, c. 1177, s. 2; 1977, c. 502, s. 2.)

§ 36A-34. Testamentary trustee may renounce. — (a) Any person or corporation named as trustee in any will admitted to probate in this State, or any substitute trustee, may at any time prior to qualifying as required by G.S. 36A-107 or taking any action as trustee if such qualification is not required, and whether or not such person or corporation is entitled to so qualify or act, renounce such trusteeship by a writing filed with the clerk of superior court of the county in which the will is admitted to probate. Upon receipt of such renunciation the clerk shall give notice thereof to all persons interested in the trust, including successor or substitute trustees named in the will, which notice shall also comply with the requirements of subsection (e) of this section.

(b) If the will names or identifies a substitute trustee in case of renunciation, the provisions of the will shall be complied with, and the clerk shall enter an appropriate order appointing the substitute trustee in accordance therewith unless the substitute trustee also renounces. A substitute trustee so named shall succeed to the office of trustee upon the date of the order of appointment by the clerk unless the will provides otherwise.

(c) If the will does not name or identify a substitute trustee in case of renunciation, and it appears that a substitute trustee should be appointed, the clerk shall appoint some fit and suitable person or corporation as substitute trustee. If the will does not name or identify a substitute trustee, but contains provisions regarding the selection of a substitute trustee, such provisions shall be complied with unless the clerk determines that such provisions would result in the selection of an unfit or unsuitable trustee. A substitute trustee so appointed shall succeed to the office of trustee upon the date of the order of appointment unless the will provides otherwise.

(d) A substitute trustee shall, upon succeeding to the office of trustee, unless the will provides otherwise, have such powers and duties and be vested with the

title to the property included in the trust, as if the substitute trustee had been originally named in the will.

(e) Each notice required by this section shall be written notice, and shall identify the proceeding and apprise the person to be notified of the nature of the action to be taken. Service of such notice may be in the same manner as is provided for service of notice in civil actions, or by mailing the notice to the person to be notified at his last known address. Service of notice must be completed not less than 10 days prior to the date the hearing is held or the action is taken. Service by mail shall be complete upon deposit of the notice enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office Department.

(f) The clerk of superior court shall file, docket, and index all proceedings pursuant to this section in the same manner as special proceedings, and shall also enter with the will a notation that the trustee has renounced and a reference to the file, or other place where the record may be found. (1967, c. 99; 1977, c. 502, s. 2.)

§ 36A-35. Removal of trustee. — Any beneficiary, cotrustee or other person interested in the trust estate may file a petition in the office of the clerk of superior court of the county having jurisdiction over the administration of the trust for the removal of a trustee or cotrustee who fails to comply with the requirements of this Chapter or a court order, or who is otherwise unsuitable to continue in office. Upon the filing of the petition, the clerk shall docket the cause as a special proceeding, with the petitioner as plaintiff. All known beneficiaries, trustees, or cotrustees not joined as plaintiffs shall be joined as defendants. Upon proper notice and hearing, the clerk may, in the exercise of his discretion, order the removal of the trustee or cotrustee and proceed to appoint a successor. The procedure for notice, hearing, appeals, and the effective date of the order, shall be in accord with that provided for in the case of a resignation of a trustee and the appointment of a successor in G.S. 36A-24 through 36A-32.

Nothing in this section shall be construed to limit the authority of the clerk of superior court to remove a trustee or cotrustee for failure to comply with the requirements of this Chapter or a court order, or who is otherwise unsuitable to continue in office. (1977, c. 502, s. 2.)

§ 36A-36. Appointment of special trustee. — If it appears necessary to the protection of the trust estate, the clerk of superior court having jurisdiction of the administration of the trust may appoint a special trustee until a successor trustee can be appointed or, where a trust has terminated, to distribute the assets. A special trustee may be appointed without notice and may be removed whenever the court so orders. The special trustee shall give such bond, if any, as the court may require and shall have the powers conferred by the order of appointment. (1977, c. 502, s. 2.)

§ 36A-37. Consolidation, merger, reorganization, reincorporation, or transfer of assets and liabilities by a corporate trustee. — Whenever any corporate trustee doing business in this State shall consolidate or merge with or shall sell to and transfer its assets and liabilities to any other corporation, or where such corporate trustee is in any manner reorganized or reincorporated all existing rights, powers, duties, and liabilities of such consolidating, merging, transferring, reorganizing or reincorporating corporation as trustee shall, upon the effective date of such consolidation, merger, reorganization or reincorporation, or sale and transfer, vest in and devolve upon the transferee corporation or the consolidated, merged, reorganized or reincorporated corporation in the manner prescribed in G.S. 53-17. (1977, c. 502, s. 2.)

§ 36A-38. **Powers of successor trustee.** — Unless otherwise provided in the creating instrument, all powers conferred upon the trustee by such instrument attached to the office, as provided in G.S. 36A-72, and are exercisable by the trustee from time to time holding the office. (1977, c. 502, s. 2.)

§ 36A-39. **Powers of cotrustees.** — Unless otherwise provided in the creating instrument, if one of several trustees dies, resigns, or is removed, the remaining trustees shall have all rights, title, and powers of all the original trustees. If the creating instrument manifests an intent that a successor trustee be appointed to fill a vacancy, the remaining trustees may exercise the powers of all the original trustees until such time as a successor is appointed. (1977, c. 502, s. 2.)

§ 36A-40. **Vesting of title.** — A special or successor trustee is vested with the title of the original trustee. A trustee who resigns, is removed, or is otherwise severed from his office shall execute such documents transferring title to trust property as may be appropriate to facilitate administration of the trust and upon his failure to do so, the clerk may order him to execute such documents, or may himself transfer title. (1977, c. 502, s. 2.)

§ 36A-41. **Applicability.** — The provisions of this Article shall not apply to proceedings begun before January 1, 1978. (1977, c. 502, s. 2.)

§§ 36A-42 to 36A-46: Reserved for future codification purposes.

ARTICLE 4.

Charitable Trusts.

§ 36A-47. **Trustees to file accounts; exceptions.** — When real or personal property has been granted by deed, will, or otherwise, for such charitable purposes as are allowed by law, it shall be the duty of those to whom are confided the management of the property and the execution of the trust, to file in writing annually a full and particular account thereof with the clerk of the superior court of the county where the charity is to take effect.

This section shall not apply to real or person property granted by deed, will or otherwise in trust or any other manner for the use and benefit of churches, hospitals, educational institutions and organizations or other incorporated or unincorporated religious and charitable institutions; provided, however, all trusts for the benefit of churches, hospitals and charitable institutions may be required to file such account upon the request of the clerk of the superior court or the verified written request of an interested citizen when in the opinion of the clerk of the superior court such request is bona fide and the interest of the public would be promoted by the filing of such report. (43 Eliz., c. 4; 1832, c. 14, s. 1; R. C., c. 18, s. 1; Code, s. 2342; Rev., s. 3922; C.S., s. 4033; 1951, c. 1008, s. 1; 1977, c. 502, s. 2.)

§ 36A-48. **Action for account; court to enforce trust.** — If G.S. 36A-47 be not complied with, or there is reason to believe that the property has been mismanaged through negligence or fraud, it shall be the duty of the clerk of the superior court in his discretion to give notice thereof to the Attorney General or district attorney who represents the State in the superior court for that county; and it shall be the duty of the Attorney General or such district attorney upon notice from the clerk or upon his own motion to bring an action in the name of the State against the grantees, executors, or trustees of the charitable fund,

calling on them to render a full and minute account of their proceedings in relation to the administration of the fund and the execution of the trust. The Attorney General or district attorney may also, at the suggestion of two reputable citizens, commence an action as aforesaid, and, in either case, the court may make such order and decree as shall seem best calculated to enforce the performance of the trust.

In furtherance of his responsibilities in the area of charitable trusts the Attorney General may request the result or report of any investigation or audit conducted by any local, State or federal agency. (1832, c. 14, ss. 2, 3; R. C., c. 18, ss. 2, 3; Code, ss. 2343, 2344; Rev., s. 3923; C. S., s. 4034; 1973, c. 47, s. 2; 1977, c. 502, s. 2.)

§ 36A-49. Not void for indefiniteness; title in trustee; vacancies. — No gift, grant, bequest or devise, whether in trust or otherwise, to religious, educational, charitable or benevolent uses or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, shall be invalid by reason of any indefiniteness or uncertainty of the objects or beneficiaries of such trust, or because said instrument confers upon the trustee or trustees discretionary powers in the selection and designation of the objects or beneficiaries of such trust or in carrying out the purpose thereof, or by reason of the same in contravening any statute or rule against perpetuities. If a trustee or trustees are named in the instrument creating such a gift, grant, bequest or devise, the legal title to the property given, granted, bequeathed or devised for such purpose shall vest in such trustee or trustees and its or their successor or successors duly appointed in accordance with the terms of such instrument. If no trustee or trustees be named in said instrument, or if a vacancy or vacancies shall occur in the trusteeship, and no method is provided in such instrument for filling such vacancy or vacancies, then the clerk of superior court of the proper county shall appoint a trustee or trustees, pursuant to G.S. 36A-23, to execute said trust in accordance with the true intent and meaning of the instrument creating the same. Such trustee or trustees when so appointed shall be vested with all the power and authority, discretionary or otherwise, conferred by such instrument. (1925, c. 264, s. 1; 1977, c. 502, s. 2.)

§ 36A-50. Trusts created in other states valid. — Every such religious, educational or charitable trust created by any person domiciled in another state, which shall be valid under the laws of the state of the domicile of such creator or donor, shall be deemed and held in all respects valid under the laws of this State, even though one or more of the trustees named in the instrument creating said trust shall be domiciled in another state or one or more of the beneficiaries named in said trust shall reside or be located in a foreign state. (1925, c. 264, s. 2; 1977, c. 502, s. 2.)

§ 36A-51. Application of § 36A-50. — G.S. 36A-50 shall apply to all trusts heretofore or hereafter created in which one or more of the beneficiaries or objects of such trust shall reside or be located in this State. (1925, c. 264, s. 3; 1977, c. 502, s. 2.)

§ 36A-52. Gifts, etc., for religious, educational, charitable or benevolent uses or purposes. — (a) Declaration of Policy. — It is hereby declared to be the policy of the State of North Carolina that gifts, transfers, grants, bequests, and devises for religious, educational, charitable, or benevolent uses or purposes, or for some or all of such uses or purposes, are and shall be valid, notwithstanding the fact that any such gift, transfer, grant, bequest, or devise shall be in general terms, and this section shall be construed liberally to affect the policy herein declared.

(b) No Gift, Transfer, Etc., Invalid for Indefiniteness. — No gift, transfer, grant, bequest, or devise of property or income or both, in trust or otherwise, for religious, educational, charitable, or benevolent purposes, or for some or all of such purposes, is or shall be void or invalid because such gift, transfer, grant, bequest, or devise is in general terms, or is uncertain as to the specific purposes, objects, or beneficiaries thereof, or because the trustee, donee, transferee, grantee, legatee, or devisee, or some or all of them, is given no specific instructions, powers, or duties as to the manner or means of affecting such purposes. When any such gift, transfer, grant, bequest, or devise has been or shall be made in general terms the trustee, donee, transferee, grantee, legatee, or devisee, or other person, corporation, association, or entity charged with carrying such purposes into effect, shall have the right and power: To prescribe or to select from time to time one or more specific objects or purposes for which any trust or any property or income shall be held and administered; to select or to create the machinery for the accomplishment of such objects and purposes, selected as hereinabove provided, or as provided by the donor, transferor, grantor, or testator, including, by way of illustration but not of limitation, the accomplishment of such objects and purposes by the acts of such trustee or trustees, donee, transferee, grantee, legatee, or devisee, or their agents or servants, or by the creation of corporations or associations or other legal entities for such purpose, or by making grants to corporations, associations, or other organizations then existing, or to be organized, through and by which such purposes can or may be accomplished, or by some or all of the said means of accomplishment, or any other means of accomplishment not prohibited by law.

(c) Enforcement. — Any gift, transfer, grant, bequest, or devise for religious, educational, charitable, or benevolent uses or purposes which is or shall be valid under the provisions of this section may be enforced in a suit for a writ of mandamus by the Attorney General of the State of North Carolina in any court of the State having original jurisdiction in equity, and such court shall have the power to enter judgment requiring the trustee, donee, transferee, grantee, legatee, or devisee, as the case may be, to make such selection as may be required of the purposes for which the property or income, or both, shall be applied, and the means, method, and manner of applying the same. The remedy for enforcement as herein provided is in addition to any other means of enforcement now in existence or which may be hereafter provided for by act of the General Assembly.

(d) Construction with Other Acts. — This section is in addition to any prior act or acts of the General Assembly adopted for the purpose of preserving and sustaining any gift, transfer, grant, bequest, or devise for religious, educational, charitable, or benevolent uses or purposes, and any such prior act or acts or any part thereof which will aid the provisions of this section in sustaining and preserving any such gift, transfer, grant, bequest, or devise shall be read and construed in conjunction herewith. (1947, c. 630, ss. 1-4; 1977, c. 502, s. 2.)

§ 36A-53. Charitable Trusts Administration Act. — (a) If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment or if a devise or bequest for charity, at the time it was intended to become effective is illegal, or impossible or impracticable of fulfillment, and if the settlor, or testator, manifested a general intention to devote the property to charity, any judge of the superior court may, on application of any trustee, executor, administrator or any interested party, or the Attorney General, order an administration of the trust, devise or bequest as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator. In every such proceeding, the Attorney General, as representative of the public interest, shall be notified and given an opportunity to be heard. This section shall not be applicable if the settlor or testator has provided, either directly or indirectly, for an alternative plan in

the event the charitable trust, devise or bequest is or becomes illegal, impossible or impracticable of fulfillment. However, if the alternative plan is also a charitable trust or devise or bequest for charity and such trust, devise or bequest for charity fails, the intention shown in the original plan shall prevail in the application of this section.

(b) In the case of a will executed before December 31, 1977, or a trust created before such date, if a federal estate tax deduction is not allowable at the time of a decedent's death because of the failure of an interest in property which passes from the decedent to a person, or for a use, described in section 2055(a) of the Internal Revenue Code of 1954, to meet the requirements of subsection 2055(e)(2)(A) of the Internal Revenue Code of 1954, then in order that such deduction shall nevertheless be allowable under section 2055(e)(3) of the Internal Revenue Code of 1954, any judge of the superior court may, on application of any trustee, executor, administrator or any interested party and either (i) with the written consent of the charitable remaindermen, the beneficiaries of the intervening interest not under any legal disability, and duly appointed guardians or guardians ad litem acting on behalf of any beneficiaries under legal disability, or (ii) upon a finding that the interest of such beneficiaries is substantially preserved, order an amendment to the trust so that the remainder interest is in a trust which is a charitable remainder annuity trust, a charitable remainder unitrust (as those terms are described in section 664 of the Internal Revenue Code of 1954) or a pooled-income fund (as that term is described in section 642(c)(5) of the Internal Revenue Code of 1954). In every such proceeding, the Attorney General, as representative of the public interest, shall be notified, and given an opportunity to be heard.

(c) The words "charity" and "charitable," as used in this section shall include, but shall not be limited to, any eleemosynary, religious, benevolent, educational, scientific, or literary purpose.

(d) The words "impracticable of fulfillment," as used in this section shall include, but shall not be limited to, the failure of any trust for charity, testamentary or inter vivos, (including, without limitation, trusts described in section 509 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws and charitable remainder trusts described in section 664 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws) to include, if required to do so by section 508(e) or section 4947(a) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws, the provisions relating to governing instruments set forth in section 508(e) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws. (1967, c. 119; 1971, c. 1136, s. 2; 1975, c. 552; 1977, c. 502, s. 2.)

§ 36A-54. Charitable trusts tax exempt status. — (a) Notwithstanding any provisions in the laws of this State or in the governing instrument to the contrary unless otherwise decreed by a court of competent jurisdiction except as provided in subsection (b), the governing instrument of each trust which is a private foundation described in section 509 of the Internal Revenue Code of 1954 (including each nonexempt charitable trust described in section 4947(a)(1) of the Code which is treated as a private foundation) and the governing instrument of each nonexempt split-interest trust described in section 4947(a)(2) of the Code (but only to the extent that section 508(e) of the Code is applicable to such nonexempt split-interest trust under section 4947(a)(2) of the Code) shall be deemed to contain the following provisions: "The trust shall make distributions at such time and in such manner as not to subject it to tax under section 4942 of the Code; the trust shall not engage in any act of self-dealing which would subject it to tax under section 4941 of the Code; the trust shall not retain any

excess business holdings which would subject it to tax under section 4943 of the Code; the trust shall not make any investments which would subject it to tax under section 4944 of the Code; and the trust shall not make any taxable expenditures which would subject it to tax under section 4945 of the Code." With respect to any such trust created prior to January 1, 1970, this subsection (a) shall apply only for its taxable years beginning on or after January 1, 1972.

(b) The trustee of any trust described in subsection (a) may, (i) without judicial proceedings, amend such trust to expressly exclude the application of subsection (a) by executing a written amendment to the trust and filing a duplicate original of such amendment with the Attorney General of the State of North Carolina, and upon filing of such amendment, subsection (a) shall not apply to such trust, or (ii) institute an action in the superior court of North Carolina seeking reformation of the trust instrument pursuant to the authority set forth in G.S. 36A-53.

(c) All references in this section to the "code" are to the Internal Revenue Code of 1954, and all references in this section to specific sections of the Code include corresponding provisions of any subsequent federal tax laws. (1971, c. 1136, s. 4; 1977, c. 502, s. 2.)

§§ 36A-55 to 36A-59: Reserved for future codification purposes.

ARTICLE 5.

Uniform Trusts Act.

§ 36A-60. **Definitions.** — As used in this Article unless the context or subject matter otherwise requires:

- (1) "Affiliate" means any person directly or indirectly controlling or controlled by another person, as herein defined, or any person under direct or indirect common control with another person. It includes any person with whom a trustee has an express or implied agreement regarding the purchase of trust investments by each from the other, directly or indirectly, except a broker or stock exchange.
- (2) "Person" means an individual, a corporation, a partnership, an association, a joint stock company, a business trust, an unincorporated organization, or two or more persons having a joint or common interest.
- (3) "Relative" means a spouse, ancestor, descendant, brother or sister.
- (4) "Trust" means an express trust only.
- (5) "Trustee" includes trustees, a corporate as well as a natural person and a successor or substitute trustee. (1939, c. 197, s. 1; 1977, c. 502, s. 2.)

§ 36A-61. **Bank account to pay special debts.** — (a) Whenever a bank account shall, by entries made on the books of the depositor and the bank at the time of the deposit, be created exclusively for the purpose of paying dividends, interest or interest coupons, salaries, wages, or pensions or other benefits to employees, and the depositor at the time of opening such account does not expressly otherwise declare, the depositor shall be deemed a trustee of such account for the creditors to be paid therefrom, subject to such power or revocation as the depositor may have reserved by agreement with the bank.

(b) If any beneficiary for whom such a trust is created does not present his claim to the bank for payment within one year after it is due, the depositor who created such trust may revoke it as to such creditor. (1939, c. 197, s. 2; 1977, c. 502, s. 2.)

§ 36A-62. Loan of trust funds. — Except as hereinafter provided in this Article, no corporate trustee shall lend trust funds to itself or an affiliate, or other business associate, or to any director, officer, or employee of itself or of an affiliate, nor shall any noncorporate trustee lend trust funds to himself, or to his relative, employer, employee, partner, affiliate, or other business associate. (1939, c. 197, s. 3; 1977, c. 502, s. 2.)

§ 36A-63. Funds held by a bank awaiting investment or distribution. — (a) Funds held in a fiduciary capacity by a bank awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account.

(b) Funds held in trust by a bank, awaiting investment or distribution may, unless prohibited by the instrument creating the trust, be deposited in the commercial or savings or other department of the bank, provided that it shall first set aside under control of the trust department as collateral security, such securities as may be found listed in G.S. 142-34 as being eligible for the investment of the sinking funds of the State of North Carolina equal in market value of such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five percent (125%) of the funds so deposited.

The securities so deposited or securities substituted therefor as collateral in the trust department by the commercial or savings or other department (as well as the deposit of cash in the commercial or savings or other department by the trust department) shall be held pursuant to the provisions of G.S. 53-43(6).

If such funds are deposited in a bank insured under the provisions of the Federal Deposit Insurance Corporation, the above collateral security will be required only for that portion of uninvested balances of each trust which are not fully insured under the provisions of that corporation. (1939, c. 197, s. 4; 1963, c. 243, ss. 1, 2; 1977, c. 502, s. 2.)

§ 36A-64. Loan to trust. — A trustee may make a loan to a trust account and may take as security therefor assets of the trust account provided that such transaction is fair. (1977, c. 502, s. 2.)

§ 36A-65. Trustee loaning from one trust to another trust. — A trustee may make a loan to a trust account from the funds belonging to another trust account, when the instrument creating the account from which the loan is made (i) authorizes the making of such loan and (ii) designates the trust account to which the loan is made, provided that the transaction is fair to both accounts. (1977, c. 502, s. 2.)

§ 36A-66. Trustee buying from or selling to self. — No trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate, or from or to a relative, employer, partner, or other business associate. (1939, c. 197, s. 5; 1977, c. 502, s. 2.)

§ 36A-67. Corporate trustee buying its own stock. — No corporate trustee shall purchase for a trust shares of its own stock, or its bonds or other securities, or the stocks, bonds or other securities of an affiliate. (1939, c. 197, s. 7; 1977, c. 502, s. 2.)

§ 36A-68. Trustee selling assets from one trust to another trust. — A trustee may sell assets held by it as fiduciary in one trust account to itself as trustee in another trust account if the transaction is fair to both accounts and

if the transaction is expressly authorized by the instrument or instruments creating the accounts. (1939, c. 197, s. 6; 1945, c. 127, s. 3; c. 743, s. 3; 1977, c. 502, s. 2.)

§ 36A-69. Voting stock. — A trustee owning shares of corporate stock or other securities may vote it in person or by general or limited proxy, but shall be liable for any loss resulting to the beneficiaries from a failure to use reasonable care in deciding how to vote the stock, in voting it or in not voting it. (1939, c. 197, s. 8; 1977, c. 502, s. 2.)

