2005-2006

SENATE
JUDICIARY II

COMMITTEE
MINUTES

MEMBERSHIP

Senate Judiciary II Committee
2005-2006 Biennium

Senator Fletcher Hartsell, Chairman
Room 518, LOB
733-7223

Senator Austin Allran, Vice Chair
Room 516, LOB
733-5876

Senator Scott Thomas, Vice Chair
Room 300-E, LOB
733-6275

Senator Hugh Webster, Ranking Minority
Room 1419
715-0706

Senator Tom Apodaca
Room 1127
733-5745

Senator Bob Atwater
Room 522, LOB
715-3036

Senator Stan Bingham
Room 2117, LB
733-5665

Senator Doug Berger
Room 622, LOB
715-8363

Senator Walter Dalton
Room 523, LOB
715-3038

Senator Charlie Dannelly
Room 2010, LB
733-5955

Committee Assistant:

Gerry Johnson

Senator Katie Dorsett
Room 2106
715-3042

Senator Jim Forrester
Room 1129, LB
715-3050-

Senator Eddie Goodall
Room 1414, LB
733-7659

Senator Malcolm Graham
Room 1113
733-5650

Senator Robert Holloman
Room 623, LOB
715-3032

Senator Jim Jacumin
Room 406, LOB
715-7823

Senator John Kerr
Room 526, LOB
733-5621

Senator Ellie Kinnaird
Room 2115, LB
733-5804

Senator John Snow
Room 517, LOB
733-5875

Senator A. B. Swindell
Room 629, LOB
715-3030

Research Staff:

Kory Goldsmith
Robin Johnson
Ben Popkin

Bill	Introducer	Short Title		Latest Action	In Date	Out Date
H0097	Moore	TERM. PAR. RIGHTS/ MURDER OF PARENT BY PARENT.	*SR	Ch. SL 2005-146	04-05-05	06-16-05
H0217	Harrison	DRIVING FROM/LEAVING SCENE OF ACCIDENT.	*S	Placed On Cal For 8/22/2005	03-17-05	06-14-05
H0288	Rapp	MV MOVE-OVER LAW CHANGES.	*SR	Ch. SL 2005-189	06-02-05	06-28-05
H0327	Culpepper	2005 TECHNICAL CORRECTIONS ACT.	*S	Re-ref Com On Judiciary I	06-02-05	08-02-05
H0345	Womble	WINSTON-SALEM POLICE.	*SR	Ch. SL 2005-110	03-07-05	06-21-05
H0355	McGee	RESTRICT USE OF BLUE AND RED VEHICLE LIGHTS.	*SR	Ch. SL 2005-152	04-18-05	06-23-05
H0451	Glazier	ADOPTIVE FAMILIES/ DHHS/CRIM. CHECKS.	*SR	Ch. SL 2005-114	04-13-05	06-21-05
H0490=	Hilton	FALSE REPORT/ DESTRUCTIVE DEVICE.	S	Ratified	03-30-05	08-12-05
H0508	Haire	ALLOW NAME CHANGE WHERE DIVORCE GRANTED.	SR	Ch. SL 2005-38	03-21-05	04-28-05
H0514	Faison	MULTICOUNTY SUPERIOR COURT DISTRICT/ MOTIONS.	*SR	Ch. SL 2005-163	03-24-05	06-14-05
H0561	Haire	COMMISSIONS FOR PERSONAL REPRESENTATIVES.	*S	Cal Pursuant Rule 36(b)	05-10-05	08-11-05
H0661	Glazier	RESP. INDIVIDUALS LIST/EXPUNCTION PROCESS.	*S	Cal Pursuant Rule 36(b)	07-13-05	08-11-05
H0666	Cole	HOV LANE PENALTIES.-AB	*S	Conf Com Appointed	04-20-05	05-02-05
H0723	Glazier	UNC/CRIMINAL RECORD CHECKS/FEE.-AB	*S	Re-ref Com On Finance	06-20-05	08-11-05
H0801	Glazier	CHILD CUSTODY/ GUARDIANSHIP JURISDICTION.	*S	Ratified	04-21-05	08-12-05
H0804	Hackney	ORDER OF PAYMENT/ EQUITABLE DISTRIBUTION.	*SR	Ch. SL 2005-180	04-11-05	06-30-05
H0821	Glazier	EVIDENCE/SPEED-MEASURING INSTRUMENTS.	SR	Ch. SL 2005-137	04-11-05	06-21-05
H0862	Wilson	PROHIBIT REMOVAL OF ELECTRONIC COLLARS.	SR	Ch. SL 2005-94	04-11-05	06-09-05
H0877	Justus	FORECLOSURE NOTICE OF SALE/DISP. OF PROCEEDS.	*S	Ref To Com On Judiciary II	06-01-05	
H0878	Justus	CONFERENCE OF CLERKS OF SUPERIOR COURT.	*SR	Ch. SL 2005-100	04-20-05	06-14-05
H0923	Hackney	AMEND POSTSEPARATION SUPPORT LAWS.	*SR	Ch. SL 2005-177	05-09-05	06-30-05
H0926	Preston	CONCEALING A DEATH/ CRIM. OFFENSE.	*S	Pres. To Gov. 8/ 12/2005	06-13-05	08-10-05
H0967	Tucker	HEALTH CARE POWER OF ATTY/DISPOS. OF REMAINS.	*S	Cal Pursuant Rule 36(b)	05-24-05	08-12-05
H1015	Hackney	CLERKS MAY ORDER MEDIATION.	*SR	Ch. SL 2005-67	05-02-05	05-18-05
H1085	Insko	CARE OF DOGS	*S	Cal Pursuant Rule	05-10-05	08-11-05

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Bill	Introducer	Short Title		Latest Action	In Date	Out Date
		ILLEGALLY USED FOR FIGHTING.		36(b)		
H1120	Frye	STRENGTHEN NEIGHBORHOOD WATCH PROGRAMS.	*S	Re-ref Com On Appropriations/ Base Budget	05-17-05	08-12-05
H1145	Michaux	PROBATION STAYED/ APPEAL FOR TRIAL DE NOVO.	*S	Ratified	04-27-05	08-11-05
H1150	Goodwin	EXPEDITE JUV. PROCEEDINGS/GUARDIANS AD LITEM.	*S	Cal Pursuant Rule 36(b)	05-11-05	08-12-05
H1176	Weiss	PROPERTY EXEMPT FROM ENFORCEMENT ACTIONS.	*S	Cal Pursuant Rule 36(b)	05-31-05	08-11-05
H1199	Holliman	INVOLUNTARY COMMITMENT AFFIDAVIT.	*SR	Ch. SL 2005-135	05-23-05	06-14-05
H1213	Moore	EXPUNGE MULTIPLE CHARGES/OCCUR WITHIN 1 YR.	*S	Cal Pursuant Rule 36(b)	05-16-05	08-12-05
H1221	Hackney	PARENTING COORDINATOR ESTABLISHED.	*SR	Ch. SL 2005-228	05-31-05	07-05-05
H1243	Fisher	MANUFACTURED HOMES/ LONGER TERMINATION NOTICE.	*S	Pres. To Gov. 8/ 12/2005	06-06-05	08-10-05
H1311	Hilton	DOMESTIC VIOLENCE VICTIMS EMPOWERMENT ACT.	*S	Ratified	05-31-05	08-11-05
H1318	Hackney	CONSIDER TAX CONSEQUENCES/EQUIT. DISTRIBUTION.	*S	Cal Pursuant Rule 36(b)	06-02-05	08-12-05
H1319	Hackney	AMEND FAMILY LAW ARBITRATION ACT.	*SR	Ch. SL 2005-187	05-11-05	06-21-05
H1328	Harrison	PARDON/EXPUNCTION OF RECORD.	S	Ratified	05-23-05	08-12-05
H1375	Culpepper	CHILD SUPPORT REFORMS.	*S	Cal Pursuant Rule 36(b)	05-16-05	08-10-05
H1394	Moore	TESTAMENTARY RECOMMENDATION OF GUARDIAN.	*S	Ratified	05-31-05	08-12-05
H1400	Folwell	SCHOOL BUS SAFETY ACT.	*SR	Ch. SL 2005-204	05-23-05	06-28-05
H1401	Folwell	CONCEALED CARRY BY LAW ENFORCEMENT OFFICERS.	*S	Ratified	05-31-05	08-12-05
H1417	Haire	REVISE JUDICIAL STANDARDS COMMISSION.	*S	Re-ref Com On Appropriations/ Base Budget	06-02-05	07-05-05
H1430	Stiller	OBSTRUCTING USE OF BOAT RAMP.	*SR	Ch. SL 2005-164	05-16-05	06-21-05
H1432	Stam	REGISTER OF DEEDS-CERTIFICATIONS.	*S	Ref To Com On Judiciary II	05-18-05	
H1436	Johnson	DEATH PENALTY/ADD AGGRAVATING FACTOR.	*S	Pres. To Gov. 8/ 12/2005	06-01-05	08-10-05
H1467	Hackney	ATTORNEYS' FEES/ TRANSFERS TO MINORS.	*S	Ref To Com On Judiciary II	05-18-05	
H1485	Culpepper	SEARCH WARRANTS/AUDIO & VIDEO TRANSMISSION.	S	Ratified	05-16-05	08-12-05
H1489	Johnson	INDECENT EXPOSURE/	S	Ref To Com On	06-01-05	

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Bill	Introducer	Short Title		Latest Action	In Date	Out Date
		INCREASE PENALTY.		Judiciary II		
H1516	Setzer	FALSE CERT. AN UNFAIR AND DECEPTIVE ACT.	*S	Ref To Com On Judiciary II	06-06-05	
S0005	Clark Jenkins	STRENGTHENING INTEGRITY OF DRIVERS LICENSES.	S	Ref To Com On Judiciary II	01-27-05	
S0061	Scott Thomas	FELONY DEATH/SERIOUS INJURY BY VEHICLE.	*S	Re-ref Com On Rules, Calendar, and Operations of the House	02-07-05	03-24-05
S0068	John H. Kerr III	APPOINTMENT/ REAPPOINTMENT OF MAGISTRATES.	S	Ref To Com On Judiciary II	02-07-05	
S0102	Andrew C. Brock	NO CELL PHONE USAGE BY UNDER 18 DRIVERS.	S	Ref To Com On Judiciary II	02-10-05	
S0104	Andrew C. Brock	DWI-ZERO ALCOHOL WHEN TRANSPORTING CHILD.	S	Ref To Com On Judiciary II	02-10-05	
S0109	Scott Thomas	HANDGUN PERMIT RENEWAL/DEPLOYED MILITARY.	*SR	Ch. SL 2005-232	02-10-05	03-09-05
S0173	Stan Bingham	COURT SYSTEM STUDY.	S	Ref To Com On Rules, Calendar, and Operations of the House	02-21-05	03-29-05
S0209	Eleanor Kinnaird	POST-ADOPTION PRIVILEGES.	S	Ref To Com On Judiciary II	02-24-05	
S0217	Walter H. Dalton	DRIVERS LICENSE REVOCATION FOR ABC VIOLATION.	*S	Ref To Com On Rules, Calendar, and Operations of the House	02-24-05	05-31-05
S0242=	Fletcher L. Hart	2005 TECHNICAL CORRECTIONS ACT.	S	Ref To Com On Judiciary II	02-28-05	
S0421=	Jim Jacumin	EXEMPT REACT/ CHARITABLE SOLICITATIONS.	SR	Ch. SL 2005-230	03-09-05	03-24-05
S0461	Fletcher L. Hart	UNITRUST AMENDMENTS.	*SR	Ch. SL 2005-244	03-10-05	04-05-05
S0461	Fletcher L. Hart	UNITRUST AMENDMENTS.	*SR	Ch. SL 2005-244	06-29-05	07-19-05
S0462=	Charlie S. Danne	CHARLOTTE SPEED CAMERA SUNSET EXTENDED.	*SR	Ch. SL 2005-27	03-10-05	03-29-05
S0472	Scott Thomas	CHILD EXPLOITATION PREVENTION ACT.	*SR	Ch. SL 2005-121	03-10-05	03-29-05
S0477=	Malcolm Graham	MASTER KEYS/LOCK-PICKING DEVICES REGULATED.	S	Ref To Com On Judiciary II	03-10-05	
S0485	Jeanne H. Lucas	HATE CRIMES/MATTHEW SHEPARD.	S	Ref To Com On Judiciary II	03-10-05	
S0486=	Austin M. Allran	RACHEL'S LAW.	*S	Placed On Cal For 8/16/2005	03-15-05	04-13-05
S0488=	Charlie S. Danne	EXPLOITATION OF ELDER OR DISABLED ADULTS/ POA.	*S	Re-ref Com On Judiciary I	03-15-05	04-21-05
S0507	Walter H. Dalton	AGGRAVATING FACTOR/ ADD SOCIAL WORKER.	SR	Ch. SL 2005-101	03-15-05	04-05-05
S0552=	Walter H. Dalton	DOI HEARING/UNAUTH. INS. SUMMARY C&D	*SR	Ch. SL 2005-217	03-15-05	04-19-05

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Bill	Introducer	Short Title		Latest Action	In Date	Out Date
		ORDER.-AB				
S0559	Eleanor Kinnaird	EXPUNCTION/ CONVICTIONS OF NONVIOLENT CRIMES.	*S	Re-ref Com On Finance	03-15-05	04-26-05
S0560	Eleanor Kinnaird	AMEND CERTAIN CRIMINAL OFFENSES.	S	Ref To Com On Judiciary II	03-15-05	
S0574	Fletcher L. Hart	AMEND POST-RELEASE SUPERVISION LAWS.	*S	Ref To Com On Judiciary III	03-16-05	05-18-05
S0588	David F. Weinste	EXPUNGE WHITE-COLLAR CRIM. CONVICTIONS.	S	Ref To Com On Judiciary II	03-16-05	
S0591=	Austin M. Allran	FALSE REPORT/ DESTRUCTIVE DEVICE.	S	Ref To Com On Judiciary II	03-16-05	
S0592	Eleanor Kinnaird	INDIGENT DEFENSE TECHNICAL REVISIONS.	*SR	Ch. SL 2005-250	03-16-05	04-14-05
S0593	Eleanor Kinnaird	COPY COSTS IN INDIGENT CASES.	*SR	Ch. SL 2005-251	03-16-05	04-19-05
S0594	Eleanor Kinnaird	RECOUPMENT BY COURT-APPOINTED ATTORNEYS.	*SR	Ch. SL 2005-254	03-16-05	04-19-05
S0629=	John Snow	MANUFACTURING REDEVELOPMENT DISTRICTS.	*S	Postponed To 8/23/ 2005	05-26-05	05-31-05
S0666=	Fletcher L. Hart	PLANNED COMMUNITY ACT AMENDMENT.	*SR	Ch. SL 2005-214	03-17-05	04-14-05
S0667=	Fletcher L. Hart	SUBORDINATION AGREEMENT/REGISTRA. AMENDMENTS.	SR	Ch. SL 2005-212	03-17-05	04-14-05
S0669=	Fletcher L. Hart	STATE LAND NOT SUBJECT TO MUNICIPAL CONTROL.	*S	Pres. To Gov. 8/ 10/2005	03-17-05	05-26-05
S0671=	Fletcher L. Hart	REAL PROPERTY ELECTRONIC RECORDING.	*S	Ref To Com On Judiciary IV	03-17-05	05-04-05
S0679	Kay R. Hagan	NORTH CAROLINA UNIFORM TRUST CODE.	*SR	Ch. SL 2005-192	03-17-05	04-28-05
$ S0686	**Walter H. Dalton**	**METH. LAB PREVENTION ACT.**	***S**	**Conf Com Appointed**	**03-21-05**	**04-26-05**
S0688	John H. Kerr III	INDIGENT DEFENSE OF PARENTS DURING APPEALS.	S	Ref To Com On Judiciary II	03-21-05	
S0689	Eleanor Kinnaird	COPIES OF FILES/ APPOINTED APPELLATE ATTORNEYS.	*SR	Ch. SL 2005-148	03-21-05	04-14-05
$ S0733=	**Malcolm Graham**	**STREET GANG PREVENTION ACT.**	**S**	**Re-ref Com On Appropriations/ Base Budget**	**03-22-05**	**08-12-05**
S0774	William R. Purce	SEAT BELT USE ENHANCEMENTS.	*S	Ref To Com On Rules, Calendar, and Operations of the House	03-22-05	05-10-05
S0775=	John Snow	CHILD SUPPORT REFORMS.	S	Ref To Com On Judiciary II	03-22-05	
S0776	John Snow	AMEND INDECENT EXPOSURE LAW.	*SR	Ch. SL 2005-226	03-22-05	05-10-05
S0778	John Snow	AMEND PRIVATE PROTECTIVE SERVICES LAWS.	*SR	Ch. SL 2005-211	03-22-05	05-26-05
S0782	Eleanor Kinnaird	STUDY AMENDMENT TO	*S	Ref To Com On	03-22-05	05-31-05

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2005-2006 Biennium

Bill	Introducer	Short Title		Latest Action	In Date	Out Date
		FAIR HOSUING ACT.		Rules, Calendar, and Operations of the House		
S0785=	John A. Garwood	PROHIBIT REMOVAL OF ELECTRONIC COLLARS.	S	Ref To Com On Judiciary II	03-23-05	
S0794=	Scott Thomas	VACATION RENTAL ACT AMENDMENTS.	S	Re-ref Com On Commerce	03-23-05	03-28-05
S0796	Scott Thomas	CRIMINAL RECORD CHECKS/ARCHAEOLOGICAL OPS.	*S	Passed 2nd Reading	03-23-05	06-14-05
S0797	Scott Thomas	BAIL BONDS/ FORFEITURES & REMITTANCES.	*S	Ref To Com On Rules, Calendar, and Operations of the House	03-23-05	05-31-05
S0805=	Fletcher L. Hart	CLERKS MAY ORDER MEDIATION.	S	Re-ref Com On Judiciary II	03-23-05	05-12-05
S0805=	Fletcher L. Hart	CLERKS MAY ORDER MEDIATION.	S	Re-ref Com On Judiciary II	05-25-05	
S0806	Fletcher L. Hart	MEDIATION AMENDMENTS.	*SR	Ch. SL 2005-167	03-23-05	05-10-05
S0809=	Tom Apodaca	FORECLOSURE NOTICE OF SALE/DISP. OF PROCEEDS.	S	Ref To Com On Judiciary II	03-23-05	
S0810=	Tom Apodaca	CONFERENCE OF CLERKS OF SUPERIOR COURT.	S	Ref to Judiciary II. If fav, re-ref to Appropriations/ Base Budget	03-23-05	
S0834	Eleanor Kinnaird	ADMINISTRATION OF LETHAL INJECTION.	S	Ref To Com On Judiciary II	03-23-05	
S0846	A. B Swindell	MODERNIZE BAIL BONDSMAN REGISTRATION.	*S	Ref To Com On Judiciary II	03-23-05	05-24-05
S0863	Doug Berger	LOSS OF WORKERS' COMP FOR FRAUD.	S	Re-ref Com On Commerce	03-23-05	04-19-05
S0864	Doug Berger	WORKERS' COMP/INJURY TO EXTREMITIES.	S	Re-ref Com On Commerce	03-23-05	04-19-05
S0865	Doug Berger	WORKERS' COMP/ EMPLOYEE WORK INCENTIVE.	S	Re-ref Com On Commerce	03-23-05	04-19-05
S0866	Doug Berger	INCREASE CAP ON LOSS OF WORKERS' ORGAN.	S	Re-ref Com On Commerce	03-23-05	04-19-05
S0887	Fletcher L. Hart	NC LIEN LAW REVISED.	*SR	Ch. SL 2005-229	03-23-05	05-16-05
S0933	Fletcher L. Hart	IMMUNITY/CERTAIN PUBLIC OFFICERS/ INDIVIDUALS.	S	Ref To Com On Judiciary II	03-24-05	
S0934	Fletcher L. Hart	NOTARY PUBLIC ACT.-AB	*S	Re-ref Com On Finance	03-24-05	05-12-05
S0939	Scott Thomas	DETER JUVENILE ESCAPES.	S	Ref To Com On Judiciary II	03-24-05	
S0940	Scott Thomas	FINAL SUBSTANTIATION APPEAL PROCESS.	S	Ref To Com On Judiciary II	03-24-05	
S0963	David F. Weinste	PARTITION SALES OF REAL PROPERTY.	S	Ref To Com On Judiciary II	03-24-05	
S0966	Stan Bingham	DEFINITE RELEASE DATES FOR INMATES.	S	Ref To Com On Judiciary II	03-24-05	
S0970	Eleanor Kinnaird	LAND-USE PERMIT APPEALS.	*S	Ref To Com On Rules, Calendar,	03-24-05	05-02-05

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Bill	Introducer	Short Title		Latest Action	In Date	Out Date
				and Operations of the House		
S0991=	Tom Apodaca	AUTHORIZE JUDGE/ CONCEALED WEAPON IN CTHS.	*S	Ref To Com On Judiciary III	03-24-05	05-18-05
S1003	Scott Thomas	ADOPTION/CRIM. CHECKS/ PROSPECTIVE FAMILIES.	S	Ref To Com On Judiciary II	03-24-05	
S1004	Larry Shaw	STATE PERSONNEL/ DISCRIMINATION.	S	Ref To Com On Judiciary II	03-24-05	
S1031	Fletcher L. Hart	ADDITIONAL CONDEMNATION AUTHORITY.	S	Ref To Com On Judiciary II	03-24-05	
S1032	John A. Garwood	STUDY INHERENTLY DANGEROUS ANIMALS.	*S	Re-ref Com On Rules, Calendar, and Operations of the House	03-24-05	05-18-05
S1058	Walter H. Dalton	AMEND ASSAULT ASSISTANCE ANIMAL.	*SR	Ch. SL 2005-184	03-24-05	05-16-05
S1087	John H. Kerr III	LIMITED DRIVING PRIVILEGES-DWLR.	*S	Ref To Com On Judiciary I	03-24-05	04-19-05
S1088	John H. Kerr III	MEDICAL RELEASE FOR ILL AND DISABLED INMATES.	S	Ref To Com On Judiciary II	03-24-05	
S1130	Charles W. Alber	NO TOBACCO USE IN PRISONS.	*S	Conf Com Appointed	08-08-05	08-10-05
S1142=	John Snow	MV MOVE-OVER LAW CHANGES.	S	Ref To Com On Judiciary II	03-24-05	
S1143	Fletcher L. Hart	PROTECT BUILDING INSPECTORS.	*S	Ref To Com On Judiciary III	03-24-05	05-31-05

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Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	February 22, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 109	Handgun Permit Renewal/Deployed Military.	Senator Thomas

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, February 22, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 109	Handgun Permit Renewal/Deployed Military.	Senator Thomas

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

February 22, 2005

Senator Fletcher Hartsell, Chairman, Called the Senate Judiciary II Committee to order on February 22, 2005, with seventeen members present. Senator Hartsell introduced pages Neil Semmler and Chris Miller and thanked them for coming. He then asked each member to introduce themselves since this was the first committee meeting.

SB 109 (Handgun Permit Renewal/Deployed Military.) Senator Hartsell asked for a motion to accept the Proposed Committee Substitute for purposes of discussion. Senator Goodall so moved, all voted and the motion passed. Senator Thomas was recognized to explain the bill. Questions from Senators Burger, Allran, Jacumin, Snow, Forrester, Dalton, Goodall, Webster, Bingham and Kerr were answered by Kory Goldsmith, Staff Attorney, Senator Thomas, Attorney Gregg McCleod, representing the office of the Attorney General, and Joe McClees, representing the National Rifle Association. No action was taken on the bill.

With no further business the Committee was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S

SENATE BILL 109

Short Title:	Handgun Permit Renewal/Deployed Military.	(Public)
Sponsors:	Senators Thomas; Apodaca, Bingham, Brock, Forrester, Garwood, Goodall, Hartsell, Kerr, Presnell, and Swindell.	
Referred to:	Judiciary II.	

February 10, 2005

A BILL TO BE ENTITLED

AN ACT TO GRANT TO DEPLOYED MILITARY PERSONNEL AN EXTENSION OF TIME WITHIN WHICH TO RENEW A CONCEALED HANDGUN PERMIT.

The General Assembly of North Carolina enacts:

SECTION 1. Deployed Military Personnel Defined. – As used in this act, the term "deployed military personnel" includes both of the following:

(1) A member of the armed forces or the armed forces reserves of the United States on active duty in support of Operation Iraqi Freedom on or after January 1, 2003.

(2) A member of the North Carolina Army National Guard or the North Carolina Air National Guard called to active duty in support of Operation Iraqi Freedom on or after January 1, 2003.

SECTION 2. Proof. – Verification by the military member's command specifying deployment is conclusive evidence of the military member's deployment.

SECTION 3. Extend Time to Renew Concealed Handgun Permit. – Notwithstanding G.S. 14-415.16, deployed military personnel are allowed 90 days after the end of their deployment to renew concealed handgun permits issued under Article 54A of Chapter 14 of the General Statutes that expired or that will expire during the term of deployment. During the period of deployment or active duty and until the expiration of the 90-day period provided for by this section, expired permits covered by this act remain valid as if they had not expired.

SECTION 4. Include Proof of Deployment With Renewal Application. – When applying for the renewal of a permit covered by this act, the holder of the permit shall provide with the renewal application proof of the person's deployment.

SECTION 5. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 109
PROPOSED COMMITTEE SUBSTITUTE S109-CSRC-1 [v.1]

2/21/2005 3:11:00 PM

Short Title: Handgun Permit Renewal/Deployed Military. (Public)

Sponsors:

Referred to:

February 10, 2005

A BILL TO BE ENTITLED

AN ACT TO GRANT TO DEPLOYED MILITARY PERSONNEL AN EXTENSION OF TIME WITHIN WHICH TO RENEW A CONCEALED HANDGUN PERMIT.

The General Assembly of North Carolina enacts:

SECTION 1. Deployed Military Personnel Defined. – As used in this act, the term "deployed military personnel" includes all of the following:

(1) A member of the armed forces or the armed forces reserves of the United States on active duty in support of:
   (a) Operation Iraqi Freedom on or after January 1, 2003, or
   (b) Operation Enduring Freedom or Operation Noble Eagle on or after September 11, 2001.

(2) A member of the North Carolina Army National Guard or the North Carolina Air National Guard called to active duty in support of:
   (a) Operation Iraqi Freedom on or after January 1, 2003, or
   (b) Operation Enduring Freedom or Operation Noble Eagle on or after September 11, 2001.

SECTION 2. Proof. – Verification by the military member's command specifying deployment is conclusive evidence of the military member's deployment.

SECTION 3. Extend Time to Renew Concealed Handgun Permit. – Notwithstanding G.S. 14-415.16, deployed military personnel are allowed 90 days after the end of their deployment to renew concealed handgun permits issued under Article 54A of Chapter 14 of the General Statutes that expired during the term of deployment or that will expire within 90 days after the end of their deployment. During the period of deployment and until the expiration of the 90-day period provided for by this section, expired permits covered by this act remain valid as if they had not expired.

SECTION 4. Include Proof of Deployment With Renewal Application. – When applying for the renewal of a permit covered under this act, the holder of the permit shall provide with the renewal application proof of the person's deployment.

SECTION 5. This act is effective when it becomes law.

SENATE BILL 109:
Handgun Permit Renewal/Deployed Military

BILL ANALYSIS

Committee: Senate Judiciary II
Date: February 21, 2005
Version: Proposed Committee Substitute S109-CSRC-1[v.1]

Introduced by: Senator Thomas
Summary by: Kory J. Goldsmith
Committee Counsel

SUMMARY: ***Senate Bill 109 would allow military personnel on active duty and deployed in support of Operation Iraqi Freedom up to 90 days after the end of their deployment to renew a concealed handgun permit that otherwise would have expired during the term of the deployment.***

The Proposed Committee Substitute adds military personnel deployed in support of Operation Enduring Freedom or Operation Noble Eagle on or after September 11, 2001. It also clarifies that a permit that would expire during the 90 days after the end of deployment remains valid during that period of time.

The act would become effective when it becomes law.

CURRENT LAW: A concealed handgun permit is valid for four years unless revoked. In order to obtain a renewal of the permit, the permittee must file a renewal form with the sheriff, provide a notarized affidavit stating that the permittee remains qualified to hold the permit, submit to a newly administered full set of fingerprints[1], and pay the appropriate renewal fee. If the permittee applies to renew the permit at least 30 days prior to its expiration and meets all the eligibility requirements, the sheriff may waive the requirement of taking another firearms safety and training course and must renew the permit. If the permit expires, a permittee must go through the complete application process including completion of an approved firearms and safety training course and payment of the application fee.

BILL ANALYSIS: The Proposed Committee Substitute to Senate Bill 109 extends the deadline for renewing a concealed handgun permit for deployed military personnel. The permit remains valid during the period of deployment and for 90 days after the deployment. Deployed military personnel have 90 days following the end of their deployment to renew the permit that expired during their deployment or that would expire within 90 days from the end of their deployment. The term "deployed military personnel" includes a member of any of the following groups that are called to active duty in support of Operation Iraqi Freedom on or after January 1, 2003 or Operation Enduring Freedom or Operation Noble Eagle on or after September 11, 2001:

- Armed forces or armed forces reserves of the United States.
- North Carolina Army National Guard or the North Carolina Air National Guard.

A copy of the military member's orders specifying deployment is conclusive evidence of the member's deployment. The military member must provide proof of deployment when applying for renewal of the permit.

[1] No fingerprints are required for a renewal permit if the applicant's fingerprints were submitted to the SBI after June 30, 2001 under the Automated Fingerprinting Information System.

BACKGROUND: The General Assembly previously enacted legislation to waive deadlines, fees, and penalties associated with the expiration of drivers' licenses and the lapse of motor vehicle liability insurance and to provide additional time to list property for taxation and to pay property taxes for military personnel deployed in Operation Enduring Freedom and Noble Eagle (S.L. 2001-508) and Operation Iraqi Freedom (S.L. 2003-300).

§ 14-415.16. Renewal of permit.

The holder of a permit shall apply to renew the permit at least 30 days prior to its expiration date by filing with the sheriff of the county in which the person resides a renewal form provided by the sheriff's office, a notarized affidavit stating that the permittee remains qualified under the criteria provided in this Article, a newly administered full set of the permittee's fingerprints, and a renewal fee. Upon receipt of the completed renewal application, including the permittee's fingerprints, and the appropriate payment of fees, the sheriff shall determine if the permittee remains qualified to hold a permit in accordance with the provisions of G.S. 14-415.12. The permittee's criminal history shall be updated, and the sheriff may waive the requirement of taking another firearms safety and training course. If the permittee applies for a renewal of the permit within 30 days of its expiration date and if the permittee remains qualified to have a permit under G.S. 14-415.12, the sheriff shall renew the permit. No fingerprints shall be required for a renewal permit if the applicant's fingerprints were submitted to the State Bureau of Investigation after June 30, 2001, on the Automated Fingerprint Information System (AFIS) as prescribed by the State Bureau of Investigation.

§ 14-415.12. Criteria to qualify for the issuance of a permit.

(a) The sheriff shall issue a permit to an applicant if the applicant qualifies under the following criteria:
- (1) The applicant is a citizen of the United States and has been a resident of the State 30 days or longer immediately preceding the filing of the application.
- (2) The applicant is 21 years of age or older.
- (3) The applicant does not suffer from a physical or mental infirmity that prevents the safe handling of a handgun.
- (4) The applicant has successfully completed an approved firearms safety and training course which involves the actual firing of handguns and instruction in the laws of this State governing the carrying of a concealed handgun and the use of deadly force. The North Carolina Criminal Justice Education and Training Standards Commission shall prepare and publish general guidelines for courses and qualifications of instructors which would satisfy the requirements of this subdivision. An approved course shall be any course which satisfies the requirements of this subdivision and is certified or sponsored by:
  - a. The North Carolina Criminal Justice Education and Training Standards Commission,
  - b. The National Rifle Association, or
  - c. A law enforcement agency, college, private or public institution or organization, or firearms training school, taught by instructors certified by the North Carolina Criminal Justice Education and Training Standards Commission or the National Rifle Association.

  Every instructor of an approved course shall file a copy of the firearms course description, outline, and proof of certification annually, or upon modification of the course if more frequently, with the North Carolina Criminal Justice Education and Training Standards Commission.
- (5) The applicant is not disqualified under subsection (b) of this section.

(b) The sheriff shall deny a permit to an applicant who:
- (1) Is ineligible to own, possess, or receive a firearm under the provisions of State or federal law.
- (2) Is under indictment or against whom a finding of probable cause exists for a felony.
- (3) Has been adjudicated guilty in any court of a felony.
- (4) Is a fugitive from justice.
- (5) Is an unlawful user of, or addicted to marijuana, alcohol, or any depressant, stimulant, or narcotic drug, or any other controlled substance as defined in 21 U.S.C. § 802.
- (6) Is currently, or has been previously adjudicated by a court or administratively determined by a governmental agency whose decisions are subject to judicial review to be, lacking mental capacity or mentally ill. Receipt of previous consultative services or outpatient treatment alone shall not disqualify an applicant under this subdivision.

(7) Is or has been discharged from the armed forces under conditions other than honorable.

(8) Is or has been adjudicated guilty of or received a prayer for judgment continued or suspended sentence for one or more crimes of violence constituting a misdemeanor, including but not limited to, a violation of a misdemeanor under Article 8 of Chapter 14 of the General Statutes, or a violation of a misdemeanor under G.S. 14-225.2, 14-226.1, 14-258.1, 14-269.2, 14-269.3, 14-269.4, 14-269.6, 14-276.1, 14-277, 14-277.1, 14-277.2, 14-277.3, 14-281.1, 14-283, 14-288.2, 14-288.4(a)(1) or (2), 14-288.6, 14-288.9, 14-288.12, 14-288.13, 14-288.14, 14-318.2, or 14-415.21(b).

(9) Has had entry of a prayer for judgment continued for a criminal offense which would disqualify the person from obtaining a concealed handgun permit.

(10) Is free on bond or personal recognizance pending trial, appeal, or sentencing for a crime which would disqualify him from obtaining a concealed handgun permit.

(11) Has been convicted of an impaired driving offense under G.S. 20-138.1, 20-138.2, or 20-138.3 within three years prior to the date on which the application is submitted.

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — Feb. 22, 2005

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
[signature]	
[signature]	Sen. Atwater
[signature]	GTCC
Ralph Soviero	GTCC
Joe McClay	McClay Consulting
Don East	NC Senate
CASANDRA SKINNER	NCCCPS
JAMES L FORTE	OSA
[signature]	NCAGO
JOHN GOODMAN	ALLEY ASSOCIATES
[signature]	SBI

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — Feb. 22, 2005

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John McM[illegible]	[illegible]
Shilpa Eg[illegible]	UNLV School of Law
Adrienne Allison	UNLV School of Law
Kelly Stovelich	UNLV School of Law
Stephanie Cecconi	
Rob Lamme	HHCS

Gerry Johnson (Sen. Hartsell)

From: Gerry Johnson (Sen. Hartsell)
Sent: Monday, February 28, 2005 4:10 PM
To: Sen. Scott Thomas
Subject: Senate J II Meeting Cancelled

Meeting Cancelled

Principal Clerk _____
Reading Clerk _____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	March 1, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR

Senator Fletcher L. Hartsell, Jr., Chair

Gerry Johnson (Sen. Hartsell)

From: Gerry Johnson (Sen. Hartsell)
Sent: Thursday, February 24, 2005 1:26 PM
To: Sen. Scott Thomas
Subject: Sen. J II Meeting 02-01-2005

Principal Clerk _____
Reading Clerk _____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	March 1, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 109	Handgun Permit Renewal/Deployed Military.	Senator Thomas

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk _____
Reading Clerk _____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	March 3, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 109	Handgun Permit Renewal/Deployed Military.	Senator Thomas

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, March 3, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 109	Handgun Permit Renewal/Deployed Military.	Senator Thomas

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

March 3, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on March 3, 2005, with twelve members present. Senator Hartsell introduced Pages Brittany Pence of Middlesex and Amanda Eubanks of Beaufort and thanked them for serving.

SB 109 (Handgun Permit Renewal/Deployed Military.) Senator Hartsell asked for a motion to accept the Proposed Committee Substitute for purposes of discussion. Senator Apodaca moved that it be accepted, all voted and the motion passed. Senator Thomas was recognized to explain the bill. Senator Webster's question was answered by Senator Thomas. Senator Hartsell recognized Mr. Eddie Caldwell who represented the Sheriffs Association. Mr. Caldwell felt that the bill met their concerns and thanked Mrs. Kory Goldsmith, staff attorney, for her work on the bill. Senator Apodaca moved that the bill be accepted as unfavorable to the original bill, favorable as to the Committee Substitute. All voted and the motion passed.

There being no further business, the Committee was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, March 09, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **109** Handgun Permit Renewal/Deployed Military.

Draft Number:	PCS85102
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 109

Short Title:	Handgun Permit Renewal/Deployed Military.	(Public)
Sponsors:	Senators Thomas; Apodaca, Bingham, Brock, Forrester, Garwood, Goodall, Hartsell, Kerr, Presnell, and Swindell.	
Referred to:	Judiciary II.	

February 10, 2005

A BILL TO BE ENTITLED

AN ACT TO GRANT TO DEPLOYED MILITARY PERSONNEL AN EXTENSION OF TIME WITHIN WHICH TO RENEW A CONCEALED HANDGUN PERMIT.

The General Assembly of North Carolina enacts:

SECTION 1. Deployed Military Personnel Defined. – As used in this act, the term "deployed military personnel" includes both of the following:

(1) A member of the armed forces or the armed forces reserves of the United States on active duty in support of Operation Iraqi Freedom on or after January 1, 2003.

(2) A member of the North Carolina Army National Guard or the North Carolina Air National Guard called to active duty in support of Operation Iraqi Freedom on or after January 1, 2003.

SECTION 2. Proof. – Verification by the military member's command specifying deployment is conclusive evidence of the military member's deployment.

SECTION 3. Extend Time to Renew Concealed Handgun Permit. – Notwithstanding G.S. 14-415.16, deployed military personnel are allowed 90 days after the end of their deployment to renew concealed handgun permits issued under Article 54A of Chapter 14 of the General Statutes that expired or that will expire during the term of deployment. During the period of deployment or active duty and until the expiration of the 90-day period provided for by this section, expired permits covered by this act remain valid as if they had not expired.

SECTION 4. Include Proof of Deployment With Renewal Application. – When applying for the renewal of a permit covered by this act, the holder of the permit shall provide with the renewal application proof of the person's deployment.

SECTION 5. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 109
PROPOSED COMMITTEE SUBSTITUTE S109-CSRC-1 [v.10]

3/2/2005 7:08:32 PM

Short Title: Handgun Permit Renewal/Deployed Military. (Public)

Sponsors:

Referred to:

February 10, 2005

A BILL TO BE ENTITLED

AN ACT TO GRANT TO DEPLOYED MILITARY PERSONNEL AN EXTENSION OF TIME WITHIN WHICH TO RENEW A CONCEALED HANDGUN PERMIT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-415.10 reads as rewritten:

"**§ 14-415.10. Definitions.**

The following definitions apply to this Article:

(1) Carry a concealed handgun. – The term includes possession of a concealed handgun.

(1a) Deployed or deployment. – Any military duty that removes a military permittee from the permitee's county of residence during which time the permittee's permit expires or will expire.

(2) Handgun. – A firearm that has a short stock and is designed to be held and fired by the use of a single hand.

(2a) Military permittee. – A person who holds a permit who is also a member of the armed forces of the United States, the armed forces reserves of the United States, the North Carolina Army National Guard, or the North Carolina Air National Guard.

(3) Permit. – A concealed handgun permit issued in accordance with the provisions of this Article.

(3a) Proof of deployment. – A copy of the military permitee's deployment orders or other written notification from the permittee's command indicating the start and end date of deployment and that orders the permittee to travel outside the permittee's county of residence.

(4) Qualified former sworn law enforcement officer. – An individual who retired from service as a law enforcement officer with a local, State, or company police agency in North Carolina, other than for reasons of mental disability, who has been retired as a sworn law enforcement

officer two years or less from the date of the permit application, and who satisfies all of the following:

a. Immediately before retirement, the individual was a qualified law enforcement officer with a local, State, or company police agency in North Carolina.

b. The individual has a nonforfeitable right to benefits under the retirement plan of the local, State, or company police agency as a law enforcement officer or has 20 or more aggregate years of law enforcement service and has retired from a company police agency that does not have a retirement plan.

c. The individual is not prohibited by State or federal law from receiving a firearm.

(5) Qualified sworn law enforcement officer. – A law enforcement officer employed by a local, State, or company police agency in North Carolina who satisfies all of the following:

a. The individual is authorized by the agency to carry a handgun in the course of duty.

b. The individual is not the subject of a disciplinary action by the agency that prevents the carrying of a handgun.

c. The individual meets the requirements established by the agency regarding handguns."

SECTION 2. Article 54B of Chapter 14 of the North Carolina General Statutes is amended by adding a new section to read:

"**§ 14-415.16A. Permit extensions and renewals for deployed military permittees.**

(a) A deployed military permittee whose permit will expire during the permittee's deployment, or the permittee's agent, may apply to the sheriff for an extension of the military permittee's permit by providing the sheriff with a copy of the permittee's proof of deployment. Upon receipt of the proof, the sheriff shall extend the permit for a period to end 90 days after the permittee's deployment is scheduled to end. A permit that has been extended under this section shall be valid throughout the State during the period of its extension.

(b) A military permittee's permit that is not extended under subsection (a) of this section and that expires during deployment shall remain valid during the deployment and for 90 days after the end of the deployment as if the permit had not expired. The military permittee may carry a concealed handgun during this period provided the permittee meets all the requirements of G.S. 14-415.11(a).

(c) A military permittee under subsection (a) or subsection (b) of this section shall have 90 days after the end of the permittee's deployment to renew the permit. In addition to the requirements of G.S. 14-415.16, the permittee shall provide to the sheriff proof of deployment. The sheriff shall renew the permit upon receipt of this documentation provided the permittee otherwise remains qualified to hold a concealed handgun permit."

SECTION 3. G.S 14-415.11(a) reads as rewritten:

"**§ 14-415.11. Permit to carry concealed handgun; scope of permit.**

(a) Any person who has a concealed handgun permit may carry a concealed handgun unless otherwise specifically prohibited by law. The person shall carry the permit together with valid identification whenever the person is carrying a concealed handgun, shall disclose to any law enforcement officer that the person holds a valid permit and is carrying a concealed handgun when approached or addressed by the officer, and shall display both the permit and the proper identification upon the request of a law enforcement officer. In addition to these requirements, a military permittee whose permit has expired during deployment may carry a concealed handgun during the 90 days following the end of deployment and before the permit is renewed provided the permittee also displays proof of deployment to any law enforcement officer."

SECTION 4. G.S. 14-269(a1) reads as rewritten:

(a1) It shall be unlawful for any person willfully and intentionally to carry concealed about his person any pistol or gun except in the following circumstances:

(1) The person is on the person's own premises.

(2) The deadly weapon is a handgun, and the person has a concealed handgun permit issued in accordance with Article 54B of this Chapter or considered valid under G.S. 14-415.24.

(3) The deadly weapon is a handgun and the person is a military permittee as defined under G.S. 14-415.10(2a) who provides to the law enforcement officer proof of deployment as required under G.S. 14-415.11(a)."

SECTION 5. G.S. 14-269 is amended by adding a new subsection to read:

"(b2) It is a defense to a prosecution under this section that:

(1) The deadly weapon is a handgun;

(2) The defendant is a military permittee as defined under G.S. 14-415.10(2a); and

(3) The defendant provides to the court proof of deployment as required under G.S. 14-415.10(3a)."

SECTION 6. This act is effective when it becomes law.

SENATE BILL 109:
Handgun Permit Renewal/Deployed Military

BILL ANALYSIS

Committee: Senate Judiciary II
Date: March 3, 2005
Version: Proposed Committee Substitute S109-CSRC-1[v.10]

Introduced by: Senator Thomas
Summary by: Kory J. Goldsmith
Committee Counsel

SUMMARY: ***The Proposed Committee Substitute for Senate Bill 109 essentially provides that a concealed handgun permit held by deployed military personnel remains valid during the term of deployment and for 90 days after the deployment ends. Military personnel may either apply to extend the permit before it expires by providing the sheriff with proof of deployment, or they may carry their proof of deployment during the 90 days following the deployment and before the permit is renewed. The bill would apply to a person who holds a concealed handgun permit who is also a member of the armed forces of the United States, the armed forces reserves of the United States, the North Carolina Army National Guard, or the North Carolina National Guard.***

The act would become effective when it becomes law.

CURRENT LAW: A concealed handgun permit is valid for five years unless revoked or suspended. In order to obtain a renewal of the permit, the permittee must file a renewal form with the sheriff, provide a notarized affidavit stating that the permittee remains qualified to hold the permit, submit to a newly administered full set of fingerprints[1], and pay the appropriate renewal fee. If the permittee meets all the eligibility requirements, the sheriff may waive the requirement of taking another firearms safety and training course and must renew the permit. If the permit expires, a permittee must go through the complete application process including completion of an approved firearms and safety training course and payment of the application fee.

A person who has a concealed handgun permit must carry the permit and other proper identification any time the person also carries a concealed handgun. The person must disclose to any law enforcement officer that the person holds a valid permit, is carrying a concealed handgun, and must present the permit and proper identification to the law enforcement office. A person who fails to carry the permit, or fails to disclose the required information to a law enforcement officer is guilty of an infraction for the first offense. Subsequent offenses for failing to carry a valid permit or failing to make the necessary disclosures are Class 2 misdemeanors. Punishment for a Class 2 misdemeanor ranges from 1-60 days of either community, intermediate or active punishment, depending upon the number of prior convictions.