§ 36A-70. Trustees holding stock or other securities in name of nominee. — A trustee may hold shares of stock or other securities in the name of a nominee, without mention of the trust relationship in the instrument representing stock or other securities or in registration records of the issuer thereof; provided, that

- (1) The records and all reports or accounts rendered by the trustee clearly show the ownership of the stock or other securities by the trustee and the facts regarding its holdings, and
- (2) The nominee shall not have possession of the stock or other securities or access thereto except under the immediate supervision of the trustee or when such securities are deposited by the fiduciary in a clearing corporation as defined in G.S. 25-8-102(3).

The trustee shall be personally liable for any acts or omissions of such nominee in connection with such stock or other securities so held, as if such had done such acts or been guilty of such omissions. (1939, c. 197, s. 9; 1945, c. 292; 1973, c. 144; c. 497, s. 1; 1975, c. 121; 1977, c. 502, s. 2.)

§ 36A-71. Bank and trust company assets kept separate, records of securities. — Every trust company shall keep its trust assets separate and distinct from assets owned by the bank. The books and accounts of the trust company shall at all times show the ownership of all moneys, funds, investments, and property held by the company. Stock or other securities may be kept by the company in either of the following ways:

- (1) All certificates representing the securities of an account may be held separate from those of all other accounts; or
- (2) Certificates representing the securities of the same class of the same issuer held for particular accounts may be held in bulk without certification as to ownership attached and, to the extent feasible, certificates of small denomination may be merged into one or more certificates of larger denomination, provided that the trust company, when operating under the method of safekeeping security certificates described in this subdivision shall be subject to such rules and regulations as, in the case of State-chartered institutions, the State Banking Commission and, in the case of national banking associations, the Comptroller of the Currency, may from time to time issue and, upon demand by any person to whom it has a duty to account, it shall certify in writing the securities held by it for an account. (1973, c. 497, s. 2; 1977, c. 502, s. 2.)

§ 36A-72. Powers attached to office. — Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, all powers of a trustee shall be attached to the office and shall not be personal. (1939, c. 197, s. 10; 1977, c. 502, s. 2.)

§ 36A-73. Powers exercisable by one or more trustees. — (a) If there are more than two trustees and the trust instrument expressly makes provision for

the execution of any of the powers of trustees by all of them or by any one or more of them, the provisions of the trust instrument govern.

(b) If there is no governing provision in the trust instrument, cotrustees may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county which is the principal place of administration of the trust, provide that any one or more of the following powers of trustees may be exercised by any designated one or more of them:

- (1) Open bank accounts and draw checks thereon;
- (2) Subject to the provisions of G.S. 105-24, enter any safe-deposit box of the deceased or any safe-deposit box rented by the trust;
- (3) Employ attorneys and accountants;
- (4) List property for taxes and prepare and file State, municipal and county tax returns;
- (5) Collect claims and debts due the trust and give receipts therefor;
- (6) Pay claims against and debts of the trust;
- (7) Compromise claims in favor of or against the trust;
- (8) Have custody of property of the trust.

For the purposes of this subsection, when there are cotrustees, the principal place of administration of the trust is (i) the usual place of business of the corporate trustee if there is but one corporate cotrustee, or (ii) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate trustee, and (iii) the usual place of business or residence of any of the cotrustees as agreed upon by them.

(c) The voting of corporate shares of stock by cotrustees is governed by G.S. 55-69(f).

(d) Subject to the provisions of subsections (a), (b) and (c) of this section, all other acts and duties must be performed by both of the trustees if there are two, or by a majority of them if there are more than two.

No trustee who has not joined in exercising a power shall be liable to the beneficiaries or to others for the consequences of such exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of his cotrustees, if he expressed his dissent in writing to any of his cotrustees at or before the time of such joinder.

(e) No trustee shall be relieved of liability on his bond or otherwise by entering into any agreement under this section. (1939, c. 197, s. 11; 1977, c. 502, s. 2.)

§ 36A-74. Contracts of trustee. — (a) Whenever a trustee shall make a contract which is within his powers as trustee, or a predecessor trustee shall have made such a contract, and a cause of action shall arise thereon, the party in whose favor the cause of action has accrued may sue the trustee in his representative capacity, and any judgment rendered, in such action in favor of the plaintiff shall be collectible (by execution) out of the trust property. In such an action the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

(b) No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within 30 days after the beginning of such action, or within such other time as the court may fix, and more than 30 days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest, or in the case of a charitable trust the Attorney General and any corporation which is a beneficiary or agency in the performance of such charitable trust, of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to the parties to be notified at their last known addresses. The trustee shall furnish the plaintiff a list of the parties to be notified, and their addresses, within 10 days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any

beneficiary, or in the case of charitable trusts the Attorney General and any corporation which is a beneficiary or agency in the performance of such charitable trust, may intervene in such action and contest the right of the plaintiff to recover.

(c) The plaintiff may also hold the trustee who made the contract personally liable on such contract, if the contract does not exclude such personal liability. The addition of the word "trustee" or the words "as trustee" after the signature of a trustee to a contract shall be deemed prima facie evidence of an intent to exclude the trustee from personal liability. (1939, c. 197, s. 12; 1977, c. 502, s. 2.)

§ 36A-75. Exoneration or reimbursement for torts. — (a) A trustee who has incurred personal liability for a tort committed in the administration of the trust is entitled to exoneration therefor from the trust property if he has not discharged the claim, or to be reimbursed therefor out of trust funds if he has paid the claim, if

- (1) The tort was a common incident of the kind of business activity in which the trustee was properly engaged for the trust, or,
- (2) Although the tort was not a common incident of such activity if neither the trustee nor any officer or employee of the trustee was guilty of personal fault in incurring the liability.

(b) If a trustee commits a tort which increases the value of the trust property, he shall be entitled to exoneration or reimbursement with respect thereto to the extent of such increase in value, even though he would not otherwise be entitled to exoneration or reimbursement.

(c) Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees. (1939, c. 197, s. 13; 1977, c. 502, s. 2.)

§ 36A-76. Tort liability of trust estate. — (a) Where a trustee or his predecessor has incurred personal liability for a tort committed in the course of his administration, the trustee in his representative capacity may be sued and collection had from the trust property, if the court shall determine in such action that

- (1) The tort was a common incident of the kind of business activity in which the trustee or his predecessor was properly engaged for the trust; or
- (2) That, although the tort was not a common incident of such activity, neither the trustee nor his predecessor, nor any officer or employee of the trustee or his predecessor, was guilty of personal fault in incurring the liability; or
- (3) That, although the tort did not fall within subdivision (1) or (2) above, it increased the value of the trust property.

If the tort is within subdivision (1) or (2) above, collection may be had of the full amount of damage proved; and if the tort is within subdivision (3) above, collection may be had only to the extent of the increase in the value of the trust property.

(b) In an action against the trustee in his representative capacity under this section the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

(c) No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within 30 days after the beginning of the action, or within such other period as the court may fix and more than 30 days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustees who then had a present interest of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to such beneficiaries at their last known addresses. The trustees shall furnish the plaintiff a list of such beneficiaries and their addresses, within 10 days after

written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary may intervene in such action and contest the right of the plaintiff to recover.

(d) The trustee may also be held personally liable for any tort committed by him, or by his agents or employees in the course of their employments, subject to the rights of exoneration or reimbursement provided in G.S. 36A-75.

(e) Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees. (1939, c. 197, s. 14; 1977, c. 502, s. 2.)

§ 36A-77. Withdrawals from mingled trust funds. — Where a person who is a trustee of two or more trusts has mingled the funds of two or more trusts in the same aggregate of cash, or in the same bank or brokerage account or other investment, and a withdrawal is made therefrom by the trustee for his own benefit, or for the benefit of a third person not a beneficiary or creditor of one or more of the trusts, or for an unknown purpose, such a withdrawal shall be charged first to the amount of cash, credit, or other property of the trustee in the mingled fund, if any, and after the exhaustion of the trustee's cash, credit, or other property, then to the several trusts in proportion to their several interests in the cash, credit, or other property at the time of the withdrawal. (1939, c. 197, s. 15; 1977, c. 502, s. 2.)

§ 36A-78. Power of settlor. — The settlor of any trust affected by this Article may, by provision in the instrument creating the trust if the trust was created by a writing, or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally, or by an amendment of the trust if the settlor reserved the power to amend the trust, relieve liabilities which would otherwise be imposed upon him by this Article; or alter or deny to his trustee any or all of the privileges and powers conferred upon the trustee by this Article; or add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this Article; but no act of the settlor shall relieve a trustee from the duties, restrictions, and liabilities imposed upon him by G.S. 36A-62, 36A-63 and G.S. 36A-66. (1939, c. 197, s. 17; 1977, c. 502, s. 2.)

§ 36A-79. Power of beneficiary. — Any beneficiary of a trust affected by this Article may, if of full legal capacity and acting upon full information, by written instrument delivered to the trustee relieve the trustee as to such beneficiary from any or all of the duties, restrictions, and liabilities which would otherwise be imposed on the trustee by this Article, except as to the duties, restrictions, and liabilities imposed by G.S. 36A-62, 36A-63 and G.S. 36A-66. Any such beneficiary may release the trustee from liability to such beneficiary for past violations of any of the provisions of this Article. (1939, c. 197, s. 18; 1977, c. 502, s. 2.)

§ 36A-80. Power of the court. — A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries relieve a trustee from any or all of the duties and restrictions which would otherwise be placed upon him by this Article, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for violations of the provisions of this Article. (1939, c. 197, s. 19; 1977, c. 502, s. 2.)

§ 36A-81. Liabilities for violations of Article. — If a trustee violated any of the provisions of this Article, he may be removed and denied compensation in whole or in part; and any beneficiary, cotrustee, or successor trustee may treat the violation as a breach of trust. (1939, c. 197, s. 20; 1977, c. 502, s. 2.)

§ 36A-82. **Uniformity of interpretation.** — This Article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law to those states which enact it. (1939, c. 197, s. 21; 1977, c. 502, s. 2.)

§ 36A-83. **Short title.** — This Article may be cited as the Uniform Trusts Act. (1939, c. 197, s. 22; 1977, c. 502, s. 2.)

§ 36A-84. **Time of taking effect.** — This Article shall take effect and shall apply in the construction of and operation under

- (1) All agreements containing trust provisions entered into on or after January 1, 1978;
- (2) All wills made by testators who shall die on or after January 1, 1978, and
- (3) All other wills and trust agreements and trust relations insofar as such terms do not impair the obligation of contract or deprive persons of property without due process of law under the Constitution of the State of North Carolina or of the United States of America. (1939, c. 197, s. 25; 1941, c. 269; 1977, c. 502, s. 2.)

§§ 36A-85 to 36A-89: Reserved for future codification purposes.

ARTICLE 6.

Uniform Common Trust Fund Act.

§ 36A-90. **Establishment of common trust funds.** — (a) Any bank or trust company duly authorized to act as a fiduciary in this State may establish and maintain one or more common trust funds for the collective investment of funds held in a fiduciary capacity by such bank or trust company hereafter referred to as the "maintaining bank". The maintaining bank may include for the purposes of collective investment in such common trust fund or funds established and maintained by it, funds held in a fiduciary capacity by any other bank or trust company duly authorized to act as a fiduciary, wherever located, which other bank or trust company is hereinafter referred to as the "participating bank".

Provided, however, that the relationship between the maintaining bank and the participating bank is (i) the maintaining bank owns, controls or is affiliated with the participating bank or (ii) a bank holding company owns, controls or is affiliated with both the maintaining bank and the participating bank.

(b) For the purposes of this section, a bank or trust company shall be considered to be owned, controlled or affiliated if twenty-five percent (25%) or more of any class of its voting stock is owned by a bank or bank holding company or if twenty-five percent (25%) or more of any class of its voting stock is owned by one person or no more than 10 persons who are the same person or persons who own twenty-five percent (25%) or more of any class of the voting stock of the maintaining bank.

(c) Such common trust funds may include a fund composed solely of funds held under an agency agreement in which the bank or trust company assumes investment discretion and assumes fiduciary responsibility.

(d) Such bank or trust company may invest the funds held by it in any fiduciary capacity in one or more common trust funds, provided (i) such investment is not prohibited by the instrument, judgment, decree or order creating such fiduciary relationship or amendment thereof; (ii) in the case of co-fiduciaries the written consent of the co-fiduciary is obtained by the bank or trust company; and (iii) that the bank has no interest in the assets of the common trust fund other than as a fiduciary. (1939, c. 200, s. 1; 1973, c. 1276; 1977, c. 502, s. 2.)

§ 36A-91. Court accountings. — Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust fund or funds shall not be required to render a court accounting with regard to such fund or funds; but it may, by application to the superior court, secure approval of such an accounting on such conditions as the court may establish. This section shall not affect the duties of the trustees of the participating trusts under the common trust fund to render accounts of their several trusts. (1939, c. 200, s. 2; 1977, c. 502, s. 2.)

§ 36A-92. Supervision by State Banking Commission. — All common trust funds established under the provisions of this Article shall be subject to the rules and regulations of the State Banking Commission. (1939, c. 200, s. 3; 1977, c. 502, s. 2.)

§ 36A-93. Uniformity of interpretation. — This Article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1939, c. 200, s. 4; 1977, c. 502, s. 2.)

§ 36A-94. Short title. — This Article may be cited as the Uniform Common Trust Fund Act. (1939, c. 200, s. 5; 1977, c. 502, s. 2.)

§§ 36A-95 to 36A-99: Reserved for future codification purposes.

ARTICLE 7.

Trusts of Death Benefits.

§ 36A-100. Interest of trustee as beneficiary of life insurance or other death benefit sufficient to support inter vivos or testamentary trust. — (a) The interest of a trustee as the beneficiary of a life insurance policy is a sufficient property interest or res to support the creation of an inter vivos or testamentary trust notwithstanding the fact that the insured or any other person or persons reserves or has the right to exercise any one or more of the following rights or powers:

- (1) To change the beneficiary,
- (2) To surrender the policy and receive the cash surrender value,
- (3) To borrow from the insurance company issuing the said policy or elsewhere using the said policy as collateral security,
- (4) To assign the said policy, or
- (5) To exercise any other right in connection with the said policy commonly known as an incident of ownership thereof.

The term "life insurance policy" includes but is not limited to life, annuity, and endowment contracts, or any variation or combination thereof, and any agreement entered into by an insurance company in connection therewith.

(b) The interest of a trustee as the beneficiary of a death benefit under an employee benefit plan or group life insurance policy is a sufficient property interest or res to support the creation of an inter vivos or testamentary trust notwithstanding the fact that the insured, employer, insurer or administrator of the plan reserves or has the right to revoke or otherwise defeat the designation or assignment or to exercise any one or more of the rights or powers incident to employee benefit plans or group life insurance policies.

The term "employee benefit plan" includes but is not limited to pension, retirement, death benefit, deferred compensation, employment, agency, retirement annuity, stock bonus, profit-sharing or employees' savings contracts,

plans, systems or trusts; and trusts, securities or accounts established or held pursuant to the federal Self-Employed Individuals Tax Retirement Act of 1962, the federal Employee Retirement Income Security Act of 1974, or similar legislation. The term "group life insurance policy" includes but is not limited to group life, industrial life, accident, and health insurance policies having death benefits.

(c) A person having the right to designate the beneficiary under a life insurance policy, employee benefit plan or group life insurance policy described in subsection (a) or (b) of this section may designate as such beneficiary a trustee named or to be named in his will whether or not the will is in existence at the time of the designation. The proceeds received by the trustee shall be held and disposed of as part of the trust estate under the terms of the will as they exist at the death of the testator. If no qualified trustee makes claim to the proceeds within six months after the death of the decedent or if within that period it is established that no trustee can qualify to receive the proceeds, payments shall be made to the personal representative of the estate of the person making the designation unless it is otherwise provided by an alternative designation or by the policy or plan. The proceeds received by the trustee shall not be subject to claims against the estate of the decedent or to inheritance taxes to any greater extent than if the proceeds were payable directly to the beneficiary or beneficiaries named in the trust. The proceeds may be commingled with any other assets which may properly become part of such trust, but the proceeds shall not become part of the decedent's estate for purposes of trust administration unless the will of the decedent expressly so provides.

(d) Pursuant to the preceding subsection (c) of this section, a decedent may designate a trustee named or to be named in his will as beneficiary of an annuity or other payment described in section 2039(c) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws. The decedent's will may prohibit the use of such an annuity or other payment for the benefit of the decedent's estate. (1957, c. 1444, s. 1; 1977, c. 502, s. 2.)

§ 36A-101. Applicability and construction of Article. — G.S. 36A-100 applies to any beneficiary designation made before or after January 1, 1978, by a person who dies on or after that date. It does not create any implication of invalidity or ineffectiveness as to any beneficiary designation made by a person who dies before January 1, 1978. If any part of the Article is held invalid, such invalidity shall not affect the validity of the remaining provisions of this Article. (1957, c. 1444, s. 2; 1977, c. 502, s. 2.)

§§ 36A-102 to 36A-106: Reserved for future codification purposes.

ARTICLE 8.

Testamentary Trustees.

§ 36A-107. Trustees in wills to qualify and file inventories and accounts. — Trustees appointed in any will admitted to probate in this State, into whose hands assets come under the provisions of the will, shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of the county where the will is probated inventories of the assets which come into his hands and annual and final accounts thereof, such as are required of executors and administrators. The power of the clerk to enforce the filing and his duties in respect to auditing and approving shall be the same as in such cases. This section shall not apply to the extent that any will makes a different provision in regard to the requirements for filing inventories and accounts. (1907, c. 804; C.S. s. 51; 1961, c. 519; 1965, c. 1176, s. 1; 1973, c. 1329, s. 4; 1977, c. 502, s. 2.)

Chapter 39.

Conveyances.

Article 2.

Conveyances by Husband and Wife.

- Sec.
- 39-10. [Repealed.]
- 39-12. Power of attorney of married person.
- 39-13.2. Married persons under 18 made competent as to certain transactions; certain transactions validated.
- 39-13.3. Conveyances between husband and wife.
- 39-13.4. Conveyances by husband or wife under deed of separation.
- 39-13.5. Creation of tenancy by entirety in partition of real property.

Article 7.

Uniform Vendor and Purchaser Risk Act.

- Sec.
- 39-40 to 39-43. [Reserved.]

Article 8.

Business Trusts.

- 39-44. Definition.
- 39-45. Authority to acquire and hold real estate.
- 39-46. Title vested; conveyance; probate.
- 39-47. Prior deeds validated.

ARTICLE 1.

Construction and Sufficiency.

§ 39-1.1. In construing conveyances court shall give effect to intent of the parties.

Legislative Intent. — By the passage of this section it would appear that it is the legislative will that the intention of the grantor and not the technical words of the common law shall govern. *Whetsell v. Jernigan*, 291 N.C. 128, 229 S.E.2d 183 (1976).

This section does not apply to conveyances executed prior to January 1, 1968. *Whetsell v. Jernigan*, 291 N.C. 128, 229 S.E.2d 183 (1976).

Construction of Conveyances Executed Prior to January 1, 1968. — Since the General

Assembly provided that this section should apply to all conveyances executed after January 1, 1968, the court should not change the proposition voiced in *Artis v. Artis*, 228 N.C. 754, 47 S.E.2d 228 (1948) and *Oxendine v. Lewis*, 252 N.C. 669, 114 S.E.2d 706 (1960) and other earlier cases in interpreting conveyances executed prior to that date. *Waters v. North Carolina Phosphate Corp.*, 32 N.C. App. 305, 232 S.E.2d 275 (1977).

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-10: Repealed by Session Laws 1977, c. 375, s. 16, effective January 1, 1978.

Editor's Note. —

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 39-12. Power of attorney of married person. — Every competent married person of lawful age is authorized to execute, without the joinder of his or her spouse, instruments creating powers of attorney affecting the real and personal property of such married person naming either third parties or, subject to the provisions of G.S. 52-10 or 52-10.1, his or her spouse as attorney-in-fact. Such

instruments may confer upon the attorney, and the attorney may exercise, any and all powers which lawfully can be conferred upon an attorney-in-fact, including, but not limited to, the authority to join in conveyances of real property for the purpose of waiving or quitclaiming any rights which may be acquired as a surviving spouse under the provisions of G.S. 29-30. (1798, c. 510; R. C., c. 37, s. 11; Code, s. 1257; Rev., s. 957; C. S., s. 1002; 1965, c. 856; 1977, c. 375, s. 7.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 52-10 or 52-10.1" for "G.S. 52-6" in the first sentence.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 39-13.2. Married persons under 18 made competent as to certain transactions; certain transactions validated.

(b) Any transaction between a husband and wife pursuant to this section shall be subject to the provisions of G.S. 52-10 or 52-10.1 whenever applicable. (1977, c. 375, s. 8.)

Editor's Note. —

The 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 52-10 or 52-10.1" for "G.S. 52-6" in subsection (b).

Session Laws 1977, c. 375, s. 17, provides that

no provision of this act shall affect pending litigation.

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 39-13.3. Conveyances between husband and wife.

(e) Any conveyance authorized by this section is subject to the provisions of G.S. 52-10 or 52-10.1, except that acknowledgment by the spouse of the grantor is not necessary. (1957, c. 598, s. 1; 1965, c. 878, s. 3; 1977, c. 375, s. 9.)

Editor's Note. —

The 1977 amendment, effective Jan. 1, 1978, deleted "by a wife" following "conveyance" near the beginning of subsection (e) and substituted "G.S. 52-10 or 52-10.1, except that acknowledgment by the spouse of the grantor is not necessary" for "G.S. 52-6" at the end of subsection (e).

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

§ 39-13.4. Conveyances by husband or wife under deed of separation. — Any conveyance of real property, or any interest therein, by the husband or wife who have previously executed a valid and lawful deed of separation which authorizes said husband or wife to convey real property or any interest therein without the consent and joinder of the other and which deed of separation or a memorandum of the deed of separation setting forth such authorization is recorded in the county where the land lies, shall be valid to pass such title as the husband or wife may have to his or her grantee, unless an instrument in writing canceling the deed of separation or memorandum thereof and properly executed and acknowledged by said husband and wife is recorded in the office of said register of deeds. The instrument which is registered under this section to authorize the conveyance of an interest in real property or the cancellation of the deed of separation or memorandum thereof shall comply with the provisions of G.S. 52-10 or 52-10.1. (1959, c. 512; 1973, c. 133; 1977, c. 375, s. 10.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, substituted "the provisions of G.S. 52-10 or 52-10.1" for "G.S. 52-6 with respect to a certificate of private examination of the wife" at the end of the section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 39-13.5. Creation of tenancy by entirety in partition of real property. — When either a husband or a wife owns an undivided interest in real property as a tenant in common with some person or persons other than his or her spouse and there occurs an actual partition of the property, a tenancy by the entirety may be created in the husband or wife who owned the undivided interest and his or her spouse in the manner hereinafter provided:

- (1) In a division by cross-deed or deeds, between or among the tenants in common provided that the intent of the tenant in common to create a tenancy by the entirety with his or her spouse in this exchange of deeds must be clearly stated in the granting clause of the deed or deeds to such tenant and his or her spouse, and further provided that the deed or deeds to such tenant in common and his or her spouse is signed by such tenant in common and is acknowledged before a certifying officer in accordance with G.S. 52-10;
- (2) In a judicial proceeding for partition. In such proceeding, both spouses have the right to become parties to the proceeding and to have their pleadings state that the intent of the tenant in common is to create a tenancy by the entirety with his or her spouse. The order of partition shall provide that the real property assigned to such tenant and his or her spouse shall be owned by them as tenants by the entirety. (1969, c. 748, s. 1; 1977, c. 375, s. 11.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, rewrote the language following "further provided that" in subdivision (1) and deleted the proviso at the end of the third sentence of subdivision (2).

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

ARTICLE 7.

Uniform Vendor and Purchaser Risk Act.

§§ 39-40 to 39-43: Reserved for future codification purposes.

ARTICLE 8.

Business Trusts.

§ 39-44. Definition. — The term "business trust" whenever used or referred to in this Article shall mean any unincorporated association, including but not limited to a Massachusetts business trust, engaged in any business or trade under a written instrument or declaration of trust under which the beneficial interest therein is divided into shares represented by certificates or shares of beneficial interest. (1977, c. 768, s. 1.)

Editor's Note. — Session Laws 1977, c. 768, s. 2, provides in part that the act shall not affect pending litigation.

§ 39-45. Authority to acquire and hold real estate. — Business trusts are hereby authorized and empowered to acquire real estate and interests therein and to hold the same in their trust names and may sue and be sued in their trust names. (1977, c. 768, s. 1.)

§ 39-46. Title vested; conveyance; probate. — Where real estate has been or may be hereafter conveyed to a business trust in its trust name or in the names of its trustees in their capacity as trustees of such business trust, the said title shall vest in said business trust, and the said real estate and interests therein may be conveyed, encumbered or otherwise disposed of by said business trust

in its trust name by an instrument signed by at least one of its trustees, its president, a vice-president or other duly authorized officer, and attested or countersigned by its secretary, assistant secretary or such other officer as is the custodian of its common seal, not acting in dual capacity, with its official seal affixed, the said conveyance to be proven and probated in the same manner as provided by law for conveyances by corporations. Any conveyance, encumbrance or other disposition thus made by any such business trust shall convey good and sufficient title to said real estate and interests therein in accordance with the provisions of said conveyance; provided, however, that with respect to any such conveyance, encumbrance or other disposition effected after June 28, 1977, there must be recorded in the county where the land lies a memorandum of the written instrument or declaration of trust referred to in G.S. 39-44. As a minimum such memorandum shall set forth the name, date and place of filing, if any, of such written instrument or declaration of trust, and the place where the written instrument or declaration of trust, and all amendments thereto, is kept and may be examined upon reasonable notice, which place need not be a public office. (1977, c. 768, s. 1.)

§ 39-47. Prior deeds validated. — All deeds, leases, mortgages, deeds of trust or other conveyances heretofore executed in conformity with this Article and which are proper in all other respects are declared to be sufficient to pass title to real estate held by such business trusts in accordance with the provisions of such instruments. (1977, c. 768, s. 1.)

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**Chapter 40.
Eminent Domain.**

Article 1.

Right of Eminent Domain.

Sec.

40-2. By whom right may be exercised.

ARTICLE 1.

Right of Eminent Domain.

§ 40-2. **By whom right may be exercised.** — The right of eminent domain may, under the provisions of this Chapter, be exercised for the purpose of constructing their roads, canals, pipelines originating in North Carolina for the transportation of petroleum products or coal, pipelines and mains originating in North Carolina for the transportation, distribution, or both, of gas, lines of wires, or other works, which are authorized by law and which involve a public use of benefit, by the bodies politic, corporation, or persons following:

(6) The Department of Natural Resources and Community Development in the administration of the laws relating to fish and fisheries.

(1977, c. 771, s. 4.)

I. GENERAL CONSIDERATION.

Editor's Note. —

The 1977 amendment substituted "Natural Resources and Community Development" for "Natural and Economic Resources" in subdivision (6).

Session Laws 1977, c. 771, s. 22, contains a severability clause.

As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (6) are set out.

Chapter 41.

Estates.

Sec.

41-2.1. Right of survivorship in bank deposits created by written agreement.

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

(b) A deposit account established under subsection (a) of this section shall have the following incidents:

- (1) Either party to the agreement may add to or draw upon any part or all of the deposit account, and any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn.
- (2) During the lifetime of both or all the parties, the deposit account shall be subject to their respective debts to the extent that each has contributed to the unwithdrawn account. In the event their respective contributions are not determined, the unwithdrawn fund shall be deemed owned by both or all equally.
- (3) Upon the death of either or any party to the agreement, the survivor, or survivors, become the sole owner, or owners, of the entire unwithdrawn deposit, subject to the following claims listed below in subdivisions a. through e. upon that portion of the unwithdrawn deposit which would belong to the deceased had the unwithdrawn deposit been divided equally between both or among all the joint tenants at the time of the death of the deceased:
 - a. The allowance of the year's allowance to the surviving spouse of the deceased;
 - b. The funeral expenses of the deceased;
 - c. The cost of administering the estate of the deceased;
 - d. The claims of the creditors of the deceased; and
 - e. Governmental rights.
- (4) Upon the death of one of the joint tenants provided herein the banking institution in which said joint deposit is held shall pay to the legal representative of the deceased, or to the clerk of the superior court if the amount is less than two thousand dollars (\$2,000), the portion of the unwithdrawn deposit made subject to the claims and expenses as provided in subdivision (3) above, and may pay the remainder to the surviving joint tenant or joint tenants. Said legal representative shall hold the portion of said unwithdrawn deposit paid to him and not use the same for the payment of the claims and expenses as provided in subdivision (3) above unless and until all other personal assets of the estate have been exhausted, and shall then use so much thereof as may be necessary to pay said claims and expenses. Any part of said unwithdrawn deposit not used for the payment of said claims and expenses shall, upon the settlement of the estate, be paid to the surviving joint tenant or tenants.

(1977, c. 671, ss. 1, 2.)

Editor's Note. —

The 1977 amendment, effective July 1, 1977, in subdivision (3) of subsection (b), substituted "following claims listed below in subdivisions a through e upon" for "claims of the creditors of the deceased and to governmental rights in,"

"the withdrawn deposit then divided" for "said withdrawn deposit then divided," and "the deceased" for "said deceased," and added paragraphs a through e. In subdivision (4) of subsection (b), the amendment substituted "claims and expenses" for "claims of the

creditors of the deceased and to governmental rights" in the first sentence, substituted "claims and expenses as provided in subdivision (3) above" for "claims of the creditors of the deceased or governmental rights" and "said claims and expenses" for "any remaining debts of the deceased or governmental claims" in the second sentence, and substituted "said claims and expenses" for "such debts or charges of administration of the deceased" in the third sentence.

Session Laws 1977, c. 671, s. 3, provides: "This act shall become effective July 1, 1977, and shall apply to accounts of person dying on or after said date."

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Cited in Combs v. Eller, 30 N.C. App. 30, 226 S.E.2d 197 (1976).

§ 41-4. Limitations on failure of issue.

Purpose of Section. —

The purpose of this section is to save gifts over upon the contingency of someone's dying without issue even if the contingency occurs after the death of the testator or after some estate or period subsequent to his death. *White v. Alexander*, 290 N.C. 75, 224 S.E.2d 617 (1976).

The words that the gift over "shall be . . . a limitation to take effect when such person dies not having such heir or issue, or child . . . living at the time of his death, or born to him within ten lunar months thereafter" mean simply that the interest will be sustained and will pass in possession when and if the contingency, e.g., dying without issue, occurs, even if this event takes place after the death of the testator or grantor or after some intervening estate or period following his death. *White v. Alexander*, 290 N.C. 75, 224 S.E.2d 617 (1976).

The words, that the gift over "shall be . . . a limitation to take effect when such person dies not having such heir or issue, or child . . . living at the time of his death, or born to him within ten lunar months thereafter," do not mean that a determination of those persons who take the interest must necessarily wait until the event occurs. At what point in time those persons are determined remains a question of the testator's intent. *White v. Alexander*, 290 N.C. 75, 224 S.E.2d 617 (1976).

This section does not operate to postpone vesting of the reversion until the death of the life tenant without children because a reversion is not an estate created by limitation in a deed or will but is an estate created by operation of law. *Atkins v. Burden*, 31 N.C. App. 660, 230 S.E.2d 594 (1976).

§ 41-9. Spendthrift trusts.

Cited in *Crockett v. First Fed. Sav. & Loan Ass'n*, 289 N.C. 620, 224 S.E.2d 580 (1976).

§ 41-10. Titles quieted.

I. GENERAL CONSIDERATION.

Cited in *McRorie v. Query*, 32 N.C. App. 311, 232 S.E.2d 312 (1977).

§ 41-11. Sale, lease or mortgage in case of remainders.

I. GENERAL CONSIDERATION.

Purpose of Section. —

The purpose of this section is not to obtain predictive declarations of future rights of the parties, inter se, but rather to promote the interest of all the parties by allowing the sale of desirable land free from restrictions imposed by the presence of uncertainties as to whom the land will ultimately belong. *Crumpton v. Crumpton*, 290 N.C. 651, 227 S.E.2d 587 (1976).

Cited in *Stoney v. MacDougall*, 31 N.C. App. 678, 230 S.E.2d 592 (1976).

III. SALE AND REINVESTMENT.

Section Contemplates Reinvestment. — This section contemplates that the proceeds of the sale, less expenses and perhaps the present worth of the life tenant's share, will be reinvested, either in purchasing or in improving real estate. *Crumpton v. Crumpton*, 290 N.C. 651, 227 S.E.2d 587 (1976).

§ 41-11.1. Sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse.

Quoted in Crumpton v. Crumpton, 290 N.C. 651, 227 S.E.2d 587 (1976).

ARTICLE I
GENERAL PROVISIONS

SECTION 1-1. Short title and purpose.

This act shall be known and may be cited as the "Act to Amend Chapter 41 of the General Statutes of the State of North Carolina."

SECTION 1-2. Definitions.

As used in this act, the words and phrases shall have the meanings herein defined, unless the context clearly indicates otherwise.

SECTION 1-3. Severability.

If any provision of this act is held to be unconstitutional, the remaining provisions shall nevertheless remain in full force and effect.

SECTION 1-4. Construction.

This act shall be construed to conform to the intent of the General Assembly as expressed in the legislative history of this act.

ARTICLE II

SECTION 2-1. Short title and purpose.

This act shall be known and may be cited as the "Act to Amend Chapter 41 of the General Statutes of the State of North Carolina."

SECTION 2-2. Definitions.

As used in this act, the words and phrases shall have the meanings herein defined, unless the context clearly indicates otherwise.

SECTION 2-3. Severability.

If any provision of this act is held to be unconstitutional, the remaining provisions shall nevertheless remain in full force and effect.

Chapter 42.**Landlord and Tenant.****Article 5.****Residential Rental Agreements.**

Sec.

- 42-38. Application.
- 42-39. Exclusions.
- 42-40. Definitions.
- 42-41. Mutuality of obligations.
- 42-42. Landlord to provide fit premises.
- 42-43. Tenant to maintain dwelling unit.
- 42-44. General remedies and limitations.
- 42-45 to 42-49. [Reserved.]

Article 6.**Tenant Security Deposit Act.**

Sec.

- 42-50. Deposits from the tenant.
- 42-51. Permitted uses of the deposit.
- 42-52. Landlord's obligations.
- 42-53. Pet deposits.
- 42-54. Transfer of dwelling units.
- 42-55. Remedies.
- 42-56. Application of Article.

ARTICLE 1.*General Provisions.***§ 42-3. Term forfeited for nonpayment of rent.**

Editor's Note. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 42-4. Recovery for use and occupation.

Applied in Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (D.N.C. 1976).

§ 42-13. Wrongful surrender to other than landlord misdemeanor.

Editor's Note. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

ARTICLE 2.*Agricultural Tenancies.***§ 42-15. Landlord's lien on crops for rents, advances, etc.; enforcement.****I. IN GENERAL.**

Editor's Note. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 42-15.1. Landlord's lien on crop insurance for rents, advances, etc.; enforcement.

Editor's Note. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 42-16. Rights of tenants.

Editor's Note. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 42-22. Unlawful seizure by landlord or removal by tenant misdemeanor.**I. IN GENERAL.**

Editor's Note. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

ARTICLE 3.*Summary Ejectment.***§ 42-26. Tenant holding-over may be dispossessed in certain cases.****I. APPLICATION AND SCOPE.**

Editor's Note. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 42-28. Summons issued by clerk.

Editor's Note. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 42-30. Judgment by confession or where plaintiff has proved case.

Editor's Note. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

ARTICLE 5.*Residential Rental Agreements.*

§ 42-38. Application. — This Article determines the rights, obligations, and remedies under a rental agreement for a dwelling unit within this State. (1977, c. 770, s. 1.)

Editor's Note. — Session Laws 1977, c. 770, s. 3, provides: "This act shall become effective on October 1, 1977, and applies to rental agreements entered into, extended, or renewed automatically or by the parties after October 1 1977."

§ 42-39. **Exclusions.** — (a) The provisions of this Article shall not apply to transient occupancy in a hotel, motel, or similar lodging subject to regulation by the Commission for Health Services.

(b) Nothing in this Article shall apply to any dwelling furnished without charge or rent. (1973, c. 476, s. 128; 1977, c. 770, ss. 1, 2.)

Editor's Note. — Pursuant to Session Laws 1973, c. 476, s. 128, "Commission for Health Services" has been substituted for "State Board of Health" in this section as enacted by Session Laws 1977, c. 770.

§ 42-40. **Definitions.** — For the purpose of this Article, the following definitions shall apply:

- (1) "Action" includes recoupment, counterclaim, defense, setoff, and any other proceeding including an action for possession.
- (2) "Premises" means a dwelling unit and the structure of which it is a part and facilities and appurtenances therein and grounds, areas, and facilities normally held out for the use of residential tenants who are using the dwelling unit as their primary residence. (1977, c. 770, s. 1.)

§ 42-41. **Mutuality of obligations.** — The tenant's obligation to pay rent under the rental agreement or assignment and to comply with G.S. 42-43 and the landlord's obligation to comply with G.S. 42-42(a) shall be mutually dependent. (1977, c. 770, s. 1.)

§ 42-42. **Landlord to provide fit premises.** — (a) The landlord shall:

- (1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code;
- (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;
- (3) Keep all common areas of the premises in safe condition; and
- (4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations.

(b) The landlord is not released of his obligations under any part of this section by the tenant's explicit or implicit acceptance of the landlord's failure to provide premises complying with this section, whether done before the lease was made, when it was made, or after it was made, unless a governmental subdivision imposes an impediment to repair for a specific period of time not to exceed six months. Notwithstanding the provisions of this subsection, the landlord and tenant are not prohibited from making a subsequent written contract wherein the tenant agrees to perform specified work on the premises, provided that said contract is supported by adequate consideration other than the letting of the premises and is not made with the purpose or effect of evading the landlord's obligations under this Article. (1977, c. 770, s. 1.)

§ 42-43. **Tenant to maintain dwelling unit.** — (a) The tenant shall:

- (1) Keep that part of the premises which he occupies and uses as clean and safe as the conditions of the premises permit and cause no unsafe or unsanitary conditions in the common areas and remainder of the premises which he uses;

- (2) Dispose of all ashes, rubbish, garbage, and other waste in a clean and safe manner;
- (3) Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits;
- (4) Not deliberately or negligently destroy, deface, damage, or remove any part of the premises or knowingly permit any person to do so;
- (5) Comply with any and all obligations imposed upon the tenant by current applicable building and housing codes; and
- (6) Be responsible for all damage, defacement, or removal of any property inside a dwelling unit in his exclusive control unless said damage, defacement or removal was due to ordinary wear and tear, acts of the landlord or his agent, defective products supplied or repairs authorized by the landlord, acts of third parties not invitees of the tenant, or natural forces.

(b) The landlord shall notify the tenant in writing of any breaches of the tenant's obligations under this section except in emergency situations. (1977, c. 770, s. 1.)

§ 42-44. General remedies and limitations. — (a) Any right or obligation declared by this Chapter is enforceable by civil action, in addition to other remedies of law and in equity.

(b) No party shall be entitled to double damages in actions brought under this Article 5.

(c) The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so. The tenant shall be entitled to remain in possession of the premises pending appeal by continuing to pay the contract rent as it becomes due; provided that, in such case, the provisions of G.S. 42-34(b) shall not apply.

(d) A violation of this Article shall not constitute negligence per se. (1977, c. 770, s. 1.)

§§ 42-45 to 42-49: Reserved for future codification purposes.

ARTICLE 6.

Tenant Security Deposit Act.

§ 42-50. Deposits from the tenant. — Security deposits from the tenant in residential dwelling units shall be deposited in a trust account with a licensed and insured bank or savings institution located in the State of North Carolina or the landlord may, at his option, furnish a bond from an insurance company licensed to do business in North Carolina. The security deposits from the tenant may be held in a trust account outside of the State of North Carolina only if the landlord provides the tenant with an adequate bond in the amount of said deposits. The landlord or his agent shall notify the tenant within 30 days after the beginning of the lease term of the name and address of the bank or institution where his deposit is currently located or the name of the insurance company providing the bond. (1977, c. 914, s. 1.)

Editor's Note. — Session Laws 1977, c. 914, s. 3, makes this Article effective Oct. 1, 1977.

§ 42-51. Permitted uses of the deposit. — Security deposits for residential dwelling units shall be permitted only for the tenant's possible nonpayment of

rent, damage to the premises, nonfulfillment of rental period, any unpaid bills which become a lien against the demised property due to the tenant's occupancy, costs of re-renting the premises after breach by the tenant, or court costs in connection with terminating a tenancy. Such security deposit shall not exceed an amount equal to two weeks' rent if a tenancy is week to week, one and one-half months' rent if a tenancy is month to month, and two months' rent for terms greater than month to month. These deposits must be fully accounted for by the landlord as set forth in G.S. 42-52. (1977, c. 914, s. 1.)

§ 42-52. Landlord's obligations. — Upon termination of the tenancy, money held by the landlord as security may be applied as permitted in G.S. 42-51 or, if not so applied, shall be refunded to the tenant. In either case the landlord in writing shall itemize any damage and mail or deliver same to the tenant, together with the balance of the security deposit, no later than 30 days after termination of the tenancy and delivery of possession by the tenant. If the tenant's address is unknown the landlord shall apply the deposit as permitted in G.S. 42-51 after a period of 30 days and the landlord shall hold the balance of the deposit for collection by the tenant for at least six months. The landlord may not withhold as damages part of the security deposit for conditions that are due to normal wear and tear nor may the landlord retain an amount from the security deposit which exceeds his actual damages. (1977, c. 914, s. 1.)

§ 42-53. Pet deposits. — Notwithstanding the provisions of this section, the landlord may charge a reasonable, nonrefundable fee for pets kept by the tenant on the premises. (1977, c. 914, s. 1.)

§ 42-54. Transfer of dwelling units. — Upon termination of the landlord's interest in the dwelling unit in question, whether by sale, assignment, death, appointment of receiver or otherwise, the landlord or his agent shall, within 30 days, do one of the following acts, either of which shall relieve him of further liability with respect to such payment or deposit:

- (1) Transfer the portion of such payment or deposit remaining after any lawful deductions made under this section to the landlord's successor in interest and thereafter notify the tenant by mail of such transfer and of the transferee's name and address; or
- (2) Return the portion of such payment or deposit remaining after any lawful deductions made under this section to the tenant. (1977, c. 914, s. 1.)

§ 42-55. Remedies. — If the landlord or the landlord's successor in interest fails to account for and refund the balance of the tenant's security deposit as required by this Article, the tenant may institute a civil action to require the accounting of and the recovery of the balance of the deposit. In addition to other remedies at law and equity, the tenant may recover damages resulting from noncompliance by the landlord; and upon a finding by the court that the party against whom judgment is rendered was in willful noncompliance with this Article, the court may, in its discretion, allow a reasonable attorney's fee to the duly licensed attorney representing the prevailing party, such attorney's fee to be taxed as part of the cost of court. (1977, c. 914, s. 1.)

§ 42-56. Application of Article. — The provisions of this Article shall apply to all persons, firms, or corporations engaged in the business of renting or managing residential dwelling units, excluding single rooms, on a weekly, monthly or annual basis. (1977, c. 914, s. 2.)

Chapter 43.

Land Registration.

Article 2.

Officers and Fees.

Sec.

43-5. Fees of officers.

ARTICLE 2.

Officers and Fees.

§ 43-5. **Fees of officers.** — The examiner hereinbefore provided for shall receive, as may be allowed by the clerk, a minimum fee of five dollars (\$5.00) for such examination of each title of property assessed upon the tax books at the amount of five thousand dollars (\$5,000) or less; for each additional thousand dollars (\$1,000) of assessed value of property so examined he shall receive fifty cents (50¢); for examination outside of the county he shall receive a reasonable allowance. There shall be allowed to the register of deeds for copying the plot upon registration of titles book two dollars (\$2.00) for the first page and one dollar (\$1.00) for each succeeding page; for copying or recording new certificates under this Chapter, two dollars (\$2.00) for the first page and one dollar (\$1.00) for each succeeding page; for issuing the certificate and new certificates under this Chapter, fifty cents (50¢) for each; for noting the entries or memorandum required and for the entries noting the cancellation of mortgages and all other entries, if any, herein provided for, fifty cents (50¢) for each entry. The county or other surveyor employed under the provisions of this Chapter shall not be allowed to charge more than forty cents (40¢) per hour for his time actually employed in making the survey and the map, except by agreement with the petitioner, but he shall be allowed a minimum fee of two dollars (\$2.00).