A person who carries a concealed handgun and who does not hold a valid permit is guilty of a Class 2 misdemeanor for a first offense and a Class I felony for subsequent offenses. The minimum punishment for a Class I felony is 3 months community service and the maximum punishment is 1 year active punishment, depending upon the number of prior convictions.

BILL ANALYSIS: The Proposed Committee Substitute to Senate Bill 109 amends a number of statutes related to concealed handgun permits to extend the deadline for renewing a permit for members of

[1] No fingerprints are required for a renewal permit if the applicant's fingerprints were submitted to the SBI after June 30, 2001 under the Automated Fingerprinting Information System.

the military whose permits would otherwise expire while they are deployed for military purposes. The permit remains valid during the period of deployment and for the 90 days after the deployment.

Section 1 creates several new definitions. A "military permittee" is a person who holds a concealed handgun permit and who is a member of the armed forces of the United States, the armed forces reserves of the United States, the North Carolina Army National Guard, or the North Carolina Air National Guard. "Deployed or deployment" means any military duty that removes a military permittee from the permittee's county of residence during which time the permittee's permit expires or will expire. "Proof of Deployment" means a copy of the permittee's deployment orders or other written notification from the permittee's command indicating the start and end date of the deployment and that orders the permittee to travel outside the permittee's county of residence.

Section 2 creates a new section in Article 54B of Chapter 14. It allows a military permittee two options regarding a permit that is going to expire during the permittee's term of deployment. The permittee (or the permittee's agent) may apply to the sheriff to have the permit extended by submitting proof of deployment. The sheriff would then extend the permit during the term of deployment and for 90 days following the end of the deployment. If the permittee does not apply for the extension, and the permit actually expires during the term of deployment, it would still be considered valid for the 90 days after the deployment ends during which time the permittee may apply to renew the permit.

Section 3 amends G.S. 14-415.11(a), which requires a person who holds a concealed handgun permit to carry the permit any time the person also carries a concealed handgun and also make certain disclosures to law enforcement officers when carrying a concealed handgun. In addition to these requirements, a military permittee who did not have his or her permit extended, but who wishes to carry a concealed handgun during the 90 day period following deployment, must also carry proof of deployment and display that proof to law enforcement officers. A permittee who has extended his or her permit would not need to carry proof of deployment because the concealed handgun permit database would reflect that the permit had been extended and is therefore still valid.

Sections 4 and 5 amend G.S. 14-269 to make it clear that it is not a crime to carry a concealed handgun if you are a military permittee whose permit expired during your term of deployment provided you make the required disclosures to a law enforcement officer and display to the officer your proof of deployment. It also creates a new affirmative defense that would allow a military permittee who is charged with carrying a concealed weapon without a valid permit to have the charges dropped by presenting proof of deployment to the court.

BACKGROUND: The General Assembly previously enacted legislation to waive deadlines, fees, and penalties associated with the expiration of drivers' licenses and the lapse of motor vehicle liability insurance and to provide additional time to list property for taxation and to pay property taxes for military personnel deployed in Operation Enduring Freedom and Noble Eagle (S.L. 2001-508) and Operation Iraqi Freedom (S.L. 2003-300).

S109-SMRC-001

§ 14-415.16. Renewal of permit.

The holder of a permit shall apply to renew the permit at least 30 days prior to its expiration date by filing with the sheriff of the county in which the person resides a renewal form provided by the sheriff's office, a notarized affidavit stating that the permittee remains qualified under the criteria provided in this Article, a newly administered full set of the permittee's fingerprints, and a renewal fee. Upon receipt of the completed renewal application, including the permittee's fingerprints, and the appropriate payment of fees, the sheriff shall determine if the permittee remains qualified to hold a permit in accordance with the provisions of G.S. 14-415.12. The permittee's criminal history shall be updated, and the sheriff may waive the requirement of taking another firearms safety and training course. If the permittee applies for a renewal of the permit within 30 days of its expiration date and if the permittee remains qualified to have a permit under G.S. 14-415.12, the sheriff shall renew the permit. No fingerprints shall be required for a renewal permit if the applicant's fingerprints were submitted to the State Bureau of Investigation after June 30, 2001, on the Automated Fingerprint Information System (AFIS) as prescribed by the State Bureau of Investigation.

§ 14-415.12. Criteria to qualify for the issuance of a permit.

(a) The sheriff shall issue a permit to an applicant if the applicant qualifies under the following criteria:
- (1) The applicant is a citizen of the United States and has been a resident of the State 30 days or longer immediately preceding the filing of the application.
- (2) The applicant is 21 years of age or older.
- (3) The applicant does not suffer from a physical or mental infirmity that prevents the safe handling of a handgun.
- (4) The applicant has successfully completed an approved firearms safety and training course which involves the actual firing of handguns and instruction in the laws of this State governing the carrying of a concealed handgun and the use of deadly force. The North Carolina Criminal Justice Education and Training Standards Commission shall prepare and publish general guidelines for courses and qualifications of instructors which would satisfy the requirements of this subdivision. An approved course shall be any course which satisfies the requirements of this subdivision and is certified or sponsored by:
  - a. The North Carolina Criminal Justice Education and Training Standards Commission,
  - b. The National Rifle Association, or
  - c. A law enforcement agency, college, private or public institution or organization, or firearms training school, taught by instructors certified by the North Carolina Criminal Justice Education and Training Standards Commission or the National Rifle Association.

  Every instructor of an approved course shall file a copy of the firearms course description, outline, and proof of certification annually, or upon modification of the course if more frequently, with the North Carolina Criminal Justice Education and Training Standards Commission.
- (5) The applicant is not disqualified under subsection (b) of this section.

(b) The sheriff shall deny a permit to an applicant who:
- (1) Is ineligible to own, possess, or receive a firearm under the provisions of State or federal law.
- (2) Is under indictment or against whom a finding of probable cause exists for a felony.
- (3) Has been adjudicated guilty in any court of a felony.
- (4) Is a fugitive from justice.
- (5) Is an unlawful user of, or addicted to marijuana, alcohol, or any depressant, stimulant, or narcotic drug, or any other controlled substance as defined in 21 U.S.C. § 802.
- (6) Is currently, or has been previously adjudicated by a court or administratively determined by a governmental agency whose decisions are subject to judicial review to be, lacking mental capacity or mentally ill. Receipt of previous consultative services or outpatient treatment alone shall not disqualify an applicant under this subdivision.
- (7) Is or has been discharged from the armed forces under conditions other than honorable.
- (8) Is or has been adjudicated guilty of or received a prayer for judgment continued or suspended sentence for one or more crimes of violence constituting a misdemeanor, including but not limited to, a violation of a misdemeanor under Article 8 of Chapter 14 of the General Statutes, or a violation of a misdemeanor under G.S. 14-225.2, 14-226.1, 14-258.1, 14-269.2, 14-269.3, 14-269.4,

14-269.6, 14-276.1, 14-277, 14-277.1, 14-277.2, 14-277.3, 14-281.1, 14-283, 14-288.2, 14-288.4(a)(1) or (2), 14-288.6, 14-288.9, 14-288.12, 14-288.13, 14-288.14, 14-318.2, or 14-415.21(b).

(9) Has had entry of a prayer for judgment continued for a criminal offense which would disqualify the person from obtaining a concealed handgun permit.

(10) Is free on bond or personal recognizance pending trial, appeal, or sentencing for a crime which would disqualify him from obtaining a concealed handgun permit.

(11) Has been convicted of an impaired driving offense under G.S. 20-138.1, 20-138.2, or 20-138.3 within three years prior to the date on which the application is submitted.

§ 14-269. Carrying concealed weapons.

(a) It shall be unlawful for any person willfully and intentionally to carry concealed about his person any bowie knife, dirk, dagger, slung shot, loaded cane, metallic knuckles, razor, shurikin, stun gun, or other deadly weapon of like kind, except when the person is on the person's own premises.

(a1) It shall be unlawful for any person willfully and intentionally to carry concealed about his person any pistol or gun except in the following circumstances:

(1) The person is on the person's own premises.

(2) The deadly weapon is a handgun, and the person has a concealed handgun permit issued in accordance with Article 54B of this Chapter or considered valid under G.S. 14-415.24.

(b) This prohibition shall not apply to the following persons:

(1) Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms and weapons;

(2) Civil and law enforcement officers of the United States while in the discharge of their official duties;

(3) Officers and soldiers of the militia and the national guard when called into actual service;

(4) Officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties;

(5) Sworn law-enforcement officers, when off-duty, if:

a. Written regulations authorizing the carrying of concealed weapons have been filed with the clerk of superior court in the county where the law-enforcement unit is located by the sheriff or chief of police or other superior officer in charge; and

b. Such regulations specifically prohibit the carrying of concealed weapons while the officer is consuming or under the influence of alcoholic beverages.

(b1) It is a defense to a prosecution under this section that:

(1) The weapon was not a firearm;

(2) The defendant was engaged in, or on the way to or from, an activity in which he legitimately used the weapon;

(3) The defendant possessed the weapon for that legitimate use; and

(4) The defendant did not use or attempt to use the weapon for an illegal purpose.

The burden of proving this defense is on the defendant.

(c) Any person violating the provisions of subsection (a) of this section shall be guilty of a Class 2 misdemeanor. Any person violating the provisions of subsection (a1) of this section shall be guilty of a Class 2 misdemeanor for the first offense. A second or subsequent offense is punishable as a Class I felony.

(d) This section does not apply to an ordinary pocket knife carried in a closed position. As used in this section, "ordinary pocket knife" means a small knife, designed for carrying in a pocket or purse, that has its cutting edge and point entirely enclosed by its handle, and that may not be opened by a throwing, explosive, or spring action.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 109
PROPOSED COMMITTEE SUBSTITUTE S109-PCS85102-RC-1

Short Title: Handgun Permit Renewal/Deployed Military. (Public)

Sponsors:

Referred to:

February 10, 2005

A BILL TO BE ENTITLED

AN ACT TO GRANT TO DEPLOYED MILITARY PERSONNEL AN EXTENSION OF TIME WITHIN WHICH TO RENEW A CONCEALED HANDGUN PERMIT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-415.10 reads as rewritten:

"**§ 14-415.10. Definitions.**

The following definitions apply to this Article:

(1) Carry a concealed handgun. – The term includes possession of a concealed handgun.

(1a) Deployed or deployment. – Any military duty that removes a military permittee from the permittee's county of residence during which time the permittee's permit expires or will expire.

(2) Handgun. – A firearm that has a short stock and is designed to be held and fired by the use of a single hand.

(2a) Military permittee. – A person who holds a permit who is also a member of the armed forces of the United States, the armed forces reserves of the United States, the North Carolina Army National Guard, or the North Carolina Air National Guard.

(3) Permit. – A concealed handgun permit issued in accordance with the provisions of this Article.

(3a) Proof of deployment. – A copy of the military permittee's deployment orders or other written notification from the permittee's command indicating the start and end date of deployment and that orders the permittee to travel outside the permittee's county of residence.

(4) Qualified former sworn law enforcement officer. – An individual who retired from service as a law enforcement officer with a local, State, or company police agency in North Carolina, other than for reasons of mental disability, who has been retired as a sworn law enforcement

officer two years or less from the date of the permit application, and who satisfies all of the following:

a. Immediately before retirement, the individual was a qualified law enforcement officer with a local, State, or company police agency in North Carolina.

b. The individual has a nonforfeitable right to benefits under the retirement plan of the local, State, or company police agency as a law enforcement officer or has 20 or more aggregate years of law enforcement service and has retired from a company police agency that does not have a retirement plan.

c. The individual is not prohibited by State or federal law from receiving a firearm.

(5) Qualified sworn law enforcement officer. – A law enforcement officer employed by a local, State, or company police agency in North Carolina who satisfies all of the following:

a. The individual is authorized by the agency to carry a handgun in the course of duty.

b. The individual is not the subject of a disciplinary action by the agency that prevents the carrying of a handgun.

c. The individual meets the requirements established by the agency regarding handguns."

SECTION 2. Article 54B of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-415.16A. Permit extensions and renewals for deployed military permittees.**

(a) A deployed military permittee whose permit will expire during the permittee's deployment, or the permittee's agent, may apply to the sheriff for an extension of the military permittee's permit by providing the sheriff with a copy of the permittee's proof of deployment. Upon receipt of the proof, the sheriff shall extend the permit for a period to end 90 days after the permittee's deployment is scheduled to end. A permit that has been extended under this section shall be valid throughout the State during the period of its extension.

(b) A military permittee's permit that is not extended under subsection (a) of this section and that expires during deployment shall remain valid during the deployment and for 90 days after the end of the deployment as if the permit had not expired. The military permittee may carry a concealed handgun during this period provided the permittee meets all the requirements of G.S. 14-415.11(a).

(c) A military permittee under subsection (a) or subsection (b) of this section shall have 90 days after the end of the permittee's deployment to renew the permit. In addition to the requirements of G.S. 14-415.16, the permittee shall provide to the sheriff proof of deployment. The sheriff shall renew the permit upon receipt of this documentation provided the permittee otherwise remains qualified to hold a concealed handgun permit."

SECTION 3. G.S 14-415.11(a) reads as rewritten:

"(a) Any person who has a concealed handgun permit may carry a concealed handgun unless otherwise specifically prohibited by law. The person shall carry the permit together with valid identification whenever the person is carrying a concealed handgun, shall disclose to any law enforcement officer that the person holds a valid permit and is carrying a concealed handgun when approached or addressed by the officer, and shall display both the permit and the proper identification upon the request of a law enforcement officer. In addition to these requirements, a military permittee whose permit has expired during deployment may carry a concealed handgun during the 90 days following the end of deployment and before the permit is renewed provided the permittee also displays proof of deployment to any law enforcement officer."

SECTION 4. G.S. 14-269(a1) reads as rewritten:

"(a1) It shall be unlawful for any person willfully and intentionally to carry concealed about his person any pistol or gun except in the following circumstances:

(1) The person is on the person's own premises.

(2) The deadly weapon is a handgun, and the person has a concealed handgun permit issued in accordance with Article 54B of this Chapter or considered valid under G.S. 14-415.24.

(3) The deadly weapon is a handgun and the person is a military permittee as defined under G.S. 14-415.10(2a) who provides to the law enforcement officer proof of deployment as required under G.S. 14-415.11(a)."

SECTION 5. G.S. 14-269 is amended by adding a new subsection to read:

"(b2) It is a defense to a prosecution under this section that:

(1) The deadly weapon is a handgun;

(2) The defendant is a military permittee as defined under G.S. 14-415.10(2a); and

(3) The defendant provides to the court proof of deployment as defined under G.S. 14-415.10(3a)."

SECTION 6. This act is effective when it becomes law.

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — March 3, 2005

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Joe McClees	McClees Consulting
Eddie Caldwell	NC Sheriffs Assn.
Nikki Hooper	Intern for Sen. Dalton
Curtis Cox	Staff - Sen Rand

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	March 24, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 61	Felony Death/Serious Injury by Vehicle.	Senator Thomas
SB 421	Exempt REACT/Charitable Solicitations.	Senator Jacumin
SB 462	Charlotte Speed Camera Sunset Extended.	Senator Dannelly

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, March 24, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 61	Felony Death/Serious Injury by Vehicle.	Senator Thomas
SB 421	Exempt REACT/Charitable Solicitations.	Senator Jacumin
SB 462	Charlotte Speed Camera Sunset Extended.	Senator Dannelly

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

March 24, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on March 24, 2005, with fourteen members present. Senator Hartsell introduced pages Karly Rivenbark, Eric Spitler, Scott Gunn and Cyrus Scott and thanked them for coming.

SB 61 (Felony Death/Serious Injury by Vehicle.) Senator Hartsell recognized Senator Thomas to explain the bill. Questions by Senators Goodall, Allran, Berger and Webster were answered by Senator Thomas and Ben Popkin, Staff Attorney. Ms. Peg Dore, representing the Conference of District Attorneys and Ms. Donna Latimer, mother of a DWI victim, spoke on the bill. Senator Allran moved for a favorable report with a recommended referral to Appropriations. All voted and the motion passed.

SB 421 (Exempt REACT/Charitable Solicitations.) Senator Hartsell recognized Senator Jacumin to explain his bill. Questions by Senators Webster and Allran were answered by Senator Jacumin and Kory Goldsmith, staff attorney. Senator Allran moved for a favorable report. All voted and the motion passed.

SB 462 (Charlotte Speed Camera Sunset Extended.) Senator Hartsell asked for a motion to accept the Proposed Committee Substitute for purposes of discussion. Senator Dannelly so moved, all voted and the motion carried. Senator Dannelly was recognized to explain the proposed committee substitute. Senator Hartsell answered the question by Senator Allran. Senator Forrester spoke against the bill and explained his "no" vote. Senator Allran moved for a favorable report. All voted and the motion carried.

With no further business, the Committee was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — March 24, 2005

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Peg Dorer	Conference of DAs
Matt Osborne	AOC
Carolyn Johnson	
Donna Latimer	200 Willow DR Williamston, NC 27892
Robert Wilson	SOS.
Daley H. Montgomery	SOS
Andy Elkin	NCRMP
Mary Thomsen	REBIC
Richard Chess	Richard Chess & Assoc.
Robin A. Young	ACLU
Lu Hodge	KCLT

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
[illegible] Tisdale	NCACC
Patricia Rawles	NCACC
John McMillan	Gov Office

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

CORRECTED REPORT

Thursday, March 24, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **61** Felony Death/Serious Injury by Vehicle.
Sequential Referral: None
Recommended Referral: Appropriations/Base Budget

S.B. **421** Exempt REACT/Charitable Solicitations.
Sequential Referral: None
Recommended Referral: Appropriations/Base Budget

TOTAL REPORTED: 2

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, March 24, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **61** Felony Death/Serious Injury by Vehicle.
Sequential Referral: None
Recommended Referral: None

S.B. **421** Exempt REACT/Charitable Solicitations.
Sequential Referral: None
Recommended Referral: Appropriations/Base Budget

TOTAL REPORTED: 2

Committee Clerk Comments:

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 61

Short Title:	Felony Death/Serious Injury by Vehicle.	(Public)
Sponsors:	Senators Thomas; Apodaca, Bingham, Garwood, Jenkins, Presnell, Smith, Swindell, Tillman, and Weinstein.	
Referred to:	Judiciary II.	

February 7, 2005

A BILL TO BE ENTITLED

AN ACT TO STRENGTHEN THE LAWS AGAINST IMPAIRED DRIVING BY INCREASING THE PUNISHMENT FOR FELONY DEATH BY VEHICLE AND CREATING THE OFFENSE OF FELONY SERIOUS INJURY BY VEHICLE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-141.4 reads as rewritten:

"**§ 20-141.4. Felony and misdemeanor death by vehicle.**

(a) Repealed by Session Laws 1983, c. 435, s. 27.

(a1) Felony Death by Vehicle. – A person commits the offense of felony death by vehicle if he unintentionally causes the death of another person while engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2 and commission of that offense is the proximate cause of the death.

(a2) Misdemeanor Death by Vehicle. – A person commits the offense of misdemeanor death by vehicle if he unintentionally causes the death of another person while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, other than impaired driving under G.S. 20-138.1, and commission of that violation is the proximate cause of the death.

(a3) Felony Serious Injury by Vehicle. – A person commits the offense of felony serious injury by vehicle if he unintentionally causes serious injury to another person while engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2, and commission of that offense is the proximate cause of the serious injury.

(b) Punishments. – Felony death by vehicle is a Class ~~G~~ D felony. Felony serious injury by vehicle is a Class E felony. Misdemeanor death by vehicle is a Class 1 misdemeanor.

(c) No Double Prosecutions. – No person who has been placed in jeopardy upon a charge of death by vehicle may be prosecuted for the offense of manslaughter arising

out of the same death; and no person who has been placed in jeopardy upon a charge of manslaughter may be prosecuted for death by vehicle arising out of the same death."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

SENATE BILL 61:
Felony Death/Serious Injury by Vehicle

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Thomas
Date:	March 24, 2005	**Summary by:**	Ben Popkin
Version:	First Edition		Committee Counsel

SUMMARY: ***Senate Bill 61 would create the new crime of felony serious injury by vehicle that would be a Class E felony. It would apply when a person unintentionally causes serious injury to another person while engaged in the offense of impaired driving and the impaired driving is the proximate cause of the serious injury. The bill would also increase the penalty for felony death by vehicle from a Class G to a Class D felony. This bill would become effective December 1, 2005 and would apply to offenses committed on or after that date.***

CURRENT LAW: G.S. 20-141.4 contains two offenses: felony death by vehicle and misdemeanor death by vehicle.

The elements of felony death by vehicle are:

- The defendant causes the death
- Of another human being
- Unintentionally
- While engaged in the offense of impaired driving or impaired driving of a commercial vehicle; &
- The commission of impaired driving is the proximate cause of the death.

This is a Class G felony with a minimum sentence of 8 months intermediate or active punishment and a maximum sentence of 44 months active punishment.

The elements of misdemeanor death by vehicle are:

- The defendant causes the death
- Of another human being
- Unintentionally
- While committing a violation of any state law or local ordinance applying to the operation of a motor vehicle or the regulation of traffic, other than impaired driving; and
- The commission of that offense is the proximate cause of death.

This is a Class 1 misdemeanor with a minimum sentence of 1 day community punishment to 120 days community, intermediate to active punishment.

G.S. 20-138.1 is impaired driving. **The elements are:**

- The person drives
- A vehicle
- On a highway or public vehicular area

- While under the influence of an impairing substance, or
- After consuming a sufficient quantity of alcohol that the person has an alcohol concentration of 0.08 or more at any relevant time after the driving.

There are multiple levels of punishment, based upon the weight of certain aggravating and mitigating factors. The punishments range from a minimum imprisonment of 30 days to a maximum imprisonment of 60 days. Fines may range from $200 to $4,000.

G.S. 20-138.2 is impaired driving of a commercial vehicle. The elements are the same as impaired driving except the defendant was operating a commercial vehicle and the threshold alcohol concentration level is 0.04. The sentences are the same as impaired driving.

BILL ANALYSIS: The new offense of felony serious injury by vehicle would have the following elements:

- The defendant
- Unintentionally causes
- Serious injury
- To another person
- While engaged in the offense of impaired driving or impaired driving of a commercial vehicle; &
- The commission of that offense is the proximate cause of the serious injury.

What qualifies as serious injury is a question of fact, but it has been delineated somewhat by case law to include, "physical injury that causes great pain and suffering... or serious mental injury". It is a lesser standard than 'serious bodily injury', used elsewhere in the criminal statutes.

The offense would be a Class E felony with a minimum sentence of 15 months intermediate or active punishment and a maximum sentence of 98 months active punishment.

The bill also increases felony death by vehicle from a Class G felony to a Class D felony. A Class D felony has a minimum sentence of 38 months active punishment and a maximum sentence of 229 months active punishment.

BACKGROUND: The North Carolina Sentencing and Policy Advisory Commission conducted an analysis of a prior version of this bill (Senate Bill 687) in April 2003. The language of Senate Bill 61 is identical to the previously proposed Senate Bill 687. The Sentencing Commission found the portion of the bill (§ 20-141.4(a3)) addressing Felony Serious Injury by Vehicle to call for a proposed offense class (Class E felony) consistent with the Commission's Offense Classification Criteria.

As a homicide offense, the portion of the bill addressing Felony Death by Vehicle was found to be of a class for which the Commission did not use Offense Classification Criteria. The Commission did state, however, that the proposed class change would shift this offense from a classification used in the event of serious property loss from the person (Class G felony) to a classification used in cases involving serious infringements on property interest also implicating physical safety concerns by use of a deadly weapon, or involving an occupied dwelling (Class D felony).

This summary is based in large part on prior work of Kory Goldsmith.

S61-SMSS-001

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: Senate Bill 61 (First Edition)

SHORT TITLE: Felony Death/Serious Injury by Vehicle

SPONSOR(S): Senator Thomas

FISCAL IMPACT

Yes (X) No ( ) No Estimate Available ( )

	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10
EXPENDITURES:					
HIGHWAY FUND:					
Transportation:	$18,388	-	-	-	-
GENERAL FUND:					
Correction:+					
Recurring:	-	$432,799+	$1,255,931+	$2,072,553+	$3,065,809+
Non-Recurring:	**There are no available prison beds during this timeframe. This note assumes that contractual beds will be used in the short run. In the long term, the state will need to construct new cells at an average cost of $86,957 per bed.**				
Judicial (Recurring):	$13,559+	$24,406+	$25,626+	$26,907+	$28,252+
TOTAL EXPENDITURES:	$31,947+	$457,205+	$1,281,557+	$2,099,460+	$3,094,061+
ADDITIONAL PRISON BEDS*	-	12+	41+	70+	102+
POSITIONS: (cumulative)	-	5+	16+	28+	41+

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch; Department of Transportation.

EFFECTIVE DATE: December 1, 2005

+*Costs reflect only the impact of enhancing the penalty for Felony Death by Vehicle. There would be an indeterminate number of additional prison beds and costs to the Administrative Office of the Courts (AOC) and the Department of Correction (DOC) as a result of the new offense of Felony Serious Injury by Vehicle. See Assumptions and Methodology for details.*

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: This bill amends G.S. 20-141.4 to raise the offense class of Felony Death by Vehicle from felony Class G to Class D and creates a new offense, Felony Serious Injury by Vehicle, punishable as a Class E felony. Both offenses require that the offender be engaged in the offense of Driving While Impaired.

ASSUMPTIONS AND METHODOLOGY:

General

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

Offenders that could be convicted of Felony Serious Injury by Vehicle due to this bill are eligible under current law to be convicted of Assault with a Deadly Weapon Inflicting Serious Injury, also a Class E felony. The Sentencing Commission does not have data reflecting the number of these convictions that involve the perpetration of a Driving While Impaired offense. To the extent that these offenders are already being charged and convicted of a Class E felony, the impact upon prison population and the courts due to this new offense would be reduced. However, an informal poll of district attorneys conducted by AOC in 2002 indicated that no charges other than DWI are currently being brought against these defendants.

Department of Transportation/Highway Fund

The State Automated Driver License System (SADLS) will require the following modifications to implement the new offense of Felony Serious Injury by Vehicle:

- Logic for new conviction codes and business rules to enforce these new codes.
- New AOC code process logic.
- New suspension codes and the business rules to enforce these new codes.
- Changes to the correspondence system for new correspondence produced.
- Alcohol Restriction for new codes and business rules to enforce these new codes.

The Drivers License Section estimates 206 hours of programming, testing, and implementation at $80/hour for a total of $16,720, plus ITS charges totaling $1,668. Total nonrecurring expenditures for the Drivers License Section are estimated to be $18,388.

Department of Correction – Division of Prisons

This bill (S.B. 687) could increase the number of prison beds needed by three means: 1) raising the offense class of Felony Death by Vehicle from Class G to Class D; 2) creating the new offense of Felony Serious Injury by Vehicle; and 3) inducing prosecutors to seek convictions for Felony Death by Vehicle in cases in which they presently seek a conviction for Involuntary Manslaughter (a Class F felony). Due to lack of historical data, the Sentencing Commission cannot estimate any impact on prison population resulting from the creation of a new offense or a change in prosecutorial behavior. Throughout this fiscal note, the + symbol is used to indicate the potential for additional, unquantifiable prison beds and expenditures resulting from those aspects of this bill.

1) Felony Death by Vehicle

This bill would increase the penalty for Felony Death by Vehicle from Class G to Class D, resulting in an increase in both sentence length and activation rate. While a judge may impose an intermediate sanction for a Class G felony, a Class D felony requires an active sentence. In FY 2003-04, there were 35 convictions for Felony Death by Vehicle. The Sentencing Commission projects that raising the offense classification to Class D would increase the number of prison beds needed each year, resulting in the need for 102 new beds by FY 2009-10.

2) Felony Serious Injury by Vehicle

The new offense of Felony Serious Injury by Vehicle would be punishable as a Class E felony. Division of Motor Vehicles (DMV) data indicates that there were 625 alcohol-related crashes that caused serious injury as defined by DMV in 2003, a continued decline from previous years. Although AOC has provided an estimate of the number of charges that could result from these accidents, it is not possible to estimate the number of convictions that might result from those charges. If, for example, there were two convictions for this offense per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed in the first year and two additional beds in the second year. The statewide average annual operating cost for each additional prison bed in 2006-07 is projected to be $24,740.

3) Change in Prosecutorial Behavior

The bill would raise Felony Death by Vehicle to an offense class above Involuntary Manslaughter (G.S. 14-18), a Class F felony. It is possible that, as a result of this bill, some convictions for Involuntary Manslaughter would instead be for Felony Death by Vehicle, increasing sentence length and ensuring an active sentence. In FY 2003-04, there were 83 convictions for Involuntary Manslaughter. There is no data on the number of these convictions that involved the commission of a Driving While Impaired offense. As such, the Sentencing Commission cannot project the number of offenders that might be convicted of Felony Death by Vehicle if it were classified above Involuntary Manslaughter.

The chart on the next page compares the projected inmate population to available prison bed capacity system-wide and shows any population increases caused by a specific bill. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.* That means the number of beds needed (row five) is always equal to the projected additional inmates due to a bill (row four).

Rows four and five in the chart show the impact of the increased penalty for Felony Death by Vehicle proposed by this bill. As shown in bold in the chart, the Sentencing Commission estimates that this specific legislation will add *at least* 102 inmates to the prison system by the end of FY 2009-10. There will be additional beds required by the creation of the new Class E offense of Felony Serious Injury by Vehicle, but the number cannot be determined.

	June 30 2006	June 30 2007	June 30 2008	June 30 2009	June 30 2010
1. Projected No. Of Inmates Under Current Structured Sentencing Act[1]	38,106	39,021	39,864	40,750	41,668
2. Projected No. of Prison Beds (DOC Expanded Capacity)[2]	37,015	37,911	38,807	38,807	38,807
3. No. of Beds Over/Under No. of Inmates Under Current Structured Sentencing Act	-1,091	-1,110	-1,057	1,943	-2,861
4. No. of Projected Additional Inmates **Due to this Bill**[3]	-	70+	12+	102+	41+
5. No. of Additional Beds Needed Each Fiscal Year Due to this Bill[3]	-	12+	41+	70+	102+

POSITIONS: It is anticipated that *at least* 41 positions would be needed to supervise the additional inmates housed under this bill by 2009-10. This position total includes security, program, and administrative personnel at a ratio of one employee for every 2.5 inmates. This ratio is the combined average of the last five prisons opened by DOC and two prisons under construction. Two of the prisons were medium custody and five were close custody.

FISCAL IMPACT BEYOND FIVE YEARS: Fiscal notes look at the impact of a bill through FY 2010. However, there is information available on the impact of this bill in later years. The chart below shows the additional inmates due to this bill, the projected available beds, and required beds due only to this bill each year.

	2010-11	2011-12	2012-13	2013-14
Inmates Due to This Bill*	134+	155+	163+	169+
Available Beds (over/under)	-3,787	-4,692	-5,574	-6,505
New Beds Needed (minimum)*	-3,921	-4,847	-5,737	-6,674

* Only part of the impact is quantifiable.

[1] The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2005 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory group, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts.

[2] Projected number of prison beds is based on beds completed, under construction, or authorized for construction as of December 2004. The number of beds is based on DOC operating at Expanded Operating Capacity (EOC).

[3] Criminal penalty bills effective December 1, 2005 will not affect prison population and bed needs until FY 2006-07 due to the lag time between when an offense is committed and an offender is sentenced.

DISTRIBUTION OF BEDS: After analyzing the proposed legislation, the Department of Correction estimates the following distribution of beds as needed under this bill:

32% Close Custody
60% Medium Custody
8% Minimum Custody

CONSTRUCTION: Construction costs for new prison beds, as listed in the following chart, are based on estimated 2004-05 costs for each custody level as provided by the Office of State Construction and the Department of Correction. An inflation rate of five percent per year is applied to future years. *The costs assume stand-alone facilities; single cells for close custody and dormitories for medium and minimum.*

Custody Level	Minimum	Medium	Close
Construction Cost Per Bed 2004-05	$45,500	$73,500	$98,500

The cost to construct each bed required by this bill is shown in the Fiscal Impact Table on page one of this note. This cost is for 2006-07 and assumes that funds to construct prison beds should be budgeted three years in advance since building a prison typically requires three years for planning, design, and construction.

The total cost to construct new beds to accommodate the 102 inmates this bill is projected to add to the prison system by FY 2009-10 is estimated to be $8.87 million. DOC would need to begin construction of these beds in fiscal year 2006-07. By fiscal year 2013-14, 169 beds would be needed due to this legislation. **The cost to construct the additional 67 beds beginning in year 2010-11 would be $7.08 million.** These figures represent a 2004-05 average base cost per bed of $78,873 adjusted for inflation at a rate of five percent annually. This base cost per bed is a weighted average of the cost per bed for each of the three custody levels as shown above.

OPERATING: Operating costs are based on actual 2003-04 costs for each custody level as provided by the Department of Correction. These costs include security, inmate programs, inmate costs (food, medical etc.) and administrative overhead costs for the Department and the Division of Prisons. A three percent annual inflation rate will be added each year to the base costs for FY 2003-04 shown below and included in the recurring costs estimated in the Fiscal Impact Table on page one.

Daily Inmate Operating Cost 2003-04

Custody Level	Minimum	Medium	Close	Statewide Average
Daily Cost Per Inmate (2003-04)	$49.34	$65.59	$82.46	$62.03

Department of Correction – Division of Community Corrections

Offenders convicted of Felony Serious Injury by Vehicle (felony Class E) in Prior Record Levels I and II could receive an intermediate rather than active punishment. Probation officers in the Division of Community Correction supervise offenders with intermediate sanctions at an estimated cost of $10.94 per day for the first six months and $1.87 per day thereafter. This cost estimate is based on the average cost and duration of intensive probation, the most common intermediate sanction. In FY 2003-04, 51 percent of Class E felons received an intermediate punishment, and the average length of supervision was 36 months.

If, for example, there were two convictions for Felony Serious Injury by Vehicle, and the rate of intermediate sentences was the same as the overall rate for Class E in 2003-04, one offender would receive an intermediate punishment. Costs to the Division of Community Corrections (DCC) for that offender would be an estimated $2,338 in the first year, and $683 per year in the second and third years. As with active sentences, costs would begin in FY 2006-07 due to the lag time between charge and conviction.

As a Class G offense, individuals convicted of Felony Death by Vehicle can receive intermediate sanctions administered by DCC. Because Class D offenders cannot receive intermediate sanctions, there would be short-term cost savings to DCC if Felony Death by Vehicle were reclassified as a Class D offense. However, in the long term DCC would incur the cost of post-release supervision for Class D offenders. To the extent that offenders charged with Felony Serious Injury by Vehicle are presently being charged with a lesser offense with a higher non-active sentence rate, the same would hold true for that offense.

Judicial Branch

For most criminal penalty bills, AOC provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

Felony Death by Vehicle

AOC estimates that it would cost the courts an additional $23,244 to process charges for Felony Death by Vehicle if it were reclassified as a Class D offense. According to AOC data, in calendar year 2004 a total of 65 defendants were charged with Felony Death by Vehicle. Of these charges, AOC estimates that four percent were settled by jury trials, sixty percent by guilty pleas, and the remaining charges were dismissed. Based on attorney preparation costs and time in court, AOC estimates the cost to dispose of these cases as Class G felonies at $20,458. The cost of indigent defense, based on an estimated indigency rate of 39 percent, would total an additional $4,077.

Using overall disposition rates for Class D felony cases in 2004, AOC estimates that, if 65 defendants were charged as Class D felons for Felony Death by Vehicle, seven percent would be disposed of by jury trial, 56 percent by plea, and the remaining charges would be dismissed. The cost to process these cases, based on attorney preparation time and time in court, would be $39,518. At an estimated indigency rate of 39 percent, costs of indigent defense would total an

additional $8,261. The increase in cost to process Felony Death by Vehicle as a Class D offense reflects presumed increases in trial rates, trial length, attorney preparation time, and time to handle pleas. This figure does not include the cost of processing dismissals, any additional appeals that could result from the punishment enhancement, nor any increase in prosecution for violent habitual felony. The figures in the box on the front page reflect the difference in total cost ($23,244), inflated at a rate of three percent annually, and adjusted in fiscal year 2005-06 to reflect only the seven months for which the bill would be effective.

Felony Serious Injury by Vehicle

Based on the costs of time in court, attorney preparation, and indigent defense, the total cost to process an estimated 120 additional Class E charges as a result of this new felony would equal $54,721 per year. North Carolina Division of Motor Vehicles (DMV) data reveals that in 2003 there were 354 alcohol-related crashes resulting in at least one fatality. During that same time period, AOC data shows that there were 68 charges for Felony Death by Vehicle, indicating that approximately 19.2 percent of alcohol-related fatal crashes in 2003 resulted in charges for Felony Death by Vehicle. According to DMV data, there were 625 alcohol-related crashes involving serious injury in 2003. If the same proportion of these 625 accidents were to result in charges for Felony Serious Injury by Vehicle, the court system could expect to handle approximately 120 charges of this new Class E felony. Using the average disposition rates of all Class E felonies, these 120 charges would result in 6 jury trials, 52 pleas, and 62 dismissals. The cost of attorney preparation time and time in court to process these charges would equal an estimated $45,814. At an indigency rate of 39 percent, additional costs for indigent defense would equal $8,907. Since no actual data exists regarding charges for this new offense and we do not know how these cases are currently charged, these figures are not included in the box on the front page.

SOURCES OF DATA: Department of Transportation; Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission; and Office of State Construction.

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Jim Mills and Aaron Paul

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

DATE: March 2, 2005

Signed Copy Located in the NCGA Principal Clerk's Offices

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 421

Short Title:	Exempt REACT/Charitable Solicitations.	(Public)
Sponsors:	Senators Jacumin; Albertson, Allran, Apodaca, Atwater, Berger of Franklin, Berger of Rockingham, Bingham, Blake, Boseman, Brock, Brown, Dalton, East, Forrester, Garrou, Garwood, Goodall, Graham, Hagan, Horton, Hoyle, Hunt, Pittenger, Presnell, Shaw, Smith, Snow, Soles, Stevens, Swindell, Thomas, Tillman, and Weinstein.	
Referred to:	Judiciary II.	

March 9, 2005

A BILL TO BE ENTITLED

AN ACT TO EXEMPT RADIO EMERGENCY ASSOCIATED COMMUNICATIONS TEAMS FROM THE LAW GOVERNING THE SOLICITATION OF CONTRIBUTIONS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 131F-3(10) reads as rewritten:

"(10) A volunteer fire department, <u>REACT (Radio Emergency Associated Communications Teams),</u> rescue squad, or emergency medical service."

SECTION 2. This act becomes effective October 1, 2005.

SENATE BILL 421:
Exempt REACT/Charitable Solicitations

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Jacumin
Date:	March 24, 2005	**Summary by:**	Kory J. Goldsmith KJG
Version:	1st Edition		Committee Counsel

SUMMARY: ***Senate Bill 421 would exempt Radio Emergency Associated Communications Teams (REACT) from having to register with the Secretary of State in order to solicit donations, or have a third party solicit donations their behalf.***

The act would become effective October 1, 2005.

CURRENT LAW: Chapter 131F governs the solicitation of contributions by or on behalf of charitable organizations in North Carolina. A charitable organization is any person who has or holds out as having a 501(c)(3) tax exempt status determination by the IRS and that operates for a charitable purpose, or a person who holds himself out or employs a charitable or civic appeal as the basis of a solicitation, or that employs an appeal that suggests there is a charitable or civic purpose for the appeal. A charitable organization includes a chapter, branch, or area office for a charitable organization with a principle office outside North Carolina.

Chapter 131F does not apply to:

- any person who solicits contributions for a religious institution;
- the solicitation of charitable contributions by the federal, State or local government;
- any person who receives less than $25,000 in contributions in any calendar year and does not provide compensation to any officer or solicitor;
- most colleges or schools;
- hospitals licensed under Chapters 131E or 122C of the General Statutes;
- noncommercial radio or television stations;
- a bona fide volunteer or bona fide employee or salaried officer of a charitable organization or sponsor;
- an attorney, investment counselor, or banker who advises a person to make a charitable contribution;
- a volunteer fire department, rescue squad, or emergency medical service;
- the YMCA or YWCA;
- a nonprofit continuing care facility; or
- tax exempt nonprofit fire or emergency medical service organizations involved in the sale of goods or services that do not ask for a donation.

Unless exempted from the statute, charitable organizations and their agents who intend to solicit funds or to have funds solicited on their behalf in North Carolina must first obtain a license from the Secretary of State. At least 5 days prior to beginning a solicitation campaign, a solicitor must file with the Secretary a

notice that describes the solicitation event or campaign, each location and phone number from which the solicitation is to be conducted, the legal name of each person responsible for supervising the campaign, the account number where donations will be deposited, a description of the charitable program for which the solicitation campaign is being carried-out, the fund-raising methods to be used, and a copy of the contract between the solicitor and the charitable organization. Within 90 days after the campaign has ended, the solicitor must file with the Secretary a report that includes the gross revenue received and an itemization of all expenses incurred.

Federal law requires that tax-exempt organizations that have annual gross receipts normally in excess of $25,000 must file an annual information return (Form 990 or 990-EZ). A tax-exempt organization is required to provide copies of its three most recent information returns (i.e., Form 990 series), its exemption letter, and its approved application with supporting documentation, without charge (other than a reasonable fee for copying costs and actual mailing costs), to persons requesting copies, unless it has made these forms widely available by publishing them on the Internet in accordance with the regulations.

BILL ANALYSIS: The bill would add REACT (Radio Emergency Associated Communications Teams) to the list of organizations that are exempt from the requirements of Chapter 131F.

BACKGROUND: REACT International, Inc. is a nonprofit corporation headquartered in Maryland and registered in Illinois. It is recognized by the IRS as a charity that is eligible to receive tax deductible donations, as are its subordinate units.

According to the REACT International web site (www.reactintl.org), the idea for using Citizen's Band (CB) radio in an organized way for emergency communications originated in Chicago during a snowstorm when CB radio was used to assist a family stuck on a freeway with a very sick child. In 1962, the first Radio Emergency Associated Communication Team was organized to use volunteers to monitor CB radio for emergency transmissions. In the early 1970's the Federal Communications Commission adopted channel 9 as the CB emergency channel, in part due to the efforts of REACT organizations. Over the years, the mission of REACT International has expanded and is currently stated as follows

> We will provide public service communications to individuals, organizations, and government agencies to save lives, prevent injuries, and give assistance wherever and whenever needed. We will strive to establish a monitoring network of trained volunteer citizen-based communicators using any and all available means to deliver the message.

REACT International is organized into regions that oversee REACT team and REACT council operations. There are REACT teams in 47 states, the District of Columbia and several foreign countries. North Carolina has 11 REACT teams.[1]

No REACT Teams are currently registered with the Secretary of State under Chapter 131F.

The General Statutes contain two references to REACT teams. G.S. 20-84(b)(7) allows the Division of Motor Vehicles to issue permanent license plates for a motor vehicle owned by an incorporated REACT Team. G.S 20-130.2 allows REACT vehicles to use an amber-colored flashing warning light on a vehicle.

S421-SMRC-001

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[1] Burke County REACT, Inc., Durham County REACT 2457, Vance County REACT, Inc., Onslow County REACT, REACT of Madison County, McDowell County REACT Team, Rutherford County REACT, REACT of Cleveland County, Johnston County REACT, Inc., Tri County REACT, Inc. Forsyth County REACT.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 462

Short Title:	Charlotte Speed Camera Sunset Extended.	(Local)
Sponsors:	Senators Dannelly; and Graham.	
Referred to:	Judiciary II.	

March 10, 2005

A BILL TO BE ENTITLED

AN ACT TO EXTEND THE SUNSET OF THE AUTHORIZATION FOR THE CITY OF CHARLOTTE TO USE PHOTOGRAPHIC SPEED-MEASURING DURING A PILOT PROGRAM IN DESIGNATED CORRIDORS.

The General Assembly of North Carolina enacts:

SECTION 1. Section 5 of S.L. 2003-280 reads as rewritten:

"**SECTION 5.** This act becomes effective July 1, 2003, and expires ~~June 30, 2006.~~September 30, 2007."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 462
PROPOSED COMMITTEE SUBSTITUTE S462-CSRH-3 [v.1]

3/23/2005 7:17:13 PM

Short Title: Charlotte Speed Camera Sunset Extended. (Local)

Sponsors:

Referred to:

March 10, 2005

A BILL TO BE ENTITLED

AN ACT TO EXTEND THE SUNSET OF THE AUTHORIZATION FOR THE CITY OF CHARLOTTE TO USE PHOTOGRAPHIC SPEED-MEASURING DURING A PILOT PROGRAM IN DESIGNATED CORRIDORS.

The General Assembly of North Carolina enacts:

SECTION 1. Section 5 of S.L. 2003-280 reads as rewritten:

"**SECTION 5.** This act becomes effective July 1, 2003, and expires ~~June 30, 2006.~~September 30, 2007."

SECTION 2. Section 6 of S.L. 2003-380 reads as rewritten:

"**SECTION 6.** This act is effective when it becomes law. Section 5 of this act expires ~~June 30, 2006.~~September 30, 2007."

SECTION 3. This act is effective when it becomes law.

SENATE BILL 462:
Charlotte Speed Camera Sunset Extended.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Sen. Dannelly
Date:	March 24, 2005	**Summary by:**	Robin Johnson
Version:	S462-CSRH-3[v.1]		Committee Counsel

SUMMARY: Senate Bill 462 would extend the sunset from June 30, 2006, to September 30, 2007, so the City of Charlotte can continue to be authorized to use photographic speed-measuring systems in designated corridors. The bill would be effective when it becomes law.

The PCS makes a conforming change to the law that amended the original legislation.

BACKGROUND:

In 2003,[1] the General Assembly authorized the City of Charlotte to use photographic speed-measuring systems during a three-year pilot program in designated corridors in that city and to establish civil penalties for speed limit and school zone speed limit violations. A photographic speed-measuring system works in conjunction with a photographic, video, or electronic camera to automatically measure the speed and produce photographs, video or digital images of vehicles violating a speed limit or speed restriction. The systems must be calibrated according to standards adopted by the North Carolina Criminal Justice Education and Training Standards Commission and the Secretary of Crime Control and Public Safety and must be monitored by a sworn law enforcement officer at all times that the system is actively in use. Any system installed or in use shall be identified by appropriate advance warning signs conspicuously posted not more than 1,000 feet from the location of the system.

The owner of a vehicle photographed is responsible for the violation unless the owner furnishes an affidavit within 30 days of notification of the violation that, at the time of the offense, the vehicle was under the care, custody or control of another person or that the vehicle had been stolen. The affidavit must be supported with supporting evidence, such as insurance or police report information. The owner is not responsible for the violation if notice of the violation is given to the registered owner more than 90 days after the date of the violation. A violation is not a crime, but includes a $50 civil penalty. No license or insurance points may be assessed. If the owner fails to provide evidence or pay the civil penalty, the owner waives the right to contest the responsibility and will be subject to an additional penalty not to exceed $50.

The city must institute a nonjudicial administrative hearing process to review objections to citations or penalties issued or assessed. The clear proceeds from the violations must be paid to the county school fund. Clear proceeds are defined as the funds remaining after paying for the lease, lease-purchase, or purchase of the photographic speed-measuring system; paying for operation of the system, either by the city or by a contractor; paying for a program to provide public awareness of the system; and paying any administrative costs incurred by the city related to the use of the system.

This law became effective July 1, 2003 and expires June 30, 2006.

S462-SMRH-001 (Susan Sitze, Research Division, contributed significantly to this summary.)

[1] **S.L. 2003-280 (HB 562), as amended by S.L. 2003-380 (HB 786). See Attached.**

S.L. 2003-280 (HB 562)

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 160A of the General Statutes is amended by adding a new section to read:

"**§ 160A-300.4. Use of photographic speed-measuring systems.**

(a) A photographic speed-measuring system is a speed-measuring system that works in conjunction with a photographic, video, or electronic camera to automatically measure the speed and produce photographs, video, or digital images of vehicles violating a speed limit or speed restriction.

(b) A photographic speed-measuring system shall be approved, calibrated, and tested for accuracy in accordance with G.S. 8-50.3.

(c) A photographic speed-measuring system shall be monitored by a sworn law enforcement officer at all times that the system is actively in use.

(d) Any photographic speed-measuring system installed or in use on a street or highway shall be identified by appropriate advance warning signs conspicuously posted not more than 1,000 feet from the location of a photographic speed-measuring system. All advance warning signs shall be consistent with a statewide standard adopted by the Department of Transportation.

(e) A municipality may adopt ordinances for the civil enforcement of G.S. 20-141 and G.S. 20-141.1 by means of a photographic speed-measuring system. Notwithstanding the provisions of G.S. 20-141, 20-141.1, and 20-176, in the event that a municipality adopts an ordinance pursuant to this section, a violation of G.S. 20-141 or G.S. 20-141.1 detected by a photographic speed-measuring system shall not be an infraction or misdemeanor. An ordinance authorized by this subsection shall provide that:

(1) The owner of a vehicle shall be responsible for a violation unless the owner can furnish evidence that the vehicle was, at the time of the violation, in the care, custody, or control of another person. The owner of the vehicle shall not be responsible for the violation if the owner of the vehicle furnishes, within 21 days of notification of the violation, to the officials or agents of the municipality that issued the citation either of the following:

a. The name and address of the person or company who leased, rented, or otherwise had the care, custody, or control of the vehicle.

b. An affidavit stating that the vehicle involved was, at the time of the violation, stolen or in the care, custody, or control of some person who did not have permission of the owner to use the vehicle.

(2) A violation detected by a photographic speed-measuring system shall be deemed a noncriminal violation for which a civil penalty of fifty dollars ($50.00) shall be assessed and for which no points authorized by G.S. 20-16(c) or G.S. 58-36-65 shall be assigned to the owner or driver of the vehicle.

(3) The owner of the vehicle shall be issued a citation, written in both English and Spanish, clearly stating the manner in which the violation may be challenged and containing both a street address within the municipality and a local or toll-free telephone number at which the owner may challenge the citation. The citation shall be processed by officials or agents of the municipality and shall be forwarded by personal service or certified mail to the address given on the motor vehicle registration. If the owner fails to pay the civil penalty or to respond to the citation within the time period specified on the citation, the owner shall have waived the right to contest responsibility for the violation and shall be subject to an additional penalty not to exceed fifty dollars ($50.00). The municipality may establish procedures for the collection of these penalties and may recover the penalties by civil action in the nature of debt.

(4) The municipality shall provide a nonjudicial administrative hearing process to review objections to citations or penalties issued or assessed under this section. The administrative hearing process shall include methods for challenging the violation or penalty either in person, at the street address provided on the citation, or through the telephone, at the telephone number provided on the citation. The municipality shall ensure that a Spanish-speaking person is available both at the street address and through the telephone number to assist Spanish-speaking persons. An administrative hearing decision shall be subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the administrative hearing decision.

(5) The clear proceeds from the citations issued pursuant to the ordinance authorized by this section shall be paid to the county school fund. The clear proceeds from the citations shall mean the funds remaining after paying for the lease, lease-purchase, or purchase of the photographic speed-measuring system; paying for operation of the system, either by the municipality or by a contractor; paying for a program to provide public awareness of the system; and paying any administrative costs incurred by the municipality related to the use of the system."

SECTION 2. Chapter 8 of the General Statutes is amended by adding a new section to read:

"**§ 8-50.3. Results of photographic speed-measuring instruments; admissibility.**

(a) The results of the use of a photographic speed-measuring system as described in G.S. 160A-300.4 shall be admissible as evidence in a nonjudicial administrative hearing held pursuant to G.S. 160A-300.4(e)(4) for the purpose of establishing the speed of the vehicle detected.

(b) Notwithstanding the provisions of subsection (a) of this section, the results of a photographic speed-measuring system are not admissible unless all of the following are established:

(1) The photographic speed-measuring system employed was approved for use by the North Carolina Criminal Justice Education and Training Standards Commission and the Secretary of Crime Control and Public Safety pursuant to G.S. 17C-6.

(2) The photographic speed-measuring system had been calibrated and tested for accuracy in accordance with the standards established by the North Carolina Criminal Justice Education and Training Standards Commission and the Secretary of Crime Control and Public Safety for that particular system.

(3) At the time the results were obtained, the photographic speed-measuring system was being operated by a sworn law enforcement officer who has been certified by the North Carolina Criminal Justice Education and Training Standards Commission under G.S. 17-6(a).

(c) All photographic speed-measuring systems shall be calibrated and tested in accordance with standards established by the North Carolina Criminal Justice Education and Training Standards Commission and the Secretary of Crime Control and Public Safety. A written certificate by a technician certified by the North Carolina Criminal Justice Education and Training Standards Commission showing that a test was made within the required testing period and that the system was accurate shall be competent and prima facie evidence of those facts in a nonjudicial administrative hearing held pursuant to G.S. 160A-300.4(e)(4).

(d) In every nonjudicial administrative hearing held pursuant to G.S. 160A-300.4(e)(4), where the results of a photographic speed-measuring system are sought to be admitted, notice shall be taken of the rules approving the photographic speed-measuring system and the procedures for calibration or testing for accuracy of the system."

SECTION 3. G.S. 17C-6(a) reads as rewritten:

"(a) In addition to powers conferred upon the Commission elsewhere in this Chapter, the Commission shall have the following powers, which shall be enforceable through its rules and regulations, certification procedures, or the provisions of G.S. 17C-10:

...

(13a) In conjunction with the Secretary of Crime Control and Public Safety, approve use of specific models and types of photographic speed-measuring systems as described in G.S. 160A-300.4(a) and establish the standards for calibration and testing for accuracy of each approved system."

SECTION 4. Section 1 of this act applies to the City of Charlotte only, and the photographic speed-measuring systems may only be used in the following corridors:

(1) South Boulevard between Interstate 485 and Scaleybark.
(2) Independence between Briarcreek and Sardis Road North.
(3) East W.T. Harris between The Plaza and Idlewild.
(4) Tryon Street from 36th to Orr Road.
(5) Tryon Street between Mallard Creek Church Road and University City Boulevard.
(6) Eastway between Independence and Sugar Creek.
(7) West W.T. Harris between North Tryon Street and Technology Drive.
(8) Albemarle Road between Independence and Lawyers.
(9) Central between Albemarle and Briar Creek.
(10) Monroe Road between Sardis Road North and Wendover.
(11) Providence between McKee and Providence Country Club.
(12) Highway 51 between Park Road and Alexander Road.

(13) Sharon Amity between Lyttleton Drive and East W.T. Harris.

(14) Billy Graham Parkway between Interstate 85 and Woodlawn.

SECTION 5. This act becomes effective July 1, 2003, and expires June 30, 2006.

S.L. 2003-380 – Sections 5 and 6

The General Assembly of North Carolina enacts:

...

SECTION 5. G.S. 160A-300.4(e), as enacted by S.L. 2003-280, reads as rewritten:

"(e) A municipality may adopt ordinances for the civil enforcement of G.S. 20-141 and G.S. 20-141.1 by means of a photographic speed-measuring system. Notwithstanding the provisions of G.S. 20-141, 20-141.1, and 20-176, in the event that a municipality adopts an ordinance pursuant to this section, a violation of G.S. 20-141 or G.S. 20-141.1 detected by a photographic speed-measuring system shall not be an infraction or misdemeanor. An ordinance authorized by this subsection shall provide that:

(1) The owner of a vehicle shall be responsible for a violation unless the owner can furnish evidence that the vehicle was, at the time of the violation, in the care, custody, or control of another person. The owner of the vehicle shall not be responsible for the violation if the owner of the vehicle furnishes, within ~~21~~30 days of notification of the violation, to the officials or agents of the municipality that issued the citation either of the following:

a. ~~The~~ An affidavit stating the name and address of the person or company who ~~leased, rented, or otherwise~~ had the care, custody, or control of the vehicle.

b. An affidavit stating that the vehicle involved was, at the time of the violation, ~~stolen~~ stolen. The affidavit must be supported with evidence that supports the affidavit, including insurance or police report information. ~~or in the care, custody, or control of some person who did not have permission of the owner to use the vehicle.~~

(2) Subdivision (1) of this subsection shall not apply, and the registered owner of the vehicle shall not be responsible for the violation, if notice of the violation is given to the registered owner of the vehicle more than 90 days after the date of the violation.

~~(2)~~(3) A violation detected by a photographic speed-measuring system shall be deemed a noncriminal violation for which a civil penalty of fifty dollars ($50.00) shall be assessed and for which no points authorized by G.S. 20-16(c) or G.S. 58-36-65 shall be assigned to the owner or driver of the vehicle.

~~(3)~~(4) The owner of the vehicle shall be issued a citation, written in both English and Spanish, clearly stating the manner in which the violation may be challenged and containing both a street address within the municipality and a local or toll-free telephone number at which the owner may challenge the citation. The citation shall be processed by officials or agents of the municipality and shall be forwarded by personal service or certified mail to the address given on the motor vehicle registration. If the owner fails to pay the civil penalty or to respond to the citation within the time period specified on the citation, the owner shall have waived the right to contest responsibility for the violation and shall be subject to an additional penalty not to exceed fifty dollars ($50.00). The municipality may establish procedures for the collection of these penalties and may recover the penalties by civil action in the nature of debt.

~~(4)~~(5) The municipality shall provide a nonjudicial administrative hearing process to review objections to citations or penalties issued or assessed under this section. The administrative hearing process shall include methods for challenging the violation or penalty either in person, at the street address provided on the citation, or through the telephone, at the telephone number provided on the citation. The municipality shall ensure that a Spanish-speaking person is available both at the street address and through the telephone number to assist Spanish-speaking persons. An administrative hearing decision shall be subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the administrative hearing decision.

~~(5)~~(6) The clear proceeds from the citations issued pursuant to the ordinance authorized by this section shall be paid to the county school fund. The clear proceeds from the citations shall mean the funds remaining after paying for the lease, lease-purchase, or purchase of the photographic speed-measuring system;

paying for operation of the system, either by the municipality or by a contractor; paying for a program to provide public awareness of the system; and paying any administrative costs incurred by the municipality related to the use of the system."

SECTION 6. This act is effective when it becomes law. Section 5 of this act expires June 30, 2006.

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	March 29, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 173	Court System Study.	Senator Bingham
SB 217	Med Malpractice Prelitigation Mediation.	Senator Dalton
SB 461	Unitrust Amendments.	Senator Hartsell
SB 472	Child Exploitation Prevention Act.	Senator Thomas

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, March 29, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 173	Court System Study.	Senator Bingham
SB 217	Med Malpractice Prelitigation Mediation.	Senator Dalton
SB 461	Unitrust Amendments.	Senator Hartsell
SB 472	Child Exploitation Prevention Act.	Senator Thomas

Presentations

Other Business

Adjournment

CORRECTED

Senate Judiciary II Committee
Tuesday, March 29, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 173	Court System Study.	Senator Bingham
SB 461	Unitrust Amendments.	Senator Hartsell
SB 472	Child Exploitation Prevention Act.	Senator Thomas

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

March 29, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on March 29, 2005, with sixteen members present. Senator Hartsell introduced pages Alexandra Boncek, Olivia Drewry, and Laura Bradley and thanked them for their services to the committee.

SB 472 (Child Exploitation Prevention Act.) Senator Hartsell recognized Senator Thomas to explain the bill. After his explanation, Senator Thomas introduced Attorney General Roy Cooper, and invited him to speak on the bill. Attorney General Cooper explained the necessity for the bill. Questions by Senators Dannelly, Webster, Jacumin, Allran, Goodall and Berger were answered by Senator Thomas, Attorney General Cooper, and Ben Popkin, Staff Attorney. Senator Holloman moved for a favorable report. All voted and the motion carried.

SB 173 (Court System Study) Senator Bingham was invited to explain the bill. Senator Kinnaird moved for a favorable report. All voted and the motion carried.

SB 461 (Unitrust Amendments) Senator Hartsell asked Senator Thomas to Chair the Committee while he (Senator Hartsell) explained the bill. Senator Thomas asked for a motion to accept the Proposed Committee Substitute for purposes of discussion. Senator Bingham so moved, all voted and the motion carried. Senator Hartsell explained the bill and then introduced Mr. William V. McPherson, Jr., who represented the Bar Association. Mr. McPherson gave additional explanation of the bill and answered questions from Senators Allran, Webster, Forrester, and Bingham. No action was taken on the bill which will be heard again at the Thursday meeting.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Jr. Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, March 29, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **173** Court System Study.
Sequential Referral: None
Recommended Referral: None

S.B. **472** Child Exploitation Prevention Act.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **462** Charlotte Speed Camera Sunset Extended.
Draft Number: PCS65290
Sequential Referral: None
Recommended Referral: None
Long Title Amended: Yes

TOTAL REPORTED: 3

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

March 29, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John Mettyl	Coloplast
Hamid Khoja	N.C. Jan
DAVID BARNES	Poyner + Spruill LLP
Paul Pulley	NCATL
Lee Hodges	
Jim Drennan	AOC
BILL McPHERSON	NC BAR ASSN
Doug Heron	NC BAR ASSOC
David Sousa	MMIC
Stephanie Hawco	Protect Health Care Now
Stephen Keene	NC Medical Society

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — March 29, 2005

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Laurie Clowers	WRAL
Richard E. Ch	Richard & Ch & Assoc.
John Goodman	Alley Assoc
Ann Reynolds	
Joel Maynard	NCA of Family Physicians
Jessica Sage	NCFPC
Robin Rawls	NADA

Effective for Offenses Committed on or after 12/1/95

FELONY PUNISHMENT CHART

PRIOR RECORD LEVEL

OFFENSE	I 0 Pts	II 1-4 Pts	III 5-8 Pts	IV 9-14 Pts	V 15-18 Pts	VI 19+ Pts
A	Death or Life Without Parole					
B1	A *240-300* 192-240 *144-192*	A *288-360* 230-288 *173-230*	A *336-420* 269-336 *202-269*	A *384-480* 307-384 *230-307*	A *Life Without Parole* 346-433 *260-346*	A *Life Without Parole* 384-480 *288-384*
B2	A *157 - 196* 125 - 157 *94 - 125*	A *189 - 237* 151 - 189 *114 - 151*	A *220 - 276* 176 - 220 *132 - 176*	A *251 - 313* 201 - 251 *151 - 201*	A *282 - 353* 225 - 282 *169 - 225*	A *313 - 392* 251 - 313 *188 - 251*
C	A *73 - 92* 58 - 73 *44 - 58*	A *100 - 125* 80 - 100 *60 - 80*	A *116 - 145* 93 - 116 *70 - 93*	A *133 - 167* 107-133 *80 - 107*	A *151 - 188* 121 - 151 *90 - 121*	A *168 - 210* 135 - 168 *101-135*
D	A *64 - 80* 51 - 64 *38 - 51*	A *77 - 95* 61 - 77 *46 - 61*	A *103 - 129* 82 - 103 *61 - 82*	A *117 - 146* 94 - 117 *71 - 94*	A *133 - 167* 107 - 133 *80 - 107*	A *146 - 183* 117 - 146 *88 - 117*
E	I/A *25 - 31* 20 - 25 *15 - 20*	I/A *29 - 36* 23 - 29 *17 - 23*	A *34 - 42* 27 - 34 *20 - 27*	A *46 - 58* 37 - 46 *28 - 37*	A *53 - 66* 42 - 53 *32 - 42*	A *59 - 74* 47 - 59 *35 - 47*
F	I/A *16 - 20* 13 - 16 *10 - 13*	I/A *19 - 24* 15 - 19 *11 - 15*	I/A *21 - 26* 17 - 21 *13 - 17*	A *25 - 31* 20 - 25 *15 - 20*	A *34 - 42* 27 - 34 *20 - 27*	A *39 - 49* 31 - 39 *23 - 31*
G	I/A *13 - 16* 10 - 13 *8 - 10*	I/A *15 - 19* 12 - 15 *9 - 12*	I/A *16 - 20* 13 - 16 *10 - 13*	I/A *20 - 25* 16 - 20 *12 - 16*	A *21 - 26* 17 - 21 *13 - 17*	A *29 - 36* 23 -29 *17 - 23*
H	C/I/A *6 - 8* 5 - 6 *4 - 5*	I/A *8 - 10* 6 - 8 *4 - 6*	I/A *10 - 12* 8 - 10 *6 - 8*	I/A *11 - 14* 9 - 11 *7 - 9*	I/A *15 - 19* 12 - 15 *9 - 12*	A *20 - 25* 16 - 20 *12 - 16*
I	C *6 - 8* 4 - 6 *3 - 4*	C/I *6 - 8* 4 - 6 *3 - 4*	I *6 - 8* 5 - 6 *4 - 5*	I/A *8 - 10* 6 - 8 *4 - 6*	I/A *9 - 11* 7 - 9 *5 - 7*	I/A *10 - 12* 8 -10 *6 - 8*

DISPOSITION
Aggravated Range
PRESUMPTIVE RANGE
Mitigated Range

Note: A - Active Punishment I - Intermediate Punishment C - Community Punishment
*Numbers shown are in months and represent the range of minimum sentences.

FIGURE B: MINIMUM AND MAXIMUM SENTENCES

The corresponding maximum sentence for each minimum sentence is shown in the tables below. In each column, the number to the left of the dash represents the minimum sentence (in months) and the number to the right of the dash represents the corresponding maximum sentence (in months). To calculate a maximum sentence when the minimum sentence is 340 months or more, see G.S. 15A-1340.17(e1).

FOR OFFENSE CLASSES B1 THROUGH E

15-27	56-77	97-126	138-175	179-224	220-273	261-323	302-372
16-29	57-78	98-127	139-176	180-225	221-275	262-324	303-373
17-30	58-79	99-128	140-177	181-227	222-276	263-325	304-374
18-31	59-80	100-129	141-179	182-228	223-277	264-326	305-375
19-32	60-81	101-131	142-180	183-229	224-278	265-327	306-377
20-33	61-83	102-132	143-181	184-230	225-279	266-329	307-378
21-35	62-84	103-133	144-182	185-231	226-281	267-330	308-379
22-36	63-85	104-134	145-183	186-233	227-282	268-331	309-380
23-37	64-86	105-135	146-185	187-234	228-283	269-332	310-381
24-38	65-87	106-137	147-186	188-235	229-284	270-333	311-383
25-39	66-89	107-138	148-187	189-236	230-285	271-335	312-384
26-41	67-90	108-139	149-188	190-237	231-287	272-336	313-385
27-42	68-91	109-140	150-189	191-239	232-288	273-337	314-386
28-43	69-92	110-141	151-191	192-240	233-289	274-338	315-387
29-44	70-93	111-143	152-192	193-241	234-290	275-339	316-389
30-45	71-95	112-144	153-193	194-242	235-291	276-341	317-390
31-47	72-96	113-145	154-194	195-243	236-293	277-342	318-391
32-48	73-97	114-146	155-195	196-245	237-294	278-343	319-392
33-49	74-98	115-147	156-197	197-246	238-295	279-344	320-393
34-50	75-99	116-149	157-198	198-247	239-296	280-345	321-395
35-51	76-101	117-150	158-199	199-248	240-297	281-347	322-3[redacted]
36-53	77-102	118-151	159-200	200-249	241-299	282-348	323-3[redacted]
37-54	78-103	119-152	160-201	201-251	242-300	283-349	324-39[redacted]
38-55	79-104	120-153	161-203	202-252	243-301	284-350	325-399
39-56	80-105	121-155	162-204	203-253	244-302	285-351	326-401
40-57	81-107	122-156	163-205	204-254	245-303	286-353	327-402
41-59	82-108	123-157	164-206	205-255	246-305	287-354	328-403
42-60	83-109	124-158	165-207	206-257	247-306	288-355	329-404
43-61	84-110	125-159	166-209	207-258	248-307	289-356	330-405
44-62	85-111	126-161	167-210	208-259	249-308	290-357	331-407
45-63	86-113	127-162	168-211	209-260	250-309	291-359	332-408
46-65	87-114	128-163	169-212	210-261	251-311	292-360	333-409
47-66	88-115	129-164	170-213	211-263	252-312	293-361	334-410
48-67	89-116	130-165	171-215	212-264	253-313	294-362	335-411
49-68	90-117	131-167	172-216	213-265	254-314	295-363	336-413
50-69	91-119	132-168	173-217	214-266	255-315	296-365	337-414
51-71	92-120	133-169	174-218	215-267	256-317	297-366	338-415
52-72	93-121	134-170	175-219	216-269	257-318	298-367	339-416
53-73	94-122	135-171	176-221	217-270	258-319	299-368	
54-74	95-123	136-173	177-222	218-271	259-320	300-369	
55-75	96-125	137-174	178-223	219-272	260-321	301-371	

FOR OFFENSE CLASSES F THROUGH I

3-4	9-11	15-18	21-26	27-33	33-40	39-47	45-54
4-5	10-12	16-20	22-27	28-34	34-41	40-48	46-56
5-6	11-14	17-21	23-28	29-35	35-42	41-50	47-57
6-8	12-15	18-22	24-29	30-36	36-44	42-51	48-58
7-9	13-16	19-23	25-30	31-38	37-45	43-52	49-59
8-10	14-17	20-24	26-32	32-39	38-46	44-53	

IMPOSING SENTENCES FOR FELONIES

The sentencing laws use a Felony Punishment Chart which classifies offenders based on the seriousness of their crime and on the extent and gravity of their prior record. Based on this classification, the chart then prescribes the types of sentences which may be imposed (active, intermediate or community punishments) and the range of minimum sentence lengths which may be selected. Following is a description of the steps required to impose felony sentences under the structured sentencing laws.

STEPS REQUIRED TO DETERMINE THE SENTENCE FOR FELONIES

1. DETERMINE THE OFFENSE CLASS FOR EACH FELONY CONVICTION

↓

2. DETERMINE THE PRIOR RECORD LEVEL FOR THE OFFENDER

↓

3. CONSIDER AGGRAVATING AND MITIGATING FACTORS

↓

4. SELECT A MINIMUM SENTENCE FROM THE APPROPRIATE MINIMUM SENTENCE RANGE

↓

5. DETERMINE THE MAXIMUM SENTENCE

↓

6. DETERMINE THE SENTENCE DISPOSITION:

↓	↓	↓
6A. IMPOSE AN ACTIVE PUNISHMENT	**6B. IMPOSE AN INTERMEDIATE PUNISHMENT**	**6C. IMPOSE A COMMUNITY PUNISHMENT**
↓	↓	↓
1. Activate the minimum and maximum sentence	*1. Suspend the minimum and maximum sentence* *2. Impose supervised probation* *3. Impose one or more intermediate punishments* *4. Impose any appropriate community punishments*	*1. Suspend the minimum and maximum sentence* *2. Impose probation and/or any other appropriate community punishment*

SAMPLE OFFENSES
AS OF 12/1/03

CLASS A FELONIES	Maximum Punishment of Death or Life Without Parole
Murder, First Degree (14-17)	
CLASS B1 FELONIES	**Maximum Punishment of Life Without Parole**
Rape, First Degree (14-27.2)	Sexual Offense, First Degree (14-27.4)
CLASS B2 FELONIES	**Maximum Punishment of 479 Months**
Murder, Second Degree (14-17)	
CLASS C FELONIES	**Maximum Punishment of 261 Months**
Habitual Felon (14-7.6)	Assault W/D/W/I/K/I/S/I (14-32(a))
Rape, Second Degree (14-27.3)	Kidnapping, First Degree (14-39)
Sexual Offense, Second Degree (14-27.5)	Embezzlement (amount involved $100,000 or more) (14-90)
CLASS D FELONIES	**Maximum Punishment of 229 Months**
Voluntary Manslaughter (14-18)	Arson, First Degree (14-58)
Malicious Use of Explosive or Incendiary (14-49(a))	Armed Robbery (14-87)
Burglary, First Degree (14-51)	Sell or Deliver a Controlled Substance to a Person Under 16 But More Than 13 Years of Age (90-95(e)(5))
CLASS E FELONIES	**Maximum Punishment of 98 Months**
Intercourse and Sexual Offenses with Certain Victims (Substitute Parent/Custodian) (14-27.7)	Assault with a Firearm on a Law Enforcement Officer (14-34.5)
Assault W/D/W/I/S/I (14-32(b))	Kidnapping, Second Degree (14-39)
Assault W/D/W/I/K (14-32(c))	Child Abuse I/S/I (14-318.4)
Discharging Weapon Into Occupied Property (14-34.1)	Sell or Deliver a Controlled Substance Within 300 Feet of a School (90-95(e)(8))
CLASS F FELONIES	**Maximum Punishment of 59 Months**
Involuntary Manslaughter (14-18)	Burning of Certain Other Buildings (14-62)
Assault Inflicting Serious Bodily Injury (14-32.4)	Incest (14-178)
Assault W/D/W on a Governmental Officer or Employee (14-34.2)	Indecent Liberties with Children (14-202.1)
Assault Inflicting Serious Injury on a Law Enforcement Officer (14-34.7)	Possess Weapon of Mass Destruction (14-288.8)
Felonious Restraint (14-43.3)	Habitual Impaired Driving (20-138.5)
CLASS G FELONIES	**Maximum Punishment of 44 Months**
Burglary, Second Degree (14-51)	Possession of Firearms, etc., by Felon (14-415.1)
Arson, Second Degree (14-58)	Death by Vehicle (20-141.4)
Common Law Robbery (14-87.1)	Sale of a Schedule I or II Controlled Substance (90-95(a)(1))
CLASS H FELONIES	**Maximum Punishment of 30 Months**
Habitual Misdemeanor Assault (14-33.2)	Obtaining Property by False Pretenses (amount involved less than $100,000) (14-100)
Breaking or Entering Buildings (14-54(a))	Intimidating/Interfering with Witnesses (14-226)
Fraudulently Setting Fire to Dwelling House (14-65)	Hit and Run Involving Personal Injury/Death (20-166(a))

Possessing Stolen Goods Worth More than $1,000 (14-71.1)	Sale of a Schedule III, IV, V, or VI Controlled Substance (90-95(a)(1))
Larceny of Property Worth More than $1,000 (14-72)	Possession W/I/M/S/D Cocaine (90-95(a)(1))
Embezzlement (amount involved less than $100,000) (14-90)	Escaping From State Prison System (felon) (148-45(b))
CLASS I FELONIES	**Maximum Punishment of 15 Months**
Breaking or Entering Motor Vehicles (14-56)	Possession W/I/M/S/D Marijuana (90-95(a)(1))
Financial Transaction Card Theft (14-113.9)	Possess Cocaine (90-95(a)(3))
Forgery of Notes, Checks, Securities (14-119)	Maintain Dwelling or Motor Vehicle for Keeping or Selling a Controlled Substance (90-108(a)(7),(b))
Uttering Forged Paper or Instrument (14-120)	Obtain a Controlled Substance by Fraud (90-108(a)(10),(b))
CLASS A1 MISDEMEANORS	**Maximum Punishment of 150 Days**
Assault Inflicting Serious Injury or Using a Deadly Weapon (14-33(c)(1))	Assault on a State Officer or Employee (14-33(c)(4))
ASSAULT ON A FEMALE (14-33(C)(2))	ASSAULT BY POINTING A GUN (14-34)
Assault on a Child Under 12 Years of Age (14-33(c)(3))	VIOLATION OF A VALID PROTECTIVE ORDER (50B-4.1)
CLASS 1 MISDEMEANORS	**MAXIMUM PUNISHMENT OF 120 DAYS**
BREAKING OR ENTERING BUILDINGS (14-54(B))	WILLFUL INJURY TO REAL PROPERTY (14-127)
LARCENY OF PROPERTY WORTH $1,000 OR LESS (14-72)	COMMUNICATING THREATS (14-277.1)
UNAUTHORIZED USE OF A MOTOR VEHICLE (14-72.2)	POSSESSION OF DRUG PARAPHERNALIA (90-113.22)
WORTHLESS CHECK/CLOSED ACCOUNT (14-107(4))	MISREPRESENTATION TO OBTAIN EMPLOYMENT SECURITY BENEFITS (96-18)
CLASS 2 MISDEMEANORS	**MAXIMUM PUNISHMENT OF 60 DAYS**
SIMPLE ASSAULT/ASSAULT AND BATTERY (14-33(A))	FAILURE TO RETURN RENTAL PROPERTY (14-167)
OBTAINING PROPERTY IN RETURN FOR WORTHLESS CHECK (14-106)	USING PROFANE, INDECENT OR THREATENING LANGUAGE TO ANY PERSON OVER TELEPHONE (14-196)
WORTHLESS CHECK/$2,000 OR LESS (14-107(1))	RESISTING OFFICERS (14-223)
TRESPASS, FIRST DEGREE (14-159.12)	CARRYING CONCEALED WEAPONS (14-269)
WILLFUL INJURY TO PERSONAL PROPERTY (14-160(A))	DISORDERLY CONDUCT (14-288.4)
CLASS 3 MISDEMEANORS	**MAXIMUM PUNISHMENT OF 20 DAYS**
CONCEALMENT OF MERCHANDISE IN MERCANTILE ESTABLISHMENTS (FIRST CONVICTION) (14-72.1)	OPERATE MOTORBOAT WITHOUT LIFESAVING DEVICE (75A-6)
TRESPASS, SECOND DEGREE (14-159.13)	HUNTING WITHOUT A LICENSE (113-270.2)
INTOXICATED AND DISRUPTIVE IN PUBLIC (14-444)	FISHING WITHOUT A LICENSE (113-271)
UNSEALED WINE/LIQUOR IN PASSENGER AREA (18B-401)	POSSESS MARIJUANA (½ OUNCE OR LESS) (90-95(A)(3))

CONSPIRACY TO COMMIT AN OFFENSE IS CLASSIFIED AS ONE CLASS LOWER THAN THE OFFENSE THE PERSON CONSPIRED TO COMMIT. (14-2.4)

ATTEMPT TO COMMIT AN OFFENSE IS CLASSIFIED AS ONE CLASS LOWER THAN THE OFFENSE THE PERSON ATTEMPTED TO COMMIT. (14-2.5)

SOLICITATION TO COMMIT AN OFFENSE IS CLASSIFIED AS TWO CLASSES LOWER THAN THE OFFENSE THE PERSON SOLICITED THE OTHER PERSON TO COMMIT. (14-2.6)

ACCESSORY BEFORE THE FACT PUNISHABLE AS THE PRINCIPAL FELON. (14-5.2)

FELONY OFFENSE CLASSIFICATION CRITERIA*

CLASS	CRITERIA
A	Reserved for First Degree Murder
	[Reasonably tends to result or does result in]:
B	Serious debilitating long-term personal injury
C	Serious long-term personal injury Serious long-term or widespread societal injury
D	Serious infringements on property interest which also implicate physical safety concerns by use of a deadly weapon or an offense involving an occupied dwelling
E	Serious personal injury
F	Significant personal injury Serious societal injury
G	Serious property loss: Loss from the person or from the person's dwelling
H	Serious property loss: Loss from any structure designed to house or secure any activity or property Loss occasioned by the taking or removing of property Loss occasioned by breach of trust, formal or informal Personal injury Significant societal injury
I	Serious property loss: All other felonious property loss Societal injury
M	All other misdemeanors

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* Personal injury includes both physical and mental injury.
Societal injury includes violations of public morality, judicial or government operations, and/or public order and welfare.

Note: The criteria were not used in the classification of the homicide offenses or drug offenses.

Effective for Offenses Committed on or after 12/1/95

MISDEMEANOR PUNISHMENT CHART

CLASS	PRIOR CONVICTION LEVELS		
	I	II	III
	No Prior Convictions	One to Four Prior Convictions	Five or More Prior Convictions
A1	1 - 60 days **C/I/A**	1 - 75 days **C/I/A**	1 - 150 days **C/I/A**
1	1 - 45 days **C**	1 - 45 days **C/I/A**	1 - 120 days **C/I/A**
2	1 - 30 days **C**	1 - 45 days **C/I**	1 - 60 days **C/I/A**
3	1 - 10 days **C**	1 - 15 days **C/I**	1 - 20 days **C/I/A**

A - Active Punishment **I - Intermediate Punishment** **C - Community Punishment**

Cells with slash allow either disposition at the discretion of the judge.

Revised: 08-04-95

DISPOSITIONS

ACTIVE PUNISHMENT

- Active sentence to the state prison system.

INTERMEDIATE PUNISHMENT

- A suspended prison sentence, supervised probation with at least one of the following conditions:

    1. Special Probation
    2. Residential Program
    3. House Arrest with Electronic Monitoring
    4. Intensive Probation
    5. Day Reporting Center

COMMUNITY PUNISHMENT

- A fine and/or a suspended prison sentence with supervised or unsupervised probation. May include:

    1. Out-Patient Treatment
    2. Community Service
    3. Restitution
    4. Any authorized conditions of probation not defined as Intermediate Punishments

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 173

Short Title:	Court System Study.	(Public)
Sponsors:	Senators Bingham; Berger of Rockingham, Forrester, Goodall, Hartsell, Kinnaird, and Stevens.	
Referred to:	Judiciary II.	

February 21, 2005

A BILL TO BE ENTITLED

AN ACT TO DIRECT THE NORTH CAROLINA COURTS COMMISSION TO STUDY THE ORGANIZATION OF THE GENERAL COURT OF JUSTICE INTO DISTRICTS AND DIVISIONS.

The General Assembly of North Carolina enacts:

SECTION 1. The North Carolina Courts Commission shall study the current state of the General Court of Justice, focusing on workloads, case backlogs, and other issues relevant to the efficient administration of justice and determine whether the current organization of the State into judicial divisions, superior court districts, district court districts, and prosecutorial districts is in need of revision or adjustment in order to better serve the interests of justice. The Commission shall report its findings and recommendations to the 2006 Regular Session of the 2005 General Assembly.

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 461

Short Title:	Unitrust Amendments.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 10, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW RELATING TO UNITRUSTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 37A-1-104.1(5) reads as rewritten:

"(5) "Income trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the ~~trustee. Notwithstanding the foregoing, no trust that may be subject to taxation under section 2001 or section 2501 of the Code shall be an income trust for purposes of this Part, until the expiration of the period for filing the return therefor, including all extensions for the filing.~~ trustee, and regardless of whether the trust directs or permits the trustee to distribute principal of the trust to one or more of those persons."

SECTION 2. G.S. 37A-1-104.1 is amended by adding a new subdivision to read:

"(9a) "Treasury Regulations" means the regulations, rulings, procedures, notices, or other administrative pronouncements issued by the Internal Revenue Service, as amended from time to time."

SECTION 3. G.S. 37A-1-104.2 reads as rewritten:

"**§ 37A-1-104.2. Conversion in trustee's discretion without court approval.**

(a) Any trustee, other than an interested trustee, or, where two or more persons are acting as trustees, a majority of the trustees who are not interested trustees (in either case hereafter "trustee"), may, in the trustee's sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy;

(2) The trustee sends written notice of its intention to take the action, along with copies of the written policy and this Part, to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) without regard to the exercise of a general power of appointment, all competent beneficiaries who would receive or be eligible to receive the distributions of income of the trust if the interests of the beneficiaries currently receiving or eligible to receive the income terminated at the time of the giving of the notice but the termination of those interests would not cause the trust to terminate, (iv) without regard to the exercise of any power of appointment, all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of the ~~notice (without regard to the exercise of any power of appointment)~~ notice, and ~~(iv)~~ (v) all persons acting as advisor or protector of the trust;

(3) ~~There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of the notice;~~ There is at least one competent beneficiary described in subsection (a)(2)(ii) or subsection (a)(2)(iii) of this section and one competent beneficiary described in subsection (a)(2)(iv) of this section; and

(4) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to the action within 60 days of receipt of the notice by written instrument delivered to the trustee.

(b) If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two or more persons are acting as trustee and are interested trustees, a majority of the interested trustees may, in its sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income as determined under this Chapter, (ii) in the case of a trust

being administered as a total return unitrust, that future distributions from the trust will be net income as determined under this Chapter rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy;

(2) The trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee (i) the percentage to be used to calculate the unitrust amount, (ii) the method to be used in determining the fair market value of the trust, and (iii) which assets, if any, are to be excluded in determining the unitrust amount;

(3) The trustee sends written notice of its intention to take the action, along with copies of the written policy and this Part, and the determinations of the disinterested person to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) without regard to the exercise of a general power of appointment, all competent beneficiaries who would receive or be eligible to receive the distributions of income of the trust if the interests of the beneficiaries currently receiving or eligible to receive the income terminated at the time of the giving of the notice but the termination of those interests would not cause the trust to terminate, (iv) without regard to the exercise of any power of appointment, all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of the ~~notice (without regard to the exercise of any power of appointment)~~ notice, and ~~(iv)~~ (v) all persons acting as advisor or protector of the trust;

(4) ~~There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of the notice;~~ There is at least one competent beneficiary described in subsection (b)(3)(ii) or subsection (b)(3)(iii) of this section and one competent beneficiary described in subsection (b)(3)(iv) of this section; and

(5) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to the action or to the determination of the disinterested person within 60 days of receipt of the notice by written instrument delivered to the trustee.

(c) A trustee may act pursuant to subsection (a) or (b) of this section with respect to a trust for which both income and principal have been permanently set aside for charitable purposes under the governing instrument and for which a federal estate or gift tax deduction has been taken, provided that:

(1) Instead of sending written notice to the persons described in subsections (a)(2) and (3) of this section or subsections (b)(2) and (3) of this section, as the case may be, the trustee shall send such written notice to the named charity or charities then entitled to receive income of the trust and, if no named charity or charities are entitled to receive all of the income, to the Attorney General of this State;

(2) Subsection (a)(4) or subsection (b)(4) of this section, as the case may be, shall not apply to such action; and

(3) In each taxable year, the trustee shall distribute the greater of the unitrust amount and the amount required by section 4942 of the Code."

SECTION 4. G.S. 37A-1-104.4 reads as rewritten:

"**§ 37A-1-104.4. Determination of unitrust amount.**

(a) The fair market value of the trust shall be determined at least annually, using a valuation date selected by the trustee in its discretion. The trustee, in its discretion, may use an average of the fair market value on the same valuation date for the current fiscal year and not more than three preceding fiscal years, if the use of this average appears desirable to reduce the impact of fluctuations in market value on the unitrust amount. Assets for which a fair market value cannot be readily ascertained shall be valued using valuation methods as are considered reasonable and appropriate by the trustee. ~~These assets may be excluded from valuation, provided all income received with respect to these assets is distributed to the extent distributable in accordance with the terms of the governing instrument.~~ Assets used by the trust beneficiary, such as a residence or tangible personal property, may also be excluded from the fair market value for computing the unitrust amount.

(b) The percentage to be used in determining the unitrust amount shall be a reasonable current return from the trust, in any event not less than three percent (3%) nor more than five percent (5%), taking into account the intentions of the grantor of the trust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust, and projected inflation and its impact on the trust.

~~(c) In the case of a trust (i) for which a marital deduction has been taken for federal tax purposes under section 2056 or section 2523 of the Code (during the lifetime of the spouse for whom the trust was created) or (ii) a trust to which the generation-skipping transfer tax due under section 2601 of the Code does not apply by reason of any effective date or transition rule, the unitrust amount in any taxable year shall not be less than the net income of the trust, determined without regard to subsection (d) of this section.~~

(d) Following the conversion of an income trust to a total return unitrust, the trustee:

~~(1) Shall treat the unitrust amount as if it were net income of the trust for purposes of determining the amount available, from time to time, for distribution from the trust; and~~

~~(2) May allocate to trust income for each taxable year of the trust (or portion of that year) (i) net short-term capital gain described in section~~

~~1222(5) of the Code for that year or portion of that year, but only to the extent that the amount allocated together with all other amounts allocated to trust income for that year or portion of that year does not exceed the unitrust amount for that year or portion of that year; and (ii) net long-term capital gain described in section 1222(7) of the Code for that year or portion of that year, but only to the extent that the amount allocated together with all other amounts, including amounts described in clause (i) above, allocated to trust income for that year or portion of that year does not exceed the unitrust amount for that year or portion of that year.~~

(1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) May, in the trustees discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as the discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)-3(b) of the Treasury Regulations, as amended from time to time; and

~~(4)~~ Shall then consider the unitrust amount as coming from the principal of the trust."

SECTION 5. G.S. 37A-1-104.9 reads as rewritten:

"**§ 37A-1-104.9. Applicability.**

This Part shall apply to all trusts in existence on, or created after January 1, 2004, unless (i) the governing instrument contains a provision clearly expressing the grantor's intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust, (ii) the trust is a trust described in section 170(f)(2)(B), section 664(d), section 2702(a)(3), or section 2702(b) of the Code, (iii) ~~one or more persons to whom the trustee could distribute income has a power of withdrawal over the trust that is not subject to an ascertainable standard under section 2041 or section 2514 of the Code, or the power of withdrawal can be exercised to discharge a duty of support the person possesses, or~~ the trust is a trust pursuant to which any amount is, or has been in the past, permanently set aside for charitable purposes unless the income therefrom is also permanently devoted to charitable purposes, or (iv) the governing instrument expressly prohibits use of this Part by specific reference to this ~~Part.~~ Part, or expressly states the grantor's intent that net income not be calculated as a unitrust amount. A provision in the governing instrument that 'the provisions of Part 2 of Article 1 of Chapter 37A or any corresponding provision of future law, shall not be used in the administration of this trust.' or 'the trustee shall not determine the

distributions to the income beneficiary as a unitrust amount.' or similar words reflecting such intent shall be sufficient to preclude the use of this Part."

SECTION 6. Chapter 37A of the General Statutes is amended by adding a new Part to read:

"Part 2A. Express Total Return Unitrusts.

"**§ 37A-1-104A.1. Definitions.**

(a) An "express total return unitrust" means a trust which by its governing instrument requires the distribution at least annually of a unitrust amount equal to a fixed percentage of not less than three percent (3%) nor more than five percent (5%) per year of the net fair market value of the trusts assets, valued at least annually.

(b) "Code" means the Internal Revenue Code as described in G.S. 37A-1-104.1(1).

(c) "Treasury Regulations" means the Treasury Regulations described in G.S. 37A-1-104.1(9a).

"**§ 37A-1-104A.2. Determination of unitrust amount.**

(a) The unitrust amount to be distributed by the express total return unitrust may be determined in the governing instrument by reference to the net fair market value of the trust's assets determined annually or averaged on a multiple year basis.

(b) The terms of the governing instrument of an express total return unitrust may provide that:

(1) Assets for which a fair market value cannot be readily ascertained shall be valued using valuation methods as are considered reasonable and appropriate by the trustee.

(2) Assets used by the trust beneficiary entitled to the unitrust amount, such as a residence property or tangible personal property, may be excluded from the net fair market value for computing the unitrust amount.

"**§ 37A-1-104A.3. Effect of distribution of unitrust amount.**

The distribution from an express total return unitrust of the fixed percentage of not less than three percent (3%) nor more than five percent (5%) reasonably apportions between the income beneficiaries and remaindermen the total return of an express total return unitrust.

"**§ 37A-1-104A.4. Change or conversion of unitrust amount.**

(a) The terms of the governing instrument of an express total return unitrust may provide the method similar to the method provided under G.S. 37A-1-104.2(a) for changing the unitrust percentage or for converting from a unitrust to an income trust or for a reconversion of an income trust to a unitrust, or for all of these actions.

(b) If the terms of the governing instrument of an express total return unitrust do not specifically or by reference to G.S. 37A-1-104.2 grant a power to the trustee to change the unitrust percentage or change to an income trust, the trustee shall have no such power.