There shall be no other fees allowed of any nature except as herein provided, and the bond of the register, clerk and sheriff shall be liable in case of any mistake, malfeasance, or misfeasance as to the duties imposed upon them by this Chapter in as full a manner as such bond is now liable by law. (1913, c. 90, s. 30; C. S., s. 2381; 1971, c. 1185, s. 1; 1977, c. 774.)

Editor's Note. — The 1977 amendment, effective July 1, 1977, in the first paragraph, substituted "two dollars (\$2.00) for the first page and one dollar (\$1.00) for each succeeding page; for copying or recording new certificates under this Chapter, two dollars (\$2.00) for the first page and one dollar (\$1.00) for each succeeding page" for "one dollar (\$1.00) and

"fifty cents (50¢) for each entry" for "a total of twenty-five cents (25¢) for the entry or entries connected with one transaction" in the second sentence and substituted "but he shall be allowed a minimum fee of two dollars (\$2.00)" for "Provided, however, that a minimum fee of two dollars (\$2.00) in any case may be allowed" at the end of the third sentence.

ARTICLE 3.

Procedure for Registration.

§ 43-6. Who may institute proceedings.

Applied in *Taylor v. Johnston*, 289 N.C. 690, 224 S.E.2d 567 (1976).

§ 43-10. Notice of petition published.

Cited in Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

§ 43-11. Hearing and decree.

Contested proceedings, etc. —

On a hearing before an examiner in a contested proceeding to register a land title under this chapter, the same rules for proving

title apply as in actions of ejection and other actions involving the establishment of land titles. Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

§ 43-12. Effect of decree; approval of judge.

Quoted in Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

Chapter 44.

Liens.

Article 9B.

Attachment or Garnishment and Lien
for Ambulance Service in
Certain Counties.

Sec.

44-51.8. Counties to which Article applies.

ARTICLE 9.

*Liens upon Recoveries for Personal Injuries to Secure
Sums Due for Medical Attention, etc.*

§ 44-49. Lien created; applicable to persons non sui juris.

The lien of this section attaches to the recovery, if any, and is not a general lien against the assets of the alleged debtor. *Gordon v. Forsyth County Hosp. Auth.*, 409 F. Supp. 708 (M.D.N.C. 1975).

Right of Hospital Receiving Funds under Provisions of Hill Burton Act, 42 U.S.C. § 291 et seq., to File Lien under Section. — See *Gordon v. Forsyth County Hosp. Auth.*, 409 F. Supp. 708 (M.D.N.C. 1975).

ARTICLE 9B.

*Attachment or Garnishment and Lien for Ambulance
Service in Certain Counties.*

§ 44-51.8. Counties to which Article applies. — The provisions of this Article shall apply only to Alamance, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Caswell, Catawba, Cherokee, Cleveland, Columbus, Cumberland, Davidson, Edgecombe, Forsyth, Franklin, Gaston, Granville, Greene, Guilford, Halifax, Haywood, Henderson, Hertford, Hoke, Hyde, Johnston, Jones, Lee, Lenoir, Lincoln, McDowell, Madison, Mecklenburg, Mitchell, Montgomery, Moore, Nash, Onslow, Pasquotank, Person, Pitt, Randolph, Richmond, Robeson, Rockingham, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Transylvania, Tyrrell, Union, Vance, Wake, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin and Yancey Counties. (1969, c. 708, s. 5; c. 1197; 1971, c. 132; 1973, c. 880, s. 1; cc. 887, 894, 907, 1182; 1975, c. 595, s. 1; 1977, cc. 64, 138, 357.)

Editor's Note. —

The first 1977 amendment made this section applicable to Alleghany, Anson, Cleveland, Cumberland, Haywood, Henderson, McDowell, Mecklenburg, Surry, Transylvania, Tyrrell and Union Counties.

The second 1977 amendment inserted Ashe, Beaufort and Hyde and the third 1977 amendment added Randolph to the list of counties.

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

Sec.

44A-4. Enforcement of lien.

Article 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers
and Materialmen Dealing with
Owner.

44A-12. Filing claim of lien.

44A-13. Action to enforce lien.

ARTICLE 1.

Possessory Liens on Personal Property.

§ 44A-4. **Enforcement of lien.** — (a) **Enforcement by Sale.** — If the charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 30 days following the maturity of the obligation to pay any such charges, the lienor may enforce the lien by public or private sale as provided in this section. The lienor may bring an action on the debt in any court of competent jurisdiction at any time following maturity of the obligation. Failure of the lienor to bring such action within a 180-day period following the commencement of storage shall constitute a waiver of any right to collect storage charges which accrue after such period. Provided that when property is placed in storage pursuant to an express contract of storage, the lien shall continue and the lienor may bring an action to collect storage charges and enforce his lien at any time within 120 days following default on the obligation to pay storage charges.

The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided. If in any such action the owner or other party requests immediate possession of the property and pays the amount of the lien asserted into the clerk of the court in which such action is pending or posts bond for double such amount, the clerk shall issue an order to the lienor to relinquish possession of the property to the owner or other party.

(e) **Public Sale.** —

(1) Not less than 20 days prior to sale by public sale the lienor:

- a. Shall cause notice to be mailed to the person having legal title to the property if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained, provided that notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof; and
- b. Shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held;

and shall publish notice of sale once a week for two consecutive weeks in a newspaper of general circulation in the same county, the date of the last publication being not less than five days prior to the sale.

- (2) A public sale must be held on a day other than Sunday and between the hours of 10:00 A.M. and 4:00 P.M.:
- In any county where any part of the contract giving rise to the lien was performed, or
 - In the county where the obligation secured by the lien was contracted for.
- (3) A lienor may purchase at public sale.
(1977, c. 74, s. 4; c. 793, s. 1.)

Editor's Note. —

The first 1977 amendment, effective July 1, 1977, in subdivision (e)(1), deleted "and by publishing notice of sale once per week for two consecutive weeks in a newspaper of general circulation in the same county" from the end of paragraph b and added the language beginning "and shall publish notice of sale" to the end of the subdivision.

The second 1977 amendment added the fourth sentence to the first paragraph of subsection (a).

Session Laws 1977, c. 793, s. 2, provides: "This act shall apply to liens for storage arising on contracts made on and after the effective date." The act was ratified June 29, 1977, and made effective on ratification.

Session Laws 1977, c. 74, s. 5, provides: "This act shall not affect pending litigation."

As the rest of the section was not changed by the amendments, only subsections (a) and (e) are set out.

ARTICLE 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-7. Definitions.

The 1975 amendment created a new right to a lien in those who perform or furnish professional design or surveying services. *Wilbur Smith & Assocs. v. South Mt. Properties,*

Inc., 29 N.C. App. 447, 224 S.E.2d 692, cert. denied, 290 N.C. 552, 226 S.E.2d 514 (1976).

Quoted in *Bryan v. Projects, Inc.*, 29 N.C. App. 453, 224 S.E.2d 689 (1976).

§ 44A-8. Mechanics', laborers' and materialmens' lien; persons entitled to lien.

Editor's Note. —

For article entitled, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," see 12 *Wake Forest L. Rev.* 283 (1976).

The 1975 amendment created a new right to a lien in those who perform or furnish professional design or surveying services. *Wilbur Smith & Assocs. v. South Mt. Properties, Inc.*, 29 N.C. App. 447, 224 S.E.2d 692, cert. denied, 290 N.C. 552, 226 S.E.2d 514 (1976).

There must be a contract, express or implied, to create a laborer's or materialman's lien. The holder of the lien has a "security" that open or general creditors do not have and that is based on contract. *Ridge Community Investors, Inc. v. Berry*, 32 N.C. App. 642, 234 S.E.2d 6 (1977).

Quoted in *Bryan v. Projects, Inc.*, 29 N.C. App. 453, 224 S.E.2d 689 (1976).

§ 44A-10. Effective date of liens.

Priority of Lien Over Deed of Trust upon Foreclosure on Leasehold. — A materialmen's lien on a leasehold which is properly enforced so as to relate back prior to a deed of trust on the leasehold would, upon foreclosure, entitle the

materialman to priority in that portion of the proceeds representing the value of the leasehold. *Miller v. Lemon Tree Inn of Roanoke Rapids, Inc.*, 32 N.C. App. 524, 233 S.E.2d 69 (1977).

§ 44A-11. Perfecting liens.

Editor's Note. — For article entitled, "Enforcement and Priority," see 12 Wake Forest L. Rev. 283 (1976).
"Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection,

§ 44A-12. Filing claim of lien.

(c) Contents of Claim of Lien to Be Filed. — All claims of lien must be filed using a form substantially as follows:

CLAIM OF LIEN

- (1) Name and address of the person claiming the lien:
- (2) Name and address of the record owner of the real property claimed to be subject to the lien at the time the claim of lien is filed:
- (3) Description of the real property upon which the lien is claimed: (Street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.)
- (4) Name and address of the person with whom the claimant contracted for the furnishing of labor or materials:
- (5) Date upon which labor or materials were first furnished upon said property by the claimant:
- (5a) Date upon which labor or materials were last furnished upon said property by the claimant:
- (6) General description of the labor performed or materials furnished and the amount claimed therefor:

..... Lien Claimant

Filed this day of, 19

.....
Clerk of Superior Court

A general description of the labor performed or materials furnished is sufficient. It is not necessary for lien claimant to file an itemized list of materials or a detailed statement of labor performed.

(1977, c. 369.)

Editor's Note. —

The 1977 amendment, effective July 1, 1977, added subdivision (5a) to subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

Stated in Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6 (1977).

Cited in J.F. Wilkerson Contracting Co. v. Rowland, 29 N.C. App. 722, 225 S.E.2d 840 (1976); Miller v. Lemon Tree Inn of Roanoke Rapids, Inc., 32 N.C. App. 524, 233 S.E.2d 69 (1977).

§ 44A-13. Action to enforce lien.

(c) Notice of Action. — Unless the action enforcing the lien created by this Article is instituted in the county in which the lien is filed, in order for the sale under the provisions of G.S. 44A-14(a) to pass all title and interest of the owner to the purchaser good against all claims or interests recorded, filed or arising after the first furnishing of labor or materials at the site of the improvement by the person claiming the lien, a notice of lis pendens shall be filed in each county in which the real property subject to the lien is located within 180 days after the

last furnishing of labor or materials at the site of the improvement by the person claiming the lien. It shall not be necessary to file a notice of lis pendens in the county in which the action enforcing the lien is commenced in order for the judgment entered therein and the sale declared thereby to carry with it the priorities set forth in G.S. 44A-14(a). If neither an action nor a notice of lis pendens is filed in each county in which the real property subject to the lien is located within 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien, as to real property claimed to be subject to the lien in such counties where the action was neither commenced nor a notice of lis pendens filed, the judgment entered in the action enforcing the lien shall not direct a sale of the real property subject to the lien enforced thereby nor be entitled to any priority under the provisions of G.S. 44A-14(a), but shall be entitled only to those priorities accorded by law to money judgments. (1969, c. 1112, s. 1; 1977, c. 883.)

Editor's Note. — The 1977 amendment added subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

For article entitled, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," see 12 Wake Forest L. Rev. 283 (1976).

An action to enforce a lien need not be filed in the county where the land is situated. Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6 (1977).

Contents of Judgment Enforcing Lien. — To enforce a materialmen's lien the judgment must state the effective date of the lien and contain a general description of the property subject to the lien so that one reading the docketed judgment would have notice that it was more than a money judgment. Miller v. Lemon Tree Inn of Roanoke Rapids, Inc., 32 N.C. App. 524, 233 S.E.2d 69 (1977).

§ 44A-16. Discharge of record lien.

Applied in Miller v. Lemon Tree Inn of Roanoke Rapids, Inc., 32 N.C. App. 524, 233 S.E.2d 69 (1977).

Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

§ 44A-18. Grant of lien; subrogation; perfection.

Editor's Note. — For article entitled, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," see 12 Wake Forest L. Rev. 283 (1976).

Applied in Lewis-Brady Bldrs. Supply, Inc. v. Bedros, 32 N.C. App. 209, 231 S.E.2d 199 (1977).

§ 44A-19. Notice to obligor.

Applied in Lewis-Brady Bldrs. Supply, Inc. v. Bedros, 32 N.C. App. 209, 231 S.E.2d 199 (1977).

§ 44A-20. Duties and liability of obligor.

Applied in Lewis-Brady Bldrs. Supply, Inc. v. Bedros, 32 N.C. App. 209, 231 S.E.2d 199 (1977).

§ 44A-22. Priority of liens.

Editor's Note. — For article entitled, "Enforcement and Priority," see 12 Wake Forest "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, L. Rev. 283 (1976).

ARTICLE 3.

Model Payment and Performance Bond.

§ 44A-25. Definitions.

Applied in Interstate Equip. Co. v. Smith, 292 N.C. 592, 234 S.E.2d 599 (1977).

Chapter 45.

Mortgages and Deeds of Trust.

Article 2A.

Sales under Power of Sale.

Part 1. General Provisions.

Sec.

45-21.12. Power of sale barred when foreclosure barred.

Part 2. Procedure for Sale.

45-21.16. Notice and hearing.

Sec.

45-21.17. Posting and publishing notice of sale of real property.

45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.

Article 4.

Discharge and Release.

45-40. Register to enter satisfaction on index.

ARTICLE 2A.

Sales under Power of Sale.

Part 1. General Provisions.

§ 45-21.12. Power of sale barred when foreclosure barred.

(b) If a sale pursuant to a power of sale contained in a mortgage or deed of trust, or provided by statute, is commenced within the time allowed by the statute of limitations to foreclose such mortgage or deed of trust, the sale may be completed although such completion is effected after the time when commencement of an action to foreclose would be barred by the statute. For the purpose of this section, a sale is commenced when the notice of hearing or the notice of sale is first filed, given, served, posted, or published, whichever occurs first, as provided by this Article or by the terms of the instrument pursuant to which the power of sale is being exercised. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1969, c. 984, s. 1; 1977, c. 359, s. 1.)

Editor's Note. —

The 1977 amendment, effective Oct. 1, 1977, in the second sentence of subsection (b), inserted "the notice of hearing or," "filed, given, served," and "whichever occurs first" and deleted "the" preceding "sale is first filed." Session Laws 1977, c. 359, s. 18, provides: "This act shall

become effective on October 1, 1977, and shall apply only to those foreclosure actions commenced on or after that date."

Session Laws 1977, c. 359, s. 17, provides that the act shall not apply to pending litigation.

As subsection (a) was not changed by the amendment, it is not set out.

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing. — (a) The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall serve upon each party entitled to notice under this section a notice of hearing. The notice shall specify a time and place for a hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. The notice shall be served in any manner provided by the Rules of Civil Procedure for the service of summons, or may be served by actual delivery by registered or certified mail, return receipt requested; provided, that in those instances in which service by publication would be authorized, service

may be made by posting a notice in a conspicuous place and manner upon the property for a period of not less than 10 days before the date of the hearing; provided further, if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting a notice in a conspicuous place and manner upon the property for a period of not less than 20 days before the date of hearing, which 20-day period may run concurrently with any other effort to effect service.

(b) Notice of hearing shall be given in a manner authorized in subsection (a) to:

- (1) Any person to whom the security interest instrument itself directs notice to be sent in case of default.
- (2) Any person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale.
- (3) Every record owner of the real estate whose interest is of record in the county where the real property is located at the time of giving notice. The term "record owner" means any person owning a present or future interest of record in the real property which interest would be affected by the foreclosure proceeding, but does not mean or include the trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, mechanic's or materialman's lien, or other lien or security interest in the real property.

(c) Notice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice aware of the following:

- (1) The particular real estate security interest being foreclosed, with such a description as is necessary to identify the real property, including the date, original amount, and book and page of the security instrument.
- (2) The name and address of the holder of the security instrument, and if different from the original holder, his name and address.
- (3) The nature of the default claimed.
- (4) The fact, if such be the case, that the secured creditor has accelerated the maturity of the debt.
- (5) Any right of the debtor to pay the indebtedness or cure the default if such is permitted.
- (6) Repealed by Session Laws 1977, c. 359, s. 7.
- (7) The right of the debtor (or other party served) to appear before the clerk of court at a time and on a date specified, at which appearance he shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held. The notice shall contain a statement that if the debtor does not intend to contest the creditor's allegations of default, the debtor does not have to appear at the hearing and that his failure to attend the hearing will not affect his right to pay the indebtedness and thereby prevent the proposed sale, or to attend the actual sale, should he elect to do so.
- (8) That if the foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date of delivery of his deed, and that the debtor, if still in possession, can then be evicted.
- (9) That the debtor should keep the trustee or mortgagee notified in writing of his address so that he can be mailed copies of the notice of foreclosure setting forth the terms under which the sale will be held, and notice of any postponements or resales.
- (10) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. 45-21.16A.

(d) The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. Upon such hearing, the clerk shall consider the evidence of the parties and may consider,

in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b), then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo. If an appeal is taken from the clerk's findings, the appealing party shall post a bond with sufficient surety as the clerk deems adequate to protect the opposing party from any probable loss by reason of appeal; and upon posting of the bond the clerk shall stay the foreclosure pending appeal.

(e) In the event of an appeal, either party may demand that the matter be heard at the next succeeding term of the court to which the appeal is taken which convenes 10 or more days after the hearing before the clerk, and such hearing shall take precedence over the trial of other cases except cases of exceptions to homesteads and appeals in summary ejectment actions, provided the presiding judge may in his discretion postpone such hearing if the rights of the parties or the public in any other pending case require that such case be heard first. In those counties where no session of court is scheduled within 30 days from the date of hearing before the clerk, either party may petition any regular or special superior court judge resident in a district or assigned to hold courts in a district where any part of the real estate is located, or the chief district judge of a district where any part of the real estate is located, who shall be authorized to hear the appeal.

(f) Waiver of the right to notice and hearing provided herein shall not be permitted except as set forth herein. In any case in which the original principal amount of indebtedness secured was one hundred thousand dollars (\$100,000), or more, any person entitled to notice and hearing may waive after default the right to notice and hearing by written instrument signed by such party. In all other cases, at any time subsequent to service of the notice of hearing provided above, the clerk, upon the request of the mortgagee or trustee, shall mail to all other parties entitled to notice of such hearing a form by which such parties may waive their rights to the hearing. Upon the return of the forms to the clerk bearing the signatures of each such party and that of a witness to each such party's signature (which witness shall not be an agent or employee of the mortgagee or trustee), the clerk in his discretion may dispense with the necessity of a hearing and proceed to issue the order authorizing sale as set forth above. (1975, c. 492, s. 2; 1977, c. 359, ss. 2-10.)

Editor's Note. —

The 1977 amendment, effective Oct. 1, 1977, added the second proviso at the end of subsection (a), substituted "given in a manner authorized in subsection (a)" for "sent" in the introductory language of subsection (b), deleted "To" from the beginning of subdivision (2) of subsection (b), rewrote subdivision (3) of subsection (b), and in subsection (c), deleted "the date by which such payment may be made or cure effected, the amount to pay or steps necessary to cure by such date, and to whom payment should be made or notice of cure given" from the end of subdivision (5), deleted subdivision (6), which read "The date, time and place when and where the real estate will be

sold, unless the obligation is earlier satisfied," and added present subdivision (10). In subsection (d), the amendment substituted "authorize" for "further find that" and "to proceed" for "can proceed" in the third sentence, added the present fifth sentence, and rewrote the sixth sentence. The amendment also substituted "session" for "term" and the language beginning "any regular or special superior court judge" and ending "real estate is located" for "the resident superior court judge or chief district court judge" in the second sentence, of subsection (e), inserted the present second sentence of subsection (f), and added "In all other cases" to the beginning of the present third sentence of subsection (f).

Session Laws 1977, c. 359, s. 18, provides: "This act shall become effective on October 1, 1977, and shall apply only to those foreclosure actions commenced on or after that date."

Session Laws 1977, c. 359, s. 17, provides that the act shall not apply to pending litigation.

§ 45-21.17. Posting and publishing notice of sale of real property. — In addition to complying with such provisions with respect to posting or publishing notice of sale as are contained in the security instrument,

(4) The notice of sale shall be mailed by first-class mail at least 20 days prior to the date of sale to each party entitled to notice of the hearing provided by G.S. 45-21.16 whose address is known to the trustee or mortgagee and in addition shall also be mailed by first-class mail to any party desiring a copy of the notice of sale who has complied with subdivision (5) below. Notice of the hearing required by G.S. 45-21.16 shall be sufficient to satisfy the requirement of notice under this section provided such notice contains the information required by G.S. 45-21.16A.

(5) a. Requests for Copies of Notice. — Any person desiring a copy of any notice of default and sale under any security instrument with power of sale upon real property may, at any time subsequent to the recordation of the security instrument and prior to the giving of notice of hearing provided for in G.S. 45-21.16, cause to be filed for record in the office of the register of deeds of the county where all or any part of the real property is situated, a duly acknowledged request for a copy of such notice of sale. This request shall be signed and acknowledged by the party making the request, shall specify the name and address of the party to whom the notice is to be mailed, shall identify the deed of trust or mortgage by stating the names of the parties thereto, the date of recordation, and the book and page where the same is recorded, and shall be in substantially the following form:

"In accordance with the provisions of G.S. 45-21.17(5) request is hereby made that a copy of any notice of sale under the deed of trust (mortgage) recorded on, 19. . . ., in Book, page, records of County, North Carolina, executed by as trustor (mortgagor), in which is named as beneficiary (mortgagee), and as trustee, be mailed to at the following address:

Signature:

b. Register of Deeds' Duties. — Upon the filing for record of such request, the register of deeds shall index in the general index of grantors the names of the trustors (mortgagors) recited therein, and the names of the persons requesting copies, with a marginal entry in the index of the book and page of the recorded security instrument to which the request refers; or upon the filing for record of such request, the register of deeds may instead of indexing such request on the general index of grantors stamp upon the face of the security instrument referred to in the request the book and page of each request for notice thereunder.

c. Mailing Notice. — The mortgagee, trustee, or other person authorized to conduct the sale shall at least 20 days prior to the date of the sale cause to be deposited in the United States mail an envelope with postage prepaid containing a copy of the notice of sale, addressed to each person whose name and address are set forth in a duly recorded request therefor as specified in [paragraph] a above, directed to the address designated in such request.