"**§ 37A-1-104A.5. Determination of character of unitrust amount.**

Unless the terms of the governing instrument of the express total return unitrust specifically provide otherwise, the trustee:

(1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) May, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as such discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)-3(b) of the Treasury Regulations; and

(4) Shall then consider the unitrust amount as coming from the principal of the trust.

"**§ 37A-104A.6. Unitrust amount in excess of a five percent payout.**

A trust that provides for a fixed percentage payout in excess of five percent (5%) per year shall be deemed to be an express total return unitrust that pays out a fixed percentage of five percent (5%) per year and pays out principal to the extent that the fixed percentage payout exceeds five percent (5%) per year."

SECTION 7. This act is effective when it becomes law, except that the amendment to G.S. 37A-1-104.9(iii) applies retroactively to October 1, 2004.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 461
PROPOSED COMMITTEE SUBSTITUTE S461-CSRH-4 [v.3]

3/28/2005 7:32:58 PM

Short Title: Unitrust Amendments. (Public)

Sponsors:

Referred to:

March 10, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW RELATING TO UNITRUSTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 37A-1-104.1(5) reads as rewritten:

"(5) "Income trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the ~~trustee. Notwithstanding the foregoing, no trust that may be subject to taxation under section 2001 or section 2501 of the Code shall be an income trust for purposes of this Part, until the expiration of the period for filing the return therefor, including all extensions for the filing.~~ trustee, and regardless of whether the trust directs or permits the trustee to distribute principal of the trust to one or more of those persons."

SECTION 2. G.S. 37A-1-104.1 is amended by adding a new subdivision to read:

"(9a) "Treasury Regulations" means the regulations, rulings, procedures, notices, or other administrative pronouncements issued by the Internal Revenue Service, as amended from time to time."

SECTION 3. G.S. 37A-1-104.2 reads as rewritten:

"**§ 37A-1-104.2. Conversion in trustee's discretion without court approval.**

(a) Any trustee, other than an interested trustee, or, where two or more persons are acting as trustees, a majority of the trustees who are not interested trustees (in either case hereafter "trustee"), may, in the trustee's sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy;

(2) The trustee sends written notice of its intention to take the action, along with copies of the written policy and this Part, to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) without regard to the exercise of a general power of appointment, all competent beneficiaries who would receive or be eligible to receive the distributions of income of the trust if the interests of the beneficiaries currently receiving or eligible to receive the income terminated at the time of the giving of the notice but the termination of those interests would not cause the trust to terminate, (iv) without regard to the exercise of any power of appointment, all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of the ~~notice (without regard to the exercise of any power of appointment)~~ notice, and ~~(iv)~~ (v) all persons acting as advisor or protector of the trust;

(3) ~~There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of the notice;~~ There is at least one competent beneficiary described in subdivision (2)(ii) of this subsection or subdivision (2)(iii) of this subsection and one competent beneficiary described in subdivision (2)(iv) of this subsection; and

(4) No person receiving notice of the trustee's intention to take the proposed action ~~of the trustee~~ objects to the action within 60 days of receipt of the notice by written instrument delivered to the trustee.

(b) If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two or more persons are acting as trustee and are interested trustees, a majority of the interested trustees may, in its sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income as determined under this Chapter, (ii) in the case of a trust

being administered as a total return unitrust, that future distributions from the trust will be net income as determined under this Chapter rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy;

(2) The trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee (i) the percentage to be used to calculate the unitrust amount, (ii) the method to be used in determining the fair market value of the trust, and (iii) which assets, if any, are to be excluded in determining the unitrust amount;

(3) The trustee sends written notice of its intention to take the action, along with copies of the written policy and this Part, and the determinations of the disinterested person to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) without regard to the exercise of a general power of appointment, all competent beneficiaries who would receive or be eligible to receive the distributions of income of the trust if the interests of the beneficiaries currently receiving or eligible to receive the income terminated at the time of the giving of the notice but the termination of those interests would not cause the trust to terminate, (iv) without regard to the exercise of any power of appointment, all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of the ~~notice (without regard to the exercise of any power of appointment)~~ notice, and ~~(iv)~~ (v) all persons acting as advisor or protector of the trust;

(4) ~~There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of the notice;~~ There is at least one competent beneficiary described in subdivision (3)(ii) of this subsection or subdivision (3)(iii) of this subsection and one competent beneficiary described in subdivision (3)(iv) of this subsection; and

(5) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to the action or to the determination of the disinterested person within 60 days of receipt of the notice by written instrument delivered to the trustee.

(c) A trustee may act under subsection (a) or (b) of this section with respect to a trust for which both income and principal have been set aside permanently for charitable purposes under the governing instrument and for which a federal estate or gift tax deduction has been taken, provided that:

(1) Instead of sending written notice to the persons described in subdivisions (2) and (3) of subsection (a) of this section or subdivisions (2) and (3) of subsection (b) of this section, as the case may be, the trustee shall send written notice to the named charity or charities then entitled to receive income of the trust and, if no named charity or charities are entitled to receive all of the income, to the Attorney General of this State;

(2) Subdivision (4) of subsection (a) of this section or subdivision (4) of subsection (b) of this section, as the case may be, shall not apply to this action; and

(3) In each taxable year, the trustee shall distribute the greater of the unitrust amount or the amount required by section 4942 of the Code."

SECTION 4. G.S. 37A-1-104.4 reads as rewritten:

"**§ 37A-1-104.4. Determination of unitrust amount.**

(a) The fair market value of the trust shall be determined at least annually, using a valuation date selected by the trustee in its discretion. The trustee, in its discretion, may use an average of the fair market value on the same valuation date for the current fiscal year and not more than three preceding fiscal years, if the use of this average appears desirable to reduce the impact of fluctuations in market value on the unitrust amount. Assets for which a fair market value cannot be readily ascertained shall be valued using valuation methods as are considered reasonable and appropriate by the trustee. ~~These assets may be excluded from valuation, provided all income received with respect to these assets is distributed to the extent distributable in accordance with the terms of the governing instrument.~~ Assets, such as a residence or tangible personal property, used by the trust beneficiary also may be excluded from the fair market value for computing the unitrust amount.

(b) The percentage to be used in determining the unitrust amount shall be a reasonable current return from the trust, in any event not less than three percent (3%) nor more than five percent (5%), taking into account the intentions of the grantor of the trust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust, and projected inflation and its impact on the trust.

~~(c) In the case of a trust (i) for which a marital deduction has been taken for federal tax purposes under section 2056 or section 2523 of the Code (during the lifetime of the spouse for whom the trust was created) or (ii) a trust to which the generation-skipping transfer tax due under section 2601 of the Code does not apply by reason of any effective date or transition rule, the unitrust amount in any taxable year shall not be less than the net income of the trust, determined without regard to subsection (d) of this section.~~

(d) Following the conversion of an income trust to a total return unitrust, the trustee:

~~(1) Shall treat the unitrust amount as if it were net income of the trust for purposes of determining the amount available, from time to time, for distribution from the trust; and~~

~~(2) May allocate to trust income for each taxable year of the trust (or portion of that year) (i) net short-term capital gain described in section 1222(5) of the Code for that year or portion of that year, but only to the extent that the amount allocated together with all other amounts allocated to trust income for that year or portion of that year does not exceed the unitrust amount for that year or portion of that year; and (ii) net long-term capital gain described in section 1222(7) of the Code for that year or portion of that year, but only to the extent that the amount allocated together with all other amounts, including amounts described in clause (i) above, allocated to trust income for that year or portion of that year does not exceed the unitrust amount for that year or portion of that year.~~

(1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) May, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as the discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)- 3(b) of the Treasury Regulations, as amended from time to time; and

(4) Shall then consider the unitrust amount as coming from the principal of the trust."

SECTION 5. G.S. 37A-1-104.9 reads as rewritten:

"**§ 37A-1-104.9. Applicability.**

This Part shall apply to all trusts in existence on, or created after January 1, 2004, unless (i) the governing instrument contains a provision clearly expressing the grantor's intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust, (ii) the trust is a trust described in section 170(f)(2)(B), section 664(d), section 2702(a)(3), or section 2702(b) of the Code, (iii) ~~one or more persons to whom the trustee could distribute income has a power of withdrawal over the trust that is not subject to an ascertainable standard under section 2041 or section 2514 of the Code, or the power of withdrawal can be exercised to discharge a duty of support the person possesses, or~~ the trust is a trust under which any amount is, or has been in the past, set aside permanently for charitable purposes unless the income from the trust also is devoted permanently to charitable purposes, or (iv) the governing instrument expressly prohibits use of this Part by specific reference to this ~~Part.~~ Part, or expressly states the grantor's intent that net income not be calculated as a unitrust amount. A provision in the governing instrument that 'the provisions of Part 2 of Article 1 of Chapter 37A or any corresponding provision of future law, shall not be

used in the administration of this trust.' or 'the trustee shall not determine the distributions to the income beneficiary as a unitrust amount.' or similar words reflecting that intent is sufficient to preclude the use of this Part."

SECTION 6. Chapter 37A of the General Statutes is amended by adding a new Part to read:

"Part 2A. Express Total Return Unitrusts.

"**§ 37A-1-104A.1. Definitions.**

(a) An "express total return unitrust" means a trust that has a governing instrument requiring the distribution at least annually of a unitrust amount equal to a fixed percentage of not less than three percent (3%) nor more than five percent (5%) per year of the net fair market value of the trust's assets, valued at least annually.

(b) "Code" means the Internal Revenue Code as described in G.S. 37A-1-104.1(1).

(c) "Treasury Regulations" means the Treasury Regulations described in G.S. 37A-1-104.1(9a).

"**§ 37A-1-104A.2. Determination of unitrust amount.**

(a) The unitrust amount to be distributed by the express total return unitrust may be determined in the governing instrument by reference to the net fair market value of the trust's assets determined annually or averaged on a multiple year basis.

(b) The terms of the governing instrument of an express total return unitrust may provide that:

(1) Assets for which a fair market value cannot be readily ascertained shall be valued using valuation methods that the trustee considers reasonable and appropriate.

(2) Assets, such as a residence property or tangible personal property, used by the trust beneficiary entitled to the unitrust amount may be excluded from the net fair market value for computing the unitrust amount.

"**§ 37A-1-104A.3. Effect of distribution of unitrust amount.**

The distribution from an express total return unitrust of the fixed percentage of not less than three percent (3%) nor more than five percent (5%) reasonably apportions between the income beneficiaries and remaindermen the total return of an express total return unitrust.

"**§ 37A-1-104A.4. Change or conversion of unitrust amount.**

(a) The terms of the governing instrument of an express total return unitrust may provide the method similar to the method provided under G.S. 37A-1-104.2(a) for changing the unitrust percentage or for converting from a unitrust to an income trust or for a reconversion of an income trust to a unitrust, or for all of these actions.

(b) If the terms of the governing instrument of an express total return unitrust do not specifically or by reference to G.S. 37A-1-104.2 grant a power to the trustee to change the unitrust percentage or change to an income trust, the trustee shall not have that power.

"**§ 37A-1-104A.5. Determination of character of unitrust amount.**

Unless the terms of the governing instrument of the express total return unitrust specifically provide otherwise, the trustee:

(1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) May, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as this discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)- 3(b) of the Treasury Regulations; and

(4) Shall then consider the unitrust amount as coming from the principal of the trust.

"**§ 37A-104A.6. Unitrust amount in excess of a five percent payout.**

A trust that provides for a fixed percentage payout in excess of five percent (5%) per year is considered an express total return unitrust that pays out a fixed percentage of five percent (5%) per year and pays out principal to the extent that the fixed percentage payout exceeds five percent (5%) per year."

SECTION 7. This act is effective when it becomes law, and applies to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes. G.S. 37A-1-104.9(iii), as rewritten in Section 5 of this act, applies retroactively to October 1, 2004, and applies to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes.

SENATE BILL 461:
Unitrust Amendments.

BILL ANALYSIS

Committee:	Senate Judiciary II Committee	**Introduced by:**	Senator Hartsell
Date:	March 29, 2005	**Summary by:**	Robin Johnson
Version:	First: S461-CSRH-4[v.3]		Committee Counsel

SUMMARY: ***Senate Bill 461, recommended by the North Carolina Bar Association, would amend Chapter 37A of the General Statutes, entitled "Uniform Principal and Income Act." Except as noted below, the bill would become effective when it becomes law and apply to trusts and decedents' estates existing on that date, unless the instrument provides otherwise.***

The PCS makes technical changes.

CURRENT LAW: Chapter 37A, based on the Uniform Principal and Income Act of 1997, provides procedures for trustees (administering trusts) and personal administrators (of a decedent's estate) in allocating property as principal and income. Generally, property that is considered principal is distributed to the persons who are entitled to receive the principal when the income interest ends. Assets considered income meet the requirements of income beneficiaries during the life of a trust or of beneficiaries who are paid out of the income derived during an estate's administration.

Chapter 37A allows trustees to convert an income trust to a total return unitrust, to reconvert a total return unitrust to an income trust, or to change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust. (The unitrust amount is an amount computed as a percentage of the fair market value of the trust.)

BILL ANALYSIS: The bill amends Part 2 of Article 1 of Chapter 37A ("Conversion to Unitrust") ands adds a new Part 2A of this Article ("Express Total Return Unitrusts") to conform to the section 643 Treasury Regulations (the "643 Regs."), which interpret the federal Internal Revenue Code. The bill also would make other clarifying changes. Some of the changes follow the recent amendments made in the Delaware statute upon which Part 2 was based.

Section 1.

- Amends G.S. 37A-1-104.1(5) by clarifying the definition of "income trust."

Section 2.

- Amends G.S. 37A-1-104.1 by adding a new definition of "Treasury Regulations."

Section 3.

- Amends G.S. 37A-1-104.2 to include among the beneficiaries entitled to receive notice the next generation of income beneficiaries after the current income beneficiary.
- Also adds a new subsection (c) to this section authorizing a trustee to convert a wholly charitable trust to a unitrust under the statute.

Section 4.

- Amends G.S. 37A-1-104.4 to provide that the value of the property, such as a residence or tangible personal property, used by a trust beneficiary does not have to be included in the computation of the unitrust distribution.
- Deletes G.S. 37A-1-104.4(c), applicable to trusts for which a marital has been taken or trusts to which the generation skipping transfer tax does not apply. This subsection is no longer required after the issuance of the 643 Regs.

- Provides for an ordering rule for the character of amounts constituting the unitrust amount, including a provision relating to net capital gains based on the 643 Regs.

Section 5.

- Amends G.S. 37A-1-104.9 to clarify the types of trusts to which the statute applies, to delete a superfluous provision, and to make clarifying changes.

Section 6.

- Creates a new Part 2A of Chapter 37A ("Express Total Return Unitrusts") so that the 643 Regs. also apply to trusts that are drafted originally as unitrusts. An express total return unitrust is a trust that has a governing instrument requiring at least annual distributions equal to a fixed percentage of 3% to 5% per year of the net fair market value of the trust's assets, which must be valued at least annually. This new Part 2A would allow marital deduction trusts originally drafted as unitrusts to provide for the distribution of the unitrust amount only and not the greater of the unitrust amount or the income of the trusts.

Section 7.

- Effective when it becomes law and would apply to trusts and estates on or after that day, except as expressly provided in the will or trust. The new G.S. 37A-1-104.9(iii), as rewritten in Section 5 of the bill, would apply retroactively to October 1, 2004, and would apply to trusts and estates on or after that day, except as expressly provided in the will or trust.

S461-SMRH-001 (Bill analysis provided by Bar Association)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 472

Short Title:	Child Exploitation Prevention Act.	(Public)
Sponsors:	Senators Thomas; Apodaca, Atwater, Berger of Franklin, Boseman, Garwood, Graham, Kinnaird, Swindell, and Weinstein.	
Referred to:	Judiciary II.	

March 10, 2005

A BILL TO BE ENTITLED

AN ACT TO PROTECT CHILDREN FROM SEXUAL PREDATORS BY ALSO MAKING IT A FELONY CRIMINAL OFFENSE TO SOLICIT A PERSON THE PERPETRATOR BELIEVES TO BE A CHILD TO COMMIT UNLAWFUL SEX ACTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-202.3 reads as rewritten:

"**§ 14-202.3. Solicitation of child by computer to commit an unlawful sex act.**

(a) Offense. – A person is guilty of solicitation of a child by a computer if the person is 16 years of age or older and the person knowingly, with the intent to commit an unlawful sex act, entices, advises, coerces, orders, or commands, by means of a computer, a child or a person the perpetrator believes to be a child who is less than 16 years of age and at least 3 years younger than the defendant, to meet with the defendant or any other person for the purpose of committing an unlawful sex act. Consent is not a defense to a charge under this section.

(b) Jurisdiction. – The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

(c) Punishment. – A violation of this section is a Class I felony."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

SENATE BILL 472:
Child Exploitation Prevention Act.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Thomas
Date:	March 29, 2005	**Summary by:**	Ben Popkin
Version:	First Edition		Committee Counsel

SUMMARY: ***Senate Bill 472 would broaden the applicability of the current felony offense "Solicitation of a child by computer to commit an unlawful sex act[1]." The bill would allow for prosecution of individuals who, by means of a computer, entice, advise, coerce, order or command an individual that they believe to be a child less than 16 years of age to commit an unlawful sex act. The bill would also remove the possibility of the victim's consent being used as a defense to this charge. This act would become effective December 1, 2005 and would apply to offenses committed on or after that date.***

CURRENT LAW: A person is guilty of the Class I felony charge of "Solicitation of a child by computer to commit an unlawful sex act" if the person:

1) is 16 years of age or older, *and*

2) knowingly, with the intent to commit an unlawful sex act,

3) entices or advises or coerces or orders or commands

4) by means of a computer

5) a child less than 16 years of age, *and*

6) at least three years younger than the person

7) to meet with the person or any other person

8) For the purpose of committing and unlawful sex act[2].

BILL ANALYSIS: This bill would expand the reach of this offense by modifying element 5 (above) of the offense to include both children less than 16 years of age and any person the perpetrator believes to be less than 16 years of age.

The bill would also prohibit the use of consent as a defense to a charge under this section.

BACKGROUND: This shift would allow those instances where an individual solicits a law enforcement officer posing as a minor – currently a Class 1 misdemeanor offense, Attempted Child Solicitation by Computer – to be punished at the higher Class I felony level. Due to lack of data regarding the number of offenders convicted of Attempted Child Solicitation by Computer in the past, the Sentencing Commission is unable to estimate the impact this legislation would have on prison populations.

S472-SMSS-001

[1] G.S. 14-202.3.
[2] G.S. 14-202.3(a).

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Incarceration Fiscal Note

BILL NUMBER: Senate Bill 472 (First Edition)

SHORT TITLE: Child Exploitation Prevention Act.

SPONSOR(S): Senator Thomas

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10
GENERAL FUND					
Correction	Exact amount cannot be determined (see pg. 2 for details).				
Judicial	Exact amount cannot be determined (see pg. 2 for details).				
ADDITIONAL PRISON BEDS*	Exact amount cannot be determined (see pg. 2 for details).				
POSITIONS: (cumulative)	Exact amount cannot be determined (see pg. 2 for details).				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch

EFFECTIVE DATE: December 1, 2005

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY:

Under current G.S. 14-202.3, it is a Class I felony to solicit a child under the age of sixteen by computer for the purpose of committing an unlawful sex act. This bill would expand the scope of that offense to include any circumstance in which a person solicits an individual over the age of sixteen while *believing* that individual to be underage. The bill additionally specifies that consent is not a defense to a charge for this offense.

ASSUMPTIONS AND METHODOLOGY:

General

This bill would have a fiscal impact due to additional felony Class I charges and convictions, some of which would be altogether new to the system, and others elevated from Class 1 misdemeanors. Under present law, an individual who solicits a law enforcement officer posing as a minor could be convicted of attempting to solicit a child by computer, a Class 1 misdemeanor. As a result of this bill, an attempt to solicit a child by computer would be punishable as a Class I felony. If offenders can be more easily charged and convicted of Attempted Solicitation of a Child by Computer than the actual offense of Child Solicitation by Computer, substantially more felony Class I charges and convictions could result from this bill.

Data regarding the number of charges and convictions for Solicitation or Attempted Solicitation of a Child by Computer in the past is unavailable because the Administrative Office of the Courts does not maintain a specific offense code for these violations. The State Bureau of Investigation (SBI) identified a total of 30 cases under its review that involved or included Solicitation or Attempted Solicitation of a Minor by Computer during 2004. This figure does not include cases under investigation by the FBI, U.S. Customs, or U.S. Postal Inspectors in conjunction with local law enforcement, or by local law enforcement alone.

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2005 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory group, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.*

Due to the lack of data regarding the number of offenders convicted of Attempted Child Solicitation by Computer in the past, the Sentencing Commission is unable to estimate the impact that this legislation would have on prison population. The SBI has indicated that, currently, an attempt to solicit a child by computer may be used as reason for a search warrant. Evidence found in the search may result in the offender being charged with Second or Third Degree Sexual Exploitation of a Minor (Class F and I felonies, respectively). For those offenders convicted of both Attempted Solicitation of a Child by Computer and Second or Third Degree Sexual Exploitation of a Minor, and given sentences that run concurrently, there would be no impact on prison population.

Active Sentences: If, for example, ten new Class I convictions resulted from the expanded definition of this offense per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed in the first year and three additional beds in

the second year. Based on FY 2003-04 actual operating costs, the statewide average annual operating cost for one prison bed in FY 2006-07, adjusted for inflation at a rate of three percent annually, is estimated to be $24,740.

Non-Active Sentences: In FY 2003-04, 49 percent of Class I convictions resulted in community sanctions and 40 percent in intermediate sanctions. Probation officers in the Division of Community Corrections supervise offenders with intermediate sanctions and the community sanction of supervised probation. The estimated cost associated with an intermediate offender is $10.94 per day for the first six months and $1.87 per day thereafter (based on the average cost and duration of intensive probation). The estimated cost for a supervised community offender is $1.87 per day.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks, and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

Because the Courts do not have data regarding the number of charges in the past for attempting to solicit a child by computer, AOC is unable to estimate the number of new Class I felony charges and the number of Class 1 misdemeanor charges that might instead be charged as Class I felonies due to this bill. Based on prior-year data, the majority of new Class I felony charges resulting from this bill that are not dismissed are likely to be settled by guilty plea.

- The estimated cost to process a single Class I felony charge is $330 per guilty plea and $5,835 per trial. The trial cost figure includes $3,904 for court and attorney costs and $1,931 for indigent defense.
- The estimated increase in cost to process one charge as a Class I felony rather than Class 1 misdemeanor is $46 per guilty plea and $2,611 per trial.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission; Department of Justice

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Aaron Paul and Chloe Gossage

Official Fiscal Research Division Publication

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

DATE: March 15, 2005

Signed Copy Located in the NCGA Principal Clerk's Offices

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	March 31, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 461	Unitrust Amendments.	Senator Hartsell
SB 477	Master Keys/Lock-Picking Devices Regulated.	Senator Graham
SB 488	Exploitation of Elder or Disabled Adults/POA.	Senator Dannelly
SB 507	Aggravating Factor/Add Social Worker.	Senator Dalton

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, March 31, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 461	Unitrust Amendments.	Senator Hartsell
SB 477	Master Keys/Lock-Picking Devices Regulated.	Senator Graham
SB 488	Exploitation of Elder or Disabled Adults/POA.	Senator Dannelly
SB 507	Aggravating Factor/Add Social Worker.	Senator Dalton

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

March 31, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on March 31, 2005, with seventeen members present. Senator Hartsell introduced pages Eric Noble and Bailey Green and thanked them for serving.

SB 461 (Unitrust Amendments.) Senator Hartsell invited Senator Allran to chair the Committee during the presentation and discussion of the Proposed Committee Substitute which was carried over from the March 29th meeting. Senator Hartsell asked Mr. William McPherson, representing the Bar Association, to continue explaining the bill. On the completion of his explanation, Senator Webster thanked Mr. McPherson and complimented him on his clear explanation. Senator Webster then moved for a favorable report for the Proposed Committee Substitute. All voted and the motion passed.

SB 507 (Aggravating Factor/Add Social Worker.) Senator Dalton was recognized to explain the bill. Senator Apodaca moved for a favorable report. All voted and the motion passed.

Senator Hartsell noted that the Committee would hear from members of the North Carolina Sentencing and Policy Advisory Commission regarding structured sentencing at the April 5th meeting.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — March 31, 2005

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
[signature]	DAA
Stacy Flannery	NCHCFA
[signature]	FR-TC
[signature]	AOC
Doug Heron	NC Bar Assoc
[signature]	SOS
DAVID BARNES	P+S

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, April 05, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **507** Aggravating Factor/Add Social Worker.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **461** Unitrust Amendments.
Draft Number: PCS55205
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

TOTAL REPORTED: 2

Committee Clerk Comments:

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 461

Short Title:	Unitrust Amendments.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 10, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW RELATING TO UNITRUSTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 37A-1-104.1(5) reads as rewritten:

"(5) "Income trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the ~~trustee. Notwithstanding the foregoing, no trust that may be subject to taxation under section 2001 or section 2501 of the Code shall be an income trust for purposes of this Part, until the expiration of the period for filing the return therefor, including all extensions for the filing.~~ trustee, and regardless of whether the trust directs or permits the trustee to distribute principal of the trust to one or more of those persons."

SECTION 2. G.S. 37A-1-104.1 is amended by adding a new subdivision to read:

"(9a) "Treasury Regulations" means the regulations, rulings, procedures, notices, or other administrative pronouncements issued by the Internal Revenue Service, as amended from time to time."

SECTION 3. G.S. 37A-1-104.2 reads as rewritten:

"**§ 37A-1-104.2. Conversion in trustee's discretion without court approval.**

(a) Any trustee, other than an interested trustee, or, where two or more persons are acting as trustees, a majority of the trustees who are not interested trustees (in either case hereafter "trustee"), may, in the trustee's sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy;

(2) The trustee sends written notice of its intention to take the action, along with copies of the written policy and this Part, to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) without regard to the exercise of a general power of appointment, all competent beneficiaries who would receive or be eligible to receive the distributions of income of the trust if the interests of the beneficiaries currently receiving or eligible to receive the income terminated at the time of the giving of the notice but the termination of those interests would not cause the trust to terminate, (iv) without regard to the exercise of any power of appointment, all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of the ~~notice (without regard to the exercise of any power of appointment)~~ notice, and ~~(iv)~~ (v) all persons acting as advisor or protector of the trust;

(3) ~~There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of the notice;~~ There is at least one competent beneficiary described in subsection (a)(2)(ii) or subsection (a)(2)(iii) of this section and one competent beneficiary described in subsection (a)(2)(iv) of this section; and

(4) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to the action within 60 days of receipt of the notice by written instrument delivered to the trustee.

(b) If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two or more persons are acting as trustee and are interested trustees, a majority of the interested trustees may, in its sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income as determined under this Chapter, (ii) in the case of a trust

being administered as a total return unitrust, that future distributions from the trust will be net income as determined under this Chapter rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy;

(2) The trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee (i) the percentage to be used to calculate the unitrust amount, (ii) the method to be used in determining the fair market value of the trust, and (iii) which assets, if any, are to be excluded in determining the unitrust amount;

(3) The trustee sends written notice of its intention to take the action, along with copies of the written policy and this Part, and the determinations of the disinterested person to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) without regard to the exercise of a general power of appointment, all competent beneficiaries who would receive or be eligible to receive the distributions of income of the trust if the interests of the beneficiaries currently receiving or eligible to receive the income terminated at the time of the giving of the notice but the termination of those interests would not cause the trust to terminate, (iv) without regard to the exercise of any power of appointment, all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of the ~~notice (without regard to the exercise of any power of appointment)~~ notice, and ~~(iv)~~ (v) all persons acting as advisor or protector of the trust;

(4) ~~There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of the notice;~~ There is at least one competent beneficiary described in subsection (b)(3)(ii) or subsection (b)(3)(iii) of this section and one competent beneficiary described in subsection (b)(3)(iv) of this section; and

(5) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to the action or to the determination of the disinterested person within 60 days of receipt of the notice by written instrument delivered to the trustee.

(c) A trustee may act pursuant to subsection (a) or (b) of this section with respect to a trust for which both income and principal have been permanently set aside for charitable purposes under the governing instrument and for which a federal estate or gift tax deduction has been taken, provided that:

(1) Instead of sending written notice to the persons described in subsections (a)(2) and (3) of this section or subsections (b)(2) and (3) of this section, as the case may be, the trustee shall send such written notice to the named charity or charities then entitled to receive income of the trust and, if no named charity or charities are entitled to receive all of the income, to the Attorney General of this State;

(2) Subsection (a)(4) or subsection (b)(4) of this section, as the case may be, shall not apply to such action; and

(3) In each taxable year, the trustee shall distribute the greater of the unitrust amount and the amount required by section 4942 of the Code."

SECTION 4. G.S. 37A-1-104.4 reads as rewritten:

"**§ 37A-1-104.4. Determination of unitrust amount.**

(a) The fair market value of the trust shall be determined at least annually, using a valuation date selected by the trustee in its discretion. The trustee, in its discretion, may use an average of the fair market value on the same valuation date for the current fiscal year and not more than three preceding fiscal years, if the use of this average appears desirable to reduce the impact of fluctuations in market value on the unitrust amount. Assets for which a fair market value cannot be readily ascertained shall be valued using valuation methods as are considered reasonable and appropriate by the trustee. ~~These assets may be excluded from valuation, provided all income received with respect to these assets is distributed to the extent distributable in accordance with the terms of the governing instrument.~~ Assets used by the trust beneficiary, such as a residence or tangible personal property, may also be excluded from the fair market value for computing the unitrust amount.

(b) The percentage to be used in determining the unitrust amount shall be a reasonable current return from the trust, in any event not less than three percent (3%) nor more than five percent (5%), taking into account the intentions of the grantor of the trust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust, and projected inflation and its impact on the trust.

~~(c) In the case of a trust (i) for which a marital deduction has been taken for federal tax purposes under section 2056 or section 2523 of the Code (during the lifetime of the spouse for whom the trust was created) or (ii) a trust to which the generation-skipping transfer tax due under section 2601 of the Code does not apply by reason of any effective date or transition rule, the unitrust amount in any taxable year shall not be less than the net income of the trust, determined without regard to subsection (d) of this section.~~

(d) Following the conversion of an income trust to a total return unitrust, the trustee:

~~(1) Shall treat the unitrust amount as if it were net income of the trust for purposes of determining the amount available, from time to time, for distribution from the trust; and~~

~~(2) May allocate to trust income for each taxable year of the trust (or portion of that year) (i) net short-term capital gain described in section~~

~~1222(5) of the Code for that year or portion of that year, but only to the extent that the amount allocated together with all other amounts allocated to trust income for that year or portion of that year does not exceed the unitrust amount for that year or portion of that year; and (ii) net long-term capital gain described in section 1222(7) of the Code for that year or portion of that year, but only to the extent that the amount allocated together with all other amounts, including amounts described in clause (i) above, allocated to trust income for that year or portion of that year does not exceed the unitrust amount for that year or portion of that year.~~

(1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) May, in the trustees discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as the discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)-3(b) of the Treasury Regulations, as amended from time to time; and

(4) Shall then consider the unitrust amount as coming from the principal of the trust."

SECTION 5. G.S. 37A-1-104.9 reads as rewritten:

"**§ 37A-1-104.9. Applicability.**

This Part shall apply to all trusts in existence on, or created after January 1, 2004, unless (i) the governing instrument contains a provision clearly expressing the grantor's intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust, (ii) the trust is a trust described in section 170(f)(2)(B), section 664(d), section 2702(a)(3), or section 2702(b) of the Code, (iii) ~~one or more persons to whom the trustee could distribute income has a power of withdrawal over the trust that is not subject to an ascertainable standard under section 2041 or section 2514 of the Code, or the power of withdrawal can be exercised to discharge a duty of support the person possesses, or~~ the trust is a trust pursuant to which any amount is, or has been in the past, permanently set aside for charitable purposes unless the income therefrom is also permanently devoted to charitable purposes, or (iv) the governing instrument expressly prohibits use of this Part by specific reference to this ~~Part.~~ Part, or expressly states the grantor's intent that net income not be calculated as a unitrust amount. A provision in the governing instrument that 'the provisions of Part 2 of Article 1 of Chapter 37A or any corresponding provision of future law, shall not be used in the administration of this trust.' or 'the trustee shall not determine the

distributions to the income beneficiary as a unitrust amount.' or similar words reflecting such intent shall be sufficient to preclude the use of this Part."

SECTION 6. Chapter 37A of the General Statutes is amended by adding a new Part to read:

"Part 2A. Express Total Return Unitrusts.

"**§ 37A-1-104A.1. Definitions.**

(a) An "express total return unitrust" means a trust which by its governing instrument requires the distribution at least annually of a unitrust amount equal to a fixed percentage of not less than three percent (3%) nor more than five percent (5%) per year of the net fair market value of the trusts assets, valued at least annually.

(b) "Code" means the Internal Revenue Code as described in G.S. 37A-1-104.1(1).

(c) "Treasury Regulations" means the Treasury Regulations described in G.S. 37A-1-104.1(9a).

"**§ 37A-1-104A.2. Determination of unitrust amount.**

(a) The unitrust amount to be distributed by the express total return unitrust may be determined in the governing instrument by reference to the net fair market value of the trust's assets determined annually or averaged on a multiple year basis.

(b) The terms of the governing instrument of an express total return unitrust may provide that:

(1) Assets for which a fair market value cannot be readily ascertained shall be valued using valuation methods as are considered reasonable and appropriate by the trustee.

(2) Assets used by the trust beneficiary entitled to the unitrust amount, such as a residence property or tangible personal property, may be excluded from the net fair market value for computing the unitrust amount.

"**§ 37A-1-104A.3. Effect of distribution of unitrust amount.**

The distribution from an express total return unitrust of the fixed percentage of not less than three percent (3%) nor more than five percent (5%) reasonably apportions between the income beneficiaries and remaindermen the total return of an express total return unitrust.

"**§ 37A-1-104A.4. Change or conversion of unitrust amount.**

(a) The terms of the governing instrument of an express total return unitrust may provide the method similar to the method provided under G.S. 37A-1-104.2(a) for changing the unitrust percentage or for converting from a unitrust to an income trust or for a reconversion of an income trust to a unitrust, or for all of these actions.

(b) If the terms of the governing instrument of an express total return unitrust do not specifically or by reference to G.S. 37A-1-104.2 grant a power to the trustee to change the unitrust percentage or change to an income trust, the trustee shall have no such power.

"**§ 37A-1-104A.5. Determination of character of unitrust amount.**

Unless the terms of the governing instrument of the express total return unitrust specifically provide otherwise, the trustee:

(1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) May, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as such discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)-3(b) of the Treasury Regulations; and

(4) Shall then consider the unitrust amount as coming from the principal of the trust.

"**§ 37A-104A.6. Unitrust amount in excess of a five percent payout.**

A trust that provides for a fixed percentage payout in excess of five percent (5%) per year shall be deemed to be an express total return unitrust that pays out a fixed percentage of five percent (5%) per year and pays out principal to the extent that the fixed percentage payout exceeds five percent (5%) per year."

SECTION 7. This act is effective when it becomes law, except that the amendment to G.S. 37A-1-104.9(iii) applies retroactively to October 1, 2004.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 461
PROPOSED COMMITTEE SUBSTITUTE S461-CSRH-4 [v.3]

3/28/2005 7:32:58 PM

Short Title: Unitrust Amendments. (Public)

Sponsors:

Referred to:

March 10, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW RELATING TO UNITRUSTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 37A-1-104.1(5) reads as rewritten:

"(5) "Income trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the ~~trustee. Notwithstanding the foregoing, no trust that may be subject to taxation under section 2001 or section 2501 of the Code shall be an income trust for purposes of this Part, until the expiration of the period for filing the return therefor, including all extensions for the filing.~~ trustee, and regardless of whether the trust directs or permits the trustee to distribute principal of the trust to one or more of those persons."

SECTION 2. G.S. 37A-1-104.1 is amended by adding a new subdivision to read:

"(9a) "Treasury Regulations" means the regulations, rulings, procedures, notices, or other administrative pronouncements issued by the Internal Revenue Service, as amended from time to time."

SECTION 3. G.S. 37A-1-104.2 reads as rewritten:

"**§ 37A-1-104.2. Conversion in trustee's discretion without court approval.**

(a) Any trustee, other than an interested trustee, or, where two or more persons are acting as trustees, a majority of the trustees who are not interested trustees (in either case hereafter "trustee"), may, in the trustee's sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy;

(2) The trustee sends written notice of its intention to take the action, along with copies of the written policy and this Part, to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) without regard to the exercise of a general power of appointment, all competent beneficiaries who would receive or be eligible to receive the distributions of income of the trust if the interests of the beneficiaries currently receiving or eligible to receive the income terminated at the time of the giving of the notice but the termination of those interests would not cause the trust to terminate, (iv) without regard to the exercise of any power of appointment, all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of the ~~notice (without regard to the exercise of any power of appointment)~~ notice, and ~~(iv)~~ (v) all persons acting as advisor or protector of the trust;

(3) ~~There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of the notice;~~ There is at least one competent beneficiary described in subdivision (2)(ii) of this subsection or subdivision (2)(iii) of this subsection and one competent beneficiary described in subdivision (2)(iv) of this subsection; and

(4) No person receiving notice of the trustee's intention to take the proposed action ~~of the trustee~~ objects to the action within 60 days of receipt of the notice by written instrument delivered to the trustee.

(b) If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two or more persons are acting as trustee and are interested trustees, a majority of the interested trustees may, in its sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income as determined under this Chapter, (ii) in the case of a trust

being administered as a total return unitrust, that future distributions from the trust will be net income as determined under this Chapter rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy;

(2) The trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee (i) the percentage to be used to calculate the unitrust amount, (ii) the method to be used in determining the fair market value of the trust, and (iii) which assets, if any, are to be excluded in determining the unitrust amount;

(3) The trustee sends written notice of its intention to take the action, along with copies of the written policy and this Part, and the determinations of the disinterested person to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) without regard to the exercise of a general power of appointment, all competent beneficiaries who would receive or be eligible to receive the distributions of income of the trust if the interests of the beneficiaries currently receiving or eligible to receive the income terminated at the time of the giving of the notice but the termination of those interests would not cause the trust to terminate, (iv) without regard to the exercise of any power of appointment, all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of the ~~notice (without regard to the exercise of any power of appointment)~~ notice, and ~~(iv)~~ (v) all persons acting as advisor or protector of the trust;

(4) ~~There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of the notice;~~ There is at least one competent beneficiary described in subdivision (3)(ii) of this subsection or subdivision (3)(iii) of this subsection and one competent beneficiary described in subdivision (3)(iv) of this subsection; and

(5) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to the action or to the determination of the disinterested person within 60 days of receipt of the notice by written instrument delivered to the trustee.

(c) A trustee may act under subsection (a) or (b) of this section with respect to a trust for which both income and principal have been set aside permanently for charitable purposes under the governing instrument and for which a federal estate or gift tax deduction has been taken, provided that:

(1) Instead of sending written notice to the persons described in subdivisions (2) and (3) of subsection (a) of this section or subdivisions (2) and (3) of subsection (b) of this section, as the case may be, the trustee shall send written notice to the named charity or charities then entitled to receive income of the trust and, if no named charity or charities are entitled to receive all of the income, to the Attorney General of this State;

(2) Subdivision (4) of subsection (a) of this section or subdivision (4) of subsection (b) of this section, as the case may be, shall not apply to this action; and

(3) In each taxable year, the trustee shall distribute the greater of the unitrust amount or the amount required by section 4942 of the Code."

SECTION 4. G.S. 37A-1-104.4 reads as rewritten:

"**§ 37A-1-104.4. Determination of unitrust amount.**

(a) The fair market value of the trust shall be determined at least annually, using a valuation date selected by the trustee in its discretion. The trustee, in its discretion, may use an average of the fair market value on the same valuation date for the current fiscal year and not more than three preceding fiscal years, if the use of this average appears desirable to reduce the impact of fluctuations in market value on the unitrust amount. Assets for which a fair market value cannot be readily ascertained shall be valued using valuation methods as are considered reasonable and appropriate by the trustee. ~~These assets may be excluded from valuation, provided all income received with respect to these assets is distributed to the extent distributable in accordance with the terms of the governing instrument.~~ Assets, such as a residence or tangible personal property, used by the trust beneficiary also may be excluded from the fair market value for computing the unitrust amount.

(b) The percentage to be used in determining the unitrust amount shall be a reasonable current return from the trust, in any event not less than three percent (3%) nor more than five percent (5%), taking into account the intentions of the grantor of the trust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust, and projected inflation and its impact on the trust.

~~(c) In the case of a trust (i) for which a marital deduction has been taken for federal tax purposes under section 2056 or section 2523 of the Code (during the lifetime of the spouse for whom the trust was created) or (ii) a trust to which the generation-skipping transfer tax due under section 2601 of the Code does not apply by reason of any effective date or transition rule, the unitrust amount in any taxable year shall not be less than the net income of the trust, determined without regard to subsection (d) of this section.~~

(d) Following the conversion of an income trust to a total return unitrust, the trustee:

~~(1) Shall treat the unitrust amount as if it were net income of the trust for purposes of determining the amount available, from time to time, for distribution from the trust; and~~

~~(2) May allocate to trust income for each taxable year of the trust (or portion of that year) (i) net short-term capital gain described in section 1222(5) of the Code for that year or portion of that year, but only to the extent that the amount allocated together with all other amounts allocated to trust income for that year or portion of that year does not exceed the unitrust amount for that year or portion of that year; and (ii) net long-term capital gain described in section 1222(7) of the Code for that year or portion of that year, but only to the extent that the amount allocated together with all other amounts, including amounts described in clause (i) above, allocated to trust income for that year or portion of that year does not exceed the unitrust amount for that year or portion of that year.~~

(1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) May, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as the discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)- 3(b) of the Treasury Regulations, as amended from time to time; and

(4) Shall then consider the unitrust amount as coming from the principal of the trust."

SECTION 5. G.S. 37A-1-104.9 reads as rewritten:

"**§ 37A-1-104.9. Applicability.**

This Part shall apply to all trusts in existence on, or created after January 1, 2004, unless (i) the governing instrument contains a provision clearly expressing the grantor's intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust, (ii) the trust is a trust described in section 170(f)(2)(B), section 664(d), section 2702(a)(3), or section 2702(b) of the Code, (iii) ~~one or more persons to whom the trustee could distribute income has a power of withdrawal over the trust that is not subject to an ascertainable standard under section 2041 or section 2514 of the Code, or the power of withdrawal can be exercised to discharge a duty of support the person possesses, or~~ the trust is a trust under which any amount is, or has been in the past, set aside permanently for charitable purposes unless the income from the trust also is devoted permanently to charitable purposes, or (iv) the governing instrument expressly prohibits use of this Part by specific reference to this ~~Part.~~ Part, or expressly states the grantor's intent that net income not be calculated as a unitrust amount. A provision in the governing instrument that 'the provisions of Part 2 of Article 1 of Chapter 37A or any corresponding provision of future law, shall not be

used in the administration of this trust.' or 'the trustee shall not determine the distributions to the income beneficiary as a unitrust amount.' or similar words reflecting that intent is sufficient to preclude the use of this Part."

SECTION 6. Chapter 37A of the General Statutes is amended by adding a new Part to read:

"Part 2A. Express Total Return Unitrusts.

"**§ 37A-1-104A.1. Definitions.**

(a) An "express total return unitrust" means a trust that has a governing instrument requiring the distribution at least annually of a unitrust amount equal to a fixed percentage of not less than three percent (3%) nor more than five percent (5%) per year of the net fair market value of the trust's assets, valued at least annually.

(b) "Code" means the Internal Revenue Code as described in G.S. 37A-1-104.1(1).

(c) "Treasury Regulations" means the Treasury Regulations described in G.S. 37A-1-104.1(9a).

"**§ 37A-1-104A.2. Determination of unitrust amount.**

(a) The unitrust amount to be distributed by the express total return unitrust may be determined in the governing instrument by reference to the net fair market value of the trust's assets determined annually or averaged on a multiple year basis.

(b) The terms of the governing instrument of an express total return unitrust may provide that:

(1) Assets for which a fair market value cannot be readily ascertained shall be valued using valuation methods that the trustee considers reasonable and appropriate.

(2) Assets, such as a residence property or tangible personal property, used by the trust beneficiary entitled to the unitrust amount may be excluded from the net fair market value for computing the unitrust amount.

"**§ 37A-1-104A.3. Effect of distribution of unitrust amount.**

The distribution from an express total return unitrust of the fixed percentage of not less than three percent (3%) nor more than five percent (5%) reasonably apportions between the income beneficiaries and remaindermen the total return of an express total return unitrust.

"**§ 37A-1-104A.4. Change or conversion of unitrust amount.**

(a) The terms of the governing instrument of an express total return unitrust may provide the method similar to the method provided under G.S. 37A-1-104.2(a) for changing the unitrust percentage or for converting from a unitrust to an income trust or for a reconversion of an income trust to a unitrust, or for all of these actions.

(b) If the terms of the governing instrument of an express total return unitrust do not specifically or by reference to G.S. 37A-1-104.2 grant a power to the trustee to change the unitrust percentage or change to an income trust, the trustee shall not have that power.

"**§ 37A-1-104A.5. Determination of character of unitrust amount.**

Unless the terms of the governing instrument of the express total return unitrust specifically provide otherwise, the trustee:

(1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) May, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as this discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)- 3(b) of the Treasury Regulations; and

(4) Shall then consider the unitrust amount as coming from the principal of the trust.

"**§ 37A-104A.6. Unitrust amount in excess of a five percent payout.**

A trust that provides for a fixed percentage payout in excess of five percent (5%) per year is considered an express total return unitrust that pays out a fixed percentage of five percent (5%) per year and pays out principal to the extent that the fixed percentage payout exceeds five percent (5%) per year."

SECTION 7. This act is effective when it becomes law, and applies to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes. G.S. 37A-1-104.9(iii), as rewritten in Section 5 of this act, applies retroactively to October 1, 2004, and applies to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes.

SENATE BILL 461:
Unitrust Amendments.

BILL ANALYSIS

Committee:	Senate Judiciary II Committee	**Introduced by:**	Senator Hartsell
Date:	March 29, 2005	**Summary by:**	Robin Johnson
Version:	First: S461-CSRH-4[v.3]		Committee Counsel

SUMMARY: ***Senate Bill 461, recommended by the North Carolina Bar Association, would amend Chapter 37A of the General Statutes, entitled "Uniform Principal and Income Act." Except as noted below, the bill would become effective when it becomes law and apply to trusts and decedents' estates existing on that date, unless the instrument provides otherwise.***

The PCS makes technical changes.

CURRENT LAW: Chapter 37A, based on the Uniform Principal and Income Act of 1997, provides procedures for trustees (administering trusts) and personal administrators (of a decedent's estate) in allocating property as principal and income. Generally, property that is considered principal is distributed to the persons who are entitled to receive the principal when the income interest ends. Assets considered income meet the requirements of income beneficiaries during the life of a trust or of beneficiaries who are paid out of the income derived during an estate's administration.

Chapter 37A allows trustees to convert an income trust to a total return unitrust, to reconvert a total return unitrust to an income trust, or to change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust. (The unitrust amount is an amount computed as a percentage of the fair market value of the trust.)

BILL ANALYSIS: The bill amends Part 2 of Article 1 of Chapter 37A ("Conversion to Unitrust") ands adds a new Part 2A of this Article ("Express Total Return Unitrusts") to conform to the section 643 Treasury Regulations (the "643 Regs."), which interpret the federal Internal Revenue Code. The bill also would make other clarifying changes. Some of the changes follow the recent amendments made in the Delaware statute upon which Part 2 was based.

Section 1.

- Amends G.S. 37A-1-104.1(5) by clarifying the definition of "income trust."

Section 2.

- Amends G.S. 37A-1-104.1 by adding a new definition of "Treasury Regulations."

Section 3.

- Amends G.S. 37A-1-104.2 to include among the beneficiaries entitled to receive notice the next generation of income beneficiaries after the current income beneficiary.
- Also adds a new subsection (c) to this section authorizing a trustee to convert a wholly charitable trust to a unitrust under the statute.

Section 4.

- Amends G.S. 37A-1-104.4 to provide that the value of the property, such as a residence or tangible personal property, used by a trust beneficiary does not have to be included in the computation of the unitrust distribution.
- Deletes G.S. 37A-1-104.4(c), applicable to trusts for which a marital has been taken or trusts to which the generation skipping transfer tax does not apply. This subsection is no longer required after the issuance of the 643 Regs.

- Provides for an ordering rule for the character of amounts constituting the unitrust amount, including a provision relating to net capital gains based on the 643 Regs.

Section 5.

- Amends G.S. 37A-1-104.9 to clarify the types of trusts to which the statute applies, to delete a superfluous provision, and to make clarifying changes.

Section 6.

- Creates a new Part 2A of Chapter 37A ("Express Total Return Unitrusts") so that the 643 Regs. also apply to trusts that are drafted originally as unitrusts. An express total return unitrust is a trust that has a governing instrument requiring at least annual distributions equal to a fixed percentage of 3% to 5% per year of the net fair market value of the trust's assets, which must be valued at least annually. This new Part 2A would allow marital deduction trusts originally drafted as unitrusts to provide for the distribution of the unitrust amount only and not the greater of the unitrust amount or the income of the trusts.

Section 7.

- Effective when it becomes law and would apply to trusts and estates on or after that day, except as expressly provided in the will or trust. The new G.S. 37A-1-104.9(iii), as rewritten in Section 5 of the bill, would apply retroactively to October 1, 2004, and would apply to trusts and estates on or after that day, except as expressly provided in the will or trust.

S461-SMRH-001 (Bill analysis provided by Bar Association)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 507

Short Title:	Aggravating Factor/Add Social Worker.	(Public)
Sponsors:	Senators Dalton; Atwater, Boseman, Hoyle, Kinnaird, Purcell, Snow, and Weinstein.	
Referred to:	Judiciary II.	

March 15, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT AN OFFENSE COMMITTED AGAINST OR THAT PROXIMATELY CAUSES SERIOUS INJURY TO A SOCIAL WORKER IS AN AGGRAVATING FACTOR.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1340.16(d)(6) reads as rewritten:

"(d) Aggravating Factors. – The following are aggravating factors:

...

(6) The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, social worker, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

SENATE BILL 507:
Aggravating Factor/Add Social Worker

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Dalton
Date:	March 31, 2005	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***SB507 would make it an aggravating factor, for purposes of structured sentencing, if the underlying offense for which a defendant has been convicted was committed against or proximately caused serious injury to a social worker while the social worker was engaged in his or her official duties.***

The act would become effective December 1, 2005, and apply to offenses committed on or after that date.

CURRENT LAW: Structured sentencing became effective for offenses committed on or after October 1, 1994. A sentencing court essentially must take seven steps to determine the appropriate sentence for felonies under structured sentencing. These steps are:

- Determine the offense class.
- Determine the prior record level for the defendant.
- Consider aggravating and mitigating factors.
- Select a minimum sentences from the applicable minimum sentence range.
- Determine the maximum sentence.
- Determine the sentence disposition (active, intermediate, or community).
- Consider the appropriateness of restitution.

The sentencing grid contains three ranges of punishment for felonies: presumptive, aggravated, and mitigated. To determine the range in which to sentence a defendant, the court must consider any evidence of aggravating and mitigating factors. The statutory aggravating factors or set out in G.S 15A-1340.16(d). If the court finds that aggravating factors are present and outweigh any mitigating factors, it may depart from the presumptive range of punishment and impose a term of punishment from the aggravated range. Evidence necessary to prove an element of the offense can not be used to prove any factor in aggravation, and the same item of evidence can not be used to prove more than one factor in aggravation.

The list of aggravating factors is provided below.

§ 15A-1340.16. Aggravated and mitigated sentences.

.....(d) Aggravating Factors. – The following are aggravating factors:

(1) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

(2) The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

(2a) The offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy. A "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of felony or violent misdemeanor offenses, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and having a common name or common identifying sign, colors, or symbols.

(3) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(4) The defendant was hired or paid to commit the offense.

(5) The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(6) The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.

(7) The offense was especially heinous, atrocious, or cruel.

(8) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(9) The defendant held public office at the time of the offense and the offense related to the conduct of the office.

(10) The defendant was armed with or used a deadly weapon at the time of the crime.

(11) The victim was very young, or very old, or mentally or physically infirm, or handicapped.

(12) The defendant committed the offense while on pretrial release on another charge.

(13) The defendant involved a person under the age of 16 in the commission of the crime.

(14) The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

(15) The defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense.

(16) The offense involved the sale or delivery of a controlled substance to a minor.

(16a) The offense is the manufacture of methamphetamine and was committed where a person under the age of 18 lives, was present, or was otherwise endangered by exposure to the drug, its ingredients, its by-products, or its waste.

(17) The offense for which the defendant stands convicted was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.

(18) The defendant does not support the defendant's family.

(18a) The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

(19) The serious injury inflicted upon the victim is permanent and debilitating.

(20) Any other aggravating factor reasonably related to the purposes of sentencing.

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: Senate Bill 507 (First Edition)

SHORT TITLE: Aggravating Factor/Add Social Worker.

SPONSOR(S): Senator Dalton

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10
GENERAL FUND					
Correction	Exact amount cannot be determined; no substantial impact anticipated.				
Judicial	Exact amount cannot be determined; no substantial impact anticipated.				
ADDITIONAL PRISON BEDS*	Exact amount cannot be determined; no substantial impact anticipated.				
POSITIONS: (cumulative)	Exact amount cannot be determined; no substantial impact anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch

EFFECTIVE DATE: December 1, 2005

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: Under current G.S. 15A-1340.16(d)(6), it is an aggravating factor when sentencing felons if the offense was committed against or caused serious injury to any of a list of specified individuals involved in law enforcement, emergency services, custody of inmates, or judicial proceedings, because of the person's official duties or while the person was engaged in their official duties. This bill would add social workers to that list.
Source: Adapted from Bill Digest S.B. 507 (03/14/2005).

ASSUMPTIONS AND METHODOLOGY:

General

Under this bill, offenders would face an aggravated sentence for any felony committed against or proximately causing injury to a social worker while that person was engaged in his or her official duties or because of that person's official duties. As sentences in the aggravated range may be up to 25 percent longer than the maximum sentence in the presumptive range, this bill would lengthen the amount of time for which some offenders would be incarcerated and thus increase prison costs. The Administrative Office of the Courts (AOC) also anticipates that costs to dispose of these cases would increase as a result of more vigorous defense and prosecution due to the potentially longer sentence for these crimes.

No data is available regarding the frequency with which the current aggravating factor provided by G.S. 15A-1340.16(d)(6) is applied or the number of offenses committed against social workers under these circumstances. However, based on the low rate at which aggravating factors are currently applied across all felony classes and the narrow expansion of the aggravating factor under G.S. 15A-1340.16(d)(6) provided by this bill, the costs associated with this legislation are not expected to be substantial.

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2005 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory group, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.*

The impact on prison population due to this bill would depend on the number and the offense class of crimes committed against or proximately causing injury to a social worker while that person was engaged in official duties or because of that person's official duties. As the Administrative Office of the Courts' computerized Criminal Information System does not maintain data on the application of specific aggravating factors, no estimate is available in respect to the frequency with which the aggravating factor under G.S. 15A-1340.16(d)(6) is presently applied. Furthermore, because it is not known how often offenders are convicted of felonies in which the victim was a social worker, we cannot estimate the number of felons that might be sentenced in the aggravated range due to this bill. However, based on the relatively low rate of felony convictions in the aggravated range and the narrow expansion of the aggravating factor provided by this bill, the number of additional convictions with aggravated sentences due to this legislation is not expected to be substantial.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

AOC expects defense and prosecution would be more vigorous for felony charges in which the defendant would face an aggravated sentence if the victim was a social worker and the offense was committed because of that person's official duties or while that person was engaged in their official duties. As a result, AOC anticipates costs in superior court would increase in these cases due to increases in trial length, attorney preparation time, jury fees, and indigent defense costs.

Because no data is available on the number of felonies charged when the offense was committed against or proximately caused injury to a social worker, AOC is unable to estimate the potential cost to the Courts associated with this bill. Due to the narrow expansion of this aggravating factor and the relatively low rate at which aggravating factors are currently found in felony convictions, we do not expect the number of charges entailing increased costs because of this bill to be substantial.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Jim Mills and Aaron Paul

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

DATE: April 4, 2005

Signed Copy Located in the NCGA Principal Clerk's Offices

Gerry Johnson (Sen. Hartsell)

From: Gerry Johnson (Sen. Hartsell)
Sent: Thursday, March 31, 2005 1:44 PM
To: Sen. Austin Allran; Sen. Ellie Kinnaird; Sen. David Weinstein
Subject: Sen. J II Meeting - 04-05-2005

Principal Clerk _____
Reading Clerk _____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	April 5, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 486	Rachel's Law.	Senator Allran
SB 559	Expunction/Convictions of Nonviolent Crimes.	Senator Kinnaird
SB 588	Expunge White-Collar Crim. Convictions.	Senator Weinstein

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, April 5, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 486	Rachel's Law.	Senator Allran
SB 559	Expunction/Convictions of Nonviolent Crimes.	Senator Kinnaird
SB 588	Expunge White-Collar Crim. Convictions.	Senator Weinstein

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

April 5, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on April 5, 2005, with sixteen members present. He then introduced pages Darius Smith and Sarah Brown and thanked them for serving.

Senator Hartsell introduced Ms. Susan Katzenelson, Executive Director for the North Carolina Sentencing and Policy Advisory Commission, to give the Committee an explanation of structured sentencing and its impact. Senators Webster and Kinnaird had questions that were answered by Senator Hartsell.

SB 486 (Rachel's Law) Senator Hartsell recognized Senator Allran to explain the bill. After his explanation, Senator Allran introduced James C. Gaither, Jr., District Attorney, and Eric R. Bellas, Chief Assistant District Attorney, both from the 25th Prosecutorial District, and invited them to speak on the bill. Senator Allran then introduced Mr. and Mrs. Lackey, grandparents of Rachel Sanchez for whom the bill was named. Mr. Lackey commented on the tragic circumstances and why he felt this bill was needed. Senator Hartsell noted changes that should possibly be made to the bill in regard to the questions from Senators Kinnaird, Forrester, Swindell and Dalton. The bill will be heard again at the April 7th meeting.

SB 588 (Expunge White-Collar Crim. Convictions.) Senator Weinstein was recognized to explain the bill. Senator Hartsell then invited Pete Powell, representing the Administrative Office of the Courts, to comment on the bill. The bill will be carried over to the April 7th meeting.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 5, 2005

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
E. Katzenelson	Sentencing Com.
Troy Page	Sentencing Comm.
[signature]	ACLU
Jay Gaither	DA - 25th District
Eric Bellas	ADA - 25th Dist
Steve Lackey	Rachel's grandfather
Kris Lackey	Rachel's grandmother
Peg Dorer	Conf of D.As
[signature illegible]	Planned Parenthood
Mark Kinsley	just observing here w/ Equality NC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 486*

Short Title:	Rachel's Law.	(Public)
Sponsors:	Senators Allran, Snow; Apodaca, Atwater, Berger of Franklin, Bingham, Cowell, Graham, Holloman, Jacumin, Nesbitt, Presnell, Rand, and Webster.	
Referred to:	Judiciary II.	

March 15, 2005

A BILL TO BE ENTITLED

AN ACT TO INCREASE THE PENALTY FOR DISCHARGING CERTAIN WEAPONS INTO OCCUPIED PROPERTY IN CERTAIN CIRCUMSTANCES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-34.1 reads as rewritten:

"**§ 14-34.1. Discharging certain barreled weapons or a firearm into occupied property.**

(a) Any person who willfully or wantonly discharges or attempts to discharge:

(1) Any barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second; or

(2) A firearm into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a ~~Class E felony.~~felony punishable as provided by subsections (b), (c), and (d) of this section.

(b) A person who violates subsection (a) of this section is guilty of a Class E felony unless subsection (c) or subsection (d) of this section provide for greater punishment.

(c) A person who violates subsection (a) of this section by discharging a weapon described in subsection (a) of this section into a dwelling or any vehicle, aircraft, watercraft, or other conveyance that is traveling upon the public streets or highways of this State or in a public vehicular area, or is traveling upon any waterway or in any airspace within this State, is guilty of a Class C felony.

(d) If a person violates subsection (c) of this section and the violation results in serious injury to any person, the person is guilty of a Class B2 felony."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

SENATE BILL 486:
Rachel's Law

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Sens. Allran and Snow
Date:	April 5, 2005	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***Senate Bill 486 would create two new criminal offenses. The first would be the offense of willfully or wantonly discharging a firearm or certain barreled weapons into an occupied dwelling, or an occupied vehicle, aircraft, watercraft or other conveyance that is being operated upon public streets, on waterways, or in any airspace. A violation of this offense would be a Class C felony. The second new offense would occur if serious injury to a person results from the commission of the discharge of the weapon under the preceding circumstances. A violation of the second offense would be a Class B2 felony.***

The act becomes effective December 1, 2005 and applies to offenses committed on or after that date.

CURRENT LAW: A person is guilty of the crime "Discharging certain barreled weapons or a firearm into occupied property" (G.S. 14-34.1) if the following applies:

- The person willfully or wantonly discharges or attempts to discharge a firearm or a barreled weapon;
- Into property;
- That is occupied when the weapon is discharged.

North Carolina courts have held that the property is occupied if someone is actually present at the time of weapon is discharged. The person is guilty of the offense only if he or she knows, or has reasonable grounds to believe, that the property is occupied.

An act is done willfully when it is done intentionally and without an honest belief that there is an excuse or justification for it. An act is done wantonly when it is done with conscious and intentional disregard of and indifference to the rights and safety of others and without care for the consequences, even though the offender had not formed an intention to harm anyone.

Commission of this crime is a Class E felony. Assuming no prior convictions and in the absence of aggravating or mitigating factors, a Class E felony is punishable by a minimum of 20-25 months intermediate or active punishment.

BILL ANALYSIS: Senate Bill 486 would create two new offenses having to do with the discharge of a firearm into certain occupied structures. It would be a Class C felony for a person to discharge a firearm into an occupied:

- dwelling; or
- vehicle, aircraft, watercraft, or other conveyance that is being operated upon a public street, highway, public vehicular area, waterway, or in any airspace.

Assuming no prior convictions and in the absence of aggravating or mitigating factors, a Class C felony is punishable by a minimum of 58 to 73 months of active punishment.

The second new crime would occur if serious injury resulted from the commission of the new crime described above. What qualifies as serious injury would be a question of fact, but it has been delineated somewhat by case law to include, "physical injury that causes great pain and suffering... or serious mental injury". It is a lesser standard than 'serious bodily injury', used elsewhere in the criminal statutes.

Assuming no prior convictions and in the absence of aggravating or mitigating factors, a Class B2 felony is punishable by a minimum of 125-157 months of active punishment.

BACKGROUND: Under current law, G.S. 14-34.1 does not provide for an increased penalty in situations where violation of the offense results in injury to another. While G.S. 14-32(a) (Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury) is a Class C felony, it probably cannot be used in situations where the defendant discharged the weapon into occupied property, but did not have a specific intent to harm a particular person.

TECHNICAL CONSIDERATIONS:

The North Carolina Sentencing and Policy Advisory Commission has reviewed the offense classifications for the 1st Edition of the bill and found both sections to be inconsistent with the offense classification criteria for the proposed classes.

NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION

PRISON POPULATION PROJECTIONS:
UPDATED JANUARY 2005

PREPARED IN CONJUNCTION WITH THE DEPARTMENT OF CORRECTION'S OFFICE OF RESEARCH AND PLANNING

FISCAL YEAR	PREVIOUS PROJECTION as of June 30	CURRENT PROJECTION as of June 30	*ESTIMATE OF EXPANDED OPERATING PRISON CAPACITY*[1]	*ESTIMATE OF STANDARD OPERATING PRISON CAPACITY*[2]
2005	36,973	**36,885**	36,119	31,500
2006	37,705	**38,106**	37,015	32,396
2007	38,613	**39,021**	37,911	33,292
2008	39,567	**39,864**	38,807	34,188
2009	40,498	**40,750**	38,807	34,188
2010	41,396	**41,668**	38,807	34,188
2011	42,304	**42,594**	38,807	34,188
2012	43,197	**43,499**	38,807	34,188
2013	44,094	**44,381**	38,807	34,188
2014	N/A	**45,312**	38,807	34,188

[1] Expanded Operating Capacity (EOC) is the number of inmates housed in dormitories that operate at varying percentages (not to exceed 130%) beyond their Standard Operating Capacity (SOC), plus the number of single cells with one inmate per cell, plus the number of single cells that house two inmates per cell that meet American Correctional Association (ACA) standards for space per inmate.

[2] Standard Operating Capacity (SOC) is the number of single cells with one inmate per cell plus the number of inmates who can be housed in dormitories by dividing the gross square feet of each dormitory by 50 square feet and rounding to the closest double bunk configuration.

Convictions and Sentences by Offense Class and Prior Record Level
FY 2003/04 Felonies

Offense Class	Prior Record Level						Total
	I 0 Pts	II 1-4 Pts	III 5-8 Pts	IV 9-14 Pts	V 15-18 Pts	VI 19+ Pts	
A	A A = 43 (100%) (n=43) Life/Death	A A = 18 (100%) (n=18) Life/Death	A A = 21 (100%) (n=21) Life/Death	A A = 15 (100%) (n=15) Life/Death	A A = 4 (100%) (n=4) Life/Death	A A = 0 (0%) (n=0) Life/Death	A A = 101 (100%) (n=101) Life/Death
B1	A A = 43 (100%) (n=43) 201 min 250 max	A A = 33 (100%) (n=33) 238 min 295 max	A A = 19 (100%) (n=19) 284 min 350 max	A A = 10 (100%) (n=10) 366 min 450 max	A A = 5 (100%) (n=5) 389 min 476 max	A A = 4 (100%) (n=4) 399 min 488 max	A A = 114 (100%) (n=114) 255 min 316 max
B2	A A = 93 (100%) (n=93) 136 min 173 max	A A = 83 (100%) (n=83) 169 min 212 max	A A = 40 (100%) (n=40) 205 min 256 max	A A =25 (100%) (n=25) 228 min 283 max	A A = 6 (100%) (n=6) 244 min 302 max	A A = 6 (100%) (n=6) 307 min 378 max	A A = 253 (100%) (n=253) 174 min 218 max
C	A A = 103 (100%) (n=103) 64 min 86 max	A A = 149 (100%) (n=149) 77 min 102 max	A A = 232 (100%) (n=232) 86 min 113 max	A A = 258 (100%) (n=258) 94 min 121 max	A A = 70 (100%) (n=70) 112 min 143 max	A A = 65 (100%) (n=65) 123 min 158 max	A A = 877 (100%) (n=877) 89 min 116 max
D	A A = 261 (100%) (n=261) 51 min 70 max	A A = 257 (100%) (n=257) 63 min 85 max	A A = 162 (100%) (n=162) 82 min 108 max	A A = 117 (100%) (n=117) 98 min 127 max	A A = 28 (100%) (n=28) 110 min 141 max	A A = 28 (100%) (n=28) 118 min 151 max	A A = 853 (100%) (n=853) 71 min 95 max
E	I/A I = 289 (72%) A = 113 (28%) (n=402) 23 min 36 max	I/A I = 258 (65%) A = 139 (35%) (n=397) 26 min 40 max	A A = 133 (100%) (n=133) 30 min 45 max	A A = 98 (100%) (n=98) 41 min 59 max	A A = 27 (100%) (n=27) 46 min 64 max	A A = 19 (100%) (n=19) 50 min 68 max	I/A I = 547 (51%) A = 529 (49%) (n=1,076) 31 min 46 max
F	I/A I = 436 (74%) A = 151 (26%) (n=587) 15 min 18 max	I/A I = 352 (60%) A = 236 (40%) (n=588) 16 min 20 max	I/A I = 216 (51%) A = 207 (49%) (n=423) 18 min 22 max	A A = 195 (100%) (n=195) 22 min 26 max	A A = 52 (100%) (n=52) 28 min 34 max	A A = 43 (100%) (n=43) 34 min 41 max	I/A I = 1,004 (53%) A = 884 (47%) (n=1,888) 19 min 24 max

Convictions and Sentences by Offense Class and Prior Record Level (continued)
FY 2003/04 Felonies

Offense Class	Prior Record Level						Total
	I 0 Pts	II 1-4 Pts	III 5-8 Pts	IV 9-14 Pts	V 15-18 Pts	VI 19+ Pts	
G	I/A I = 473 (81%) A = 111 (19%) (n=584) 11 min 14 max	I/A I = 703 (71%) A = 293 (29%) (n=996) 13 min 16 max	I/A I = 356 (49%) A = 363 (51%) (n=719) 14 min 17 max	I/A I = 187 (34%) A = 357 (66%) (n=544) 17 min 21 max	A A = 111 (100%) (n=111) 18 min 23 max	A A = 90 (100%) (n=90) 25 min 30 max	I/A I = 1,719 (56%) A = 1,325 (44%) (n=3,044) 15 min 19 max
H	C/I/A C = 1,374 (59%) I = 762 (32%) A = 213 (9%) (n=2,349) 5 min 7 max	I/A I = 2,316 (73%) A = 862 (27%) (n=3,178) 7 min 9 max	I/A I = 1,223 (57%) A = 919 (43%) (n=2,142) 9 min 11 max	I/A I = 642 (37%) A = 1,087 (63%) (n=1,729) 10 min 12 max	I/A I = 132 (28%) A = 334 (72%) (n=466) 13 min 16 max	A A = 320 (100%) (n=320) 18 min 22 max	C/I/A C = 1,374 (13%) I = 5,075 (50%) A = 3,735 (37%) (n=10,184) 10 min 12 max
I	C C = 1,449 (100%) (n=1,449) N/A	C/I C = 1,765 (66%) I = 913 (34%) (n=2,678) N/A	I I = 1,154 (100%) (n=1,154) N/A	I/A I = 425 (50%) A = 425 (50%) (n=850) 7 min 8 max	I/A I = 85 (40%) A = 125 (60%) (n=210) 8 min 10 max	I/A I = 51 (28%) A = 134 (72%) (n=185) 9 min 11 max	C/I/A C = 3,214 (49%) I = 2,628 (40%) A = 684 (11%) (n=6,526) 7 min 9 max
TOTAL	C/I/A C = 2,823 (48%) I = 1,960 (33%) A = 1,131 (19%) (n=5,914) 44 min 59 max	C/I/A C = 1,765 (21%) I = 4,542 (54%) A = 2,070 (25%) (n=8,377) 33 min 42 max	I/A I = 2,949 (58%) A = 2,096 (42%) (n=5,045) 33 min 42 max	I/A I = 1,254 (33%) A = 2,587 (67%) (n=3,841) 28 min 36 max	I/A I = 217 (22%) A = 762 (78%) (n=979) 32 min 40 max	I/A I = 51 (7%) A = 709 (93%) (n=760) 37 min 46 max	C/I/A C = 4,588 (18%) I = 10,973 (44%) A = 9,355 (38%) (n=24,916) 33 min 43 max

Note: Of the 27,830 felony convictions in FY 2003/04, 2,914 convictions were excluded from this table. These convictions did not fit within the sentencing grid due to discrepant offense classes, prior record levels, or for other reasons (such as consecutive sentencing or extraordinary mitigation). Death and life without parole sentences were excluded from the calculation of the average minimum and maximum sentences.

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2003/04 Statistical Report Data

BILL: Supporters say 'Rachel's Law' would send 'serious' message to shooters

FROM PAGE 1

Setzer is one of five sponsors of the bill. The bill is expected to be referred to a committee next week.

Under current state law, shooting into an occupied building or vehicle could lead to 20 to 25 months in prison for a defendant without a prior record and without aggravating or mitigating circumstances.

If the vehicle is on a public road, the bill would increase the penalty to between four years, 10 months and six years, one month. If the shooting further results in serious injury, the penalty would increase to between 10 years, five months and 13 years, one month.

The bill would not have affected Rachel's case because the shooter was a juvenile, but supporters said that it would send a message.

"If you're going to do this, it's a serious thing that you're doing," said Rep. Mark Hilton, R-Catawba, another sponsor. "If you shoot into a moving vehicle, it's hard to say, 'I didn't mean to harm anyone.'"

Besides vehicles on public roads, the bill would also apply to shooting into aircraft in the state's airspace or shooting into watercraft on any of the state's waterways.

The other three sponsors are Sen. Austin Allran, R-Catawba, Sen. John Snow, D-Cherokee, and Rep. Mark Hollo, R-Taylorsville.

DAVID INGRAM *is a staff writer for the Winston-Salem Journal.*

DAVID RICE, *Journal Raleigh reporter, contributed to this story.*

Bill would stiffen penalties for shooting into cars

■ **Unifour lawmakers sponsor bill inspired by 2003 shooting of Rachel Sanchez.**

HDR 3/11/05

BY DAVID INGRAM
MEDIA GENERAL NEWS SERVICE

RALEIGH — The minimum penalty for shooting into an occupied vehicle on a public road and causing serious injury could grow from less than two years in prison to nearly 10 1/2, under a bill filed in the General Assembly on Thursday that was inspired by a 2003 shooting.

Sponsors of the bill, titled "Rachel's Law," said it's intended to deter incidents such as the February 2003 shooting of Rachel Sanchez while she and family members were traveling through Conover on Interstate 40.

Sanchez

Rachel, of Virginia, was 4 years old at the time and was visiting family. They were traveling down I-40 when a 15-year-old boy in a yard near the highway fired at their vehicle. The bullet went through a window and hit Rachel in the head, causing brain damage from which she may never fully recover.

The boy was sentenced to 12 months on probation.

"People were scared to death when that happened," said state Rep. Mitch Setzer, R-Catawba. "This is an attempt to keep it from happening to someone else."

SEE BILL, A10

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 588

Short Title:	Expunge White-Collar Crim. Convictions.	(Public)
Sponsors:	Senators Weinstein; Albertson, Allran, Apodaca, Garwood, Goodall, Jenkins, and Kinnaird.	
Referred to:	Judiciary II.	

March 16, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR THE EXPUNCTION OF CONVICTIONS FOR CERTAIN WHITE-COLLAR CRIMINAL OFFENSES.

The General Assembly of North Carolina enacts:

SECTION 1. Article 5 of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-149. Expunction of records for conviction of certain white-collar criminal offenses if there are no subsequent criminal convictions for at least 10 years.**

(a) For purposes of this section, the term "white-collar criminal offense" means a violation of any of the following:

(1) Article 5 of Chapter 14 of the General Statutes. (Counterfeiting and Issuing Monetary Substitutes.)

(2) Article 16 of Chapter 14 of the General Statutes. (Larceny)

(3) Article 18 of Chapter 14 of the General Statutes. (Embezzlement)

(4) Article 19 of Chapter 14 of the General Statutes. (False Pretenses and Cheats.)

(5) Article 19A of Chapter 14 of the General Statutes. (Obtaining Property by False or Fraudulent Use of Credit Device or Other Means.)

(6) Article 19B of Chapter 14 of the General Statutes. (Financial Transaction Card Crime Act.)

(7) Article 19C of Chapter 14 of the General Statutes. (Financial Identity Fraud.)

(8) Article 20 of Chapter 14 of the General Statutes. (Frauds.)

(9) Article 21 of Chapter 14 of the General Statutes. (Forgery.)

(10) Article 56 of Chapter 14 of the General Statutes. (Debt Adjusting.)

(11) Article 58 of Chapter 14 of the General Statutes. (Records, Tapes, and Other Recorded Devices.)

(12) Article 60 of Chapter 14 of the General Statutes. (Computer-Related Crime.)
(13) Chapter 66 of the General Statutes. (Commerce and Business.)
(14) G.S. 105-236. (Certain Tax Penalties.)

(b) Whenever a person who has not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States, the laws of this State, or any other state, pleads guilty to or is guilty of a white-collar criminal offense, the person may file a petition in the court where he or she was convicted for expunction of the white-collar criminal offense from the person's criminal record. The petition cannot be filed earlier than 10 years after the date of the conviction, any period of probation, any period of post-release supervision, or the completion of the person's sentence, whichever occurs later. The petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he or she has been of good behavior for the 10-year period since the date of conviction of the white collar criminal offense in question or other later and appropriate time period as defined by this subsection and has not been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state.
(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage that they know the character and reputation of the petitioner in the community in which the petitioner lives and that the person's character and reputation are good.
(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.
(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at anytime prior to the conviction for the white-collar criminal offense in question or during the appropriate 10-year period as defined by this subsection following that conviction.
(5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner are outstanding.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented may call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the 10-year period that the judge deems desirable.

(c) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for 10 years from the date of conviction of the white-collar criminal offense in question or other appropriate time period as defined by subsection (b) of this section and the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner, then the court shall order that the petitioner be restored, in the contemplation of the law, to the status the petitioner occupied before the arrest or indictment or information for the white-collar criminal offense. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his or her failure to recite or acknowledge such arrest, indictment, information, trial, or response to any inquiry made of the person for any purpose.

(d) The court shall also order that the conviction for the white-collar criminal offense be expunged from the records of the court and direct all law enforcement agencies bearing record of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief, or head of any other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation.

(e) Any person entitled to an expunction under this section may also apply to the court for an order expunging DNA records when the person's DNA record or profile has been included in the State DNA Database, and the person's DNA sample is stored in the State DNA Databank. A copy of the application for expunction of the DNA record or DNA sample shall be served on the district attorney for the judicial district in which the charges of the white-collar criminal offense were brought not less than 20 days prior to the date of the hearing on the application. If the application for expunction is granted, a certified copy of the court order issued under subsection (c) of this section shall be attached to an order of expunction. The order of expunction shall include the name and address of the defendant and the defendant's attorney and shall direct the SBI to send a letter documenting expunction as required by subsection (f) of this section.

(f) Upon receiving an order of expunction entered pursuant to subsection (c) of this section, the SBI shall purge the DNA record and all other identifying information from the State DNA Database and the DNA sample stored in the State DNA Databank covered by the order, except that the order shall not apply to other offenses committed by the individual that qualify for inclusion in the State DNA Database and the State DNA Databank. A letter documenting expunction of the DNA record and destruction of the DNA sample shall be sent by the SBI to the defendant and the defendant's attorney at the address specified by the court in the order of expunction.

(g) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his or her county, file with the Administrative Office of the Courts the name of those persons granted expunctions under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential

file containing the name of persons granted expunctions. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expunction.

(h) A person who files a petition for expunction of a criminal record under this section must pay the clerk of superior court a fee of sixty-five dollars ($65.00) at the time the petition is filed. Fees collected under this subsection shall be deposited in the General Fund. This subsection does not apply to petitions filed by an indigent."

SECTION 2. This act becomes effective December 1, 2005.

SENATE BILL 588:
Expunge White-Collar Crim. Convictions.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Weinstein
Date:	April 5, 2005	**Summary by:**	Ben Popkin
Version:	First Edition		Committee Counsel

SUMMARY: ***Senate Bill 588 would provide for the expunction of convictions for certain white-collar criminal offenses. The bill would require a waiting period of 10 years after the conviction; no prior or subsequent felony or non-traffic misdemeanor offenses; and an affidavit attesting to the petitioner's character. The act would become effective December 1, 2005***

CURRENT LAW: Article 5 of the Criminal Procedure Act provides for the expunction of criminal records of certain criminal charges or convictions. Expunction is the process by which a record of criminal conviction is removed by order of the court, and the individual is restored to the status he or she occupied before the arrest or indictment. General Statute 15A-145 (Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor; expunction of certain other misdemeanors) allows a person convicted of a misdemeanor to file a petition for expunction of the misdemeanor from his or her criminal record if the person was under 18 at the time of a conviction or, in the case of a misdemeanor alcohol possession charge, the person was under 21 at the time of conviction. The petition may not be filed sooner than 2 years after the conviction or completion of probation and must include the following [1]:

1) an affidavit of good behavior for the two years following conviction, stating that the petitioner has not been convicted of any felony or non-traffic misdemeanor charge;

2) two affidavits of good character from persons unrelated to the petitioner;

3) a statement that the petition is a motion in the cause in the case wherein the petitioner was convicted; and

4) affidavits of the clerk of superior court, chief of police, and sheriff of the county of the offense and where the petitioner resides showing that petitioner has not been convicted of a felony or non-traffic misdemeanor offense prior to or in the two years since the conviction in question.

If the court finds in favor of the petitioner the clerk of superior court and the appropriate law enforcement agencies must expunge the record of the conviction.

Other sections of Article 5 provide for "Expunction of records when charges are dismissed or there are finding of not guilty as a result of identity fraud"[2] and "Expunction of DNA records when charges are dismissed on appeal or pardon of innocence is granted."[3].

BILL ANALYSIS: The bill would add a new section to Article 5 "Expunction of Records" of Chapter 15A "Criminal Procedure Act" of the General Statutes. The proposed G.S. 15A-149 – "Expunction of records for conviction of certain white-collar criminal offenses if there are no subsequent criminal convictions for at least 10 years" would apply to persons with no criminal record prior to the conviction

[1] G.S. 15A-145(a)(1) through (4).
[2] G.S. 15A-147.
[3] G.S. 15A-148.

for which expunction is sought. "White-collar criminal offense" would include the following Articles of Chapter 14 of the General Statutes:

- Article 5 – Counterfeiting and Issuing Monetary Substitutes;
- Article 16 – Larceny;
- Article 18 – Embezzlement;
- Article 19 – False Pretenses and Cheats;
- Article 19A – Obtaining Property by False or Fraudulent Use of Credit Device or Other Means;
- Article 19B – Financial Transaction Card Crime Act;
- Article 19C – Financial Identity Fraud;
- Article 20 – Frauds;
- Article 21 – Forgery;
- Article 56 – Debt Adjusting;
- Article 58 – Records, Tapes, and Other Recorded Devices; and
- Article 60 – Computer-Related Crime.

And the following offenses:

- Chapter 66 – Commerce and Business;
- General Statute 105-236 – Certain Tax Penalties

The procedure to be followed by the petitioner is modeled along the lines of the existing procedures for expunction of records, but with a waiting period of 10 years from the date of conviction or completion of probation (whichever is later). The petition would require at least the following:

1) an affidavit of good behavior for the 10 years following conviction, stating that the petitioner has not been convicted of any felony or non-traffic misdemeanor charge during that time;

2) two affidavits of good character from persons unrelated to petitioner;

3) a statement that the petition is a motion in the cause in the case wherein the petitioner was convicted;

4) affidavits of the clerk of superior court, chief of police, and sheriff of the county of the offense and where the petitioner resides showing that petitioner has not been convicted of a felony or non-traffic misdemeanor offense prior to or in the 10 years since the conviction in question; and

5) an affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner are outstanding.

If the court finds in favor of the petitioner the clerk of superior court and the appropriate law enforcement agencies will expunge their records of the conviction and the petitioner will be entitled to apply to the court for an order expunging the petitioner's DNA record from the State DNA Database and the petitioner's DNA sample stored in the State DNA Databank.

SB559-SMSS-001

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 559

Short Title:	Expunction/Convictions of Nonviolent Crimes.	(Public)
Sponsors:	Senators Kinnaird; Cowell, Graham, Holloman, Lucas, Nesbitt, Shaw, and Weinstein.	
Referred to:	Judiciary II.	

March 15, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR THE EXPUNCTION OF CONVICTIONS FOR CERTAIN NONVIOLENT CRIMINAL OFFENSES.

The General Assembly of North Carolina enacts:

SECTION 1. Article 5 of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-149. Expunction of records for conviction of certain nonviolent criminal offenses if there are no subsequent criminal convictions for at least 15 years.**

(a) For purposes of this section, the term "nonviolent criminal offense" means a misdemeanor, Class H felony, or Class I felony; however, the term does not include any of the following:

(1) An offense that includes assault as an essential element of the offense.

(2) An offense for which the offender must register under Article 27A of Chapter 14 of the General Statutes.

(3) An offense that includes the possession or use of a firearm as an essential element of the offense.

(4) An offense for which the offender was armed with or used a firearm.

(5) An offense that is trafficking under G.S. 90-95(h).

(b) Whenever a person who has not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States, the laws of this State, or any other state, pleads guilty to or is guilty of a nonviolent criminal offense, the person may file a petition in the court where he or she was convicted for expunction of the nonviolent criminal offense from the person's criminal record. The petition cannot be filed earlier than 15 years after the date of the conviction or any period of probation, whichever occurs later. The petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he or she has been of good behavior for the 15-year period since the date of conviction of the nonviolent criminal offense in question and has not been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state.

(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which the petitioner lives and that the person's character and reputation are good.

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the nonviolent criminal offense in question or during the 15-year period following that conviction.

(5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner are outstanding.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented may call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the 15-year period that the judge deems desirable.

(c) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for 15 years from the date of conviction of the nonviolent criminal offense in question and the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner, then the court shall order that the petitioner be restored, in the contemplation of the law, to the status the petitioner occupied before the arrest or indictment or information for the nonviolent criminal offense. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his or her failure to recite or acknowledge such arrest, indictment, information, trial, or response to any inquiry made of the person for any purpose.

(d) The court shall also order that the conviction for the nonviolent criminal offense be expunged from the records of the court and direct all law enforcement agencies bearing record of the same to expunge their records of the conviction. The

clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief, or head of any other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation.

(e) Any person entitled to an expunction under this section may also apply to the court for an order expunging DNA records when the person's DNA record or profile has been included in the State DNA Database, and the person's DNA sample is stored in the State DNA Databank. A copy of the application for expunction of the DNA record or DNA sample shall be served on the district attorney for the judicial district in which the charges of the nonviolent criminal offense were brought not less than 20 days prior to the date of the hearing on the application. The order of expunction shall include the name and address of the defendant and the defendant's attorney and shall direct the SBI to send a letter documenting expunction as required by subsection (f) of this section.

(f) Upon receiving an order of expunction entered pursuant to subsection (c) of this section, the SBI shall purge the DNA record and all other identifying information from the State DNA Database and the DNA sample stored in the State DNA Databank covered by the order, except that the order shall not apply to other offenses committed by the individual that qualify for inclusion in the State DNA Database and the State DNA Databank. A letter documenting expunction of the DNA record and destruction of the DNA sample shall be sent by the SBI to the defendant and the defendant's attorney at the address specified by the court in the order of expunction.

(g) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his or her county, file with the Administrative Office of the Courts, the name of those persons granted expunctions under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the name of persons granted expunctions. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expunction.

(h) A person who files a petition for expunction of a criminal record under this section must pay the clerk of superior court a fee of sixty-five dollars ($65.00) at the time the petition is filed. Fees collected under this subsection shall be deposited in the General Fund. This subsection does not apply to petitions filed by an indigent."

SECTION 2. This act becomes effective December 1, 2005.

Newton police make drug arrests, page 3.

The Observer Enterprise

Serving Catawba County since 1879 Vol. 129 No. 38 Newton, North Carolina

05/12/05 **B032
AUSTIN ALLRAN
PO BOX 2907
HICKORY NC 28603-2907

Tuesday
February 22, 2005

State: Easley stumps for education, page 11.

Sports: Red Devils get big playoff win, page 6

'No regard for human life'

Murder suspects face shooting charges for second time in a year.

By Michael Willard
O-N-E editor

When Erica Payne was shot and killed during a drive-by shooting in Sherrills Ford on Feb. 7, the incident stirred grim memories for another area family.

Then, as suspects in Payne's murder were announced, those disturbing memories turned to horror.

Rees

Reid

According to Catawba County Sheriff's Department investigators, Payne died after she was hit by a bullet that pierced the wall of a Sherrills Ford mobile home during a drive-by shooting. Shortly after the incident, police made several arrests in connection to the case including, Terrence Demario Williams, 20, of Troutman, Adam Robert Rees, 19, of Sherrills Ford, Bernie Deangelo Brunelle, 20, of Columbia, S.C., Robert Farmer, 27, of Sherrills Ford and Antione Reid, 19, of Catawba.

For one Sherrills Ford area family, some of those suspects now charged with murder are familiar. About a year ago, three of those suspects were allegedly involved in a shooting that injured their son and left a bullet in his chest for life.

In January 2004, Adam Christopher Hunt was at a party at Deangelo Brunelle's

•See **Life**, page 3

Regard

Continued from 1

home in Sherrills Ford, where he was involved in an altercation with Rees and Reid. According to police reports from 2004 that altercation concluded when Hunt was shot in the chest and arm.

"Evidently he went to a party at the house and they had a confrontation, and he (Adam Hunt) accused them of stealing something," Hunt's father, John Hunt said, adding his son believed $20 and a marijuana bowl were stolen from him. "When he confronted them, they pulled a gun on him. When he started to leave, he got into my truck and took out a gun that belonged to me and held it in the window."

John Hunt displayed the gun, Reid and Rees began shooting, according to John Hunt.

"When he came home that Sunday morning, he [had been] shot through the arm and the chest and they shot the car up," John Hunt said, adding he believed one of the individuals was using an automatic pistol, while the other was using a revolver.

> **"I am really concerned about putting somebody like this on the street. They already shot two people. They don't have concern for the life or well-being of another person."**
>
> **John Hunt**

Following the 2004 incident, Rees was charged with assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI), as well as discharging a weapon into occupied property.

Reid was charged with the same charges.

During ensuing investigation immediately following the 2004 shooting, police found about a half-pound of marijuana in the home of Brunelle, which led to drug distribution charges against both Rees and Reid.

According to Assistant District Attorney Sean McGinnis, Rees ultimately pleaded guilty to some of the charges in the case and received a probation sentence.

According to court records obtain by the O-N-E from the Catawba County clerk of court, Rees' AWDWIKISI charge was reduced to a misdemeanor charge of assault with a deadly weapon. The charge of discharging a firearm into occupied property was dismissed in the plea agreement. Meanwhile, a felony charge of possession with intent to sell or distribute marijuana was reduced to felony possession of marijuana, court records indicate. In the plea agreement, Rees was sentenced to 40 months of supervised probation.

Reid, McGinnis said, "exercised his right to a jury by his peers and was found not guilty." The result of that trial came about three weeks ago, McGinnis said.

The outcome of those cases left John Hunt appalled.

"Rees pleaded guilty and only got a few months probation ... I'm appalled that he just got probation after admitting his guilt," he said, adding he testified during Reid's trial, which didn't include evidence such as shell casings or firearms believed to be used in the incident. "The defense attorney for Antoine said, 'Since he (Rees) already confessed there is no evidence my client ever shot.' So he was acquitted."

John Hunt said he saw Rees during Reid's trial.

"He sat there at the trial and looked at me and just giggled, like 'Hey, you know what I did, and I didn't get anything for this,'" he said.

Following the result of cases against Reid and Rees, the pair was implicated in the murder of Payne, and John Hunt argues the 18-year-old girl's death could have been avoided.

"They let these guys out of jail and they turned around and shot in the house," John Hunt said. "It is totally uncalled for and if people aren't outraged, they should be."

Some people in the Sherrills Ford community are outraged, he said. Petitions present at restaurants and businesses and circulating throughout the southeastern Catawba County community ask that suspects in the case, including Reid, Rees and Brunelle, be kept in jail. Specifically it asks "justice authorities to fulfill their obligation to prevent these people from repeating such a heinous crime."