- d. Effect of Request on Title. — No request for a copy of any notice filed pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property, or be deemed notice to any person that the person requesting copies of notice has any claim or any right, title or interest in, or lien or charge upon, the property described in the deed of trust or mortgage referred to therein.
- e. Evidence of Compliance. — The affidavit of the mortgagee, trustee, or other person authorized to conduct the sale that copies of the notice of sale have been mailed to all parties filing requests for the same hereunder shall be deemed prima facie true. If on hearing it is proven that a party seeking to have the foreclosure sale set aside or seeking damages resulting from the foreclosure sale was mailed notice in accordance with this section or had actual notice of the sale before it was held (or if a resale was involved, prior to the date of the last resale), then he shall not prevail. Costs, expenses, and reasonable attorneys' fees incurred by the prevailing party in any action to set aside the foreclosure sale or for damages resulting from the foreclosure sale shall be allowed as of course to the prevailing party.
- f. Action to Set Foreclosure Sale Aside for Failure to Comply. — A person entitled to notice of sale by virtue of G.S. 45-21.17(5)a shall not bring any action to set the sale aside on grounds that he was not mailed the notice of sale unless such action is brought prior to the filing of the final report and account as provided in G.S. 45-21.33, if the property is purchased by someone other than the secured party; or if brought by the secured party, unless the action is brought within six months of the date of such filing and prior to the time the secured party sells the property to a bona fide purchaser for value; nor unless the party bringing such action also tenders an amount exceeding the reported sale price or the amount of the secured party's interest in the property, including all expenses and accrued interest, whichever is greater. Such tender shall be irrevocable pending final adjudication of the action.
- g. Action for Damages from Foreclosure Sale for Failure to Comply. — A person entitled to notice of sale by virtue of G.S. 45-21.17(5)a shall not bring any action for damages resulting from the sale on grounds that he was not mailed the notice unless such action is brought within six months of the date of the filing of the final report and account as provided in G.S. 45-21.33, nor unless the party bringing such action also deposits with the clerk a cash or surety bond approved by the clerk and in such amount as the clerk deems adequate to secure the party defending the action for such costs, expenses, and reasonable attorneys' fees to be incurred in the action.
- (6) Any time periods relating to notice of hearing or notice of sale that are provided in the security instrument may commence with and run concurrently with the time periods provided in G.S. 45-21.16 or 45-21.17. (1949, c. 720, s. 1; 1965, c. 41; 1967, c. 979, s. 3; 1975, c. 492, s. 3; 1977, c. 359, ss. 11-14.)

Editor's Note. —

The 1977 amendment, effective Oct. 1, 1977, inserted "by first-class mail" in 2 places in subdivision (4), rewrote paragraph e and added paragraphs f and g of subdivision (5), and added subdivision (6). Session Laws 1977, c. 359, s. 18,

provides: "This act shall become effective on October 1, 1977, and shall apply only to those foreclosure actions commenced on or after that date."

Session Laws 1977, c. 359, s. 17, provides that the act shall not apply to pending litigation.

As the rest of the section was not changed by the amendment, only the introductory language and subdivisions (4), (5), and (6) are set out.

§ 45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.

(c) When the highest bidder at a sale or resale of real property fails to comply with his bid upon tender to him of a deed for the property or after a bona fide attempt to tender such deed, the person authorized to sell the property may hold a resale. The procedure for such resale is the same in every respect as is provided by this Article in the case of an original sale of real property except that the provisions of G.S. 45-21.16 are not applicable to a resale, and the provisions of G.S. 45-21.29(b), (c) and (d) apply with respect to the posting and publishing of the notice of such resale.

(1977, c. 359, s. 15.)

Editor's Note. —

The 1977 amendment, effective Oct. 1, 1977, inserted "of G.S. 45-21.16 are not applicable to a resale, and the provisions" in the second sentence of subsection (c). Session Laws 1977, c. 359, s. 18, provides: "This act shall become effective on October 1, 1977, and shall apply only

to those foreclosure actions commenced on or after that date."

Session Laws 1977, c. 359, s. 17, provides that the act shall not apply to pending litigation.

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 45-21.33. Final report of sale of real property.

Cited in *Mozingo v. North Carolina Nat'l Bank*, 31 N.C. App. 157, 229 S.E.2d 57 (1976).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales or confirmations thereof on equitable grounds.

Cited in *Mozingo v. North Carolina Nat'l Bank*, 31 N.C. App. 157, 229 S.E.2d 57 (1976).

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

This section does not forbid the holder of the note secured by a deed of trust to purchase the property at a foreclosure sale conducted pursuant to the power of sale contained in the deed of trust. *Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977).

This section does not entitle the debtor to have credited upon the note whatever profit such purchaser may realize upon a subsequent sale of the property. There is no principle of law, apart from this section, which entitles the debtor to such credit simply by reason of such subsequent sale of the property at a price greater than the bid at the foreclosure sale.

Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

A sale subsequent to the foreclosure sale would be a circumstance indicating the fair value of the property at the time of the foreclosure, the weight to be given it depending upon other circumstances such as the lapse of time between the foreclosure and the subsequent sale and the known probability, at the time of the foreclosure sale, that such subsequent sale could be made. *Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

Evidence of Indebtedness Must Show Debt for Purchase-Money for Realty. — A strict reading of this section reveals that this statute does not apply unless the “evidence of

indebtedness,” i.e., the note and deed of trust, shows on its face that the debt is for the purchase-money for real property. *Gambill v. Bare*, 32 N.C. App. 597, 232 S.E.2d 870 (1977).

ARTICLE 4.

Discharge and Release.

§ 45-40. Register to enter satisfaction on index. — When satisfaction of the provisions of any deed of trust or mortgage is acknowledged and entry of such acknowledgment of satisfaction is made upon the margin of the record of said deed of trust or mortgage, or when the register of deeds or his deputy shall cancel the mortgage or other instrument by entry of satisfaction, then the register of deeds or his deputy shall enter upon the alphabetical grantor index kept by him, as required by law, and opposite the names of the grantor and grantee and on a line with the names of said grantor and grantee, the words “satisfied mortgage,” if the instrument of which satisfaction has been acknowledged or entered is a mortgage, and the words “satisfied deed of trust,” if the instrument of which satisfaction has been acknowledged or entered is a deed of trust, or, in lieu of the entries herein provided, the register of deeds or his deputy may denote satisfaction in the grantor index by using a capital “C” or the word “Cancelled,” or the word “Satisfied.” This statute shall not apply to counties using computerized indexing. (1909, c. 658, s. 1; C. S., s. 2595; 1965, c. 771; 1977, c. 1107.)

Editor’s Note. — The 1977 amendment, effective July 1, 1977, added the second sentence.

ARTICLE 5.

Miscellaneous Provisions.

§ 45-45.1. Release of mortgagor by dealings between mortgagee and assuming grantee.

Quoted in *Wachovia Realty Invs. v. Housing, Inc.* 292 N.C. 93, 232 S.E.2d 667 (1977).

Chapter 46.

Partition.

Article 2.

Partition Sales of Real Property.

Sec.

46-28.2. When confirmation order final.

46-33. Shares in proceeds to cotenants secured.

Sec.

46-28.1. Petition for revocation of confirmation order.

ARTICLE 2.

Partition Sales of Real Property.

§ 46-28.1. Petition for revocation of confirmation order. — (a) Notwithstanding G.S. 46-28 or any other provision of law, an order confirming the partition sale of real property shall not become final and effective until 15 days after entered. At any time before the confirmation order becomes final and effective, the purchaser may petition the court to revoke its order of confirmation and to order the withdrawal of the purchaser's offer to purchase the property because a lien or liens remain unsatisfied on the property to be conveyed. In no event shall the confirmation order become final or effective during the pendency of a petition under this section. No upset bid shall be permitted after the entry of the confirmation order.

(b) The purchaser shall deliver a copy of the petition to all parties required to be served under Rule 5 of G.S. 1A-1, and the officer or person designated to make such sale in the manner provided for service of process in Rule 4(j) of G.S. 1A-1. The court shall schedule a hearing on the petition within a reasonable time and shall cause a notice of the hearing to be served on the petitioner, the officer or person designated to make such a sale and all parties required to be served under Rule 5 of G.S. 1A-1.

(c) If the purchaser proves by a preponderance of the evidence that:

- (1) A lien remains unsatisfied on the property to be conveyed;
- (2) The purchaser has not agreed in writing to assume the lien;
- (3) The lien will not be satisfied out of the proceeds of the sale; and
- (4) The existence of the lien was not disclosed in the notice of sale of the property, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any moneys or security to the purchaser tendered pursuant to his offer.

(d) The order of the court in revoking an order of confirmation under this section may not be introduced in any other proceeding to establish or deny the existence of a lien. (1977, c. 833, s. 1.)

Editor's Note. — Session Laws 1977, c. 833, s. 4, provides: "This act shall become effective October 1, 1977, but shall not affect pending litigation."

§ 46-28.2. When confirmation order final. — After the order of confirmation has been entered, the successful bidder may immediately purchase the property upon which he bid; and upon the exercise of such election, the order of confirmation shall become final. (1977, c. 833, s. 3.)

Editor's Note. — Session Laws 1977, c. 833, s. 4, provides: "This act shall become effective October 1, 1977, but shall not affect pending litigation."

§ 46-33. Shares in proceeds to cotenants secured. — At the time that the order of confirmation becomes final, the court shall secure to each tenant in common, or joint tenant, his ratable share in severalty of the proceeds of sale. (1868-9, c. 122, s. 31; Code, s. 1921; Rev., s. 2513; C. S., s. 3244; 1977, c. 833, s. 2.)

Editor's Note. — The 1977 amendment, effective Oct. 1, 1977, substituted "At the time that the order of confirmation becomes final" for "Upon confirmation of the report" at the beginning of the section.

Session Laws 1977, c. 833, s. 4, provides in part that the act shall not affect pending litigation.

Chapter 47.

Probate and Registration.

Article 1.

Probate.

- Sec.
47-3. Commissioner appointed by clerk for nonresident maker.
47-5. When seal of officer necessary to probate.
47-9. Probates before stockholders in building and loan associations.
47-12. Proof of attested instrument by subscribing witness.
47-12.1. Proof of attested instrument by proof of handwriting.
47-13. Proof of unattested writing.

Article 2.

Registration.

- 47-27. Deeds of easements.
47-30. Plats and subdivisions; mapping requirements.
47-32. Photographic copies of plats, etc.
47-32.2. Violation of § 47-30 or 47-32 a misdemeanor.

Article 3.

Forms of Acknowledgment, Probate and Order of Registration.

- Sec.
47-38. Acknowledgment by grantor.
47-39. [Repealed.]

Article 4.

Curative Statutes; Acknowledgments; Probates; Registration.

- 47-71.1. Corporate seal omitted prior to January, 1975.
47-108.11. Validation of recorded instruments where seals have been omitted.

Article 6.

Execution of Powers of Attorney.

- 47-115.1. Appointment of attorney-in-fact which may be continued in effect notwithstanding incapacity or mental incompetence of the principal therein.

ARTICLE 1.

Probate.

§ 47-3. **Commissioner appointed by clerk for nonresident maker.** — When it appears to the clerk of the superior court of any county that any person nonresident of this State desires to acknowledge a power of attorney, deed or other conveyance touching any real estate situated in the county of said clerk, he may issue a commission to a commissioner for receiving such acknowledgment, or taking such proof. The commissioner shall make certificate of acknowledgment or proof and shall return the same to the clerk of the superior court, whereupon he shall adjudge that such conveyance, power of attorney or other instrument is duly acknowledged or proved and shall order the same to be registered. (1869-70, c. 185; Code, s. 1258; Rev., s. 991; C. S., s. 3295; 1945, c. 73, s. 9; 1977, c. 375, s. 12.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, deleted "and said commissioner may likewise take the acknowledgment and take such proof as to a married woman" from the end of the first sentence.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 47-5. **When seal of officer necessary to probate.** — When proof or acknowledgment of the execution of any instrument by any maker of such instrument, whether a person or corporation, is had before any official authorized by law to take such proof and acknowledgment, and such official has an official seal, he shall set his official seal to his certificate. If the official before

whom the instrument is proved or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the instrument is proved or acknowledged before the register of deeds of the county in which the instrument is to be registered, the official seal shall not be necessary. (1899, c. 235, s. 8; Rev., s. 993; C. S., s. 3297; 1969, c. 664, s. 3; 1977, c. 375, s. 12.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, deleted "married woman or other" preceding "person or corporation" in the first sentence.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 47-9. Probates before stockholders in building and loan associations. — No acknowledgment or proof of execution of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association shall hereafter be held invalid by reason of the fact that the officer taking such acknowledgment or proof is a stockholder in said building and loan association. This section does not authorize any officer or director of a building and loan association to take acknowledgments or proofs. The provisions of this section shall apply to federal savings and loan associations having their principal offices in this State. Acknowledgments and proofs of execution, including private examinations of any married woman taken before March 20, 1939, by an officer who is or was a stockholder in any federal savings and loan association, are hereby validated. (1913, c. 110, ss. 1, 3; C. S., s. 3301; 1939, c. 136; 1977, c. 375, s. 12.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, deleted "including the privy examination of any married woman" following "proof of execution" in the first sentence, substituted "or proof" for "proof or privy examination" in the first sentence, and

substituted "or proofs" for "proofs and privy examinations" at the end of the second sentence.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 47-12. Proof of attested instrument by subscribing witness. — Except as provided by G.S. 47-12.2, the execution of any instrument required or permitted by law to be registered, which has been witnessed by one or more subscribing witnesses, may be proved for registration before any official authorized by law to take proof of such an instrument, by a statement under oath of any such subscribing witness that the maker either signed the instrument in his presence or acknowledged to him the execution thereof. Nothing in this section in anywise affects any of the requirements set out in G.S. 52-10 or 52-10.1. (1899, c. 235, s. 12; Rev., s. 997; C. S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; 1951, c. 379, s. 1; 1953, c. 1078, s. 1; 1977, c. 375, s. 12.)

Editor's Note. —

The 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 52-10 or 52-10.1" for "G.S. 52-12" at the end of the section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 47-12.1. Proof of attested instrument by proof of handwriting.

(b) Nothing in this section in anywise affects any of the requirements set out in G.S. 52-10 or 52-10.1. (1899, c. 235, s. 12; Rev., s. 997; C. S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; 1951, c. 379, s. 1; 1977, c. 375, s. 12.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 52-10 or 52-10.1" for "G.S. 52-12" at the end of subsection (b).

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

As subsection (a) was not changed by the amendment, it is not set out.

§ 47-13. Proof of unattested writing. — If an instrument required or permitted by law to be registered has no subscribing witness, the execution of the same may be proven before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of the maker and this shall likewise apply to proof of execution of instruments by married persons. (1899, c. 235, s. 11; Rev., s. 998; C. S., s. 3304; 1945, c. 73, s. 12; 1977, c. 375, s. 12.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, substituted "persons" for "women" at the end of the section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 47-14.1. Repeal of laws requiring private examination of married women.

Editor's Note. — For comment on the constitutionality of the privy examination under

§ 52-6(a) and its relation to this section, see 12 Wake Forest L. Rev. 1007 (1977).

ARTICLE 2.

Registration.

§ 47-18. Conveyances, contracts to convey, options and leases of land.

I. IN GENERAL.

Applied in *Cities Serv. Oil Co. v. Pochna*, 30 N.C. App. 360, 226 S.E.2d 884 (1976).

§ 47-26. Deeds of gift.

Applied in *Penninger v. Barrier*, 29 N.C. App. 312, 224 S.E.2d 245 (1976).

§ 47-27. Deeds of easements. — All persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights-of-way and easements of any character whatsoever shall record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated. Where such deeds and agreements may have been acquired, but no use has been made thereof, the person, firm, or corporation holding such instrument, or any assignment thereof, shall not be required to record them until within 90 days after the beginning of the use of the easements granted thereby. If after 90 days from the beginning of the easement granted by such deeds and agreements the person, firm, or corporation holding such deeds or agreements has not recorded the same in the office of the register of deeds of the county where the land affected is situated, then the grantor in the said deed or agreement may, after 10 days' notice in writing served and returned by the

sheriff or other officer of the county upon the said person, firm, or corporation holding such lease or agreement, file a copy of the said lease or agreement for registration in the office of the register of deeds of the county where the original should have been recorded, but such copy of the lease or agreement shall have attached thereto the written notice above referred to, showing the service and return of the sheriff or other officer. The registration of such copy shall have the same force and effect as the original would have had if recorded: Provided, said copy shall be duly probated before being registered.

Nothing in this section shall require the registration of the following classes of instruments or conveyances, to wit:

- (1) It shall not apply to any deed or instrument executed prior to January 1, 1910.
- (2) It shall not apply to any deed or instrument so defectively executed or witnessed that it cannot by law be admitted to probate or registration provided that such deed or instrument was executed prior to the ratification of this section.
- (3) It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts.
- (4) It shall not apply to local telephone companies, operating exclusively within the State, or to agreements about alleyways.

The failure of electric companies or power companies operating exclusively within this State or electric membership corporations, organized pursuant to Chapter 291 of the Public Laws of 1935 [G.S. 117-6 through 117-27], to record any deeds or agreements for rights-of-way acquired subsequent to 1935, shall not constitute any violation of any criminal law of the State of North Carolina.

No deed, agreement for right-of-way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies.

From and after July 1, 1959, the provisions of this section shall apply to require the Department of Transportation to record as herein provided any deeds of easement, or any other agreements granting or conveying an interest in land which are executed on or after July 1, 1959, in the same manner and to the same extent that individuals, firms or corporations are required to record such easements. (1917, c. 148; 1919, c. 107; C. S., s. 3316; 1943, c. 750; 1959, c. 1244; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment, of Transportation" for "Board of effective July 1, 1977, substituted "Department Transportation" in the last paragraph.

§ 47-30. Plats and subdivisions; mapping requirements.

(f) Map to Contain Specific Information. — Every map shall contain the following specific information:

- (1) An accurately positioned north arrow coordinated with any bearings shown on the map. Indication shall be made as to whether the north index is true, magnetic or grid.
- (2) The azimuth or courses and distances as surveyed of every line shall be shown including offset lines where actually used in the field. Distances shall be in feet and decimals thereof; other units of measure may be placed in parentheses if desired.
- (3) All map lines shall be by horizontal (level) measurements. All information shown on the map shall be correctly plotted to the scale shown. Enlargement of portions of a map are acceptable in the interest of clarity, where shown as inserts on the same sheet.
- (4) Where a boundary is formed by a curved line, the following data must be given: actual survey data from the point of curvature of the curve

to the point of tangent shall be shown as standard curve data, or as a traverse of chords around the curve.

- (5) Where a subdivision of land is set out on the map, all streets and lots shall be carefully plotted with dimension lines indicating widths and all other pertinent information necessary to reestablish in the field.
- (6) Where control corners have been established in compliance with G.S. 39-32.1, 39-32.2, 39-32.3 and 39-32.4, as amended, the location and pertinent information as required in the reference statute shall be plotted on the map. All other corners which are marked by monument or natural object shall be so identified on all maps, and all corners of adjacent owners in the boundary lines of the subject tract which are marked by monument or natural object must be shown with a distance from one or more of the subject tract's corners.
- (7) The names of adjacent landowners and lot block and subdivision designations shall be shown where they have been determined and verified by the surveyor.
- (8) All visible and apparent rights-of-way, watercourses, utilities, roadways, and other such improvements shall be accurately located where crossing or forming any boundary line of the property shown, and locating, offset or traverse lines shall be plotted in broken lines with azimuths or courses and distances shown on the map.
- (9) Where the map is the result of a survey, one or more corners shall, by a system of azimuths or courses and distances, be accurately tied to a monument of some United States or State Agency Survey System, such as the United States Coast and Geodetic Survey Systems, where such monument is within 2,000 feet of said corner. Where the North Carolina Grid System coordinates of said monument have been published by the North Carolina Department of Natural Resources and Community Development, the coordinates of the referenced corner shall be computed and shown in X and Y ordinates on the map. Where such a monument is not available, the tie shall be made to some pertinent and permanent recognizable landmark or identifiable point.

(k) The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Anson, Ashe, Beaufort, Brunswick, Camden, Caswell, Cherokee, Clay, Franklin, Granville, Greene, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, McDowell, Martin, Mitchell, Northampton, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Richmond, Robeson, Scotland, Surry, Swain, Vance, Warren, Washington and Yadkin.

(1977, c. 50, s. 1; c. 221, s. 1; c. 305, s. 2; c. 771, s. 4.)

Local Modification. — Onslow: 1977, c. 305, s. 1.

Editor's Note. —

The first 1977 amendment, effective July 1, 1977, deleted "Lenoir," the second 1977 amendment deleted "Tyrrell," and the third 1977 amendment, effective July 1, 1977, deleted "Sampson," in subsection (k).

The fourth 1977 amendment substituted

"Natural Resources and Community Development" for "Natural and Economic Resources" in subdivision (9) of subsection (f).

Session Laws 1977, c. 771, s. 22, contains a severability clause.

As the rest of the section was not changed by the amendments, only subsections (f) and (k) are set out.

§ 47-30.1. Plats and subdivisions; alternative requirements.

Local Modification. — Yadkin: 1977, c. 480.

§ 47-32. **Photographic copies of plats, etc.** — After January 1, 1960, in all special proceedings in which a map shall be filed as a part of the papers, such

map shall meet the specifications required for recording of maps in the office of the register of deeds, and the clerk of superior court may certify a copy thereof to the register of deeds of the county in which said lands lie for recording in the Map Book provided for that purpose; and the clerk of superior court may have a photographic copy of said map made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, may place said photographic copy in said book at the end of the report of the commissioner or other document referring to said map.