"I am really concerned about putting somebody like this on the street. They already shot two people. They don't have concern for the life or well-being of another person," John Hunt said. "That is why laws were enacted to protect the public. I think letting these guys loose would not be in the public's best interest."

Fur John Hunt and his son, the 2004 shooting led to a positive outcome.

"My Adam was heading in the wrong direction prior to getting shot," John Hunt said. "He really turned around after that. He is going to church and has settled down. He now understands that he is mortal, and he still has a bullet from where he was shot in his chest as a reminder of that night.

"It has been a positive thing for him, and it has turned his life around. I know he would never associate with those guys again," he continued. "It has been a Godsend for us. We prayed about it and we thanked Him and like to see him now headed in the right direction."

Still, John Hunt has concer for the rest of the community.

"It concerns me. As a parent, am concerned for other people children," he said. "We woul just like to see the law take it course. ... These guys have r regard whatsoever for huma

Gerry Johnson (Sen. Hartsell)

From: Gerry Johnson (Sen. Hartsell)
Sent: Tuesday, April 05, 2005 1:50 PM
To: Sen. Austin Allran; Sen. Ellie Kinnaird; Sen. David Weinstein; Sen. Walter Dalton; Sen. Fletcher Hartsell, Jr.
Subject: Sen. J II Committee Meeting April 7, 2005

Principal Clerk _____
Reading Clerk _____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	April 7, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 486	Rachel's Law.	Senator Allran
SB 559	Expunction/Convictions of Nonviolent Crimes.	Senator Kinnaird
SB 588	Expunge White-Collar Crim. Convictions.	Senator Weinstein
SB 552	DOI Hearing/Unauth. Ins. Summary C&D Order.-AB	Senator Dalton
SB 574	Amend Post-Release Supervision Laws.	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, April 7, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 486	Rachel's Law.	Senator Allran
SB 559	Expunction/Convictions of Nonviolent Crimes.	Senator Kinnaird
SB 588	Expunge White-Collar Crim. Convictions.	Senator Weinstein
SB 552	DOI Hearing/Unauth. Ins. Summary C&D Order.-AB	Senator Dalton
SB 574	Amend Post-Release Supervision Laws.	Senator Hartsell

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

April 7, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on April 7, 2005, with nineteen members present. Senator Hartsell introduced pages Emily Bean and Dericka Burleson and thanked them for serving.

SB 486 (Rachel's Law.) Senator Hartsell recognized Senator Allran to explain the bill and the changes that had been made in the Proposed Committee Substitute. Senator Forrester moved for a favorable report for the Proposed Committee Substitute, unfavorable to the original bill, with a referral to Appropriations. All voted and the motion carried.

SB 559 (Expunction/Convictions of Nonviolent Crimes.) Senator Hartsell invited Senator Kinnaird to explain the bill and called for a motion to accept the Proposed Committee Substitute for purposed of discussion. Senator Holloman moved that the PCS be accepted. All voted and the motion passed.

Senator Hartsell explained the combining of Senator Kinnaird's bill (SB 559) and Senator Weinstein's bill (SB 588) which formed the Proposed Committee Substitute. Senator Kinnaird explained the bill. Questions and comments by Senators Dannelly, Holloman, Bingham, Dalton, Allran, Swindell, Webster, Forrester and Goodall were answered by Senator Kinnaird, Senator Hartsell, Mr. Pete Powell, representing the Administrative Office of the Courts, Gregg McCloud, Legislative Counsel for the North Carolina Department of Justice and Mr. Troy Page from the North Carolina Sentencing and Policy Advisory Commission. Senator Holloman offered an amendment and then withdrew the amendment. Senator Dannelly offered an amendment. All voted and the amendment passed. Senators Apodaca and Kinnaird respectively offered amendments which were voted on and passed. Senator Kinnaird moved for a favorable report for the Proposed Committee Substitute, unfavorable to the original bill with a motion to roll into a new Committee Substitute with a sequential referral to Finance. All members voted and the motion carried.

With no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

CORRECTED REPORT

Wednesday, April 13, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **486** Rachel's Law.

Draft Number:	75282
Sequential Referral:	None
Recommended Referral:	Appropriations/Base Budget
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 486*
PROPOSED COMMITTEE SUBSTITUTE S486-PCS75282-RC-10

Short Title: Rachel's Law. (Public)

Sponsors:

Referred to:

March 15, 2005

A BILL TO BE ENTITLED

AN ACT TO INCREASE THE PENALTY FOR DISCHARGING CERTAIN WEAPONS INTO OCCUPIED PROPERTY IN CERTAIN CIRCUMSTANCES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-34.1 reads as rewritten:

"**§ 14-34.1. Discharging certain barreled weapons or a firearm into occupied property.**

(a) Any person who willfully or wantonly discharges or attempts to ~~discharge:~~

~~(1)~~ ~~Any~~ discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per ~~second; or~~

~~(2)~~ ~~A firearm~~

second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E ~~felony.~~felony, unless a greater penalty applies.

(b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an occupied dwelling or into any occupied vehicle, aircraft, watercraft, or other conveyance that is being operated upon a public road, highway, public vehicular area, railroad track or waterway, or in any airspace is guilty of a Class C felony.

(c) If a person violates subsection (a) of this section and the violation results in serious injury to any person, the person is guilty of a Class B2 felony."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 7 2005
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Eric Bellas	Catawba County/ District Attorney's Office ADA
Kathleen Edwards	UNC-CH Legis. Reporting Service
TRAY PAGE	Sentencing Commission
Karen [illegible]	" "
John Bowdish	ADA
[illegible]	[illegible]
BILL HALE	ACLI
Frank W. Folger	NCDOT
[illegible]	AOC
Mildred Spearman	NCDOC
Tim Moose	NCDOC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 486*
PROPOSED COMMITTEE SUBSTITUTE S486-CSRC-10 [v.6]

4/6/2005 10:49:01 AM

Short Title: Rachel's Law. (Public)

Sponsors:

Referred to:

March 15, 2005

A BILL TO BE ENTITLED

AN ACT TO INCREASE THE PENALTY FOR DISCHARGING CERTAIN WEAPONS INTO OCCUPIED PROPERTY IN CERTAIN CIRCUMSTANCES.

The General Assembly of North Carolina enacts:

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~~(1) Any~~ discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per ~~second; or~~

~~(2) A firearm~~

second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E ~~felony.~~felony, unless a greater penalty applies.

(b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an occupied dwelling or into any occupied vehicle, aircraft, watercraft, or other conveyance that is being operated upon a public road, highway, public vehicular area, railroad track or waterway, or in any airspace is guilty of a Class C felony.

(c) If a person violates subsection (a) of this section and the violation results in serious injury to any person, the person is guilty of a Class B2 felony."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

SENATE BILL 486:
Rachel's Law

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Sens. Allran and Snow
Date:	April 7, 2005	**Summary by:**	Kory J. Goldsmith KJG
Version:	Proposed Committee Substitute S486-CSRC-10[v.6]		Committee Counsel

SUMMARY: ***Senate Bill 486 would create two new criminal offenses. The first would be the offense of willfully or wantonly discharging a firearm or certain barreled weapons into an occupied dwelling, or an occupied vehicle, aircraft, watercraft or other conveyance that is being operated upon public streets, on railroad tracks, on waterways, or in any airspace. A violation of this offense would be a Class C felony. The second new offense would occur if serious injury to a person results from the discharge or attempted discharge of a firearm or barreled weapon into any occupied building, structure, vehicle, watercraft or aircraft. A violation of the second new offense would be a Class B2 felony.***

The Proposed Committee Substitute differs from the original bill by broadening the instances when the B2 felony might occur and by making the C felony applicable to trains operating on railroad tracks.

The act becomes effective December 1, 2005 and applies to offenses committed on or after that date.

CURRENT LAW: A person is guilty of the crime "Discharging certain barreled weapons or a firearm into occupied property" (G.S. 14-34.1) if the following applies:

- The person willfully or wantonly discharges or attempts to discharge a firearm or a barreled weapon;
- Into property;
- That is occupied when the weapon is discharged.

North Carolina courts have held that the property is occupied if someone is actually present at the time of weapon is discharged. The person is guilty of the offense only if he or she knows, or has reasonable grounds to believe, that the property is occupied.

An act is done willfully when it is done intentionally and without an honest belief that there is an excuse or justification for it. An act is done wantonly when it is done with conscious and intentional disregard of and indifference to the rights and safety of others and without care for the consequences, even though the offender had not formed an intention to harm anyone.

Commission of this crime is a Class E felony. Assuming no prior convictions and in the absence of aggravating or mitigating factors, a Class E felony is punishable by a minimum of 20-25 months intermediate or active punishment.

BILL ANALYSIS: Senate Bill 486 would create two new offenses having to do with the discharge of a firearm into certain occupied structures. It would be a Class C felony for a person to discharge a firearm into an occupied:

- dwelling; or

- vehicle, aircraft, watercraft, or other conveyance that is being operated upon a public street, highway, public vehicular area, railroad track, waterway, or in any airspace.

Assuming no prior convictions and in the absence of aggravating or mitigating factors, a Class C felony is punishable by a minimum of 58 to 73 months of active punishment.

The second new crime would occur if:

- The person willfully or wantonly discharges or attempts to discharge a firearm or a barreled weapon;
- Into property;
- That is occupied when the weapon is discharged; and
- Causes serious injury.

What qualifies as a serious injury would be a question of fact, but it has been delineated somewhat by case law to include, "physical injury that causes great pain and suffering... or serious mental injury". It is a lesser standard than 'serious bodily injury', used elsewhere in the criminal statutes.

Assuming no prior convictions and in the absence of aggravating or mitigating factors, a Class B2 felony is punishable by a minimum of 125-157 months of active punishment.

The only other B2 felony is Second Degree Murder.

BACKGROUND: Under current law, G.S. 14-34.1 does not provide for an increased penalty in situations where violation of the offense results in injury to another. While G.S. 14-32(a) (Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury) is a Class C felony, it probably cannot be used in situations where the defendant discharged the weapon into occupied property, but did not have a specific intent to harm a particular person.

TECHNICAL CONSIDERATIONS:

The North Carolina Sentencing and Policy Advisory Commission has reviewed the offense classifications for the 1st Edition of the bill and found both sections to be inconsistent with the offense classification criteria for the proposed classes. The PCS uses the same offense classifications as the 1st edition of the bill.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 559
PROPOSED COMMITTEE SUBSTITUTE S559-CSSS-3 [v.1]

4/6/2005 5:10:36 PM

Short Title: Expunction/Convictions of Nonviolent Crimes. (Public)

Sponsors:

Referred to:

March 15, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR THE EXPUNCTION OF CONVICTIONS FOR CERTAIN NONVIOLENT CRIMINAL OFFENSES.

The General Assembly of North Carolina enacts:

SECTION 1. Article 5 of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-149. Expunction of records for conviction of certain nonviolent criminal offenses if there are no subsequent criminal convictions for at least 15 years.**

(a) For purposes of this section, the term "nonviolent criminal offense" means a misdemeanor, Class H felony, or Class I felony; however, the term does not include any of the following:

(1) An offense that includes assault as an essential element of the offense.

(2) An offense for which the offender must register under Article 27A of Chapter 14 of the General Statutes.

(3) An offense that includes the possession or use of a firearm as an essential element of the offense.

(4) An offense for which the offender was armed with or used a firearm.

(5) An offense that is trafficking under G.S. 90-95(h).

(b) Whenever a person who has not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States, the laws of this State, or any other state, pleads guilty to or is guilty of a nonviolent criminal offense, the person may file a petition in the court where he or she was convicted for expunction of the nonviolent criminal offense from the person's criminal record. The petition cannot be filed earlier than 15 years after the date of the conviction or any period of probation, whichever occurs later. The petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he or she has been of good behavior for the 15-year period since the date of conviction of the nonviolent criminal offense in question and has not been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state.

(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which the petitioner lives and that the person's character and reputation are good.

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the nonviolent criminal offense in question or during the 15-year period following that conviction.

(5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner are outstanding.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented may call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the 15-year period that the judge deems desirable.

(c) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for 15 years from the date of conviction of the nonviolent criminal offense in question and the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner, then the court shall order that the petitioner be restored, in the contemplation of the law, to the status the petitioner occupied before the arrest or indictment or information for the nonviolent criminal offense. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his or her failure to recite or acknowledge such arrest, indictment, information, trial, or response to any inquiry made of the person for any purpose.

(d) The court shall also order that the conviction for the nonviolent criminal offense be expunged from the records of the court and direct all law enforcement agencies bearing record of the same to expunge their records of the conviction. The

clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief, or head of any other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation.

(e) Any person entitled to an expunction under this section may also apply to the court for an order expunging DNA records when the person's DNA record or profile has been included in the State DNA Database, and the person's DNA sample is stored in the State DNA Databank. A copy of the application for expunction of the DNA record or DNA sample shall be served on the district attorney for the judicial district in which the charges of the nonviolent criminal offense were brought not less than 20 days prior to the date of the hearing on the application. The order of expunction shall include the name and address of the defendant and the defendant's attorney and shall direct the SBI to send a letter documenting expunction as required by subsection (f) of this section.

(f) Upon receiving an order of expunction entered pursuant to subsection (c) of this section, the SBI shall purge the DNA record and all other identifying information from the State DNA Database and the DNA sample stored in the State DNA Databank covered by the order, except that the order shall not apply to other offenses committed by the individual that qualify for inclusion in the State DNA Database and the State DNA Databank. A letter documenting expunction of the DNA record and destruction of the DNA sample shall be sent by the SBI to the defendant and the defendant's attorney at the address specified by the court in the order of expunction.

(g) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his or her county, file with the Administrative Office of the Courts, the name of those persons granted expunctions under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the name of persons granted expunctions. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expunction.

(h) A person who files a petition for expunction of a criminal record under this section must pay the clerk of superior court a fee of one hundred dollars ($100.00) at the time the petition is filed. Fifty dollars ($50.00) of the fee collected under this subsection shall be remitted to the North Carolina Department of Justice to pay the costs of the SBI purging records pursuant to receipt of an order of expunction. The remaining fifty dollars ($50.00) of the fee shall be remitted to the Administrative Office of the Courts to pay the costs associated with implementation of the provisions of this Article. This subsection does not apply to petitions filed by an indigent."

SECTION 2. This act becomes effective December 1, 2005.

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EXPUNCTION OF CRIMINAL RECORDS

This is a summary of North Carolina law concerning the expunction of criminal records. Expunction is the process by which a record of criminal conviction is removed by order of the court, and the individual is restored to the status he or she occupied before the arrest or indictment. The terms 'expunction' and 'expungement' are often used interchangeably, and both appear in the statutes. In very limited circumstances, North Carolina law permits the expunction of certain offenses from a person's criminal record. There are several requirements that must be met for expunction and each individual can generally be granted only one expungement in his or her lifetime. Any person seeking advice regarding a specific case should contact an attorney of his or her choice for more information.

Expunction When Charges Dismissed/Not Guilty

- ***Charges Dismissed Or Person Found Not Guilty*** - G.S. 15A-146 provides for the expunction of records when charges are dismissed or there is a finding of not guilty. A person charged with any crime, whether a misdemeanor or a felony, who is not convicted of that offense, can apply to have the charge expunged. *Persons who have previously received an expungement under this or other specified provisions, or persons who have previously been convicted of a felony would not qualify under this provision.*

- ***Charges Dismissed Or Person Found Not Guilty As A Result Of Identity Fraud*** - G.S. 15A-147 provides for the expunction of records when a charge is dismissed or there is a finding of not guilty in a case where a person is charged with a crime as a result of someone else using the person's identifying information to commit an infraction or crime. When the charge against the person is dismissed, a finding of not guilty is made, or the conviction is set aside, the person can apply to have the charge expunged. *There is no limit to the number of times a person who is the victim of identity fraud can qualify for an expungement under this provision.*

- ***Charges Dismissed Or Person Found Not Guilty Of Certain Drug-Related Offenses Committed While Under The Age Of 21*** - G.S. 90-96(d) provides for the expunction of records when a person is charged with misdemeanor possession of a controlled substance or possession of less than 1 gram of cocaine, and the charges are subsequently dismissed or there is a finding of not guilty. *An order of expunction must be entered if the court determines that the person was not over 21 at the time any of the proceedings occurred.* A similar provision is contained in G.S. 113.14(d) with regard to misdemeanor possession of controlled substances in violation of the Toxic Vapors Act and possession of drug paraphernalia.

Expunction When The Offender Was Under A Specified Age At The Time Of The Offense or Conviction

- ***Juvenile Records*** - G.S. 7B-3200 provides for a person who has reached the age of 18 to petition for the expunction of records relating to the person's having been adjudicated delinquent or undisciplined while

a minor. *This provision does not allow the expunction of records relating to an offense that would have been a Class A-E felony if committed by an adult.* The statute also provides for expunction of juvenile records when a juvenile petition was dismissed without adjudication

- ***Convictions of Misdemeanor While Under The Age Of 18*** - G.S. 15A-145 provides for the expunction of records for first offenders under the age of 18 at the time of conviction of a misdemeanor. *A person who is convicted of a misdemeanor prior to reaching the age of 18 may have that conviction expunged after 2 years, assuming there have been no other convictions within that time period.*

- ***Misdemeanor Possession Of Alcohol While Under the Age of 21*** - G.S. 15A-145 also provides for the expunction of records for first offenders under the age of 21 at the time of conviction of misdemeanor possession of alcohol. *A person who is convicted of misdemeanor possession of alcohol while under the age of 21 may have that conviction expunged after 2 years, assuming there have been no other convictions in that time period.*

Expunction Of Convictions For Certain Drug-Related Offenses

- ***Conditional Discharge And Expunction For First Offenders*** - G.S. 90-96 and G.S. 90-113.14 provide for the conditional discharge and expunction of records for first offenders, and apply to persons who have not previously been convicted of any offense under North Carolina's Controlled Substances Act, Toxic Vapors Act, or Drug Paraphernalia Act, or under corresponding federal law or the laws of another state. When such person pleads guilty to or is found guilty of misdemeanor drug possession, possession of less than one gram of cocaine, possessing drug paraphernalia, or inhaling or possessing any substance having the property of releasing toxic vapors or fumes, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place the offender on probation. The probation, if imposed, must be for a period of at least one year and require, absent extenuating circumstances, that the defendant who was found guilty or pleads guilty enroll in and successfully complete, within 150 days of the date of the imposition of probation, the program of instruction at the drug education school approved by the Department of Health and Human Services. Upon fulfillment of the terms and conditions of probation, the person is discharged and the proceedings against him are dismissed. Discharge and dismissal under G.S. 90-96 and G.S. 90-113.14 may occur only once with respect to any person. Both G.S. 90-96(e) and 90-113.14(e) provide that, upon the discharge and dismissal of the proceedings, an offender who was not over 21 years of age at the time of the offense may apply to the court for an order of expunction. The court may, upon application of the person not sooner than 12 months after conviction, order cancellation of the judgment of conviction and expunction of the records.

Brenda J. Carter, Research Division
North Carolina General Assembly
October 27, 2004

SENATE BILL 559:
Expunction/Convictions of Nonviolent Crimes.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Kinnaird
Date:	April 5, 2005	**Summary by:**	Ben Popkin
Version:	Proposed Committee Substitute		Committee Counsel

SUMMARY: ***Senate Bill 559 would provide for the expunction of convictions for certain nonviolent criminal offenses. The bill would require a waiting period of 15 years after the conviction; no prior or subsequent felony or non-traffic misdemeanor offenses; and an affidavit attesting to the petitioner's character. The Proposed Committee Substitute would set the fee for filing an application for expunction at $100.00, to be divided equally between the Department of Justice and the Administrative Office of the Courts. The act would become effective December 1, 2005.***

CURRENT LAW: Article 5 of the Criminal Procedure Act provides for the expunction of criminal records of certain criminal charges or convictions. Expunction is the process by which a record of criminal conviction is removed by order of the court, and the individual is restored to the status he or she occupied before the arrest or indictment. General Statute 15A-145 (Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor; expunction of certain other misdemeanors) allows a person convicted of a misdemeanor to file a petition for expunction of the misdemeanor from his or her criminal record if the person was under 18 at the time of a conviction or, in the case of a misdemeanor alcohol possession charge, the person was under 21 at the time of conviction. The petition may not be filed sooner than 2 years after the conviction or completion of probation and must include the following [1]:

1) an affidavit of good behavior for the two years following conviction, stating that the petitioner has not been convicted of any felony or non-traffic misdemeanor charge;

2) two affidavits of good character from persons unrelated to the petitioner;

3) a statement that the petition is a motion in the cause in the case wherein the petitioner was convicted; and

4) affidavits of the clerk of superior court, chief of police, and sheriff of the county of the offense and where the petitioner resides showing that petitioner has not been convicted of a felony or non-traffic misdemeanor offense prior to or in the two years since the conviction in question.

If the court finds in favor of the petitioner the clerk of superior court and the appropriate law enforcement agencies must expunge the record of the conviction.

Other sections of Article 5 provide for "Expunction of records when charges are dismissed or there are finding of not guilty as a result of identity fraud"[2] and "Expunction of DNA records when charges are dismissed on appeal or pardon of innocence is granted."[3].

BILL ANALYSIS: The bill would add a new section to Article 5 "Expunction of Records" of Chapter 15A "Criminal Procedure Act" of the General Statutes. The proposed G.S. 15A-149 – "Expunction of

[1] G.S. 15A-145(a)(1) through (4).
[2] G.S. 15A-147.
[3] G.S. 15A-148.

records for conviction of certain nonviolent criminal offenses if there are no subsequent criminal convictions for at least 15 years" would apply to persons with no criminal record prior to the conviction for which expunction is sought. "Nonviolent criminal offense" would include misdemeanors, Class H and Class I felonies, but would specifically exclude the following offenses:

- an offense that includes assault as an essential element of the offense;
- an offense included in Article 27A "Sex Offender and Public Protection Registration Programs"[4];
- an offense involving a firearm;
- a drug trafficking offense[5].

The procedure to be followed by the petitioner is modeled along the lines of the existing procedures for expunction of records, but with a waiting period of 15 years from the date of conviction or completion of probation (whichever is later). The petition would require at least the following:

1) an affidavit of good behavior for the 15 years following conviction, stating that the petitioner has not been convicted of any felony or non-traffic misdemeanor charge during that time;

2) two affidavits of good character from persons unrelated to petitioner;

3) a statement that the petition is a motion in the cause in the case wherein the petitioner was convicted;

4) affidavits of the clerk of superior court, chief of police, and sheriff of the county of the offense and where the petitioner resides showing that petitioner has not been convicted of a felony or non-traffic misdemeanor offense prior to or in the 15 years since the conviction in question; and

5) an affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner are outstanding.

The bill would set the filing fee at $100.00, to be divided equally between the North Carolina Department of Justice and the Administrative Office of the Courts to cover costs associated with implementation of provisions of the bill.

If the court finds in favor of the petitioner the clerk of superior court and the appropriate law enforcement agencies will expunge their records of the conviction and the petitioner will be entitled to apply to the court for an order expunging the petitioner's DNA record from the State DNA Database and the petitioner's DNA sample stored in the State DNA Databank.

SB559-SMSS-001

[4] G.S. 14-208.5 through 14-208.32. (Article 27A of Chapter 14 of the General Statutes)
[5] G.S. 90-95(h).

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. 1

H. B. No. _____ DATE 4/7/05

S. B. No. 559 Amendment No. _____

COMMITTEE SUBSTITUTE S559-CSSS-3[v.1] (to be filled in by Principal Clerk)

Rep.)
) Dannelly
Sen.)

moves to amend the bill on ~~page~~ 3 ~~line~~ 28 throughout

( ) WHICH CHANGES THE TITLE

by deleting the number "15" where ever it appears and substituting the number "10".

SIGNED C. L. Dannelly

ADOPTED X FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____

S. B. No. 559

COMMITTEE SUBSTITUTE X

DATE 4/7/05

Amendment No. _____
(to be filled in by Principal Clerk)

Rep.)
(Sen.) Apodaca

moves to amend the bill on page 3, line S 6-22

( ) WHICH CHANGES THE TITLE.

by deleting the lines and renumbering the remaining subsections.

ADOPTED X FAILED _____ TABLED _____

SIGNED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____ DATE 4/7/05

S. B. No. 559 Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE 5559-CSSS-3[v.1]

Rep.)
Sen.) Kinnaird

moves to amend the bill on page 3, line 5

( ) WHICH CHANGES THE TITLE

by inserting the following after the period

"A person shall not be eligible to ~~obtain subsequent~~ have subsequent criminal offenses expunged."

SIGNED _____

ADOPTED X FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	April 12, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 686	Meth. Lab Prevention Act.	Senator Dalton
SB 552	DOI Hearing/Unauth. Ins. Summary C&D Order.-AB	Senator Dalton
SB 574	Amend Post-Release Supervision Laws.	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, April 12, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 686	Meth. Lab Prevention Act.	Senator Dalton
SB 552	DOI Hearing/Unauth. Ins. Summary C&D Order.-AB	Senator Dalton
SB 574	Amend Post-Release Supervision Laws.	Senator Hartsell

Presentations

Roy Cooper, Attorney General of North Carolina
Lonnie Wright, Director Oklahoma Bureau of Narcotics
Darien South, Firefighter

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

April 12, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on February 22, 2005, with fourteen members present. Senator Hartsell introduced the pages and thanked them for serving. Senator Kinnaird was recognized to introduced her granddaughter, Sarah Kinnaird, who was visiting the committee meeting.

SB 686 (Meth. Lab Prevention Act.) Senator Hartsell asked for a motion to accept the Proposed Committee Substitute for purposes of discussion. Senator Apodaca so moved, all voted and the motion passed. Senator Hartsell recognized Senator Dalton to explain the proposed committee substitute. After giving an explanation, Senator Dalton recognized Mr. Roy Cooper, Attorney General of North Carolina, who spoke on the manufacturing and dangers of methamphetamine labs. Attorney General Cooper then introduced Mr. Lonnie Wright, Director, Oklahoma Bureau of Narcotics, who spoke on the problems Oklahoma has encountered with Methamphetamine Labs and the steps the state has taken to deal with the problem. Senator Snow, co-sponsor, also spoke on the bill. Senator Hartsell invited Mr. Darien South, an injured firefighter, to relate his experience in fighting a fire where a methamphetamine lab existed. Questions by Senators Allran, Bingham, Forrester, Kinnaird, Berger and Dorsett were answered by Senators Dalton, Snow and Hartsell, Director Wright, and Attorney General Cooper. Senator Hartsell thanked those making presentations for coming. The bill will be heard again at a later date.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

April 12, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
	Watauga County DA's Office Boone, NC
Darien South	Deep Gap Fire Dept. Deep Gap, NC
Mary Smith	Boone, NC
Mike Chandler	Fayetteville, NC
Ramesh Mehta	Cliffside Park, NJ
Usha Mehta	" " "
Tim Moore	NC DOC
Robin Pendergraft	NC SBI
Jerry Ratley	NC SBI
Karen Jones	NC Sentencing Comm.
Troy Page	NC Sentencing Comm'n.
Melisa Groomes	Parole Commission

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Patti A. Yancey	ACCU
Gary Harris	NCPMA
Doug Howery	NCPMA
Lu-Ann Cox	FAMM
Stephen Bryant	AG's office
Doug Lassiter	NCSTA
~~JD Mabry~~	Gov. office
Sean Devereux	NCATC / IDS commission
Katie Tester	Appalachian State University
Emily Hobbs	Appalachian State University
Dara Rose	Appalachian State University

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John Snow	Staff
Van W. Shaw	NCSBI
Ann C. Hamlin	NCSBI
Lee Hodge	KCLH
Andy Ellen	NCRLWA
Erin Kinsey	NCCW
Deb P. Chaudhuri	Fayetteville
Muthu Chaudhuri	Fayetteville.
Sarah Kinnaird	Visitor
Dave Ingram	WSJ
Mary Robertson	AP

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Meredith Lilley	Appalachian State University
Jessica Peedin	"
Cassie Snyder	Appalachian State
Sara Osborne	Appalachian State University
Catherine Colarco	Appalachian State University
Kellie Reed Ashcraft	Appalachian State Univ.
Cynthia Kittle	" " "
RICHARD BLANKENHORN	" "
John Bourdish	ASU
Kimberly Hankins	Appalachian State University
Kathleen Vaughn	Appalachian State Univ.
Ashley Watts	Appalachian State University
Wendy Blanton	Appalachian State
Lauren Cho	Appalachian State University
Miranda Cline	ASU

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jay J. Chan[illegible]	DOJ
Kristi Hyman	NCDOJ
Eddie Caldwell	NC Sheriffs' Assn.
Melissa Lovell	NCDOJ
Rick Zechini	NC Assoc. of REALTORS
Colleen Kochanek	Holt York
Bill Lane	Kilpatrick Stockton
James Spruce	Vann+Sheridan
Frank W. Folger	NCDOI
Byron Saintsing	Smith Helms
Ellis Reynolds	NC DOJ
Courtney D Alexander	YOI
Rachel Progett	Appalachian State University

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 686

Short Title:	Meth. Lab Prevention Act.	(Public)
Sponsors:	Senators Dalton, Snow; Albertson, Apodaca, Atwater, Berger of Franklin, Bingham, Blake, Boseman, Brown, Dannelly, Dorsett, Hagan, Hartsell, Holloman, Jacumin, Kerr, Lucas, Malone, Nesbitt, Purcell, Rand, Swindell, Thomas, and Weinstein.	
Referred to:	Judiciary II.	

March 21, 2005

A BILL TO BE ENTITLED

AN ACT TO ADD PSEUDOEPHEDRINE, A CRITICAL INGREDIENT IN THE MANUFACTURE OF THE ILLEGAL DRUG METHAMPHETAMINE, TO SCHEDULE V OF THE CONTROLLED SUBSTANCES LIST, TO APPROPRIATE FUNDS TO THE DEPARTMENT OF JUSTICE TO COMBAT THE MANUFACTURE OF METHAMPHETAMINE, TO MAKE THE MANUFACTURE OF METHAMPHETAMINE IN A DWELLING THAT IS ONE OF FOUR OR MORE CONTIGUOUS DWELLINGS AN AGGRAVATING FACTOR, AND TO AUTHORIZE THE LEGISLATIVE RESEARCH COMMISSION TO STUDY THE ISSUES RELATING TO THE ABUSE OF METHAMPHETAMINE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 90-93 reads as rewritten:

"**§ 90-93. Schedule V controlled substances.**

(a) This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a low potential for abuse relative to the substances listed in Schedule IV of this Article; currently accepted medical use in the United States; and limited physical or psychological dependence relative to the substances listed in Schedule IV of this Article. The following controlled substances are included in this schedule:

(1) Any compound, mixture or preparation containing any of the following limited quantities of narcotic drugs or salts thereof, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or

preparation valuable medicinal qualities other than those possessed by the narcotic alone:

a. Not more than 200 milligrams of codeine or any of its salts per 100 milliliters or per 100 grams.

b. Not more than 100 milligrams of dihydrocodeine or any of its salts per 100 milliliters or per 100 grams.

c. Not more than 100 milligrams of ethylmorphine or any of its salts per 100 milliliters or per 100 grams.

d. Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

e. Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

f. Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

(2) Repealed by Session Laws 1985, c. 172, s. 9.

(3) Stimulants. – Unless specifically exempted or excluded or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers and salts of isomers:

a. Repealed by Session Laws 1993, c. 319, s. 7.

b. Pyrovalerone.

(4) Any compound, mixture, or preparation containing any detectable quantity of pseudoephedrine base, its salts or optical isomers, or salts of optical isomers; however, this does not include compounds, mixtures, or preparations that are in liquid, liquid capsule, or gel capsule form if pseudoephedrine is not the only active ingredient.

(b) A Schedule V substance may be sold at retail without a prescription only by a registered pharmacist and no other person, agent or employee may sell a Schedule V substance even if under the direct supervision of a pharmacist.

(c) Notwithstanding the provisions of G.S. 90-93(b), after the pharmacist has fulfilled the responsibilities required of him in this Article, the actual cash transaction, credit transaction, or delivery of a Schedule V substance, may be completed by a nonpharmacist. A pharmacist may refuse to sell a Schedule V substance until he is satisfied that the product is being obtained for medicinal purposes only.

(d) A Schedule V substance may be sold at retail without a prescription only to a person at least 18 years of age. The pharmacist must require every retail purchaser of a Schedule V substance to furnish suitable identification, including proof of age when appropriate, in order to purchase a Schedule V substance. If the Schedule V substance is pseudoephedrine, then the retail purchaser must provide a photo identification showing the date of birth of the person. The name and address obtained from such identification shall be entered in the record of disposition to consumers.

(e) No person shall purchase, receive, or otherwise acquire more than nine grams of any mixture, product, or preparation containing the controlled substance described in

subdivision (a)(4) of this section within any 30-day period; however, this limit does not apply if the controlled substance is dispensed pursuant to a valid prescription.

(f) The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, by rule, may exempt other products from this Schedule that the Commission finds are not used in the illegal manufacture of methamphetamine or other dangerous controlled substances. A manufacturer of a drug product may apply for removal of the product from this Schedule if the product is determined by the Commission to have been formulated in such a way as to effectively prevent the conversion of the active ingredient into methamphetamine."

SECTION 2. There is appropriated from the General Fund to the Department of Justice the sum of eight hundred thirty-six thousand six hundred dollars ($836,000) for the 2005-2006 fiscal year to combat the illegal manufacture of methamphetamine. The funds appropriated by this act shall be used to create 13 new positions in the State Bureau of Investigation to combat illegal methamphetamine lab operations in North Carolina. These new positions shall include the following: six SBI drug chemists, two drug chemistry technicians, four SBI field agents, and one special agent supervisor who would oversee a coordinated statewide methamphetamine elimination strategy. These new positions are established beginning January 1, 2006.

SECTION 3. G.S. 15A-1340.16(d) is amended by adding a new subdivision to read:

"(16b) The offense is the manufacture of methamphetamine and was committed in a dwelling that is one of four or more contiguous dwellings."

SECTION 4.(a) The Legislative Research Commission may study the issues regarding the abuse of methamphetamine precursors used to make methamphetamine and any other issues that are relevant to that topic. In conducting the study, the Commission shall also consider how to address the problems presented by the abuse of methamphetamine, including educational and training programs that focus on curbing the use of methamphetamine in North Carolina. The Commission may also consider any other issues relevant to the study.

SECTION 4.(b) If the study authorized by this section is undertaken, the Legislative Research Commission shall appoint at a minimum the members to the study committee as provided by this subsection.

(1) The President Pro Tempore of the Senate shall appoint the following members:

a. One representative from the Office of the Attorney General.

b. One member of the Senate as appointed by the President Pro Tempore of the Senate.

c. One representative from the North Carolina Association of County Directors of Social Services.

d. One representative from the North Carolina Association of Community Pharmacists.

e. One representative from the Consumer Healthcare Products Association.

(2) The Speaker of the House of Representatives shall appoint the following members:
a. One member of the House of Representatives.
b. One representative from the Office of the Governor.
c. One representative from the North Carolina Retail Merchants Association.
d. One representative from the District Attorney's Association of North Carolina.
e. One representative from the North Carolina Sheriffs' Association, Inc.

SECTION 4.(c) The Legislative Research Commission may make an interim report to the 2005 General Assembly, Regular Session 2006, and shall make its final report to the 2007 General Assembly.

SECTION 4.(d) The Legislative Services Officer shall allocate funds appropriated to the General Assembly for the expenditures of the Legislative Services Commission in conducting this study.

SECTION 5. Sections 1 and 3 of this act become effective December 1, 2005, and apply to offenses committed on or after that date. The remainder of this act becomes effective July 1, 2005.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 686
PROPOSED COMMITTEE SUBSTITUTE S686-CSRH-7 [v.4]

4/8/2005 3:04:24 PM

Short Title: Meth. Lab Prevention Act. (Public)

Sponsors:

Referred to:

March 21, 2005

A BILL TO BE ENTITLED

AN ACT TO ADD PSEUDOEPHEDRINE, A CRITICAL INGREDIENT IN THE MANUFACTURE OF THE ILLEGAL DRUG METHAMPHETAMINE, TO SCHEDULE V OF THE CONTROLLED SUBSTANCES LIST; TO MAKE THE MANUFACTURE OF METHAMPHETAMINE IN A DWELLING THAT IS ONE OF FOUR OR MORE CONTIGUOUS DWELLINGS AN AGGRAVATING FACTOR; TO EXEMPT FROM LIABILITY THE OWNER, LESSEE, OPERATOR, OR OTHER PERSON IN CONTROL OF PROPERTY AFTER THE PROPERTY IS DECONTAMINATED; TO AUTHORIZE THE LEGISLATIVE RESEARCH COMMISSION TO STUDY THE ISSUES RELATING TO THE ABUSE OF METHAMPHETAMINE; AND TO MAKE TECHNICAL CHANGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 90-93 reads as rewritten:

"**§ 90-93. Schedule V controlled substances.**

(a) This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a low potential for abuse relative to the substances listed in Schedule IV of this Article; currently accepted medical use in the United States; and limited physical or psychological dependence relative to the substances listed in Schedule IV of this Article. The following controlled substances are included in this schedule:

(1) Any compound, mixture or preparation containing any of the following limited quantities of narcotic drugs or salts thereof, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic alone:

a. Not more than 200 milligrams of codeine or any of its salts per 100 milliliters or per 100 grams.
b. Not more than 100 milligrams of dihydrocodeine or any of its salts per 100 milliliters or per 100 grams.
c. Not more than 100 milligrams of ethylmorphine or any of its salts per 100 milliliters or per 100 grams.
d. Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.
e. Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.
f. Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

(2) Repealed by Session Laws 1985, c. 172, s. 9.

(3) ~~Stimulants.~~—Unless specifically exempted or excluded or unless listed in another schedule, any material, compound, mixture, or preparation ~~which~~ that contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers and salts of isomers:
a. Repealed by Session Laws 1993, c. 319, s. 7.
b. Pyrovalerone.

(4) Any compound, mixture, or preparation containing any detectable quantity of pseudoephedrine base, its salts or isomers, or salts of isomers; however, this does not include compounds, mixtures, or preparations that are in liquid, liquid capsule, or gel capsule form unless pseudoephedrine is the only active ingredient.

(b) A Schedule V substance may be sold at retail without a prescription only by a registered pharmacist and no other person, agent or employee may sell a Schedule V substance even if under the direct supervision of a pharmacist.

(c) Notwithstanding ~~the provisions of~~ G.S. 90-93(b), after the pharmacist has fulfilled the responsibilities required of him in this Article, a nonpharmacist may complete the actual cash transaction, credit transaction, or delivery of a Schedule V ~~substance, may be completed by a nonpharmacist.~~ substance. A pharmacist may refuse to sell a Schedule V substance until ~~he~~ the pharmacist is satisfied that the product is being obtained for medicinal purposes only.

(d) A Schedule V substance may be sold at retail without a prescription only to a person at least 18 years of age. The pharmacist must require every retail purchaser of a Schedule V substance to furnish suitable identification, including proof of age when appropriate, in order to purchase a Schedule V substance. If the Schedule V substance is pseudoephedrine, then the retail purchaser must provide a photo identification showing the date of birth of the person. The name and address obtained from ~~such~~ the identification shall be entered in the record of disposition to consumers.

(e) No person shall purchase, receive, or otherwise acquire more than nine grams of any mixture, product, or preparation containing the controlled substance described in

subdivision (a)(4) of this section within any 30-day period; however, this limit does not apply if the controlled substance is dispensed under a valid prescription.

(f) The Commission, by rule, may exempt other products from this Schedule that the Commission finds are not used in the illegal manufacture of methamphetamine or other dangerous controlled substances. A manufacturer of a drug product may apply for removal of the product from this Schedule if the Commission determines the product has been formulated in a way that effectively prevents the conversion of the active ingredient into methamphetamine."

SECTION 2. G.S. 15A-1340.16(d) is amended by adding a new subdivision to read:

"(16b) The offense is the manufacture of methamphetamine and was committed in a dwelling that is one of four or more contiguous dwellings."

SECTION 3. G.S. 130A-284 reads as rewritten:

"**§ 130A-284. Decontamination of property used for the manufacture of methamphetamine.**

For the protection of the public health, the Commission shall adopt rules establishing decontamination standards to ensure that certain property is reasonably safe for habitation. An owner, lessee, operator or other person in control of a residence or place of business or any structure appurtenant to a residence or place of business, and who has knowledge that the property has been used for the manufacture of methamphetamine, shall comply with these rules. No owner, lessee, operator, or other person in control of property shall be liable in any action based on the presence of methamphetamine in or on the property after the property is decontaminated in compliance with the standards in these rules. For purposes of this section, the terms "residence" and "place of business" shall be defined as set forth in G.S. 130A-334."

SECTION 4.(a) The Legislative Research Commission may study the issues regarding the abuse of methamphetamine precursors used to make methamphetamine and any other issues that are relevant to that topic. In conducting the study, the Commission shall also consider how to address the problems presented by the abuse of methamphetamine, including educational and training programs that focus on curbing the use of methamphetamine in North Carolina. The Commission may also consider any other issues relevant to the study.

SECTION 4.(b) If the study authorized by this section is undertaken, the Legislative Research Commission shall appoint at a minimum the members to the study committee as provided by this subsection.

(1) The President Pro Tempore of the Senate shall appoint the following members:

a. One representative from the Office of the Attorney General.

b. One member of the Senate as appointed by the President Pro Tempore of the Senate.

c. One representative from the North Carolina Association of County Directors of Social Services.

d. One representative from the North Carolina Association of Community Pharmacists.
e. One representative from the Consumer Healthcare Products Association.

(2) The Speaker of the House of Representatives shall appoint the following members:
a. One member of the House of Representatives.
b. One representative from the Office of the Governor.
c. One representative from the North Carolina Retail Merchants Association.
d. One representative from the District Attorney's Association of North Carolina.
e. One representative from the North Carolina Sheriffs' Association, Inc.

SECTION 4.(c) The Legislative Research Commission may make an interim report to the 2005 General Assembly, Regular Session 2006, and shall make its final report to the 2007 General Assembly.

SECTION 4.(d) The Legislative Services Officer shall allocate funds appropriated to the General Assembly for the expenditures of the Legislative Services Commission in conducting this study.

SECTION 5. Sections 1 and 2 of this act become effective December 1, 2005, and apply to offenses committed on or after that date. Section 3 of this act becomes effective October 1, 2005, and applies to causes of action arising on or after that date. The remainder of this act becomes effective July 1, 2005.

Senate Bill 686: Meth. Lab Prevention Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	April 11, 2005
Introduced by:	Sen. Dalton	**Summary by:**	Robin Johnson Committee Counsel
Version:	First Edition S686-CSRH-7[v.4]		

SUMMARY: ***The PCS would (i) add pseudoephedrine, an ingredient used to manufacture methamphetamine, to Schedule V of the Controlled Substance Act, (ii) make the manufacture of methamphetamine in a dwelling that is one of four or more contiguous dwellings an aggravating factor, (iii) exempt from liability a person in control of property after the property has been decontaminated, (iv) authorize the Legislative Research Commission (LRC) to study issues related to methamphetamine abuse, and (v) make technical changes.***

The PCS adds Section 3, which would exempt from liability property owners and others in control of the property after the property has been decontaminated, and makes technical changes.

BILL ANALYSIS:

ADD PSEUDOEPHEDRINE TO SCHEDULE V OF THE CONTROLLED SUBSTANCE ACT (Section 1)

CURRENT LAW: The Controlled Substance Act[1] categorizes by Schedules the different types of controlled substances subject to the Act. Schedule I controlled substances are those that have (i) a high potential for abuse, (ii) no currently accepted medical use in the United States, or (iii) a lack of accepted safety for use in treatment under medical supervision. Schedule V controlled substances have (i) a low potential for abuse relative to those listed in Schedules I-IV, (ii) currently accepted medical use in the United States, and (iii) limited physical or psychological dependence relative to the substances listed in Schedules III or IV. Schedule V substances include narcotics and stimulants. (Methamphetamine is a Schedule II substance.)

Schedule V substances may be sold at retail without a prescription only by a registered pharmacist, only for a medical purpose, and only to someone at least 18 years old. A nonpharmacist may complete the actual cash transaction, credit transaction, or delivery of a Schedule V substance. The pharmacist must require every retail purchaser of a Schedule V substance to furnish suitable identification. The purchaser's name and address must be entered in the record of disposition to consumers. This is not a public record, but may be disclosed at the pharmacist's discretion.[2]

Currently sold retail without a prescription, pseudoephedrine is a decongestant that comes as a regular tablet and capsule, extended-release (long-acting) tablet and capsule, liquid, and drops for children to take by mouth. Pseudoephedrine may be used to manufacture methamphetamine.

Unlawful possession of a Schedule V substance is a Class 2 misdemeanor. Assuming no prior convictions, the presumptive minimum sentence for a person convicted of a Class 2 misdemeanor is 1-30 days community punishment.

[1] Article 5 of Chapter 90 of the General Statutes.
[2] G.S. 90-85.36(c).

To unlawfully manufacture, deliver, or possess with intent to manufacture, sell or deliver, a Class V substance is a Class I felony. Assuming no prior convictions, the presumptive minimum sentence for a person convicted of a Class I felony is 4-6 months community punishment.

To unlawfully sell a Schedule V substance is a Class H felony, punishable by an absolute minimum of four months community service and an absolute maximum of 30 months active, depending on the defendant's prior record.

ANALYSIS: Section 1 of the bill would amend G.S. 90-93(a) to make the following changes:

- Add to the list of Schedule V substances pseudoephedrine when it is in the form of (i) a tablet or capsule or (ii) a liquid, liquid capsule, or gel capsule where it is the only active ingredient.
- Require the retail purchaser of pseudoephedrine to provide a photo identification showing the purchaser's birth date.
- Limit the purchase, receipt, or acquisition of pseudoephedrine without a prescription to nine grams within any 30-day period.
- Authorize the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services (Commission), by rule, to exempt other products from Schedule V that the Commission finds are not used in the illegal manufacture of methamphetamine or other dangerous controlled substances. Drug manufacturers may apply for removal of a product from this Schedule if the Commission determines it has been formulated so that the active ingredient cannot be converted into methamphetamine.

Section 1 would become effective December 1, 2005, and would apply to offenses committed on or after that date.

AGGRAVATING FACTOR AND CONTIGUOUS DWELLINGS (Section 2)

CURRENT LAW: A court must consider evidence of aggravating or mitigating factors in felony sentencing.[3] If the court finds that aggravating or mitigating factors exist, it may depart from the presumptive ranges of sentences specified in the felony sentencing chart. The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists. The defense bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

The unlawful manufacture of methamphetamine is a Class C felony. Assuming no prior convictions, the presumptive minimum sentence for a person convicted of a Class C felony is 58-73 months active punishment.

ANALYSIS: Section 2 of Senate Bill 686 would amend G.S. 15A-1340.16(d) by adding a new subdivision (16b) so that, in a case involving the manufacture of methamphetamine, if the offense was committed in a dwelling that is one of four or more contiguous dwellings, this would be an aggravating factor to be considered in sentencing.

Section 2 would become effective December 1, 2005, and would apply to offenses committed on or after that date.

EXEMPTION FROM LIABILITY FOLLOWING DECONTAMINATION (Section 3)

CURRENT LAW: In 2004, legislation was enacted to direct the Commission for Health Services to adopt rules establishing decontamination standards to ensure that a residence or place of business, or a structure appurtenant to the residence or place of business is reasonably safe for habitation. An owner,

[3] G.S. 15A-1340.16.

lessee, operator or other person in control of a residence (a private home, dwelling unit in a multiple family structure, hotel, motel, summer camp, labor work camp, manufactured home, institution or any other place where people reside), a place of business (a store, warehouse, manufacturing establishment, place of amusement or recreation, service station, office building or any other place where people work), or a structure appurtenant to the residence or business, would be required to comply with the rules.

ANALYSIS: Section 3 would amend G.S. 130A-284 to exempt from civil liability any owner, lessee, operator, or other person in control of property after the property is decontaminated under the standards adopted in the Commission's rules.

Section 3 would become effective October 1, 2005, and would apply to causes of action arising on or after that date.

LRC STUDY METHAMPHETAMINE ABUSE ISSUES (Section 4)

Section 4 of Senate Bill 686 would authorize the LRC to study issues concerning the abuse of methamphetamine precursors used to make methamphetamine. If the LRC opts to undertake this study, the committee would consist of 10 members, five appointed by the President Pro Tempore of the Senate and five appointed by the Speaker of the House of Representatives. The LRC would report to the 2006 or 2007 Session, or both.

This section would become effective July 1, 2005.

BACKGROUND: According to the Office of National Drug Control Policy (ONDCP), Methamphetamine is a growing threat to North Carolina. It. can be manufactured easily in clandestine laboratories (meth labs) using ingredients purchased in local stores. Over-the-counter cold medicines containing ephedrine or pseudoephedrine and other materials are "cooked" in meth labs to make methamphetamine.

Meth labs can be portable and so are easily dismantled, stored, or moved. This portability helps methamphetamine manufacturers avoid law enforcement authorities. Meth labs have been found in many different types of locations, including apartments, hotel rooms, rented storage spaces, and trucks. Methamphetamine labs have been known to be boobytrapped and lab operators are often well armed.

In 2004, 322 meth labs were found in North Carolina. (In 2001, only 34 were found.)

S0686e1-SMRH-CSRH-7[v.4]

NORTH CAROLINA ALLIANCE
FOR DRUG ENDANGERED CHILDREN
Rescue. Defend. Shelter. Support.

North Carolina Children Are The Victims of Meth Labs

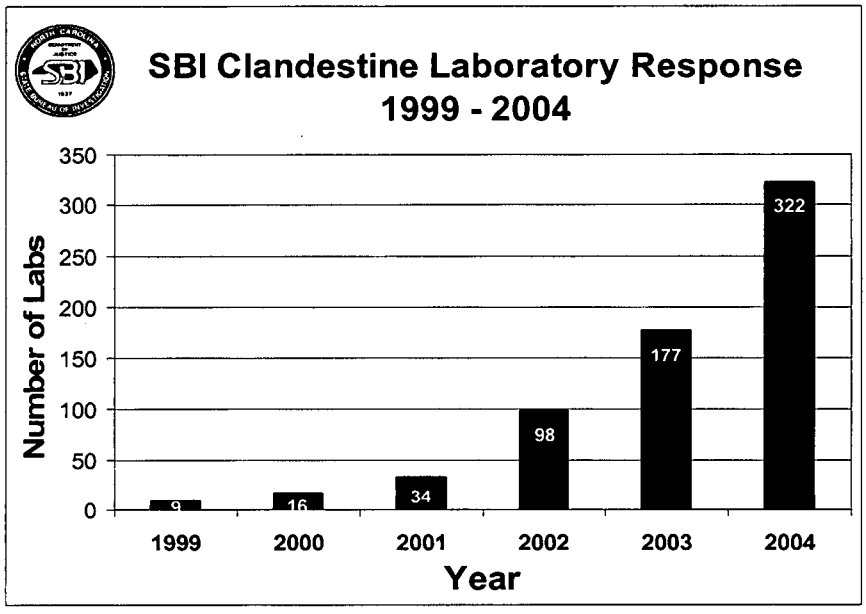
The Growing Meth Problem is Hurting Our Children.

North Carolina law enforcement officers are finding children living in more than 20% of homes where meth is made. In 2004, 124 children were found living in meth labs in the state. Already this year, SBI agents have discovered 50 children in meth labs. Children in these homes are exposed to toxic chemicals and threatened by fire and explosions, and they're often neglected or abused.

Roy Cooper
North Carolina Attorney General

METHAMPHETAMINE: NORTH CAROLINA'S FASTEST-GROWING DRUG PROBLEM

Meth lab busts have increased dramatically since 1999. In 1999, the State Bureau of Investigation (SBI) busted only nine labs. In 2004, they discovered 322 meth labs – more than 35 times as many as the year before. [State Bureau of Investigation, December 2004]. As of April 6, the SBI has busted 117 labs so far this year. [SBI, April 2005].



The growing meth problem is hurting our children. North Carolina law enforcement officers are finding children living in more than 20 percent of homes where meth is made. In 2004, 124 children were found living in meth labs in the state. [SBI, December 2004]. Already this year, SBI agents have discovered 50 children in meth labs. [SBI, April 2005]. Children in these homes are exposed to toxic chemicals and threatened by fire and explosions, and they're often neglected or abused.

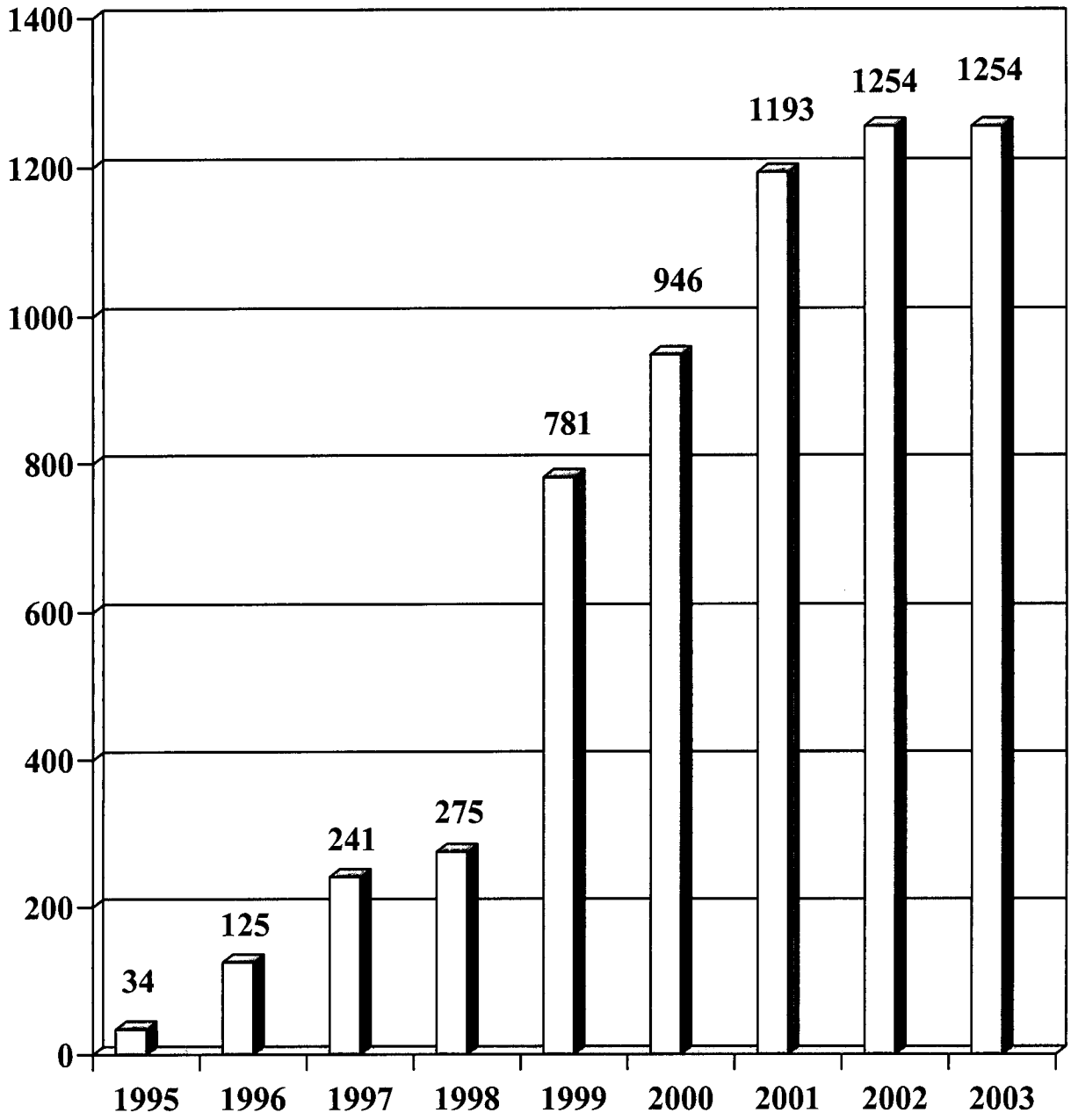
Tougher penalties are helping but we need to do more. Last year, Attorney General Roy Cooper and legislators pushed through tougher penalties against meth manufacturers. Local prosecutors are using the new law to put meth makers behind bars. Last month, a Chatham County woman was sentenced to five years of prison for using her two children to help make meth. "It was one of the first cases to take advantage of a new law which hands down tougher penalties for making meth." ["Chatham Woman Accused of Using Kids to Make Meth," *WRAL.com*, February 21, 2005].

Cold remedy limits dramatically reduce meth labs. Criminals can't make meth without pseudoephedrine or ephedrine, found in over-the-counter cold remedies. Oklahoma has seen a startling 80 percent reduction in meth lab busts since enacting its new law. [Oklahoma Bureau of Narcotics and Dangerous Drug Control].

Cold remedies will still be available. The law won't change for gel cap and liquid cold remedies, which most children take. Tablets containing pseudoephedrine will still be widely available behind the counter in pharmacies with valid identification.

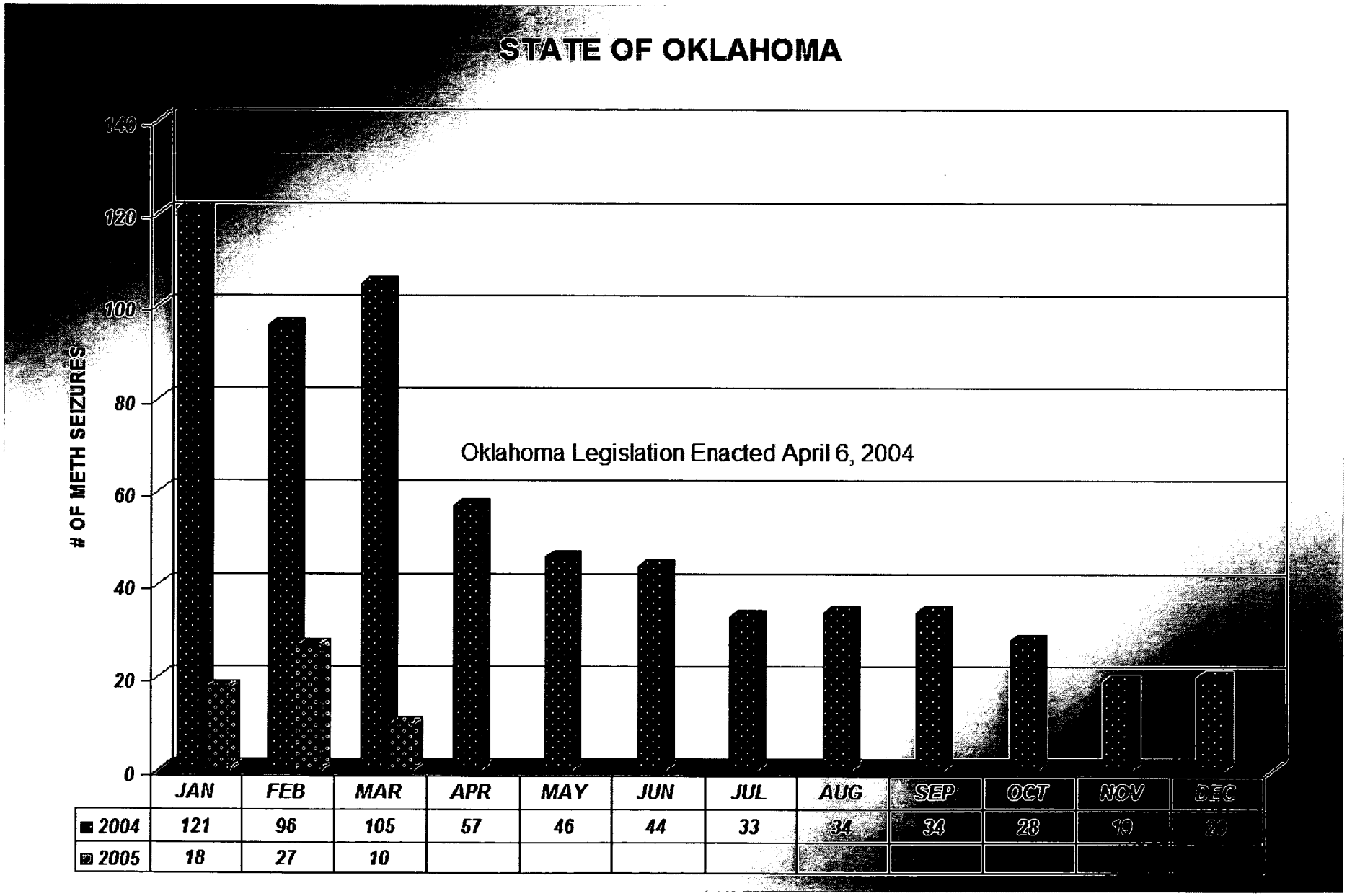
Oklahoma Bureau of Narcotics and Dangerous Drugs Control

Oklahoma Meth Lab Seizures



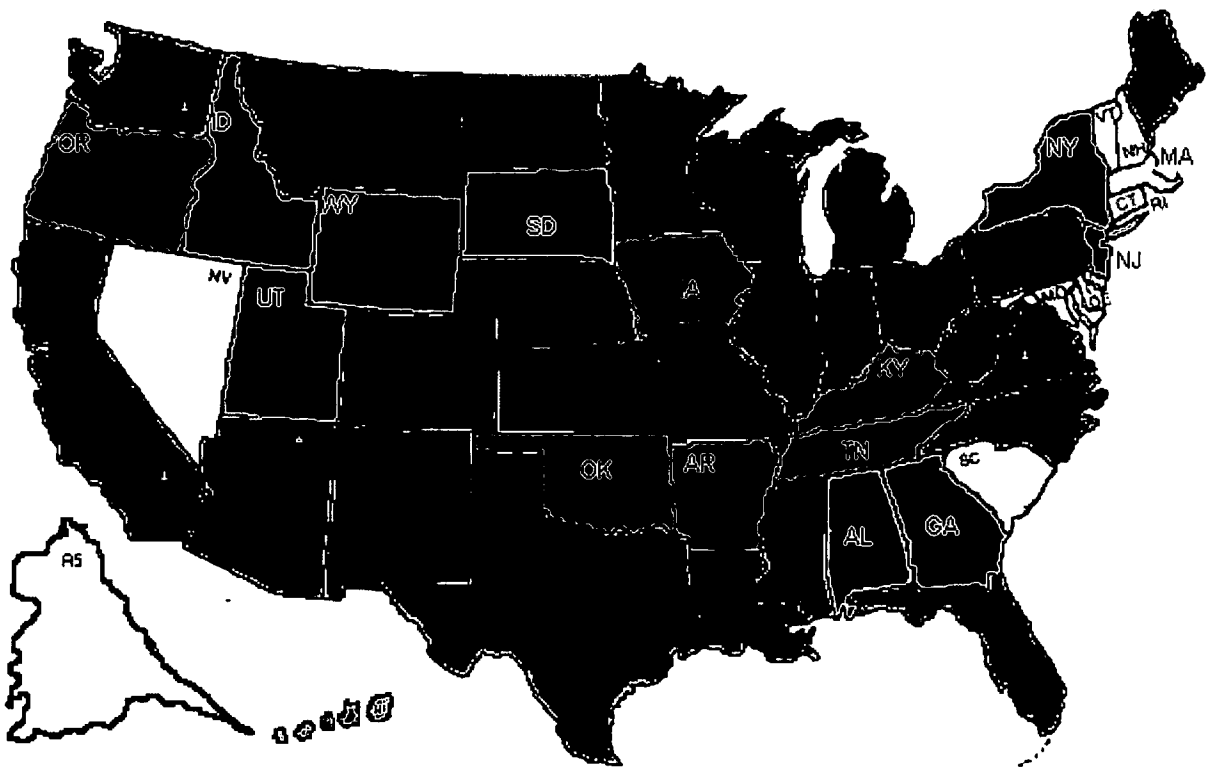
Source: Oklahoma Bureau of Narcotics and Dangerous Drug Control

STATE OF OKLAHOMA



	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2004	121	96	105	57	46	44	33	34	34	28	19	29
2005	18	27	10									

OKLAHOMA LAW BECOMES MODEL LEGISLATION



States that have passed versions of the Oklahoma Model Law
(However, grace periods may be in effect prior to full implementation)

States with Oklahoma Model Law in progress

States that have expressed an interest in the Oklahoma Model Law

Principal Clerk ____
Reading Clerk ____

Please note time change

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	April 14, 2005	9:00 to 11:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 552	DOI Hearing/Unauth. Ins. Summary C&D Order.-AB	Senator Dalton
SB 574	Amend Post-Release Supervision Laws.	Senator Hartsell
SB 592	Indigent Defense Technical Revisions.	Senator Kinnaird
SB 593	Copy Costs in Indigent Cases.	Senator Kinnaird
SB 594	Recoupment by Court-Appointed Attorneys.	Senator Kinnaird
SB 689	Copies of Files/Appointed Appellate Attorneys.	Senator Kinnaird
SB 666	Planned Community Act Amendment.	Senator Hartsell
SB 667	Subordination Agreement/Registra. Amendments.	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, April 14, 2005, 9:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 552	DOI Hearing/Unauth. Ins. Summary C&D Order.-AB	Senator Dalton
SB 574	Amend Post-Release Supervision Laws.	Senator Hartsell
SB 592	Indigent Defense Technical Revisions.	Senator Kinnaird
SB 593	Copy Costs in Indigent Cases.	Senator Kinnaird
SB 594	Recoupment by Court-Appointed Attorneys.	Senator Kinnaird
SB 689	Copies of Files/Appointed Appellate Attorneys.	Senator Kinnaird
SB 666	Planned Community Act Amendment.	Senator Hartsell
SB 667	Subordination Agreement/Registra. Amendments.	Senator Hartsell

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

April 14, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on April 14, 2005, with sixteen members present. Senator Hartsell introduced pages Chris Wilson, Christian Shackelford, Amanda Protzman and Cooper Padgett and thanked them for serving.

SB 552 (DOI Hearing/Unauth.Ins. Summary C&D Order-AB.) Senator Hartsell asked for a motion to adopt the Proposed Committee Substitute for SB 552. Senator Forrester so moved, all voted and the motion passed. Senator Hartsell then recognized Senator Dalton to explain the bill. Mr. Frank Folger representing the Department of Insurance spoke on the bill. Senator Goodall moved for a favorable report, all voted and the motion carried.

SB 592 (Indigent Defense Technical Revisions.) Senator Kinnaird was recognized by the Chairman to explain the bill. Questions by Senators Allran, Dannelly, Dorsett and Snow were answered by Danielle Carman, Assistant Director for the Office of Indigent Defense Services, and Mr. Malcolm Hunter, Executive Director for the Office of Indigent Defense Services. Senator Dannelly moved for a favorable report with a referral to Finance. All voted and the motion carried.

SB 593 (Copy Costs in Indigent Cases.) The Proposed Committee Substitute was accepted for discussion. Senator Kinnaird explained the bill. Senator Allran moved for a favorable report with a referral to Finance. All voted and the motion carried

SB 594 (Recoupment by Court-Appointed Attorneys.) Senator Kinnaird was recognized to explain the bill. Questions by Senators Allran, Bingham, Thomas, and Apodaca were answered by Senators Snow and Danielle Carman, from the Office of Indigent Defense Services. Senator Allran sent forth an amendment which was accepted by Senator Kinnaird. Senator Kinnaird moved for a favorable report as amended, rolled into a new Committee Substitute with a referral to Finance. All voted and the motion carried.

SB 689 (Copies of Files/Appointed Appellate Attorneys.) Senator Kinnaird was recognized to explain the bill and answered Senator Apodaca's question. Senator Dannelly moved for a favorable report. The motion carried.

SB 666 (Planned Community Act Amendment) Senator Hartsell asked Senator Thomas to chair the committee while he (Senator Hartsell) explained the bill. Bly Hall, attorney representing the General Statutes Commission, spoke on the bill. Questions by

Senators Bingham, Dannelly and Goodall were answered by Senator Hartsell. Senator Allran moved for a favorable report. All voted and the motion carried.

SB 667 (Subordination Agreement/Registra. Amendments.) Senator Thomas chaired the committee while Senator Hartsell explained the bill. Senator Hartsell invited Bly Hall, representing the General Statutes Commission to speak on the bill. The question by Senator Allran was answered by Bly Hall. Senator Allran moved for a favorable report. All voted and the motion carried.

SB 574 (Amend Post-Release Supervision Laws.) Senator Hartsell invited Senator Allran to chair the committee while Senator Hartsell explained the bill. Karen Jones, from the North Carolina Sentencing and Policy Advisory Commission spoke on the bill. Questions by Senators Bingham, Snow, Thomas, Allran, Dannelly, Goodall, Berger were answered by Karen Jones, Senator Hartsell, Robin Johnson, Staff Attorney and Melita Groomes, Executive Director of the North Carolina Post-Release Supervision and Parole Commission. Senator Goodall moved for a favorable report and then withdrew his motion due to discussion. The bill was withdrawn for purposes of need for changes.

Senator Hartsell noted that the committee would hear Senator Bill 686 (Meth. Lab Prevention Act) again at the Tuesday, April 19th meeting.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, April 19, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **552** DOI Hearing/Unauth. Ins. Summary C&D Order.-AB

Draft Number:	PCS75285
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

S.B. **593** Copy Costs in Indigent Cases.

Draft Number:	PCS75286
Sequential Referral:	None
Recommended Referral:	Finance
Long Title Amended:	No

S.B. **594** Recoupment by Court-Appointed Attorneys.

Draft Number:	PCS35210
Sequential Referral:	None
Recommended Referral:	Finance
Long Title Amended:	No

TOTAL REPORTED: 3

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, April 14, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B.	**592**	Indigent Defense Technical Revisions.	
		Sequential Referral:	None
		Recommended Referral:	Finance
S.B.	**666**	Planned Community Act Amendment.	
		Sequential Referral:	None
		Recommended Referral:	None
S.B.	**667**	Subordination Agreement/Registra. Amendments.	
		Sequential Referral:	None
		Recommended Referral:	None
S.B.	**689**	Copies of Files/Appointed Appellate Attorneys.	
		Sequential Referral:	None
		Recommended Referral:	None

TOTAL REPORTED: 4

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 14, 2005

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Doug Heron	NC Bar Assoc
Kathleen Edwards	UNC-CH Legis. Reporting Service
Danielle Carman	Indigent Defense Services
Tye Hunter	IDS
Mildred Spearman	NCDOC
Bill Scoggin	Friend of Bly's
Bly Hall	General Statutes Commission
Paul Stock	NC Bar Assn
Lou Rubsky	CYK
Karen Jones	NC Sent. Commission
Troy Page	NC Sentencing Commission

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

April 14, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Rick Zechini	NC Assoc. of Realtors
SHELIA A GROOMES	PAROLE COMMISSION
Melissa Lovell	NCDOJ
Mary Thomas	CCBIC
John McLeg	Gov Office
Lee Hoke	KCCH
[illegible]	[illegible]
[illegible]	NCFPC
[illegible]	AOC
Paul Pulley	NCATR

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. First

H. B. No. _____ DATE 4/14/05

S. B. No. 594 Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.)
Sen.) Allran

1 moves to amend the bill on page 1, line 9
2 ( ) WHICH CHANGES THE TITLE
3 by replacing "the" with "that".
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SIGNED A. Allran

ADOPTED X FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 552*

Short Title:	DOI Hearing/Unauth. Ins. Summary C&D Order.-AB	(Public)
Sponsors:	Senator Dalton.	
Referred to:	Judiciary II.	

March 15, 2005

A BILL TO BE ENTITLED

AN ACT TO REQUIRE AN UNAUTHORIZED INSURER AGAINST WHICH A SUMMARY CEASE AND DESIST ORDER HAS BEEN ISSUED TO PETITION THE DEPARTMENT OF INSURANCE FOR A HEARING ON THE MATTER BEFORE PETITIONING THE SUPERIOR COURT OF WAKE COUNTY.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 58-28-25 reads as rewritten:

"**§ 58-28-25. Judicial review of cease and desist ~~orders.~~orders; administrative review of summary cease and desist orders.**

Any person required by an order of the Commissioner under G.S. 58-28-20(a) to cease and desist may seek judicial review pursuant to G.S. 58-2-75. If the Commissioner issues a summary cease and desist order pursuant to G.S. 58-28-20(d), the Commissioner shall promptly commence proceedings in accordance with G.S. 150B-3(c).

~~(a) Any person required by an order of the Commissioner under G.S. 58-28-20 to cease and desist may obtain a review of such order by filing in the Superior Court of Wake County, within 30 days from the date of the service of such order, a written petition praying that the order of the Commissioner be set aside. A copy of such petition shall be immediately served upon the Commissioner, and the Commissioner shall then immediately certify and file in the Court a transcript of the entire record in the proceeding, including all the evidence taken, and the order of the Commissioner. Upon such filing of the petition and transcript the Court has jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay of such order of the Commissioner, and has the power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree modifying, affirming, or reversing the order of the Commissioner, in whole or in part. The findings of the Commissioner as to the facts, if supported by substantial evidence, shall be conclusive.~~

~~(b) To the extent that the order of the Commissioner is affirmed, the Court shall thereupon issue its own order commanding obedience to the terms of such order of the Commissioner. If either party applies to the Court for leave to adduce additional evidence, and satisfies the Court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commissioner, the Court may order such additional evidence to be taken before the Commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as the Court considers proper. The Commissioner may modify his findings of fact, or make new findings by reason of the additional evidence so taken; and he shall file such modified or new findings which, if supported by substantial evidence, shall be conclusive; or shall file his recommendations, if any, for the modification or setting aside of his original order, with the return of such additional evidence.~~

~~(c) A cease and desist order issued by the Commissioner under G.S. 58-28-20 shall become final:~~

~~(1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time; except that the Commissioner may thereafter modify or set aside his order to the extent provided in G.S. 58-28-20(b); or~~

~~(2) Upon the final decision of the court if the court directs that the order of the Commissioner be affirmed or the petition for review dismissed.~~

~~(d) No order of the Commissioner under this Article or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this State.~~"

SECTION 2. G.S. 58-28-20(b) reads as rewritten:

"(b) Until the expiration of the time allowed under ~~G.S. 58-28-25(a)~~ G.S. 58-28-25 for filing a petition for review, if no such petition has been duly filed within such time; or if a petition for review has been filed within such time, then until the transcript of the record in the proceeding has been filed in the Court, the Commissioner may at any time, upon such notice and in such manner as he considers proper, modify or set aside in whole or in part any order issued by him under this section."

SECTION 3. This act becomes effective October 1, 2005, and applies to orders issued on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 552*
PROPOSED COMMITTEE SUBSTITUTE S552-CSRC-14 [v.3]

4/11/2005 4:25:08 PM

Short Title: DOI Hearing/Unauth. Ins. Summary C&D Order.-AB (Public)

Sponsors:

Referred to:

March 15, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE AN UNAUTHORIZED INSURER AGAINST WHICH AN EMERGENCY CEASE AND DESIST ORDER HAS BEEN ISSUED TO PETITION THE DEPARTMENT OF INSURANCE FOR A HEARING ON THE MATTER AND TO APPEAL THAT DECISION TO THE SUPERIOR COURT OF WAKE COUNTY.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 58-28-20 reads as rewritten:

"**§ 58-28-20. Cease and desist ~~orders.~~orders; judicial review.**

(a) Whenever the Commissioner, ~~from evidence satisfactory to him,~~ has reasonable grounds to believe that any person is violating or is about to violate G.S. 58-28-5, ~~he~~ the Commissioner may, after notice and opportunity for hearing, ~~reduce his findings to writing~~ make written findings and issue and cause to be served upon ~~such~~ the person an order to cease and desist ~~from~~ violating G.S. 58-28-5.

(b) Until the expiration of the time allowed under ~~G.S. 58-28-25(a)~~G.S. 58-2-75 for filing a petition for review, ~~if no such petition has been duly filed within such time; or if a petition for review has been filed within such time, then until the transcript of the record in the proceeding has been filed in the Court,~~ the Commissioner may at any time, upon ~~such~~ notice and in ~~such~~ a manner ~~as he~~the Commissioner considers proper, modify or set aside in whole or in part any order issued by ~~him~~ the Commissioner under this ~~section.~~section as follows:

(1) any time before the expiration of the time allowed for seeking judicial review, if no petition for review has been filed; or

(2) if a petition for review has been timely filed, until the transcript of the record in the proceeding has been filed with the Court.

(c) ~~After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time,~~ If no petition for judicial review has been filed within the time provided under G.S. 58-2-75, the Commissioner may at any

time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any order issued by ~~him~~ the Commissioner under this section, whenever in ~~his~~ the Commissioner's opinion conditions of fact or of law have so changed as to require such action or if the public interest requires.

(d) Whenever the Commissioner has evidence that any person has or is violating G.S. 58-28-5, or has or is violating any order or requirement of the Commissioner issued ~~or promulgated~~ by the Commissioner under this Article, and that the interests of policyholders, creditors, or the public may be irreparably harmed by delay, the Commissioner may issue ~~a~~ an emergency cease and desist ~~order. Notice of the cease and desist order and notice of hearing shall be delivered by first-class mail.~~ order that shall become effective on the date specified in the order or upon service of a certified copy of the order upon the person ordered to cease and desist, whichever is later. The emergency cease and desist order shall also include a notice of hearing, which shall be conducted as provided under Article 3A of Chapter 150B of the General Statutes. However, the person ordered to cease and desist under this subsection may request and shall be granted an expedited review of the order. The emergency order shall remain in effect prior to and during the proceedings, unless modified by the Commissioner as provided under subsection (b) of this section.

(e) Any person required to cease and desist violating G.S. 58-28-5 by an order issued after notice and a hearing under subsections (a) or (d) of this section may seek judicial review of that order under G.S. 58-2-75."

SECTION 2. G.S. 58-28-25 is repealed.

SECTION 3. This act becomes effective October 1, 2005, and applies to orders issues on or after that date.

Senate Bill 552: DOI Hearing/Unauth. Ins. Summary C&D Order.-AB

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	April 7, 2005
Introduced by:	Sen. Dalton	**Summary by:**	Kory Goldsmith
Version:	PCS for First Edition S552-CSRC-14[v.3]		Committee Counsel

SUMMARY: ***Senate Bill 552 is an Agency bill that creates a hearing procedure in the event the Commissioner of Insurance issues an emergency cease and desist order against a person who is selling insurance without a license. The order may be issued prior to a hearing, but a hearing would have to be held according to the procedures specified under the Administrative Procedures Act (APA).***

The Proposed Committee Substitute primarily makes conforming changes to existing law.

This act would become effective October 1, 2005, and would apply to orders issued on or after that date.

CURRENT LAW: G.S. 58-28-20 gives the Commissioner of Insurance the authority to issue a cease and desist order if a person is selling insurance or otherwise transacting insurance business without a license. G.S. 58-28-20(a) provides that the cease and desist order may be issued after the person has been given notice and an opportunity for a hearing. G.S. 58-28-20(d) authorizes the Commissioner to issue a cease and desist order without notice or a hearing if the Commissioner believes that the "interests of policyholders, creditors, or the public maybe irreparably harmed by delay." The statute does not provide a hearing procedure following the issuance of this type of cease and desist order, thereby making its enforceability susceptible to a due process challenge.

G.S. 58-28-25 provides a procedure for judicial review after a cease and desist order has been ordered. The procedure is identical to the one specified in G.S. 58-2-75.

BILL ANALYSIS:

Section 1 of the bill makes a number of changes to G.S. 58-28-20, although the changes in subsections (a) through (c) are primarily stylistic. Subsection (d) is the law that already authorizes the Commissioner to issue a cease and desist order without notice and a hearing. The changes to this subsection are as follows:

- Distinguishes these types of cease and desist orders by designating them as "emergency" orders.
- Makes the order effective either upon a date specified in the order, or when a certified copy of the order has been served on the person, which ever is later.
- Specifies that the emergency order must include a notice of hearing, that the Commissioner must proceed under the APA for contested cases (Article 3A of Chapter 150B of the General Statutes), and that the person ordered to cease and desist may request and shall be granted an expedited hearing.
- Specify that the emergency order remains in effect during the hearing process.

The act also creates a new subsection (e) that provides that a person who wants to seek judicial review of a cease and desist order may do so under G.S. 58-2-75.

Section 2 of the bill repeals G.S. 58-20-25 which contained the process for judicial review of a cease and desist order. The procedure in G.S. 58-20-25 is identical to that in G.S. 58-2-75 that has been substituted as the procedure in Section 1 of the bill. (See copy of G.S. 58-2-75 below)

EFFECTIVE DATE: The act would become effective October 1, 2005 and apply to orders issued on or after that date.

§ 58-2-75. Court review of orders and decisions.

(a) Any order or decision made, issued or executed by the Commissioner, except an order to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets and except an order or decision that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory, or not in the public interest, shall be subject to review in the Superior Court of Wake County on petition by any person aggrieved filed within 30 days from the date of the delivery of a copy of the order or decision made by the Commissioner upon such person. A copy of such petition for review as filed with and certified to by the clerk of said court shall be served upon the Commissioner or in his absence upon someone in active charge of the Department within five days after the filing thereof. If such petition for review is not filed within the said 30 days, the parties aggrieved shall be deemed to have waived the right to have the merits of the order or decision reviewed and there shall be no trial of the merits thereof by any court to which application may be made by petition or otherwise, to enforce or restrain the enforcement of the same.

(b) The Commissioner shall within 30 days, unless the time be extended by order of court, after the service of the copy of the petition for review as provided in subsection (a) of this section, prepare and file with the clerk of the Superior Court of Wake County a complete transcript of the record of the hearing, if any, had before him, and a true copy of the order or decision duly certified. The order or decision of the Commissioner if supported by substantial evidence shall be presumed to be correct and proper. The court may change the place of hearing,

(1) Upon consent of the parties; or

(2) When the convenience of witnesses and the ends of justice would be promoted by the change; or

(3) When the judge has at any time been interested as a party or counsel.

The cause shall be heard by the trial judge as a civil case upon transcript of the record for review of findings of fact and errors of law only. It shall be the duty of the trial judge to hear and determine such petition with all convenient speed and to this end the cause shall be placed on the calendar for the next succeeding term for hearing ahead of all other cases except those already given priority by law. If on the hearing before the trial judge it shall appear that the record filed by the Commissioner is incomplete, he may by appropriate order direct the Commissioner to certify any or all parts of the record so omitted.

(c) The trial judge shall have jurisdiction to affirm or to set aside the order or decision of the Commissioner and to restrain the enforcement thereof.

(d) Appeals from all final orders and judgments entered by the superior court in reviewing the orders and decisions of the Commissioner may be taken to the appellate division of the General Court of Justice by any party to the action as in other civil cases.

(e) The commencement of proceedings under this section shall not operate as a stay of the Commissioner's order or decision, unless otherwise ordered by the court.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 574

Short Title:	Amend Post-Release Supervision Laws.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 16, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE STRUCTURED SENTENCING LAWS WITH REGARD TO POST-RELEASE SUPERVISION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1340.11 is amended by adding a new subdivision to read:

"(6a) Post-release supervision. – The time for which a sentenced prisoner is supervised in the community following the termination of the prisoner's maximum prison term, controlled by the rules and conditions of Article 84A of this Chapter."

SECTION 2. G.S. 15A-1340.13(b) reads as rewritten:

"(b) Procedure Generally; Requirements of Judgment; Kinds of Sentences. – Before imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14. The sentence shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified for the class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment. For Class B1, B2, C, D, and E felony offenses, the sentence shall include a period of post-release supervision pursuant to G.S. 15A-1340.18. The kinds of sentence dispositions are active punishment, intermediate punishment, and community punishment."

SECTION 3. G.S. 15A-1340.17 reads as rewritten:

"**§ 15A-1340.17. Punishment limits for each class of offense and prior record level.**

(a) Offense Classification; Default Classifications. – The offense classification is as specified in the offense for which the sentence is being imposed. If the offense is a felony for which there is no classification, it is a Class I felony.

(b) Fines. – Any judgment that includes a sentence of imprisonment may also include a fine. If a community punishment is authorized, the judgment may consist of a fine only. Additionally, when the defendant is other than an individual, the judgment

may consist of a fine only. Unless otherwise provided, the amount of the fine is in the discretion of the court.

(c) Punishments for Each Class of Offense and Prior Record Level; Punishment Chart Described. – The authorized punishment for each class of offense and prior record level is as specified in the chart ~~below.~~ below and under G.S. 15A-1340.18. Prior record levels are indicated by the Roman numerals placed horizontally on the top of the chart. Classes of offense are indicated by the letters placed vertically on the left side of the chart. Each cell on the chart contains the following components:

(1) A sentence disposition or dispositions: "C" indicates that a community punishment is authorized; "I" indicates that an intermediate punishment is authorized; "A" indicates that an active punishment is authorized; and "Life Imprisonment Without Parole" indicates that the defendant shall be imprisoned for the remainder of the prisoner's natural life.

(2) A presumptive range of minimum durations, if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in that range is permitted unless the court finds pursuant to G.S. 15A-1340.16 that an aggravated or mitigated sentence is appropriate. The presumptive range is the middle of the three ranges in the cell.

(3) A mitigated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that a mitigated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the mitigated range is permitted. The mitigated range is the lower of the three ranges in the cell.

(4) An aggravated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that an aggravated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the aggravated range is permitted. The aggravated range is the higher of the three ranges in the cell.

PRIOR RECORD LEVEL

	I 0 Pts	II 1-4 Pts	III 5-8 Pts	IV 9-14 Pts	V 15-18 Pts	VI 19+ Pts	
A	Life Imprisonment Without Parole or Death as Established by Statute						
	A 240-300	A 288-360	A 336-420	A 384-480	A Life Imprisonment Without Parole	A	DISPOSITION Aggravated
B1	192-240 144-192	230-288 173-230	269-336 202-269	307-384 230-307	346-433 260-346	384-480 288-384	PRESUMPTIVE Mitigated
	A 157-196	A 189-237	A 220-276	A 251-313	A 282-353	A 313-392	DISPOSITION Aggravated
B2	125-157	151-189	176-220	201-251	225-282	251-313	PRESUMPTIVE

	94-125	114-151	132-176	151-201	169-225	188-251	Mitigated
	A	A	A	A	A	A	DISPOSITION
	73-92	100-125	116-145	133-167	151-188	168-210	Aggravated
C	58-73	80-100	93-116	107-133	121-151	135-168	PRESUMPTIVE
	44-58	60-80	70-93	80-107	90-121	101-135	Mitigated
	A	A	A	A	A	A	DISPOSITION
	64-80	77-95	103-129	117-146	133-167	146-183	Aggravated
D	51-64	61-77	82-103	94-117	107-133	117-146	PRESUMPTIVE
	38-51	46-61	61-82	71-94	80-107	88-117	Mitigated
	I/A	I/A	A	A	A	A	DISPOSITION
	25-31	29-36	34-42	46-58	53-66	59-74	Aggravated
E	20-25	23-29	27-34	37-46	42-53	47-59	PRESUMPTIVE
	15-20	17-23	20-27	28-37	32-42	35-47	Mitigated
	I/A	I/A	I/A	A	A	A	DISPOSITION
	16-20	19-24	21-26	25-31	34-42	39-49	Aggravated
F	13-16	15-19	17-21	20-25	27-34	31-39	PRESUMPTIVE
	10-13	11-15	13-17	15-20	20-27	23-31	Mitigated
	I/A	I/A	I/A	I/A	A	A	DISPOSITION
	13-16	15-19	16-20	20-25	21-26	29-36	Aggravated
G	10-13	12-15	13-16	16-20	17-21	23-29	PRESUMPTIVE
	8-10	9-12	10-13	12-16	13-17	17-23	Mitigated
	C/I/A	I/A	I/A	I/A	I/A	A	DISPOSITION
	6-8	8-10	10-12	11-14	15-19	20-25	Aggravated
H	5-6	6-8	8-10	9-11	12-15	16-20	PRESUMPTIVE
	4-5	4-6	6-8	7-9	9-12	12-16	Mitigated
	C	C/I	I	I/A	I/A	I/A	DISPOSITION
	6-8	6-8	6-8	8-10	9-11	10-12	Aggravated
I	4-6	4-6	5-6	6-8	7-9	8-10	PRESUMPTIVE
	3-4	3-4	4-5	4-6	5-7	6-8	Mitigated

(d) Maximum Sentences Specified for ~~Class F through Class I Felonies.~~ Class B1 Felonies Through Class I Felonies for Minimum Terms up to 346 Months. – Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class ~~F~~ B1 through Class I felonies. The first figure in each cell in the table is the minimum term and the second is the maximum term.