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Brunswick, Camden, Caswell, Cherokee, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1931, c. 171; 1959, c. 1235, ss. 2, 3A, 3.1; 1961, cc. 7, 111, 164, 252, 697, 932, 1122; 1963, c. 71, s. 3; c. 236; c. 361, s. 2; 1965, c. 139, s. 2; 1971, c. 1185, s. 13; 1977, c. 111; c. 221, s. 2.)

Editor's Note. — The first 1977 amendment deleted Tyrrell in the list of counties in the deleted Lenoir and the second 1977 amendment second paragraph.

§ 47-32.2. Violation of § 47-30 or 47-32 a misdemeanor. — Any person, firm or corporation willfully violating the provisions of G.S. 47-30 or G.S. 47-32 shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00).

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Brunswick, Camden, Caswell, Cherokee, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1959, c. 1235, ss. 3, 3A, 3.1; 1961, cc. 7, 111, 164, 252; c. 535, s. 1; cc. 687, 932, 1122; 1963, c. 236; c. 361, s. 3; 1965, c. 139, s. 3; 1977, c. 110; c. 221, s. 3.)

Editor's Note. — The first 1977 amendment deleted Tyrrell in the list of counties in the deleted Lenoir and the second 1977 amendment second paragraph.

ARTICLE 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-38. Acknowledgment by grantor. — Where the instrument is acknowledged by the grantor or maker, the form of acknowledgment shall be in substance as follows:

North Carolina, County.

I (here give the name of the official and his official title), do hereby certify that (here give the name of the grantor or maker) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal this the day of (year).

(Official seal.)

(Signature of officer.)

(Rev., s. 1002; C. S., s. 3323; 1945, c. 73, s. 13; 1977, c. 375, s. 12.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, deleted "or where a married woman is a grantor or maker" following "acknowledged by the grantor or maker" near the beginning of the section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 47-39: Repealed by Session Laws 1977, c. 375, s. 16, effective January 1, 1978.

Editor's Note. — Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

ARTICLE 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-71.1. **Corporate seal omitted prior to January, 1975.** — Any corporate deed, or conveyance of land in this State, made prior to January 1, 1975, which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance. (1957, c. 500, s. 1; 1963, c. 1015; 1969, c. 815; 1971, c. 61; 1973, c. 479; 1977, c. 538.)

Editor's Note. — The 1977 amendment substituted "January 1, 1975" for "January 1, 1973."

§ 47-108.11. **Validation of recorded instruments where seals have been omitted.** — In all cases of any deed, deed of trust, mortgage, lien or other instrument authorized or required to be registered in the office of the register of deeds of any county in this State where it appears of record or it appears that from said instrument, as recorded in the office of the register of deeds of any county in the State, there has been omitted from said recorded or registered instrument the word "seal," "notarial seal" and that any of said recorded or registered instruments shows or recites that the grantor or grantors "have hereunto fixed or set their hands and seals" and the signature of the grantor or grantors appears without a seal thereafter or on the recorded or registered instrument or in all cases where it appears there is an attesting clause which recites "signed, sealed and delivered in the presence of," and the signature of the grantor or grantors appears on the recorded or registered instrument without any seal appearing thereafter or of record, then all such deeds, mortgages, deeds of trust, liens or other instruments, and the registration of same in the office of the register of deeds, are hereby declared to be in all respects valid and binding and are hereby made in all respects valid and binding to the same extent as if the word "seal" or "notarial seal" had not been omitted, and the registration and recording of such instruments in the office of the register of deeds in any county in this State are hereby declared to be valid, proper, legal and binding registrations.

This section shall not apply in any respect to any instrument recorded or registered subsequent to January 1, 1977, or to pending litigation or to any such

instruments now directly or indirectly involved in pending litigation. (1953, c. 996; 1959, c. 1022; 1973, c. 519; c. 1207, s. 2; 1977, c. 165.)

Editor's Note. — The 1977 amendment substituted "1977" for "1974" in the second paragraph.

ARTICLE 6.

Execution of Powers of Attorney.

§ 47-115.1. Appointment of attorney-in-fact which may be continued in effect notwithstanding incapacity or mental incompetence of the principal therein. — (a) Any person 18 years of age or more and mentally competent may as principal execute a power of attorney pursuant to the provisions of this section which shall continue in effect until revoked as hereinafter provided, notwithstanding any incapacity or mental incompetence of such principal which occurs after the date of the execution and acknowledgment of the power of attorney.

(k) In the event that any power of attorney executed pursuant to the provisions of this section does not contain the amount of commissions that the attorney-in-fact is entitled to receive or the way such commissions are to be determined, and the principal should thereafter become incompetent, the commissions such attorney-in-fact shall receive shall be fixed in the discretion of the clerk of superior court pursuant to the provisions of G.S. 32-50 (c). (1961, c. 341, s. 1; 1967, c. 1087; 1971, c. 197; c. 1231, s. 1; 1977, c. 814, s. 6.)

Editor's Note. —

The 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 32-50(c)" for "G.S. 28-170" at the end of subsection (k).

Subsection (a) is set out above to correct a typographical error in the Replacement Volume.

As the rest of the section was not changed, only subsections (a) and (k) are set out.

Chapter 47A.

Unit Ownership Act.

§ 47A-1. Short title.

Editor's Note. — For article entitled "Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations," see 12 Wake Forest L. Rev. 915 (1976).

For comment on areas of dispute in condominium law, see 12 Wake Forest L. Rev. 979 (1976).

Chapter 47B.

Real Property Marketable Title Act.

§ 47B-1. Declaration of policy and statement of purpose.

This Chapter does not affect the presumption in favor of the State set forth in § 146-79 relating to land controversies wherein

the State is a party. Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

§ 47B-3. Exceptions.

Applied in Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

Chapter 48.

Adoptions.

Sec.	Sec.
48-2. Definitions.	48-6.1. [Repealed.]
48-5. When parent is not necessary party to adoption proceedings.	48-9. When consent may be given by persons other than parents.
48-6. When consent of parents not necessary.	48-13. Reference to parental status.

§ 48-1. Legislative intent; construction of Chapter.

Applied in *In re Adoption of Spinks*, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

§ 48-2. **Definitions.** — In this Chapter, unless the context or subject matter otherwise requires —

(6) "Parent" means the biological or legal mother or father of a child. (1949, c. 300; 1953, c. 880; 1957, c. 778, s. 1; 1961, c. 241; 1969, c. 982; 1971, c. 157, ss. 1, 2; c. 1231, s. 1; 1973, c. 476, s. 138; 1975, c. 321, s. 2; 1977, c. 879, s. 1.)

Editor's Note. —

The 1977 amendment, effective Oct. 1, 1977, added subdivision (6).

Session Laws 1977, c. 879, s. 9, provides in part that the act shall not affect pending litigation.

As the other subdivisions were not changed by the amendment, only the introductory language and subdivision (6) are set out.

§ 48-5. **When parent is not necessary party to adoption proceedings.** — (a) The court shall be authorized to determine whether the parent or parents of a child shall be necessary parties to any proceeding under this Chapter, and whether the consent of such parent or parents shall be required in accordance with G.S. 48-6 and 48-7.

(b) If the identity of either parent is unknown or if one parent is unwilling to identify the other parent, the determination of whether consent of such parent shall be necessary to the adoption of the child shall be made according to G.S. 48-7(c).

(c) In all cases where a district court has entered an order pursuant to G.S. 7A-288 terminating the parental rights with respect to a child adjudicated to be neglected or dependent, the parent whose parental rights with respect to such child may have been terminated shall not be a necessary party to any proceeding under this Chapter nor shall the consent of such parent or parents be required.

(d) In the event that a district court has not heretofore entered an order terminating parental rights as provided for in G.S. 7A-288, then on written notice of not less than 10 days to the parent, parents, or guardian of the person, the court in the adoption proceeding is hereby authorized to determine whether an abandonment as defined in G.S. 48-2(3a) and (3b) has taken place.

(e) If the parent, parents, or guardian of the person deny that an abandonment has taken place, this issue of fact shall be determined as provided in G.S. 1-273, and if abandonment is determined, then the consent of the parent, parents, or guardian of the person shall not be required. Upon final determination of this issue of fact the proceeding shall be transferred back to the special proceedings docket for further action by the clerk.

(f) A copy of the order terminating parental rights or a copy of the order declaring a child abandoned as provided in subsections (d) and (e) must be filed

in the proceeding with the petition in which case consent must be given or withheld in accordance with G.S. 48-9, subsection (a)(2) or subsection (a)(3). (1949, c. 300; 1957, c. 90; c. 778, s. 3; 1971, c. 1185, s. 17; 1975, c. 321, s. 1; 1977, c. 879, s. 2.)

Editor's Note. —

The 1977 amendment, effective Oct. 1, 1977, redesignated former subsections (a) through (d) as subsections (c) through (f) and added present subsections (a) and (b).

Session Laws 1977, c. 879, s. 9, provides in part that the act shall not affect pending litigation.

§ 48-6. When consent of parents not necessary. — (a) The court shall determine whether the parent or parents of a child must give written consent to adoption of said child in accordance with the following provisions:

- (1) If a parent who has been served with notice pursuant to G.S. 48-7 fails to appear at the hearing by the date and time specified in the notice, and has not given a written consent to adoption, the clerk shall enter an order with supporting findings of fact allowing the adoption to proceed without the said parent's consent.
- (2) If a putative father appears at the hearing and cannot establish a parental right in accordance with subsection (3) below as to why his consent should be necessary, the court shall enter an order with supporting findings of fact allowing the adoption to proceed without the said putative father's consent.
- (3) In the case of a child born out of wedlock the consent of the putative father shall not be required unless prior to the filing of the adoption petition:
 - a. Paternity has been judicially established or acknowledged by affidavit; or
 - b. The child has been legitimated either by marriage to the mother or in accordance with provisions of G.S. 49-10, a petition for legitimation has been filed; or
 - c. The putative father has provided substantial financial support or consistent care with respect to the child and mother.

(a1) If a putative father of a child executes an affidavit denying paternity or executes a waiver of any and all rights to said child, including the right to notice of adoption, his consent shall not be required and he shall not be a necessary party to any proceeding under this Chapter, and the court shall enter an order to this effect.

(1977, c. 879, s. 3.)

Cross Reference. —

For provisions relating to the termination of parental rights, see § 7A-289.20 et seq.

Editor's Note. —

The 1977 amendment, effective Oct. 1, 1977, rewrote subsection (a) and added subsection (a1).

Session Laws 1977, c. 879, s. 9, provides in part that the act shall not affect pending litigation.

As subsection (b) was not changed by the amendment, it is not set out.

§ 48-6.1: Repealed by Session Laws 1977, c. 879, s. 4, effective October 1, 1977.

Cross Reference. — For provisions specifying when consent of parents is not necessary, see § 48-6.

§ 48-9. When consent may be given by persons other than parents. — (a) In the following instances written consent sufficient for the purposes of adoption filed with the petition shall be sufficient to make the person giving consent a party to the proceeding and no service of any process need be made upon such person:

- (1) When the parent, parents, or guardian of the person of the child has in writing surrendered the child to a director of social services of a county or to a licensed child-placing agency and at the same time in writing has consented generally to adoption of the child, the director of social services or the executive head of such agency may give consent to the adoption of the child by the petitioners. A county director of social services may accept the surrender of a child regardless of its place of birth or the residence of the parent or parents.
 - (2) If the court finds as a fact that there is no person qualified to give consent, or that the child has been abandoned by one or both parents or by the guardian of the person of the child, the court shall appoint some suitable person or the county director of social services of the county in which the child resides to act in the proceeding as guardian ad litem of the child to give or withhold such consent. The court may make the appointment immediately upon such determination and forthwith may make such further orders as to the court may seem proper.
 - (3) When a district court has entered an order terminating parental rights as provided by G.S. 7A-288, and when the court has placed such child in the custody of the county department of social services or a licensed child-placing agency, then the director of such county department of social services or the executive director of such licensed child-placing agency shall have the right to give written consent to the adoption of such child without being appointed as guardian ad litem of the child.
- (1977, c. 879, s. 5.)

Editor's Note. —

The 1977 amendment, effective Oct. 1, 1977, substituted "regardless of its place of birth or the residence of the parent or parents" for "who was born in the county or whose parent or parents have established residence in the county" at the end of the second sentence of subdivision (1) of subsection (a).

Session Laws 1977, c. 879, s. 9, provides in part that the act shall not affect pending litigation.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 48-13. Reference to parental status. — No reference shall be made in any petition, interlocutory decree, or final order of adoption to the marital status of the natural parents of the child sought to be adopted, to their fitness for the care and custody of such child, nor shall any reference be made therein to any child being born out of wedlock.

In the case of a child born out of wedlock and not legitimated prior to the time of the signing of the consent, an affidavit setting forth such facts sufficient to show that only the consent required under G.S. 48-6 is necessary shall be filed with the petition for adoption. (1949, c. 300; 1977, c. 879, s. 6.)

Editor's Note. — The 1977 amendment, effective Oct. 1, 1977, substituted "the petition for adoption" for "and become a part of the report provided for in G.S. 48-16" at the end of the second paragraph.

Session Laws 1977, c. 879, s. 9, provides in part that the act shall not affect pending litigation.

§ 48-23. Legal effect of final order.

Subdivision (3) does not abolish, etc. —

It is well established that the cardinal principle in the construction of a will is to give effect to the intent of the testator as it appears from the language used in the instrument itself, subject to the limits imposed by statute or decision. Subdivision (3) has not changed this principle, but merely has provided the courts with a clear and certain rule of construction to be applied unless a contrary intent plainly appears from the terms of the instrument. *Stoney v. MacDougall*,

31 N.C. App. 678, 230 S.E.2d 592 (1976), cert. denied, 291 N.C. 716, 232 S.E.2d 208 (1977).

Use of Word "Issue" in Will. —

The mere use of the word "issue" in an instrument drafted prior to the enactment of subdivision (3) does not plainly reveal the contrary intent required by this section. *Stoney v. MacDougall*, 31 N.C. App. 678, 230 S.E.2d 592 (1976).

Applied in *In re Adoption of Spinks*, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

§ 48-25. Record and information not to be made public; violation a misdemeanor.

Service of Motion and Notice of Hearing upon Director of Social Services Required. —

Subsection (c) requires that before a director of social services shall be required to disclose any information acquired in contemplation of the adoption of a child, the director must be served

with the motion and notice of hearing. *In re Adoption of Spinks*, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

There is no requirement that the natural parents be served. *In re Adoption of Spinks*, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

§ 48-26. Procedure for opening record for necessary information.

Under this section, disclosure is permitted when the trial judge determines it to be in the best interest of the child or the public. *In re Adoption of Spinks*, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

In making the determination that disclosure of any necessary information would be in the best interest of the child or the public, the judge should carefully weigh the interests of the child and the public, including the interests of the adoptive parents and the natural parents.

Any conflict should be resolved in favor of the best interest of the child. *In re Adoption of Spinks*, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

Finding of Fact Required. — There must be a finding of fact that the information sought to be revealed is necessary for the best interest of the child or the public before an order can be entered requiring disclosure of the information. *In re Adoption of Spinks*, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

§ 48-37. Compensation for placing or arranging placement of child for adoption prohibited.

Arrangement by Prospective Adoptive Parents to Pay Transportation Expenses and Medical Costs for Expectant Mother. —

Prospective adoptive parents who enter into an arrangement with an expectant mother to pay her transportation expenses to North Carolina

as well as all medical costs incident to the birth of the child pursuant to an independent adoption placement violate the provisions of this section. *Opinion of Attorney General to Renee P. Hill*, 45 N.C.A.G. 24 (1975).

Chapter 48A.

Minors.

§ 48A-2. Age of minors.

Legal Obligation of Support. —

Nothing else showing, where an order of the court for support entered prior to the effective date of this section provides for support of the children until the age of majority, maturity or emancipation, it has been interpreted, in light of this section, to impose the legal obligation of

support only to the child's eighteenth birthday. *Harding v. Harding*, 29 N.C. App. 633, 225 S.E.2d 590, cert. denied, 290 N.C. 661, 228 S.E.2d 452 (1976).

Applied in *Loer v. Loer*, 31 N.C. App. 150, 228 S.E.2d 473 (1976).

Chapter 49.

Bastardy.

Article 1.

Support of Illegitimate Children.

Sec.

- 49-2. Nonsupport of illegitimate child by parents made misdemeanor.
49-7. Issues and orders.

Article 2.

Legitimation of Illegitimate Children.

- 49-10. Legitimation.

Article 3.

Civil Actions regarding Illegitimate Children.

Sec.

- 49-14. Civil action to establish paternity.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor. — Any parent who willfully neglects or who refuses to provide adequate support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided. A child within the meaning of this Article shall be any person less than 18 years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain if such child were the legitimate child of such parent. (1933, c. 228, s. 1; 1937, c. 432, s. 1; 1939, c. 217, ss. 1, 2; 1951, c. 154, s. 1; 1977, c. 3, s. 1.)

Editor's Note. —

The 1977 amendment inserted "provide adequate" near the beginning of the first sentence.

Purpose. —

The purpose of this section is not to confer rights upon either the mother or the father but to protect the child and to protect the State against the child's becoming a public charge. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

Violation of Statute Is Continuing Offense. —

The criminal offense of willful nonsupport of an illegitimate child by a parent of the child may be repeated and, if it is, prosecution for the subsequent offense is not barred by the prosecution for the former offense on the theory of double jeopardy. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

The begetting of, etc. —

The criminal offense is not committed by the begetting but by the willful nonsupport of the child. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

The question of paternity, etc. —

In accord with 2nd paragraph of original. See *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

The State's right to proceed under this section does not, as a matter of law, require the

consent of the mother or of the child to the bringing of the proceeding, however important to its case may be the mother's cooperation as a witness. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

But Paternity Need Not Be Relitigated, etc. —

Upon a subsequent prosecution of an alleged father, the question of paternity, necessarily determined against him in the previous criminal action, need not be relitigated, that question being *res judicata*. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

Effect of Proceedings under Section upon Subsequent Civil Proceedings to Establish Paternity. —

Since the parties to a previous criminal proceeding under this section and civil proceedings under § 49-14 are not the same, and the State and the present plaintiff were not in privity, the defendant was not estopped in a civil action to deny paternity. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

Appointment of Counsel. —

In accord with 1st paragraph of original. See *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

Cited in *Smith v. Burden*, 31 N.C. App. 145, 228 S.E.2d 662 (1976).

§ 49-5. Prosecution; indictments; death of mother no bar; determination of fatherhood.

Joining of Mother In Prosecution Not Required. — Prosecution of the alleged father for the violation of § 49-2 may be initiated by the mother, but her joining therein is not a prerequisite to the validity of the prosecution. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

Continuance until after Birth of Child. — It would seem that in a preliminary proceeding under this section a continuance until the birth of the child would be required when a defendant requests a blood-grouping test under § 49-7. *State v. Morgan*, 31 N.C. App. 128, 228 S.E.2d 523 (1976).

§ 49-7. Issues and orders. — The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to provide adequate support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the particular child who is the object of the proceedings. The court in fixing this sum shall take into account the circumstances of the case, the financial ability to pay and earning capacity of the defendant, and his or her willingness to cooperate for the welfare of the child. The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require. Compliance by the defendant with any or all of the further provisions of this Article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof.

The court before whom the matter may be brought on motion of the defendant, shall direct an order that the defendant, the mother, and the child shall submit to a blood-grouping test; and the court in its discretion may require the person requesting a blood-grouping test to pay the cost thereof. The result of any such blood-grouping test shall be admitted in evidence when offered by a duly licensed practicing physician or duly qualified person, and the evidentiary effect of such blood-grouping test shall be as prescribed in G.S. 8-50.1, and, if a jury shall try the issue, it shall be instructed as set out therein. From a finding of the issue of paternity against the defendant, the defendant shall have the same right of appeal as though he had been found guilty of the crime of willful failure to support a bastard child. (1933, c. 228, s. 6; 1937, c. 432, s. 2; 1939, c. 217, ss. 1, 4; 1945, c. 40; 1947, c. 1014; 1971, c. 1185, s. 19; 1975, c. 449, s. 3; 1977, c. 3, s. 2.)

Editor's Note. —

The 1977 amendment inserted "provide adequate" near the end of the second sentence of the first paragraph.

A defendant's right to a blood test, etc. — In accord with original. See *State v. Morgan*, 31 N.C. App. 128, 228 S.E.2d 523 (1976).

The 1975 amendment to § 8-50.1 amplifies the importance of the right to a blood-grouping test

under this section. *State v. Morgan*, 31 N.C. App. 128, 228 S.E.2d 523 (1976).

Issue of Paternity, etc. —

An affirmative answer to the question of paternity is an indispensable prerequisite to the defendant's conviction on the criminal charge. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation. — The putative father of any child born out of wedlock, whether such father resides in North Carolina or not, may apply by a verified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides or in the superior court of the county in which the child resides, praying that such child be declared legitimate. The mother, if living, and the child shall be necessary parties to the proceeding, and the full names of the father, mother and the child shall be set out in the petition. A certified copy of a certificate of birth of the child shall be attached to the petition. If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated; and the full names of the father, mother and the child shall be set out in the court order decreeing legitimation of the child. The clerk of the court shall record the order in the record of orders and decrees and it shall be cross-indexed under the name of the father as plaintiff or petitioner on the plaintiff's side of the cross-index, and under the name of the mother, and the child as defendants or respondents on the defendants' side of the cross-index. (Code, s. 39; Rev., s. 263; C.S., s. 277; 1947, c. 663, s. 1; 1971, c. 154; 1977, c. 83, s. 1.)

Editor's Note. —

The 1977 amendment, effective July 1, 1977, added the present third sentence.

ARTICLE 3.

Civil Actions regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity. — (a) The paternity of a child born out of wedlock may be established by civil action. A certified copy of a certificate of birth of the child shall be attached to the complaint. Such establishment of paternity shall not have the effect of legitimation. (1977, c. 83, s. 2.)

Editor's Note. — The 1977 amendment, effective July 1, 1977, added the second sentence of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Effect of Criminal Proceedings under § 49-2 upon Proceedings under This Section. —

Since the parties to a previous criminal proceeding under § 49-2 and civil proceedings under this section are not the same, and the State and the present plaintiff were not in privity, the defendant was not estopped in the civil action to deny paternity. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

§ 49-15. Custody and support of illegitimate children when paternity established.

This section contemplates that parents' rights may be determined and enforced in an action brought pursuant to § 49-14. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

And does not contemplate the bringing of a separate action for that purpose pursuant to § 50-13.1 et seq., which relates to the custody and support of legitimate children. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

An action to enforce liability under this section is barred after three years under § 1-52(2). *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

Statute of Limitation Applies to Each Expenditure. — Each time a mother makes an expenditure reasonably incurred for the support of a child, such expenditure creates in her a new right to reimbursement so that the statute of

limitation applicable to proceedings hereunder, § 1-52(2), begins to run against each expenditure on the date when the expenditure was made.

Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

§ 49-16. Parties to proceeding.

Cited in Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Chapter 50.

Divorce and Alimony.

Sec.	Sec.
50-5. Grounds for absolute divorce.	50-13.2. Who entitled to custody; terms of custody; taking child out of state.
50-6. Divorce after separation of one year on application of either party.	
50-11.3. Certain judgments entered prior to April 1, 1977, validated.	

§ 50-5. Grounds for absolute divorce. — Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

(1)

Adultery is adequate cause for separation. Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977).

Condonation. — Condonation is the forgiveness of a marital offense constituting a ground for divorce. Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977).

Condonation is forgiveness upon condition, and the condition is, that the party forgiven will abstain from like offense afterwards, and moreover treat the forgiving party, in all

(4)

Separation, as this word is used, etc. —

In accord with 1st paragraph in original. See In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

In accord with 2nd paragraph in original. See In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Effect of Resumption of Cohabitation upon Separation Agreement. — The same public policy which will not permit spouses to continue to live together in the same home — holding themselves out to the public as husband and wife — to sue each other for an absolute divorce on the ground of separation, or to base the period of separation required for a divorce on any time they live together, will also nullify a separation agreement if the parties resume marital

respects, with conjugal kindness; and, if the condition shall be violated, then the original offense shall be revived. Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977).

Voluntary sexual intercourse by the innocent spouse, with knowledge or reason to know that the other has committed adultery, usually operates as a condonation of the offense. Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977).

cohabitation. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

When separated spouses who have executed a separation agreement resume living together in the home which they occupied before the separation, they hold themselves out as man and wife in the ordinary acceptance of the descriptive phrase. Irrespective of whether they have resumed sexual relations, in contemplation of law, their action amounts to a resumption of marital cohabitation which rescinded their separation agreement insofar as it had not been executed. Further, a subsequent separation will not revive the agreement. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

(6) In all cases where a husband and wife have lived separate and apart for three consecutive years, without cohabitation, and are still so living separate and apart by reason of the incurable insanity of one of them, the court may grant a decree of absolute divorce upon the petition of the sane spouse: Provided, if the insane spouse has been released on a trial basis to the custody of his or her respective spouse such shall not be considered as terminating the status of living "separate and apart" nor shall it be considered as constituting "cohabitation" for the purpose of this section nor shall it prevent the granting of a divorce as provided by this section. Provided further, the evidence shall show that the

insane spouse is suffering from incurable insanity, and has been confined or examined for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered or, if not so confined, has been examined at least three years preceding the institution of the action for divorce and then found to be incurably insane as hereinafter provided. Provided further, that proof of incurable insanity be supported by the testimony of two reputable physicians, one of whom shall be a staff member or the superintendent of the institution where the insane spouse is confined, and one regularly practicing physician in the community wherein such husband and wife reside, who has no connection with the institution in which said insane spouse is confined; and provided further that a sworn statement signed by said staff member or said superintendent of the institution wherein the insane spouse is confined or was examined shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse and as to whether or not said insane spouse is suffering from incurable insanity, or the parties according to the laws governing depositions may take the deposition of said staff member or superintendent of the institution wherein the insane spouse is confined; and provided further that incurable insanity may be proved by the testimony of one or more licensed physicians who are members of the staff of one of this State's accredited four-year medical schools or a state-supported mental institution, supported by the testimony of one or more other physicians licensed by the State of North Carolina, that each of them examined the allegedly incurable insane spouse at least three years preceding the institution of the action for divorce and then determined that said spouse was suffering from incurable insanity and that one or more of them examined the allegedly insane spouse subsequent to the institution of the action and that in his or their opinion the said allegedly insane spouse was continuously incurably insane throughout the full period of three years prior to the institution of the said action.

In lieu of proof of incurable insanity and confinement for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered prescribed in the preceding paragraph, it shall be sufficient if the evidence shall show that the allegedly insane spouse was adjudicated to be insane more than three years preceding the institution of the action for divorce, that such insanity has continued without interruption since such adjudication and that such person has not been adjudicated to be sane since such adjudication of insanity; provided, further, proof of incurable insanity existing after the institution of the action for divorce shall be furnished by the testimony of two reputable, regularly practicing physicians, one of whom shall be a psychiatrist.

In lieu of proof of incurable insanity and confinement for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered, or the adjudication of insanity, as prescribed in the preceding paragraphs, it shall be sufficient if the evidence shall show that the insane spouse was examined by two or more members of the staff of one of this State's accredited four-year medical schools, both of whom are medical doctors, at least three years preceding the institution of the action for divorce with a determination at that time by said staff members that said spouse is suffering from incurable insanity, that such insanity has continued without interruption since such determination; provided, further, that sworn statements signed by the staff members of the accredited medical school who examined the insane spouse at least

three years preceding the commencement of the action shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse as to whether or not said insane spouse was suffering from incurable insanity; provided, further, that proof of incurable insanity under this section existing after the institution of the action for divorce shall be furnished by the testimony of two reputable physicians, one of whom shall be a psychiatrist on the staff of one of the State's accredited four-year medical schools, and one a physician practicing regularly in the community wherein such insane person resides.

In all decrees granted under this subdivision in actions in which the insane defendant has insufficient income and property to provide for his or her own care and maintenance, the court shall require the plaintiff to provide for the care and maintenance of the insane defendant for the defendant's lifetime, based upon the standards set out in G.S. 50-16.5(a). The trial court will retain jurisdiction of the parties and the cause, from term to term, for the purpose of making such orders as equity may require to enforce the provisions of the decree requiring plaintiff to furnish the necessary funds for such care and maintenance.

Service of process shall be held upon the regular guardian for said defendant spouse, if any, and if no regular guardian, upon a duly appointed guardian ad litem and also upon the superintendent or physician in charge of the institution wherein the insane spouse is confined. Such guardian or guardian ad litem shall make an investigation of the circumstances and notify the next of kin of the insane spouse or the superintendent of the institution of the action and whenever practical confer with said next of kin before filing appropriate pleadings in behalf of the defendant.

In all actions brought under this subdivision, if the jury finds as a fact that the plaintiff has been guilty of such conduct as has conduced to the unsoundness of mind of the insane defendant, the relief prayed for shall be denied.

The plaintiff or defendant must have resided in this State for six months next preceding institution of any action under this section.

(1977, c. 501, s. 1.)

Editor's Note. —

The 1977 amendment, effective July 1, 1977, rewrote subdivision (6).

Session Laws 1977, c. 501, s. 3, provides that the act shall not affect pending litigation.

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (6) are set out.

For article entitled, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For an article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

Cited in *Ponder v. Ponder*, 32 N.C. App. 150, 230 S.E.2d 786 (1977).

§ 50-6. Divorce after separation of one year on application of either party.

— Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce. A plea of *res judicata* or of recrimination with respect to any provision of G.S. 50-5 shall not be a bar to either party obtaining a divorce on this ground: Provided that no final judgment of divorce shall be rendered under this section until the court determines that there are no claims for support or alimony between the parties or that all such claims have been fully and finally adjudicated. (1931, c. 72; 1933, c. 163; 1937, c. 100, ss. 1, 2; 1943, c. 448, s. 3; 1949, c. 264, s. 3; 1965, c. 636, s. 2; 1977, c. 817, s. 1.)

Editor's Note. —

The 1977 amendment, effective Aug. 1, 1977, added the third sentence.

Session Laws 1977, c. 817, s. 2, provides that the act shall not affect pending litigation.

For article entitled, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

"Judicial Separation" Included. —

The pendente lite order in the wife's action for divorce from bed and board legalized the separation between the husband and wife since it provided not only for alimony pendente lite and child custody but also that the wife have the sole use and peaceful and undisturbed possession of the residence, and such separation having continued for the requisite one year thereafter, the plaintiff-husband became entitled to a divorce. *Earles v. Earles*, 29 N.C. App. 348, 224 S.E.2d 284 (1976).

Separation means cessation, etc. —

In accord with original. See *In re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976).

Physical Separation Must Be Accompanied, etc. —

The words "separate and apart," as used in this section, mean that there must be both a physical separation and an intention on the part of at least one of the parties to cease the matrimonial cohabitation. *Earles v. Earles*, 29 N.C. App. 348, 224 S.E.2d 284 (1976).

Plaintiff Need Not Establish, etc. —

In an action for absolute divorce under this section, the plaintiff need not allege and prove that he or she is an injured party. *Earles v. Earles*, 29 N.C. App. 348, 224 S.E.2d 284 (1976).

Effect of Resumption of Cohabitation upon Separation Agreement. —

When separated spouses who have executed a separation agreement resume living together in the home which they occupied before the separation, they hold themselves out as man and wife in the ordinary acceptance of the descriptive phrase. Irrespective of whether they have resumed sexual relations, in contemplation of law, their action amounts to a resumption of marital cohabitation which rescinded their separation agreement insofar as it had not been executed. Further, a subsequent separation will not revive the agreement. In *re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976).

The same public policy which will not permit spouses to continue to live together in the same home — holding themselves out to the public as husband and wife — to sue each other for an absolute divorce on the ground of separation, or to base the period of separation required for a divorce on any time they live together, will also nullify a separation agreement if the parties resume marital cohabitation. In *re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976).

The heart of a separation agreement is the parties' intention and agreement to live separate and apart forever, and when a husband and wife enter into a deed of separation the policy of the law is that they are to live separate. Therefore, they void the separation agreement if they reestablish a matrimonial home. In *re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976).

Applied in *Ponder v. Ponder*, 32 N.C. App. 150, 230 S.E.2d 786 (1977).

§ 50-7. Grounds for divorce from bed and board.**Editor's Note. —**

For an article dealing with marriage contracts as related to North Carolina law, see 13 *Wake Forest L. Rev.* 85 (1977).

Cited in *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976).

§ 50-11. Effects of absolute divorce.**Editor's Note. —**

For article entitled, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

Applied in *Webber v. Webber*, 32 N.C. App. 572, 232 S.E.2d 865 (1977).

§ 50-11.2. Judgment provisions pertaining to care, custody, tuition and maintenance of minor children.

Editor's Note. — For article entitled, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

§ 50-11.3. Certain judgments entered prior to April 1, 1977, validated. — Any judgment of divorce which has been entered prior to April 1, 1977, by a court of competent jurisdiction within the State of North Carolina without a conclusion of law that the plaintiff was entitled to an absolute divorce, but which is proper in all other respects, is hereby rendered valid and of full force and effect. (1977, c. 320.)

§ 50-13.1. Action or proceeding for custody of minor child.

Effect of Foreign Adjudication of Paternity.

— See *Brondum v. Cox*, 292 N.C. 192, 232 S.E.2d 687 (1977).

§ 50-13.2. Who entitled to custody; terms of custody; taking child out of state. — (a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child. Provided, between the mother and father, whether natural or adoptive, there is no presumption as to who will better promote the interest and welfare of the child.

(1977, c. 501, s. 2.)

Editor's Note. —

The 1977 amendment, effective July 1, 1977, added the second sentence of subsection (a).

Session Laws 1977, c. 501, s. 3, provides that the act shall not affect pending litigation.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

For article entitled, "Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents," see 1976 Duke L.J. 911.

For article entitled, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

The welfare of the child, etc. —

In accord with 18th paragraph in original. See *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

But Trial Court Has Wide Discretion. —

The trial judge is vested with broad discretion since he is in a position to see and hear the parties and witnesses. *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

To support an award of visitation rights, the judgment of the trial court should contain

findings of fact which sustain the conclusion of law that the party is a fit person to visit the child and that such visitation rights are in the best interest of the child. *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

Trial Court Must Make, etc. —

In accord with 3rd paragraph in original. See *Hampton v. Hampton*, 29 N.C. App. 342, 224 S.E.2d 197 (1976).

To support an award of custody, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child. *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

Such Findings Are Conclusive, etc. —

In accord with 1st paragraph in original. See *Hampton v. Hampton*, 29 N.C. App. 342, 224 S.E.2d 197 (1976).

Applied in *Stanback v. Stanback*, 31 N.C. App. 174, 229 S.E.2d 693 (1976).

§ 50-13.3. Enforcement of order for custody.

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, s. 26, effective July 1, 1978, will rewrite subsection (a) to read as follows:

"(a) An order providing for the custody of a minor child is enforceable by proceedings for civil contempt and its disobedience may be punished by proceedings for criminal contempt,

as provided in Chapter 5A, Contempt, of the General Statutes."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article

85, "Parole" shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

§ 50-13.4. Action for support of minor child.

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, s. 26, effective July 1, 1978, will rewrite subdivision (f)(9) to read as follows:

"(9) An order for the payment of child support is enforceable by proceedings for civil contempt and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgement was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Father Primarily Liable, etc. —

This section imposes upon the father the primary duty to support the child, the mother's obligation being secondary. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

Separation Agreements Are Not Binding, etc. —

Any separation agreement dealing with the custody and the support of the children of the parties cannot deprive the court of its inherent as well as statutory authority to protect the interests of and provide for the welfare of minors. *McKaughn v. McKaughn*, 29 N.C. App. 702, 225 S.E.2d 616 (1976).

Valid separation agreements relating to marital and property rights of the parties are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. *Perry v. Perry*, 33 N.C. App. 139, 234 S.E.2d 449 (1977).

Amount Set by Agreement, etc. —

Where parties to a separation agreement agree concerning the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the provisions mutually agreed upon are just and reasonable, and the court is not warranted in ordering a change in the absence of any evidence of a change in conditions. *McKaughn v. McKaughn*, 29 N.C. App. 702, 225 S.E.2d 616 (1976).

When Agreement May Be Modified. — A separation agreement is a contract between the parties and the court is without power to modify it except (1) to provide for adequate support for minor children, and (2) with the mutual consent

of the parties thereto where rights of third parties have not intervened. *McKaughn v. McKaughn*, 29 N.C. App. 702, 225 S.E.2d 616 (1976).

Present Earnings, etc. —

Ordinarily the husband's ability to pay is determined by his income at the time the award is made if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976).

Capacity to earn may be the basis of an award if it is based upon a proper finding that the husband is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children. *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976).

Award of Homeplace. — The award of the homeplace does not constitute a writ of possession within the meaning of § 50-17 and the trial judge may award exclusive possession of the homeplace, even though owned by the entirety, as a part of support under this section. *Arnold v. Arnold*, 30 N.C. App. 683, 228 S.E.2d 48 (1976).

Granting of Credit Towards Payment of Court-Ordered Child Support for Voluntary Expenditures. — See *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

To support an award of payment for support, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that the support payments ordered are in "such amount as to meet the reasonable needs of the child for health, education and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular care." *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

Where the court does not make appropriate findings based on competent evidence as to what are the reasonable needs of the children for health, education and maintenance, it is error to direct payments for their support. *Hampton v. Hampton*, 29 N.C. App. 342, 224 S.E.2d 197 (1976).

Award Not Disturbed Unless Discretion Abused. —

The amount of child support awarded is in the discretion of the trial judge and will be disturbed only on a showing of abuse of that discretion. *Wyatt v. Wyatt*, 32 N.C. App. 162, 231 S.E.2d 42 (1977).

Trial Court Must Find Defendant Possessed Means to Comply. —

In order to hold a parent in contempt for failure to pay child support in accordance with a decree, the failure must be willful. In order to find the failure willful, there must be particular findings of the ability to pay during the period of delinquency. *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

Appellate Review, etc. —

In determining the amount of alimony and child support to be awarded, the trial judge must follow the requirements of this section. The amount is a reasonable subsistence, to be determined by the trial judge in the exercise of a judicial discretion from the evidence before

him. His determination is reviewable, but it will not be disturbed in the absence of a clear abuse of discretion. *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976).

The trial court's discretion as to the amount of child support awarded is not absolute and unreviewable. The order must be based not only on the needs of the child but also on the ability of the father to meet the needs. But where there is a finding of ability to pay supported in the record by competent evidence, that finding will be conclusive. *Wyatt v. Wyatt*, 32 N.C. App. 162, 231 S.E.2d 42 (1977).

Stated in *Stanback v. Stanback*, 31 N.C. App. 174, 229 S.E.2d 693 (1976).

§ 50-13.5. Procedure in actions for custody or support of minor children.

Application of Subsection (f). —

The first proviso of subsection (f), when read in conjunction with the first sentence of subsection (f) and in conjunction with subsection (b), makes it clear that after final judgment in a previously instituted action between the parents, where custody and support has not been brought to issue or determined, the custody and support issue may be determined in an independent action in another court. *Kennedy v. Surratt*, 29 N.C. App. 404, 224 S.E.2d 215 (1976).

And Issue of Custody and Support Remains in Fieri. —

If custody and support had been brought to issue or determined in the previously instituted action between the parents, there could be no final judgment in that case, because the issue of custody and support remains in fieri until the children have become emancipated. *Kennedy v. Surratt*, 29 N.C. App. 404, 224 S.E.2d 215 (1976).

Custody Decree of Another State, etc. —

The Full Faith and Credit Clause does not conclusively bind the North Carolina courts to give greater effect to a decree of another state than it has in that state, or to treat as final and conclusive an order of a sister state which is interlocutory in nature. *Johnston v. Johnston*, 29 N.C. App. 345, 224 S.E.2d 276 (1976).

Adultery. —

In accord with 4th paragraph in original. See *Hunt v. Hunt*, 29 N.C. App. 380, 224 S.E.2d 270 (1976).

To support an award of custody, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child. *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

To support an award of visitation rights, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that the party is a fit person to visit the child and that such visitation rights are in the best interest of the child. *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

Effect of Appeal. —

While an appeal from an order providing for the custody of a minor child removes the cause from the trial court to the appellate court, and pending the appeal the trial court is without jurisdiction to punish for contempt, taking an appeal does not authorize a violation of the custody order. If the custody order is upheld by the appellate court, the violation may be inquired into when the cause is remanded to the trial court. *Sturdivant v. Sturdivant*, 31 N.C. App. 341, 229 S.E.2d 318 (1976).

Cited in *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

This section applies to a proceeding to compel the future support of the child. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

And not to a proceeding to compel

reimbursement for past payments made by a person secondarily liable for such child's support. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

The amount awarded, etc. —

The trial court's determination of attorney fees is binding on the appellate courts in the absence of abuse of discretion. *Wyche v. Wyche*, 29 N.C. App. 685, 225 S.E.2d 626, cert. denied, 290 N.C. 668, 228 S.E.2d 459 (1976).

The partial listing of legal expenses is an insufficient finding of fact as to the reasonable worth of attorney's fees. *Wyatt v. Wyatt*, 32 N.C. App. 162, 231 S.E.2d 42 (1977).

Second Sentence of Section, etc. —

The requirement of a finding that the party ordered to pay support has refused to provide support applies only in support actions and not

in custody or custody and support actions. *Arnold v. Arnold*, 30 N.C. App. 683, 228 S.E.2d 48 (1976).

Findings of fact are not required to support an award of attorney's fees in an action for custody and support. *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

Award of Fees by Appellate Court. — Neither this section nor any other statute authorizes an appellate court to make an award of attorney's fees. *Tilley v. Tilley*, 30 N.C. App. 581, 227 S.E.2d 640 (1976).

Applied in *Hampton v. Hampton*, 29 N.C. App. 342, 224 S.E.2d 197 (1976).

§ 50-13.7. Modification of order for child support or custody.**The welfare of the children in controversies involving custody, etc. —**

The welfare of the child is the polar star by which the courts must be guided in awarding custody. *Dean v. Dean*, 32 N.C. App. 482, 232 S.E.2d 470 (1977).

And Judgment in Custody Suit, etc. —

A judgment awarding custody is based upon the conditions found to exist at the time it was entered. *Owen v. Owen*, 31 N.C. App. 230, 229 S.E.2d 49 (1976).

While a decree making a judicial award of the custody of a child determines the present rights of the parties to the contest, it is not permanent in its nature, and may be modified by the court in the future as subsequent events and the welfare of the child may require. *Owen v. Owen*, 31 N.C. App. 230, 229 S.E.2d 49 (1976).

The wishes of a child. —

Although not controlling, the wishes of a child who has reached the age of discretion are entitled to consideration in awarding custody because the consideration of such wishes will aid the court in making a custodial decree which is

for the best interests and welfare of the child. In re *Williamson*, 32 N.C. App. 616, 233 S.E.2d 677 (1977).

The modification of a custody decree must be supported by findings of fact. — In accord with original. See *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

The proper procedure to follow when a supported child reaches majority is to apply to the trial court for relief under this section. *Tilley v. Tilley*, 30 N.C. App. 581, 227 S.E.2d 640 (1976).

Appellate Review. —

The scope of appellate review of a trial court's judgment awarding custody of children is well settled: The court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence to the contrary, or even though some incompetent evidence may have been admitted. In re *Williamson*, 32 N.C. App. 616, 233 S.E.2d 677 (1977).

§ 50-16.1. Definitions.**Editor's Note. —**

For article entitled, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For an article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

Cited in *Privette v. Privette*, 30 N.C. App. 305, 227 S.E.2d 137 (1976); *Reid v. Reid*, 32 N.C. App. 750, 233 S.E.2d 620 (1977).

§ 50-16.2. Grounds for alimony.**Editor's Note. —**

For article entitled, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For an article dealing with marriage contracts

as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

Sexual cohabitation after acts of cruelty cannot be considered as condonation in the sense in which it would be after an act of

adultery. The effort to endure unkind treatment as long as possible is commendable; and it is obviously a just rule that the patient endurance by one spouse of the continuing ill treatment of the other should never be allowed to weaken his or her right to relief under subdivision (7). *Privette v. Privette*, 30 N.C. App. 305, 227 S.E.2d 137 (1976).

§ 50-16.3. Grounds for alimony pendente lite.

Purpose of Remedy. —

The purpose of the speedy proceedings for alimony pendente lite is to give the dependent spouse subsistence and counsel fees pending trial of the action on its merits. This result places the dependent spouse on a more nearly equal footing with the supporting spouse for purposes of preparing for and prosecuting the dependent spouse's claim. *Black v. Black*, 30 N.C. App. 403, 226 S.E.2d 858, appeal dismissed, 290 N.C. 775, 229 S.E.2d 31 (1976).

The purpose of alimony pendente lite is to provide the dependent spouse with reasonable living expenses during the pendency of litigation. *Roberts v. Roberts*, 30 N.C. App. 242, 226 S.E.2d 400 (1976).

Subsistence and counsel fees pendente lite are within the discretion of the court. —

The specific amount of alimony pendente lite to be paid a dependent spouse is within the discretion of the trial judge to determine and will not be disturbed on appeal in the absence of an abuse of discretion. *Strother v. Strother*, 29 N.C. App. 223, 223 S.E.2d 838 (1976).

Findings of Fact Required. — In order for a spouse to be entitled to alimony pendente lite under this section, the trial court must make findings of fact to show three requirements: (1) the existence of a marital relationship; (2) the spouse is either (a) actually or substantially dependent upon the other spouse for maintenance and support, or (b) is substantially in need of maintenance and support from the other spouse; and (3) the supporting spouse is capable of making the required payments. *Hampton v. Hampton*, 29 N.C. App. 342, 224 S.E.2d 197 (1976).

§ 50-16.4. Counsel fees in actions for alimony.

Applied in *Hampton v. Hampton*, 29 N.C. App. 342, 224 S.E.2d 197 (1976).

§ 50-16.5. Determination of amount of alimony.

Editor's Note. —

For an article dealing with marriage contracts

The affirmative defense of condonation must be carried by the defendant. *Privette v. Privette*, 30 N.C. App. 305, 227 S.E.2d 137 (1976).

Cited in *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976); *Reid v. Reid*, 29 N.C. App. 754, 225 S.E.2d 649 (1976).

The mere fact that the wife has property or means of her own does not prohibit an award of alimony pendente lite. *Strother v. Strother*, 29 N.C. App. 223, 223 S.E.2d 838 (1976).

Nor a Determination of Property Rights. —

The final merits of the action are not before the trial judge upon a pendente lite hearing. Therefore, upon a pendente lite hearing, the trial judge may not determine the ultimate property rights of the parties. *Black v. Black*, 30 N.C. App. 403, 226 S.E.2d 858, appeal dismissed, 290 N.C. 775, 229 S.E.2d 31 (1976).

A determination of the rights to a joint savings account is a matter for final hearing on all the merits, and not for hearing on alimony pendente lite. *Roberts v. Roberts*, 30 N.C. App. 242, 226 S.E.2d 400 (1976).

Effect of Appeal. — When an order arising from a domestic case is appealed, the cause is taken out of the jurisdiction of the trial court and put into the jurisdiction of the appellate court. Pending the appeal, the trial judge is *functus officio* and is without authority to act in the matter. *Traywick v. Traywick*, 31 N.C. App. 363, 229 S.E.2d 220 (1976).

The district court had jurisdiction to entertain a motion in the cause and to adjudge defendant guilty of contempt for failure to comply with the alimony pendente lite order after the judgment on the merits had been reversed on other grounds, a new trial was ordered and the case was certified back to the trial court by the Court of Appeals. *Traywick v. Traywick*, 31 N.C. App. 363, 229 S.E.2d 220 (1976).

Quoted in *Bridges v. Bridges*, 29 N.C. App. 209, 223 S.E.2d 845 (1976).

as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

Discretion of Judge. —

In determining the amount of alimony and child support to be awarded, the trial judge must follow the requirements of this section. The amount is a reasonable subsistence, to be determined by the trial judge in the exercise of a judicial discretion from the evidence before him. His determination is reviewable, but it will not be disturbed in the absence of a clear abuse of discretion. *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976).

When Award Based on Defendant's Earnings, etc. —

Ordinarily the husband's ability to pay is determined by his income at the time the award is made if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976).

§ 50-16.6. When alimony not payable.**Editor's Note. —**

For article entitled, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

One who has no income, but is able-bodied and capable of earning, etc. —

Capacity to earn may be the basis of an award if it is based upon a proper finding that the husband is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children. *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976).

The court must consider the estate and earnings of both husband and wife. —

In fixing the amount of alimony and child support which the husband is required to pay the wife, the court must consider not only the needs of the wife and children but the estate and earnings of both the husband and wife. It is a question of fairness and justice to all parties. *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976).

For an article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

§ 50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, s. 26, effective July 1, 1978, will rewrite subsection (j) to read as follows:

"(j) An order for the payment of alimony or alimony pendente lite is enforceable by proceedings for civil contempt and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and

applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Quoted in *Bridges v. Bridges*, 29 N.C. App. 209, 223 S.E.2d 845 (1976).

§ 50-16.8. Procedure in actions for alimony and alimony pendente lite.**I. IN GENERAL.**

Applied in *Brondum v. Cox*, 30 N.C. App. 35, 226 S.E.2d 193 (1976).

Cited in *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976).

§ 50-16.9. Modification of order.**But May Be Modified or Vacated, etc. —**

Under subsection (a), the spouse may obtain a modification of the order for permanent alimony upon a showing of changed circumstances, even though the order was by consent. *Seaborn v. Seaborn*, 32 N.C. App. 556, 233 S.E.2d 67 (1977).

Applied in *Downey v. Downey*, 29 N.C. App. 375, 224 S.E.2d 255 (1976).

§ 50-17. Alimony in real estate, writ of possession issued.

Award of Homeplace as Part of Support. — The award of the homeplace does not constitute a writ of possession within the meaning of this section and the trial judge may award exclusive

possession of the homeplace, even though owned by the entirety, as a part of support under § 50-13.4. *Arnold v. Arnold*, 30 N.C. App. 683, 228 S.E.2d 48 (1976).

Chapter 51.

Marriage.

Article 1.

General Provisions.

- Sec.
51-1. Requisites of marriage; solemnization.
51-3. Want of capacity; void and voidable marriages.
51-3.1. Interracial marriages validated.

Article 2.

Marriage Licenses.

- Sec.
51-6. Solemnization without license unlawful.
51-9. Health certificates required of applicants for licenses.

ARTICLE 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization. — The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a magistrate, and the consequent declaration by such minister or officer that such persons are husband and wife, shall be a valid and sufficient marriage: Provided, that the rite of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be interfered with by the provisions of this Chapter: Provided further, that marriages solemnized and witnessed by a local spiritual assembly of the Baha'is, according to the usage of their religious community, shall be valid; provided further, marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation. (1871-2, c. 193, s. 3; Code, s. 1812; Rev., s. 2081; 1908, c. 47; 1909, c. 704, s. 2; c. 897; C. S., s. 2493; 1945, c. 839; 1965, c. 152; 1971, ch. 1185, s. 26; 1977, c. 592, s. 1.)

Editor's Note. —

The 1977 amendment substituted "husband and wife" for "man and wife" near the middle of the section.

§ 51-3. Want of capacity; void and voidable marriages. — All marriages between any two persons nearer of kin than first cousins, or between double first cousins, or between a male person under 16 years of age and any female, or between a female person under 16 years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or between persons either of whom is at the time incapable of contracting from want of will or understanding, shall be void. No marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section except for bigamy. No marriage by persons either of whom may be under 16 years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead. A marriage contracted under a

representation and belief that the female partner to the marriage is pregnant, followed by the separation of the parties within 45 days of the marriage which separation has been continuous for a period of one year, shall be voidable unless a child shall have been born to the parties within 10 lunar months of the date of separation. (R. C., c. 68, ss. 7, 8, 9; 1871-2, c. 193, s. 2; Code, s. 1810; 1887, c. 245; Rev., s. 2083; 1911, c. 215, s. 2; 1913, c. 123; 1917, c. 135; C. S., s. 2495; 1947, c. 383, s. 3; 1949, c. 1022; 1953, c. 1105; 1961, c. 367; 1977, c. 107, s. 1.)

Editor's Note. —

The 1977 amendment divided the former first sentence into the present first, second and third sentences by deleting "provided further, that" preceding the present second and third sentences, and in the present first sentence, deleted "a white person and a negro or between a white person and person of negro descent to the third generation, inclusive, or between a Cherokee Indian of Robeson County and a negro, or between a Cherokee Indian of Robeson County and a person of negro descent to the third generation, inclusive, or between"

following "All marriages between" and "Provided, double first cousins may not marry; and" following "shall be void", inserted "or between double first cousins" and substituted "or between persons either of whom is at the time" for "or is." The amendment also deleted "for that one of the parties was a white person and the other a negro or of negro descent to the third generation, inclusive, and" preceding "for bigamy" in the present second sentence and substituted "unless a" for "Provided, that no" in the present fourth sentence.

§ 51-3.1. Interracial marriages validated. — All interracial marriages that were declared void by statute or a court of competent jurisdiction prior to March 24, 1977, are hereby validated. The parties to such interracial marriages are deemed to be lawfully married, provided that the provisions of this Chapter have been complied with. (1977, c. 107, s. 2.)

ARTICLE 2.

Marriage Licenses.

§ 51-6. Solemnization without license unlawful. — No minister or officer shall perform a ceremony of marriage between a man and woman, or shall declare them to be husband and wife, until there is delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place or by his lawful deputy. There must be at least two witnesses to the marriage ceremony.

Whenever a man and woman have been lawfully married in accordance with the laws of the state in which the marriage ceremony took place, and said marriage was performed by a justice of the peace or some other civil official duly authorized to perform such ceremony, and the parties thereafter wish to confirm their marriage vows before an ordained minister or minister authorized by his church, nothing herein shall be deemed to prohibit such confirmation ceremony; provided, however, that such confirmation ceremony shall not be deemed in law to be a marriage ceremony, such confirmation ceremony shall in no way affect the validity or invalidity of the prior marriage ceremony performed by a civil official, no license for such confirmation ceremony shall be issued by a register of deeds, and no record of such confirmation ceremony may be kept by a register of deeds. (1871-2, c. 193, s. 4; Code, s. 1813; Rev., s. 2086; C. S., s. 2498; 1957, c. 1261; 1959, c. 338; 1967, c. 957, ss. 6, 9; 1977, c. 592, s. 2.)

Editor's Note. — The 1977 amendment substituted "a man and woman, or shall declare them to be husband and wife" for "any two

persons, or shall declare them to be man and wife" in the first sentence of the first paragraph.

§ 51-7. Penalty for solemnizing without license.

Cited in In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976).

§ 51-9. Health certificates required of applicants for licenses. — No license to marry shall be issued by the register of deeds of any county to a male or female applicant therefor except upon the following conditions: The said applicant shall present to the register of deeds a certificate executed within 30 days from the date of presentation showing that, by the usual methods of examination made by a regularly licensed physician, no evidence of any venereal disease was found. Such certificate shall be accompanied by a report from a laboratory approved by the Commission for Health Services for making such test showing that a serologic test for syphilis currently approved by the United States Public Health Service was made, such test to have been made within 30 days of the time application for license is made. Before any laboratory shall make such tests or any serologic test required by this section, it shall apply to the Department of Human Resources for a certificate of approval; and such application shall be in writing and shall be accompanied by such reports and information as shall be required by the Department of Human Resources. The Department of Human Resources may, in its discretion, revoke or suspend any certificate of approval issued by it for the operation of such a laboratory; and after notice of such revocation or suspension, no such laboratory shall operate as an approved laboratory under this section.

Furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, no evidence of tuberculosis in the infectious or communicable stage was found.

Furthermore, such certificate shall state that a rubella immunity test has been administered to the female applicant by a regularly licensed physician.

And, furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, the applicant was found to be mentally competent. (1939, c. 314, s. 1; 1941, c. 218, s. 1; 1945, c. 577, s. 1; 1947, c. 929; 1955, c. 484; 1967, c. 137, s. 1; c. 957, s. 11; 1973, c. 476, s. 128; 1977, c. 428.)

Editor's Note. —

The 1977 amendment, effective Jan. 1, 1978, added the third paragraph.

Chapter 52.

Powers and Liabilities of Married Persons.

Sec.	Sec.
52-2. Capacity to contract.	52-10. Contracts between husband and wife generally; releases.
52-6. [Repealed.]	
52-8. Validation of contracts between husband and wife where wife is not privately examined.	52-10.1. Separation agreements.
52-9. Effect of absolute divorce decree on certificate failing to comply with § 52-6.	

§ 52-2. Capacity to contract. — Subject to the provisions of G.S. 52-10 or 52-10.1, G.S. 39-7 and other regulations and limitations now or hereafter prescribed by the General Assembly, every married person is authorized to contract and deal so as to affect his or her real and personal property in the same manner and with the same effect as if he or she were unmarried. (1871-2, c. 193, s. 17; Code, s. 1826; Rev., s. 2094; 1911, c. 109; C. S., s. 2507; 1945, c. 73, s. 16; 1965, c. 878, s. 1; 1977, c. 375, s. 13.)

I. IN GENERAL.

Editor's Note. —

The 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 52-10 or 52-10.1" for "G.S. 52-6" near the beginning of the section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 52-5.1. Tort actions between husband and wife arising out of acts occurring outside State.

This section was designed by the legislature to enable a North Carolina resident to sue in the courts of this State, notwithstanding the rule that the law of the state wherein the injury occurred determines the right of the injured spouse to bring an action for damages. *Henry v. Henry*, 291 N.C. 156, 229 S.E.2d 158 (1976).

The legislature, by the enactment of this section, rescinded the rule with reference to the right of a wife domiciled in North Carolina to maintain, in the courts of this State, an action for

damages for injuries proximately caused by the negligence of her husband in another state. *Henry v. Henry*, 291 N.C. 156, 229 S.E.2d 158 (1976).

This section left untouched the rule with reference to the right of a nonresident wife to sue her husband in the courts of North Carolina to recover damages for injuries inflicted in this State and proximately caused by his negligence. *Henry v. Henry*, 291 N.C. 156, 229 S.E.2d 158 (1976).

§ 52-6: Repealed by Session Laws 1977, c. 375, s. 1, effective January 1, 1978.

I. IN GENERAL.

Editor's Note. —

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 52-8. Validation of contracts between husband and wife where wife is not privately examined. — Any contract between husband and wife coming within

the provisions of G.S. 52-6 executed between January 1, 1930, and January 1, 1978, which does not comply with the requirement of a private examination of the wife and which is in all other respects regular is hereby validated and confirmed to the same extent as if the examination of the wife had been separate and apart from the husband. This section shall not affect pending litigation. (1957, c. 1178; 1959, c. 1306; 1965, c. 207; c. 878, s. 1; 1967, c. 1183, s. 1; 1971, c. 101; 1973, c. 1387, s. 1; 1975, c. 495, s. 1; 1977, c. 375, s. 15.)

Editor's Note. —

The 1977 amendment, effective Jan. 1, 1978, substituted "January 1, 1978" for "December 31, 1974" in the first sentence.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

Quoted in *Spencer v. Spencer*, 430 F. Supp. 683 (M.D.N.C. 1977).

§ 52-9. Effect of absolute divorce decree on certificate failing to comply with § 52-6. — Whenever it appears that, since the execution of a contract between a husband and wife in which the certificate of acknowledgment thereof fails to comply with the requirements of G.S. 52-6, a valid decree of absolute divorce between said husband and wife has been rendered, no action shall be maintained by her or anyone claiming under her for the recovery of the possession of, or to establish title to any interest in any property described in such contract unless such action is commenced within seven years after such decree of absolute divorce has become final or unless such action is commenced before January 1, 1978, whichever date is earlier. (1957, c. 1260; 1965, c. 878, s. 1; 1977, c. 375, s. 14.)

Editor's Note. —

The 1977 amendment, effective Jan. 1, 1978, substituted "January 1, 1978, whichever date is earlier" for "May 1, 1958, whichever date is later" at the end of the section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 52-10. Contracts between husband and wife generally; releases. — (a) Contracts between husband and wife not inconsistent with public policy are valid, and any persons of full age about to be married and married persons may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released. No contract or release between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of either spouse, or the accruing income thereof for a longer time than three years next ensuing the making of such contract or release, unless it is in writing and is acknowledged by both parties before a certifying officer.

(b) Such certifying officer shall be a notary public, or a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment is made. Such officer must not be a party to the contract.

(c) This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and wife, or their attorneys, may be construed to constitute a contract or release between such husband and wife. (1871-2, c. 193, s. 28; Code, s. 1836; Rev., s. 2108; C. S., s. 2516; 1959, c. 879, s. 12; 1965, c. 878, s. 1; 1977, c. 375, s. 2.)

Editor's Note. —

The 1977 amendment, effective Jan. 1, 1978, designated the former provisions of this section as subsection (a), deleted "not forbidden by G.S. 52-6 and" following "husband and wife" and "subject to G.S. 52-6, any" preceding "married persons" in the first sentence of present subsection (a), added the second sentence of

present subsection (a), and added subsections (b) and (c).

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

For an article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

§ 52-10.1. Separation agreements. — Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b). Such certifying officer must not be a party to the contract. This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and wife, or their attorneys, may be construed to constitute a separation agreement between such husband and wife. (1965, c. 803; 1977, c. 375, s. 3.)

Editor's Note. —

The 1977 amendment, effective Jan. 1, 1978, rewrote this section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

§ 52A-1. Short title.

A proceeding under this Chapter is a civil proceeding as in actions for alimony without divorce. *Brondum v. Cox*, 30 N.C. App. 35, 226

S.E.2d 193 (1976), affirmed 232 S.E.2d 687 (1977).

§ 52A-2. Purposes.

Quoted in *Pifer v. Pifer*, 31 N.C. App. 486, 229 S.E.2d 700 (1976).

§ 52A-3. Definitions.

Applied in *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

§ 52A-8. What duties are applicable.

Cited in *Brondum v. Cox*, 292 N.C. 192, 232 S.E.2d 687 (1977).

§ 52A-8.2. Paternity.

In an action under this Chapter, paternity must be judicially determined to warrant relief. *Smith v. Burden*, 31 N.C. App. 145, 228 S.E.2d 662 (1976).

Prior criminal conviction of failure to support illegitimate children is not conclusive as to paternity in a subsequent civil action for

support of the same children. In the subsequent civil action, the putative father is entitled to have the issue of paternity litigated. *Smith v. Burden*, 31 N.C. App. 145, 228 S.E.2d 662 (1976).

Effect of Foreign Adjudication of Paternity. — See *Brondum v. Cox*, 292 N.C. 192, 232 S.E.2d 687 (1977).

§ 52A-9. How duties of support are enforced.

Cited in *Brondum v. Cox*, 30 N.C. App. 35, 226 S.E.2d 193 (1976).

§ 52A-10.1. Official to represent obligee; responding.

Applied in *Pifer v. Pifer*, 31 N.C. App. 486, 229 S.E.2d 700 (1976).

§ 52A-12. Duty of the court of this State as responding state.

A proceeding under this Chapter, etc. — In accord with original. See *Brondum v. Cox*, 30 N.C. App. 35, 226 S.E.2d 193 (1976), *aff'd*, 292 N.C. 192, 232 S.E.2d 687 (1977).

An action for support of illegitimate children under this Chapter is a civil action. *Smith v.*

Burden, 31 N.C. App. 145, 228 S.E.2d 662 (1976).

Right of Defendant to Blood Grouping Test and Jury Trial on Issue of Paternity. — A defendant is entitled in a proceeding under the Uniform Reciprocal Enforcement of Support Act to a blood grouping test pursuant to § 8-50.1

where the issue of paternity is raised and, upon timely motion, is entitled to have the jury pass on the issue of paternity. *Brondum v. Cox*, 30 N.C.

App. 35, 226 S.E.2d 193 (1976), *aff'd*, 292 N.C. 192, 232 S.E.2d 687 (1977).

§ 52A-13. Order of support.

Jurisdiction of Judge in Responding State. — The judge in the responding State of North Carolina has jurisdiction only to determine whether the defendant owed a duty of support to his children in the initiating state of Florida, and to enter an order requiring the defendant to furnish such support. *Pifer v. Pifer*, 31 N.C. App. 486, 229 S.E.2d 700 (1976).

The judge in the responding state has no jurisdiction whatsoever to condition the support

payments upon certain visitation privileges for the defendant with his children in the responding or initiating state. *Pifer v. Pifer*, 31 N.C. App. 486, 229 S.E.2d 700 (1976).

The judge in the responding state has no authority to permit a discontinuance of the support payments upon a finding by him of an alleged violation of the condition of visitation privileges. *Pifer v. Pifer*, 31 N.C. App. 486, 229 S.E.2d 700 (1976).

§ 52A-22. Effect of participation in proceeding.

This section should make it clear that the obligor may raise the defenses of lack of jurisdiction over his person or property at any

proceeding on enforcement. *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

§ 52A-26. Registration.

Jurisdiction over the person or property of the obligor is unnecessary for registration of a

foreign support order. *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

§ 52A-29. Registration procedure; notice.

The mere registration of a foreign support order presented by the obligee under this section is a ministerial duty of the clerk. By that act no court or agency of the State is purporting to exercise power over the obligor or his property. *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

Registration under this section does not prejudice any rights of the obligor; it merely changes the status of the foreign support order by allowing it to be treated the same as a support order issued by a court of North Carolina under § 52A-30. *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

§ 52A-30. Effect of registration; enforcement procedure.

This section establishes a two-step procedure: (1) registration of the order, and if required, a hearing on whether to vacate the registration or grant the "obligor" other relief; and (2) enforcement of the order. *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

Determinations Required in Proceedings to Enforce Order. — Once the foreign support

order is treated as a support order issued by a North Carolina court the obligee or the obligor may request modifications in the order, and when the obligee attempts to enforce the order, the court must determine whether jurisdiction exists over the person or property of the obligor and what amount, if any, is in arrears. *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 15, 1977

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1977 Supplement to the General Statutes of North Carolina was prepared and published by the Michie Company under the supervision of the Department of Justice of the State of North Carolina.

Rufus L. EDMISTEN

Attorney General of North Carolina

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