3-4	4-5	5-6	6-8	7-9	8-10	9-11	10-12
11-14	12-15	13-16	14-17	15-18	16-20	17-21	18-22
19-23	20-24	21-26	22-27	23-28	24-29	25-30	26-32
27-33	28-34	29-35	30-36	31-38	32-39	33-40	34-41
35-42	36-44	37-45	38-46	39-47	40-48	41-50	42-51

43-52	44-53	45-54	46-56	47-57	48-58	49-59	50-60
51-61	52-62	53-64	54-65	55-66	56-67	57-68	58-70
59-71	60-72	61-73	62-74	63-76	64-77	65-78	66-79
67-80	68-82	69-83	70-84	71-85	72-86	73-88	74-89
75-90	76-91	77-92	78-94	79-95	80-96	81-97	82-98
83-100	84-101	85-102	86-103	87-104	88-106	89-107	90-108
91-109	92-110	93-112	94-113	95-114	96-115	97-116	98-118
99-119	100-120	101-121	102-122	103-124	104-125	105-126	106-127
107-128	108-130	109-131	110-132	111-133	112-134	113-136	114-137
115-138	116-139	117-140	118-142	119-143	120-144	121-145	122-146
123-148	124-149	125-150	126-151	127-152	128-154	129-155	130-156
131-157	132-158	133-160	134-161	135-162	136-163	137-164	138-166
139-167	140-168	141-169	142-170	143-172	144-173	145-174	146-175
147-176	148-178	149-179	150-180	151-181	152-182	153-184	154-185
155-186	156-187	157-188	158-190	159-191	160-192	161-193	162-194
163-196	164-197	165-198	166-199	167-200	168-202	169-203	170-204
171-205	172-206	173-208	174-209	175-210	176-211	177-212	178-214
179-215	180-216	181-217	182-218	183-220	184-221	185-222	186-223
187-224	188-226	189-227	190-228	191-229	192-230	193-232	194-233
195-234	196-235	197-236	198-238	199-239	200-240	201-241	202-242
203-244	204-245	205-246	206-247	207-248	208-250	209-251	210-252
211-253	212-254	213-256	214-257	215-258	216-259	217-260	218-262
219-263	220-264	221-265	222-266	223-268	224-269	225-270	226-271
227-272	228-274	229-275	230-276	231-277	232-278	233-280	234-281
235-282	236-283	237-284	238-286	239-287	240-288	241-289	242-290
243-292	244-293	245-294	246-295	247-296	248-298	249-299	250-300
251-301	252-302	253-304	254-305	255-306	256-307	257-308	258-310
259-311	260-312	261-313	262-314	263-316	264-317	265-318	266-319
267-320	268-322	269-323	270-324	271-325	272-326	273-328	274-329
275-330	276-331	277-332	278-334	279-335	280-336	281-337	282-338
283-340	284-341	285-342	286-343	287-344	288-346	289-347	290-348
291-349	292-350	293-352	294-353	295-354	296-355	297-356	298-358
299-359	300-360	301-361	302-362	303-364	304-365	305-366	306-367
307-368	308-370	309-371	310-372	311-373	312-374	313-376	314-377
315-378	316-379	317-380	318-382	319-383	320-384	321-385	322-386
323-388	324-389	325-390	326-391	327-392	328-394	329-395	330-396
331-397	332-398	333-400	334-401	335-402	336-403	337-404	338-406
339-407	340-408	341-409	342-410	343-412	344-413	345-414	346-415

~~(e) Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms up to 339 Months. Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table~~

~~below for Class B1 through Class E felonies. The first figure in each cell of the table is the minimum term and the second is the maximum term.~~

~~15-27~~	~~16-29~~	~~17-30~~	~~18-31~~	~~19-32~~	~~20-33~~	~~21-35~~	~~22-36~~
~~23-37~~	~~24-38~~	~~25-39~~	~~26-41~~	~~27-42~~	~~28-43~~	~~29-44~~	~~30-45~~
~~31-47~~	~~32-48~~	~~33-49~~	~~34-50~~	~~35-51~~	~~36-53~~	~~37-54~~	~~38-55~~
~~39-56~~	~~40-57~~	~~41-59~~	~~42-60~~	~~43-61~~	~~44-62~~	~~45-63~~	~~46-65~~
~~47-66~~	~~48-67~~	~~49-68~~	~~50-69~~	~~51-71~~	~~52-72~~	~~53-73~~	~~54-74~~
~~55-75~~	~~56-77~~	~~57-78~~	~~58-79~~	~~59-80~~	~~60-81~~	~~61-83~~	~~62-84~~
~~63-85~~	~~64-86~~	~~65-87~~	~~66-89~~	~~67-90~~	~~68-91~~	~~69-92~~	~~70-93~~
~~71-95~~	~~72-96~~	~~73-97~~	~~74-98~~	~~75-99~~	~~76-101~~	~~77-102~~	~~78-103~~
~~79-104~~	~~80-105~~	~~81-107~~	~~82-108~~	~~83-109~~	~~84-110~~	~~85-111~~	~~86-113~~
~~87-114~~	~~88-115~~	~~89-116~~	~~90-117~~	~~91-119~~	~~92-120~~	~~93-121~~	~~94-122~~
~~95-123~~	~~96-125~~	~~97-126~~	~~98-127~~	~~99-128~~	~~100-129~~	~~101-131~~	~~102-132~~
~~103-133~~	~~104-134~~	~~105-135~~	~~106-137~~	~~107-138~~	~~108-139~~	~~109-140~~	~~110-141~~
~~111-143~~	~~112-144~~	~~113-145~~	~~114-146~~	~~115-147~~	~~116-149~~	~~117-150~~	~~118-151~~
~~119-152~~	~~120-153~~	~~121-155~~	~~122-156~~	~~123-157~~	~~124-158~~	~~125-159~~	~~126-161~~
~~127-162~~	~~128-163~~	~~129-164~~	~~130-165~~	~~131-167~~	~~132-168~~	~~133-169~~	~~134-170~~
~~135-171~~	~~136-173~~	~~137-174~~	~~138-175~~	~~139-176~~	~~140-177~~	~~141-179~~	~~142-180~~
~~143-181~~	~~144-182~~	~~145-183~~	~~146-185~~	~~147-186~~	~~148-187~~	~~149-188~~	~~150-189~~
~~151-191~~	~~152-192~~	~~153-193~~	~~154-194~~	~~155-195~~	~~156-197~~	~~157-198~~	~~158-199~~
~~159-200~~	~~160-201~~	~~161-203~~	~~162-204~~	~~163-205~~	~~164-206~~	~~165-207~~	~~166-209~~
~~167-210~~	~~168-211~~	~~169-212~~	~~170-213~~	~~171-215~~	~~172-216~~	~~173-217~~	~~174-218~~
~~175-219~~	~~176-221~~	~~177-222~~	~~178-223~~	~~179-224~~	~~180-225~~	~~181-227~~	~~182-228~~
~~183-229~~	~~184-230~~	~~185-231~~	~~186-233~~	~~187-234~~	~~188-235~~	~~189-236~~	~~190-237~~
~~191-239~~	~~192-240~~	~~193-241~~	~~194-242~~	~~195-243~~	~~196-245~~	~~197-246~~	~~198-247~~
~~199-248~~	~~200-249~~	~~201-251~~	~~202-252~~	~~203-253~~	~~204-254~~	~~205-255~~	~~206-257~~
~~207-258~~	~~208-259~~	~~209-260~~	~~210-261~~	~~211-263~~	~~212-264~~	~~213-265~~	~~214-266~~
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~~223-277~~	~~224-278~~	~~225-279~~	~~226-281~~	~~227-282~~	~~228-283~~	~~229-284~~	~~230-285~~
~~231-287~~	~~232-288~~	~~233-289~~	~~234-290~~	~~235-291~~	~~236-293~~	~~237-294~~	~~238-295~~
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~~263-325~~	~~264-326~~	~~265-327~~	~~266-329~~	~~267-330~~	~~268-331~~	~~269-332~~	~~270-333~~
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~~319-392~~	~~320-393~~	~~321-395~~	~~322-396~~	~~323-397~~	~~324-398~~	~~325-399~~	~~326-401~~
~~327-402~~	~~328-403~~	~~329-404~~	~~330-405~~	~~331-407~~	~~332-408~~	~~333-409~~	~~334-410~~
~~335-411~~	~~336-413~~	~~337-414~~	~~338-415~~	~~339-416~~			

(e1) Maximum Sentences Specified for Class B1 ~~through~~ through Class ~~E~~ I Felonies for Minimum Terms of ~~340~~347 Months or More. – Unless provided otherwise in a statute establishing a punishment for a specific crime, when the minimum sentence is ~~340~~347 months or more, the corresponding maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest ~~month, plus nine additional months.~~ month."

SECTION 4. Article 81B of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-1340.18. Post-release supervision.**

(a) Except as provided in subsection (b) of this section, the court must also impose a period of post-release supervision to follow the term of imprisonment and an additional term of imprisonment to be served upon revocation of the period of post-release supervision on all offenders convicted of a Class B1, B2, C, D, or E felony offense. The period of supervision and the term of imprisonment are as follows:

(1) Period of supervision. – The period of post-release supervision shall be nine months, unless the offense is a Class B1 through E offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years.

(2) Term of imprisonment. – The term of imprisonment upon revocation of post-release supervision shall be for a minimum term of seven months and a maximum term of nine months.

(b) If an offender is convicted of a Class B1, B2, C, D, or E felony offense and receives a sentence of imprisonment, then the court may decline to impose post-release supervision if it makes a finding of facts which indicates post-release supervision would not be necessary in that case. If an offender is convicted of a Class B1 felony offense and receives a sentence of life imprisonment without parole, then post-release supervision shall not be imposed.

(c) If the court imposes an intermediate punishment on an offender who is required to receive post-release supervision under subsection (a) of this section, then the period of post-release supervision is suspended.

(d) Provisions of Article 84A of this Chapter apply to judgments entered pursuant to this section."

SECTION 5. G.S. 15A-1342(c) reads as rewritten:

"(c) Conditions; Suspended Sentence. – When the court places a convicted offender on probation, it must determine conditions of probation as provided in G.S. 15A-1343. In addition, it must impose a suspended sentence of imprisonment, determined as provided in Article 83, Imprisonment, which may be activated upon violation of conditions of probation. Suspension of a term of imprisonment also suspends any period of post-release supervision that may be imposed for that offense."

SECTION 6. G.S. 15A-1344(d) reads as rewritten:

"(d) Extension and Modification; Response to Violations. – At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation. The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence and any period of post-release supervision imposed at the time of initial sentencing, if any, or may order that charges as to which prosecution has been deferred be brought to trial; provided that probation may not be revoked solely for conviction of a Class 3 misdemeanor. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence, but the reduction shall be consistent with subsection (d1) of this section. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period."

SECTION 7. G.S. 15A-1354 reads as rewritten:

"**§ 15A-1354. Concurrent and consecutive terms of imprisonment.**

(a) Authority of Court. – When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

(b) Effect of Consecutive Terms. – In determining the effect of consecutive sentences imposed under authority of this Article and the manner in which they will be served, the Department of Correction must treat the defendant as though he has been committed for a single term with the following incidents:

(1) The maximum prison sentence consists of the total of the maximum terms of the consecutive ~~sentences, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies; and~~ sentences; and

(2) The minimum term consists of the total of the minimum terms of the consecutive sentences.

(c) Post-Release Supervision. – When multiple periods of post-release supervision are imposed on a person, either at the same time or in addition to existing

periods of supervision, the periods of post-release supervision are consolidated to run as a single period and begin at the conclusion of all terms of imprisonment."

SECTION 8. G.S. 15A-1368(a) reads as rewritten:

"(a) The following words have the listed meaning in this Article:

(1) Post-release supervision or supervision. – The time for which a sentenced prisoner is ~~released from prison before~~ supervised in the community following the termination of ~~his~~ the prisoner's maximum prison term, controlled by the rules and conditions of this Article. Purposes of post-release supervision include all or any of the following: to monitor and control the prisoner in the community, to assist the prisoner in reintegrating into society, to collect restitution and other court indebtedness from the prisoner, and to continue the prisoner's treatment or education.

(2) Supervisee. – A person released from incarceration and in the custody of the Department of Correction and Post-Release Supervision and Parole Commission on post-release supervision.

(3) Commission. – The Post-Release Supervision and Parole Commission, whose general authority is described in G.S. 143B-266.

(4) Minimum imposed term. – The minimum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive imprisonment terms, the minimum imposed term, for purposes of this Article, is the sum of all minimum terms imposed in the court judgment.

(5) Maximum imposed term. – The maximum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive prison terms, the maximum imposed term, for purposes of this Article, is the sum of all maximum terms imposed in the court judgment or ~~judgments, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies.~~ judgments."

SECTION 9. G.S. 15A-1368.1 reads as rewritten:

"**§ 15A-1368.1. Applicability of Article 84A.**

This Article applies to all felons in Class B1 through Class E sentenced to an active punishment under Article 81B of this ~~Chapter,~~ Chapter or G.S. 90-95(h), but does not apply to felons in Class B1 sentenced to life imprisonment without parole. Prisoners subject to Articles 85 and 85A of this Chapter are excluded from this Article's coverage."

SECTION 10. G.S. 15A-1368.2 reads as rewritten:

"**§ 15A-1368.2. Post-release supervision eligibility and procedure.**

(a) A prisoner to whom this Article applies shall be released from prison for post-release supervision on the date equivalent to his maximum imposed prison term ~~less nine months,~~ less any earned time awarded by the Department of Correction or the custodian of a local confinement facility under G.S. 15A-1340.13(d). If a prisoner has

not been awarded any earned time, the prisoner shall be released for post-release supervision on the date equivalent to his maximum prison ~~term less nine months.~~term.

(b) A prisoner shall not refuse post-release supervision.

(c) A supervisee's period of post-release supervision shall be for a period of nine months, unless the offense is ~~an~~ a Class B1 through E offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years. The conditions of post-release supervision are as authorized in G.S. ~~15A-1368.5.~~15A-1368.4.

~~(d) A supervisee's period of post-release supervision may be reduced while the supervisee is under supervision by earned time awarded by the Department of Correction, pursuant to rules adopted in accordance with law. A supervisee is eligible to receive earned time credit toward the period of supervision for compliance with reintegrative conditions described in G.S. 15A-1368.5.~~

(e) Repealed by Session Laws 1997-237, s. 7.

(f) When a supervisee completes the period of post-release supervision, the sentence or sentences from which the supervisee was placed on post-release supervision are terminated."

SECTION 11. G.S. 15A-1368.3 reads as rewritten:

"**§ 15A-1368.3. Incidents of post-release supervision.**

(a) Conditionality. – Post-release supervision is conditional and subject to revocation.

(b) Modification. – The Commission may for good cause shown modify the conditions of post-release supervision at any time before the termination of the supervision period.

(c) Effect of Violation. – If the supervisee violates a condition, described in G.S. 15A-1368.4, at any time before the termination of the supervision period, the Commission may continue the supervisee on the existing supervision, with or without modifying the ~~conditions, or~~ conditions. If the supervisee violates a controlling condition described in G.S. 15A-1368.4(b), (b1), (e), or (e2), and if continuation or modification is not appropriate, the Commission may revoke post-release supervision as provided in G.S. 15A-1368.6 and reimprison the supervisee for a term consistent with the following requirements:

(1) The supervisee will be returned to prison ~~up to the time remaining on his maximum imposed term.~~ for a minimum term of seven months and a maximum term of nine months.

(2) The supervisee shall not receive any credit for days on post-release supervision against the maximum term of imprisonment imposed by the court under G.S. 15A-1340.13.

(3) Pursuant to Article 19A of Chapter 15, the Department of Correction shall award a prisoner credit against any term of reimprisonment for all time spent in custody as a result of revocation proceedings under G.S. 15A-1368.6.

(4) The prisoner is eligible to receive earned time credit against the maximum prison term as provided in G.S. 15A-1340.13(d) for time served in prison after the revocation.

(d) No Re-Release After Revocation of Post-Release Supervision. – A prisoner who has been reimprisoned prior to completing a post-release supervision period may ~~again~~ not be released again on post-release supervision by the ~~Commission subject to the provisions which govern initial release.~~Commission.

(e) Timing of Revocation. – The Commission may revoke post-release supervision for violation of a controlling condition during the period of supervision. The Commission may also revoke post-release supervision following a period of supervision if:

(1) Before the expiration of the period of post-release supervision, the Commission has recorded its intent to conduct a revocation hearing; and

(2) The Commission finds that every reasonable effort has been made to notify the supervisee and conduct the hearing earlier. Prima facie evidence of reasonable effort to notify is the issuance of a temporary or conditional revocation order, as provided in G.S. 15A-1376, that goes unserved."

SECTION 12. G.S. 15A-1368.4 reads as rewritten:

"**§ 15A-1368.4. Conditions of post-release supervision.**

(a) In General. – Conditions of post-release supervision may be reintegrative in nature or designed to control the supervisee's behavior and to enforce compliance with law or judicial order. A supervisee may have his supervision period revoked for any violation of a controlling ~~condition or for repeated violation of a reintegrative condition. Compliance with reintegrative conditions may entitle a supervisee to earned time credits as described in G.S. 15A-1368.2(d).~~condition.

(b) Required Condition. – The Commission shall provide as an express condition of every release that the supervisee not commit another crime during the period for which the supervisee remains subject to revocation. A supervisee's failure to comply with this controlling condition is a supervision violation for which the supervisee may face revocation as provided in G.S. 15A-1368.3.

(b1) Additional Required Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. – In addition to the required condition set forth in subsection (b) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, controlling conditions, violations of which may result in revocation of post-release supervision, are:

(1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).

(2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the Commission.

(3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.

(4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.

(5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless ~~a court of competent jurisdiction~~ the Post-Release Supervision and Parole Commission expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the child's best interest to allow the supervisee to reside in the same household with a minor child.

(c) Discretionary Conditions. – The Commission, in consultation with the Division of Community Corrections, may impose reintegrative or controlling conditions on a supervisee it believes reasonably necessary to ensure that the supervisee will lead a law-abiding life or to assist the supervisee to do so.

(d) Reintegrative Conditions. – Appropriate reintegrative ~~conditions, for which a supervisee may receive earned time credits against the length of the supervision period, and repeated violation that may result in revocation of post-release supervision, are:~~conditions are:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip the supervisee for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on post-release supervision.

(4) Support the supervisee's dependents and meet other family responsibilities.

(5) In the case of a supervisee who attended a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(6) Satisfy other conditions reasonably related to reintegration into society.

(e) Controlling Conditions. – Appropriate controlling conditions, violation of which may result in revocation of post-release supervision, are:

(1) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the supervisee by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

(2) Comply with a court order to pay the costs of reintegrative treatment for a minor and a minor's parents or custodians where the offense involved evidence of physical, mental, or sexual abuse of a minor.

(3) Comply with a court order to pay court costs and costs for appointed counsel or public defender in the case for which the supervisee was convicted.

(4) Not possess a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or a post-release supervision officer.

(5) Report to a post-release supervision officer at reasonable times and in a reasonable manner, as directed by the Commission or a post-release supervision officer.

(6) Permit a post-release supervision officer to visit at reasonable times at the supervisee's home or elsewhere.

(7) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the post-release supervision officer.

(8) Answer all reasonable inquiries by the post-release supervision officer and obtain prior approval from the post-release supervision officer for any change in address or employment.

(9) Promptly notify the post-release supervision officer of any change in address or employment.

(10) Submit at reasonable times to searches of the supervisee's person by a post-release supervision officer for purposes reasonably related to the post-release supervision. The Commission shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the supervisee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(12) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the supervisee in connection with any judgment rendered by the court.

(13) Remain in one or more specified places for a specified period or periods each day, and wear a device that permits the defendant's compliance with the condition to be monitored electronically.

(14) Submit to supervision by officers assigned to the Intensive Post-Release Supervision Program established pursuant to G.S. 143B-262(c), and abide by the rules adopted for that Program.

(e1) Prohibited Conditions. – The Commission shall not impose community service as a condition of post-release supervision.

(e2) Additional Discretionary Controlling Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. – In addition to the discretionary conditions set forth in subsections (d) and (e) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, appropriate discretionary controlling conditions, violations of which may result in revocation of post-release supervision, are that the offender:

(1) Reside at a residence to be approved by the supervising officer.

(2) Not have contact with the victim including, but not limited to, letters, phone calls, tapes, videos, computer, Internet, or visits. This includes any form of direct contact, or any form of contact through a third party.

(3) Not socialize or communicate with individuals under the age of 18 in work or social activities unless accompanied by a responsible adult who is aware of the abusive patterns and is approved in writing by the supervising officer.

(4) Submit to psychological and psychophysiological assessment at the direction of the supervising officer to assist in treatment planning and case monitoring.

(5) Participate in a sexual abuse treatment program approved by the supervising officer and complete the same to the full satisfaction of the treatment provider. Comply with all programs, including the polygraph examinations, to be used as a tool in conjunction with the treatment plan developed by the treatment provider. Program participation is defined as attendance at all meetings, prompt payment of fees, admission of responsibility for his or her offense, and progress toward reasonable treatment goals.

(6) Pay for the victims' mental health counseling expenses that are incurred as a result of the crime or offense as ordered by the court.

(7) Not possess any sexually stimulating or sexually oriented materials as deemed inappropriate by the supervising officer, nor patronize any place where such material or entertainment is the primary business.

(8) Not use, possess, control, distribute, sell, exchange, or collect pornography or child erotica, including any obtained through Internet access or telephonic communications.

(9) Submit at reasonable times to warrantless searches and seizures by the supervising officer of his person, vehicle, premises, computer equipment, and telephone records while he is present for the purposes of detecting or discovering pornography and/or erotica, which are reasonably related to his supervision.

(10) Not linger, loiter, nor spend time at locations where unsupervised persons under 18 years of age are present, including, but not limited to, parks, playgrounds, school yards, arcades, or places frequented by

children, activities, and such similar places whose purpose is the care, entertainment, or education of such persons under 18 years of age.

(11) Not work or volunteer for any business or organization that provides services to or employs persons under 18 years of age. This includes, but is not limited to, arcades, babysitting, daycare agencies, schools, churches, playgrounds, and youth sporting activities or groups. The supervising officer must approve employment.

(12) Not associate with or have any contact with convicted sex offenders unless in a counseling group.

(13) When given authorization to visit another jurisdiction, present a travel letter to the local police department, have it signed, and return it to the supervising officer.

(14) Not purchase, possess, or consume alcoholic beverages or controlled substances. Submit to blood, breath, and urine testing for analysis for the presence of prohibited drugs or alcohol as requested by the supervising officer and pay any fees associated with testing.

(15) Not be alone with any minor child below the age of 18 years unless approved by his or her supervising officer in writing.

(16) Not engage in any sexual behavior with any minor child below the age of 18 years of age.

(17) Abide by a curfew at the discretion of the supervising officer.

(f) Required Supervision Fee. – The Commission shall require as a condition of post-release supervision that the supervisee pay a supervision fee of thirty dollars ($30.00) per month. The Commission may exempt a supervisee from this condition only if it finds that requiring payment of the fee is an undue economic burden. The fee shall be paid to the clerk of superior court of the county in which the supervisee was convicted. The clerk shall transmit any money collected pursuant to this subsection to the State to be deposited in the State's General Fund. In no event shall a supervisee be required to pay more than one supervision fee per month."

SECTION 13. G.S. 90-95(h) reads as rewritten:

"(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 50 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42

months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of

a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(3a) Repealed by Session Laws 1999-370, s. 1, effective December 1, 1999.

(3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or amphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine or amphetamine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of ~~117~~108 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of ~~279~~270 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium

or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of ~~117~~108 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of ~~279~~270 months in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethylamide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more dosage units, or equivalent quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(4b) Any person who sells, manufactures, delivers, transports, or possesses 100 or more tablets, capsules, or other dosage units, or 28 grams or more of 3,4-methylenedioxyamphetamine (MDA), including its salts, isomers, and salts of isomers, or 3,4-methylenedioxymethamphetamine

(MDMA), including its salts, isomers, and salts of isomers, or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in MDA/MDMA." If the quantity of the substance or mixture involved:

a. Is 100 or more tablets, capsules, or other dosage units, but less than 500 tablets, capsules, or other dosage units, or 28 grams or more, but less than 200 grams, the person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more tablets, capsules, or other dosage units, but less than 1,000 tablets, capsules, or other dosage units, or 200 grams or more, but less than 400 grams, the person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more tablets, capsules, or other dosage units, or 400 grams or more, the person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined not less than two hundred fifty thousand dollars ($250,000).

(5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section."

SECTION 14. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

SENATE BILL 574:
Amend Post-Release Supervision Laws.

BILL ANALYSIS

Committee: Senate Judiciary II
Date: April 7, 2005
Version: First

Introduced by: Sen. Hartsell
Summary by: Robin Johnson*
Committee Counsel

SUMMARY: ***Senate Bill 574 would amend the laws related to Post-Release Supervision (PRS). The bill would delete from the Structured Sentencing charts the nine months of PRS included within the maximum sentences and would create PRS as a sanction that may be imposed at the judge's discretion and that is separate from the prison term.***

CURRENT LAW:

Structured Sentencing – The maximum sentences for Class B1 through Class E felonies include nine months of PRS. The purpose of PRS is to monitor and control the offender in the community, to assist the offender's reintegration into society, to collect restitution and indebtedness owed by the offender, and to continue the offender's treatment and education.

Post-Release Supervision - Individuals convicted of a Class B1 through Class E felony are released from prison nine months prior to the maximum sentence imposed, less any earned time awarded. PRS lasts for nine months, unless the individual is convicted of a sex offense that requires registration under the Sex Offender Registration Act, in which case the period of PRS is five years. It is possible for the period of PRS to be reduced by earned time during the period of supervision, but generally this does not happen.

PRS is conditional and subject to revocation. Violation of any condition may result is the modification or revocation of PRS. Upon a revocation of PRS, no matter when it occurs during the nine months, the supervisee is returned to prison to serve the remainder of the maximum sentence (nine months). This period may be reduced by earned time. Upon a second release, the prisoner is eligible for PRS under the same conditions as imposed the first time.

Certain Drug Trafficking Offenses – The maximum sentences for the following drug trafficking offenses include nine months of PRS: Marijuana (10,000 or more pounds); Methaqualone (10,000 or more dosage units); Cocaine (400 grams or more); Methamphetamine (200 grams or more); Opium or heroin (14 grams or more); LSD (1,000 or more dosage units); and MDA/MDMA (1,000 or more tablets).

BILL ANALYSIS:

Section 1 would amend the definitions of Article 81B of Chapter 15A (Structured Sentencing) to include "Post-release supervision". It would be defined as the time a prisoner is supervised in the community following the termination of the prisoner's maximum prison term.

Section 2 would amend G.S. 15A-1340.13(b) to require that when a judge is imposing a sentence under structured sentencing, the judge shall also include a period of post-release supervision if the offense is a Class B1 through Class E felony.

Section 3 would amend G.S. 15A-1340.17 (the structured sentencing chart) to make PRS a separate punishment, and to create a single table for calculating the maximum sentences for Class B1 through Class I felonies where the minimum term is less than 347 months.

Section 4 would create a new section (G.S. 15A-1340.18) relating to PRS under structured sentencing. Any person convicted of a Class B1, B2, C, D, or E felony could be required to participate in PRS. The minimum period of PRS would be seven months and the maximum period would be nine months, unless the offense is subject to the registration requirements of Article 27A of Chapter 14 (Sex Offenders Registration Program). If the period of PRS is revoked, the term of re-imprisonment would be a minimum term of seven months and a maximum of nine months. A court may decline to impose PRS if it makes a finding of facts that indicate that PRS would not be necessary in that case. PRS would not be imposed for an offender convicted of a Class B1 felony offense who receives a life sentence.

Section 5 would amend G.S. 15A-1342(c) to provide that if a court places an offender on probation, the period of PRS is also suspended.

Section 6 would amend G.S. 15A-1344(d) to provide that if an offender violates a condition of probation under a suspended sentence, the Post-Release Supervision and Parole Commission ("Commission") may activate the offender's prison sentence and any period of PRS.

Section 7 would amend G.S. 15A-1354 to provide that where a court imposes consecutive terms, the periods of PRS are consolidated to run as a single period and run at the conclusion of the term of imprisonment.

Section 8 would amend the definitions in Article 84A (Post-Release Supervision) to reflect that PRS is the time an offender is supervised in the community after the termination of the maximum prison term.

Section 9 would amend G.S. 15A-1368.1 to reflect that it applies to certain drug trafficking offenses under G.S. 90-95.

Section 10 would amend G.S. 15A-1368.2 to provide that earned time is inapplicable to the period of PRS.

Section 11 would amend G.S. 15A-1368.3 to provide that a supervisee who violates a controlling condition of PRS *(see page 11, line 34, through page 12, line 42)*, it would be revoked and the supervisee would return to prison for a minimum of seven months and a maximum of nine months. It also would prohibit the re-release of an offender into PRS once it has been revoked.

Section 12 would amend G.S. 15A-1368.4 to (i) remove the authority to revoke PRS for a repeated violation of a reintegrative condition *(see page 11, lines 16-33)*; (ii) clarify that a supervisee may not receive earned time credit during PRS; and (iii) codify certain discretionary controlling conditions for sex offenders that currently are imposed under the Commission's general authority.

Section 13 would amend G.S. 90-95(h) regarding the sentences for certain drug trafficking offenses to remove the period of PRS from the maximum sentence and require that it be imposed as a separate sanction.

BACKGROUND: Post-Release Supervision was not developed as part of the original structured sentencing proposals of 1993. It was added to the structured sentencing legislation during the legislative process. The Structured Sentencing Commission has repeatedly recommended changes to PRS to make it more consistent with the way structured sentencing functions and to also clarify certain details regarding how PRS functions.

This act would become effective December 1, 2005 and apply to offenses committed on or after that date.

*S574-SMRH-001: *Kory Goldsmith, Committee Counsel, substantially contributed to this summary*

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 592

Short Title:	Indigent Defense Technical Revisions.	(Public)
Sponsors:	Senators Kinnaird; Hartsell, Rand, and Weinstein.	
Referred to:	Judiciary II.	

March 16, 2005

A BILL TO BE ENTITLED

AN ACT TO MAKE TECHNICAL REVISIONS TO THE LAW GOVERNING INDIGENT DEFENSE AND ENTITLEMENT TO COUNSEL.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7A-304(d)(1) reads as rewritten:

"(d) (1) In any criminal case in which the liability for costs, fines, restitution, attorney's fees, or any other lawful charge has been finally determined, the clerk of superior court shall, unless otherwise ordered by the presiding judge, disburse such funds when paid in accordance with the following priorities:

a. Sums in restitution to the victim entitled thereto;
b. Costs due the county;
c. Costs due the city;
d. Fines to the county school fund;
e. Sums in restitution prorated among the persons other than the victim entitled thereto;
f. Costs due the State;
g. Attorney's fees, including appointment fees assessed pursuant to G.S. 7A-455.1.

(2) Sums in restitution received by the clerk of superior court shall be disbursed when:

a. Complete restitution has been received; or
b. When, in the opinion of the clerk, additional payments in restriction will not be collected; or
c. Upon the request of the person or persons entitled thereto; and
d. In any event, at least once each calendar year."

SECTION 2. G.S. 7A-451(a) reads as rewritten:

"(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;
(2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;
(3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars ($500.00) or more, or has been sentenced to a term of imprisonment;
(4) A hearing for revocation of probation;
(5) A hearing in which extradition to another state is sought;
(6) A proceeding for an inpatient involuntary commitment to a facility under Part 7 of Article 5 of Chapter 122C of the General Statutes, or a proceeding for commitment under Part 8 of Article 5 of Chapter 122C of the General Statutes.
(7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;
(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;
(9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;
(10) Repealed by Session Laws 2003, c. 13, s. 2(a), effective April 17, 2003, and applicable to all petitions for sterilization pending and orders authorizing sterilization that have not been executed as of April 17, 2003.
(11) A proceeding for the provision of protective services according to Chapter 108A, Article 6 of the General Statutes;
(12) In the case of a juvenile alleged to be ~~neglected~~ abused, neglected, or dependent under ~~Chapter 7A, Article 23~~ Subchapter I of Chapter 7B of the General Statutes;
(13) A proceeding to find a person incompetent under Subchapter I of Chapter 35A, of the General Statutes;
(14) A proceeding to terminate parental rights where a guardian ad litem is appointed pursuant to G.S. 7B-1101;
(15) An action brought pursuant to ~~Article 24B of Chapter 7A~~ Article 11 of Chapter 7B of the General Statutes to terminate an indigent person's parental rights.
(16) A proceeding involving consent for an abortion on an unemancipated minor pursuant to Article 1A, Part 2 of Chapter 90 of the General Statutes. G.S. 7A-450.1, 7A-450.2, and 7A-450.3 shall not apply to this proceeding.

(17) A proceeding involving limitation on freedom of movement or access pursuant to G.S. 130A-475 or G.S. 130A-145."

SECTION 3. G.S. 7A-455.1 reads as rewritten:

"**§ 7A-455.1. Appointment fee in criminal cases.**

(a) Each person ~~who requests the appointment of~~ for whom counsel is appointed in a criminal case at the trial level shall pay to the clerk of court ~~a nonrefundable~~ an appointment fee of fifty dollars ~~($50.00) at the time of appointment.~~ ($50.00). No fee shall be due ~~if the court finds that the person is not entitled to the appointment of counsel.~~ unless the person is convicted.

(b) ~~The appointment fee in this section is due regardless of the outcome of the proceedings. If paid in full at the time of appointment, the fifty dollars ($50.00) paid shall be credited against any amounts the court determines to be owed for the value of legal services rendered to the defendant. If not paid in full at the time of appointment,~~ ~~the~~ The fifty-dollar ($50.00) fee shall be added to any amounts the court determines to be owed for the value of legal services rendered to the defendant and shall be collected in the same manner as attorneys' fees are collected for such representation. ~~If the fee is not paid in full at the time of appointment, and no attorneys' fees are found due when the action is finally determined at the trial level, a judgment shall be entered, docketed, and indexed pursuant to G.S. 1-233 in the amount of fifty dollars ($50.00) and shall constitute a lien as prescribed by the general law of the State applicable to judgments.~~

~~(c) The attorney representing the defendant when the action is finally determined at the trial level shall advise the court whether the appointment fee required by this section has been paid.~~

(d) Inability, failure, or refusal to pay the appointment fee shall not be grounds for denying appointment of counsel, for withdrawal of counsel, or for contempt.

(e) The appointment fee required by this section shall be assessed only once for each ~~affidavit of indigency submitted by a defendant or other determination of indigency by the court,~~ attorney appointment, regardless of the number of cases ~~for~~ to which ~~an~~ the attorney ~~is appointed.~~ was assigned. An additional appointment fee shall not be assessed for any additional cases thereafter assigned to ~~an~~ the attorney if any cases ~~for which a defendant was previously assessed an appointment fee~~ to which the attorney was appointed are still pending. Nor shall an additional appointment fee be assessed if the charges for which an attorney was appointed ~~are~~ were dismissed and subsequently ~~refiled or if the defendant is appointed an attorney on appeal on a matter for which the defendant was assessed an appointment fee at the trial level.~~ refiled, or if the charges for which an attorney was appointed were reassigned to a different attorney.

(f) Of each appointment fee collected under this section, the sum of forty-five dollars ($45.00) shall be credited to the Indigent Persons' Attorney Fee Fund and the sum of five dollars ($5.00) shall be credited to the Court Information Technology Fund under G.S. 7A-343.2. These fees shall not revert.

(g) The Office of Indigent Defense Services shall adopt rules and develop forms to govern implementation of this section."

SECTION 4. G.S. 15A-1343(e) reads as rewritten:

"(e) Costs of Court and Fees for Appointed Counsel. – Unless the court finds there are extenuating circumstances, any person placed upon supervised or unsupervised probation under the terms set forth by the court shall, as a condition of probation, be required to pay all court costs and ~~costs~~ all fees for appointed ~~counsel or public defender~~ counsel, public defender, or counsel employed by or under contract with the Office of Indigent Defense Services in the case in which ~~he~~ the person was convicted. The ~~cost of~~ fees for appointed ~~counsel or public defender~~ counsel, public defender, or other counsel services shall be determined in accordance with rules adopted by the Office of Indigent Defense Services. The court shall determine the amount of those costs and fees to be repaid and the method of payment."

SECTION 5. G.S. 35A-1245(c) reads as rewritten:

"(c) A copy of the petition shall be served on the ward personally. If the ward is unable to comprehend the nature of the proposed procedure and its consequences and is unable to provide an informed consent, the clerk shall appoint an attorney to represent the ~~ward.~~ ward in accordance with rules adopted by the Office of Indigent Defense Services."

SECTION 6. This act is effective when it becomes law.

SENATE BILL 592:
Indigent Defense Technical Revisions.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Kinnaird
Date:	April 14, 2005	**Summary by:**	Ben Popkin
Version:	First Edition		Committee Counsel

SUMMARY: ***Senate Bill 592 would make technical revisions to current law governing indigent defense and entitlement to counsel to correspond with current practices and to comply with the recent North Carolina Supreme Court Decision – State v. Webb. The act would be effective when it becomes law.***

CURRENT LAW: **Section 1**: G.S. 7A-304(d)(1) does not specifically include attorney's fees in the types of funds to be disbursed by the clerk of superior court, though it is included in the payment priority list that follows[1]. **Section 2**: G.S. 7A-451(a)(12) and (a)(15) currently refer to sections of the statutes addressing termination of parental rights that have been repealed and recodified. **Section 3**: G.S. 7A-455.1 – Appointment fee in criminal cases, calls for a $50.00 fee to be paid by a defendant requesting appointed counsel at the time of appointment, regardless of the ultimate outcome of the case. The statute also calls for collection of a $50.00 fee for appellate appointments, though current practice by the Office of Indigent Services does not direct the courts to assess the fee in appellate or post-conviction proceedings. **Section 4**: G.S. 15A-1343 includes attorney's costs with court costs that are to be paid by the convicted defendant as a condition of probation. **Section 5**: G.S. 35A-1245(c) authorizes the clerk of superior court to appoint an attorney to represent the mentally ill or mentally retarded in cases involving sterilization.

BILL ANALYSIS: **Section 1**: The bill would specifically include attorney's fees in the types of funds to be disbursed by the clerk of superior court in G.S. 7A-304(d)(1) to correspond with the payment priority list that follows[2]. **Section 2**: The bill would adjust the references in G.S. 7A-451(a)(12) and (a)(15) to correspond to the correct sections of the statutes as recodified. **Section 3**: The bill would comply with *State v. Webb*, which bars up-front collections of appointment fees. The bill would call for the $50.00 fee to come due after the defendant has been convicted, and only at the trial level (not appellate level). Currently, the Office of Indigent Services does not direct the courts to assess the fee in appellate or post-conviction proceedings; the bill would change statutory language to reflect this practice. **Section 4**: The bill would clarify that attorney's fees are considered to be separate from court costs. The bill could clarify that payment of attorney's fees may also be included as a condition of probation. **Section 5**: The bill would add language to correspond to other language addressing the appointment of counsel in cases under Article 36 of Chapter 7A – Entitlement of Indigent Persons.

S592-SMSS-001

[1] G.S. 7A-304(d)(1)g.
[2] G.S. 7A-304(d)(1)g.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 593

Short Title:	Copy Costs in Indigent Cases.	(Public)
Sponsors:	Senators Kinnaird; Hartsell, Rand, and Weinstein.	
Referred to:	Judiciary II.	

March 16, 2005

A BILL TO BE ENTITLED

AN ACT TO EXEMPT ATTORNEYS APPOINTED TO REPRESENT INDIGENT CLIENTS FROM THE FEE CHARGED BY THE CLERK OF COURT FOR PREPARING COPIES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7A-308 is amended by adding a new subsection to read:

"(b) The fees set forth in subdivision (12) of subsection (a) of this section are not chargeable when copies are requested by an attorney who has been appointed to represent an indigent person at State expense, if the request is made in connection with the appointed case and during the duration of the appointment."

SECTION 2. This act becomes effective July 1, 2005, and applies to fees charged on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 593
PROPOSED COMMITTEE SUBSTITUTE S593-CSSS-5 [v.1]

4/13/2005 4:59:45 PM

Short Title: Copy Costs in Indigent Cases. (Public)

Sponsors:

Referred to:

March 16, 2005

A BILL TO BE ENTITLED

AN ACT TO EXEMPT ATTORNEYS APPOINTED TO REPRESENT INDIGENT CLIENTS FROM THE FEE CHARGED BY THE CLERK OF COURT FOR PREPARING COPIES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7A-308 is amended by adding a new subsection to read:

"(b1) The fees set forth in subdivision (12) of subsection (a) of this section are not chargeable when copies are requested by an attorney who has been appointed to represent an indigent person at State expense, if the request is made in connection with the appointed case and during the duration of the appointment."

SECTION 2. This act becomes effective July 1, 2005, and applies to fees charged on or after that date.

SENATE BILL 593:
Copy Costs in Indigent Cases.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Kinnaird
Date:	April 14, 2005	**Summary by:**	Ben Popkin
Version:	Proposed Committee Substitute - First Edition		Committee Counsel

SUMMARY: ***Senate Bill 593 would provide an exception to the collection of certain miscellaneous fees by the clerk of superior court. The clerk would not charge for preparing copies requested by counsel appointed to represent an indigent person at State expense so long as the request is made in connection with the appointed case and is during the period of appointment. The Proposed Committee Substitute makes a minor technical correction to the numbering of a section of the bill. The act would be effective on July 1, 2005 and would apply to fees charged on or after that date.***

CURRENT LAW: Article 28 – Uniform Costs and Fees, provides for the collection of miscellaneous fees and commissions by clerks of superior court and remittance of these fees to the State for support of the General Court of Justice.[1] Preparation of copies is listed among these fees at $2.00 for the first page and .25 for each additional page[2].

BILL ANALYSIS: This bill would add a section exempting copies made at the request of counsel appointed to represent an indigent person at State expense from those fees clerks are directed to collect. The bill would limit copies provided without charge to only those that are made at the request of appointed counsel in connection with the appointed case and during the duration of the appointment

BACKGROUND: Many clerk's offices currently waive the fee for preparing copies for counsel appointed in indigent cases. When the fee is charged, the cost is billed to the Office of Indigent Defense Services by the appointed counsel, for reimbursement from State funds. The money paid by appointed counsel is deposited by the clerks into the State financial management system for remittance to the State General Fund. Providing for appointed counsel working on indigent cases to be exempt from collection of copy costs would simplify the system and avoid any associated transaction costs.

S593-CSSS-001

[1] G.S. 7A-308(a).
[2] G.S. 7A-308(a)(12).

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 594

Short Title:	Recoupment by Court-Appointed Attorneys.	(Public)
Sponsors:	Senators Kinnaird; Hartsell, Rand, and Weinstein.	
Referred to:	Judiciary II.	

March 16, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW GOVERNING RECOUPMENT FOR LEGAL SERVICES PROVIDED TO INDIGENT PERSONS WHO ARE FINANCIALLY ABLE TO PAY A PORTION OF THE VALUE OF THOSE SERVICES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7A-455 reads as rewritten:

"**§ 7A-455. Partial indigency; liens; acquittals.**

(a) If, in the opinion of the court, an indigent person is financially able to pay a portion, but not all, of the value of the legal services rendered for ~~him~~the person by assigned counsel, the public defender, or the appellate defender, and other necessary expenses of representation, ~~he~~the court shall order the partially indigent person to pay such portion to the clerk of superior court for transmission to the State treasury.

(b) In all cases the court shall direct that a judgment be entered in the office of the clerk of superior court for the money value of services rendered by assigned counsel, the public defender, or the appellate defender, plus any sums allowed for other necessary expenses of representing the indigent person, including any fees and expenses that may have been allowed prior to final determination of the action to assigned counsel pursuant to G.S. 7A-458, which shall constitute a lien as prescribed by the general law of the State applicable to judgments. Any reimbursement to the State as provided in subsection (a) of this section or any funds collected by reason of such judgment shall be deposited in the State treasury and credited against the judgment. The value of services shall be determined in accordance with rules adopted by the Office of Indigent Defense Services. The money value of services rendered by the public defender and the appellate defender shall be based upon the factors normally involved in fixing the fees of private attorneys, such as the nature of the case, the time, effort, and responsibility involved, and the fee usually charged in similar cases. A district court judge shall direct entry of judgment for actions or proceedings finally determined in the district court and a superior court judge shall direct entry of judgment for actions or proceedings originating in, heard on appeal in, or appealed from the superior court.

Even if the trial, appeal, hearing, or other proceeding is never held, preparation therefor is nevertheless compensable.

(b1) In every case in which the State is entitled to a lien pursuant to this section, the public defender shall at the time of sentencing or other conclusion of the proceedings petition the court to enter judgment for the value of the legal services rendered by the public defender, and the appellate defender shall upon completion of the appeal petition or request the trial court to enter judgment for the value of the legal services rendered by the appellate defender.

(c) No order for partial payment under subsection (a) of this section and no judgment under subsection (b) of this section shall be entered unless the indigent person is convicted. If the indigent person is convicted, the order or judgment shall become effective and the judgment shall be docketed and indexed pursuant to G.S. 1-233 et seq., in the amount then owing, upon the later of (i) the date upon which the conviction becomes final if the indigent person is not ordered, as a condition of probation, to pay the State of North Carolina for the costs of his representation in the case or (ii) the date upon which the indigent person's probation is terminated or revoked if the indigent person is so ordered. No order for partial payment under subsection (a) of this section and no judgment under subsection (b) of this section shall be entered for the value of legal services rendered to perfect an appeal to the Appellate Division or in postconviction proceedings, if all of the matters that the person raised in the proceeding are vacated, reversed, or remanded for a new trial or resentencing.

(d) In all cases in which the entry of a judgment is authorized under G.S. 7A-450.1 through G.S. 7A-450.4 or under this section, the attorney, guardian ad litem, public defender, or appellate defender who rendered the services or incurred the expenses for which the judgment is to be entered shall obtain the social security number, if any, of each person against whom judgment is to be entered. This number, or a certificate that the person has no social security number, shall be included in each fee application submitted by an assigned attorney, guardian ad litem, public defender, or appellate defender, and no order for payment entered upon an application which does not include the required social security number or certification shall be valid to authorize payment to the applicant from the Indigent Persons' Attorney Fee Fund. Each judgment docketed against any person under this section or under G.S. 7A-450.3 shall include the social security number, if any, of the judgment debtor."

SECTION 2. G.S. 7B-603 reads as rewritten:

"**§ 7B-603. Payment of court-appointed attorney or guardian ad litem.**

(a) An attorney or guardian ad litem appointed pursuant to G.S. 7B-601 shall be paid a reasonable fee fixed by the court or by direct engagement for specialized guardian ad litem services through the Administrative Office of the Courts.

(a1) The court may require payment of the fee for an attorney or guardian ad litem appointed pursuant to G.S. 7B-601 from a person other than the juvenile as provided in G.S. 7A-450.1, 7A-450.2, and 7A-450.3. In no event shall the parent or guardian be required to pay the fees for a court-appointed attorney or guardian ad litem in an abuse, neglect, or dependency proceeding unless the juvenile has been adjudicated to be abused, neglected, or dependent or, in a proceeding to terminate parental rights, unless

the parent's rights have been terminated. If the party is ordered to reimburse the State for attorney or guardian ad litem fees and fails to comply within 90 days, the court shall file a judgment against the party for the amount due the State.

(b) An attorney appointed pursuant to G.S. 7B-602 or pursuant to any other provision of the Juvenile Code for which the Office of Indigent Defense Services is responsible for providing counsel shall be paid a reasonable fee in accordance with rules adopted by the Office of Indigent Defense Services.

(b1) The court may require payment of the fee for an attorney appointed pursuant to G.S. 7B-602 or G.S. 7B-1101 from the respondent. In no event shall the respondent be required to pay the fees for a court-appointed attorney in an abuse, neglect, or dependency proceeding unless the juvenile has been adjudicated to be abused, neglected, or dependent or, in a proceeding to terminate parental rights, unless the respondent's rights have been terminated. At the dispositional hearing or other appropriate hearing, the court shall make a determination whether the respondent should be held responsible for reimbursing the State for the respondent's attorneys' fees. This determination shall include the respondent's financial ability to pay.

If the court determines that the respondent is responsible for reimbursing the State for the respondent's attorneys' fees, the court shall so order. If the respondent does not comply with the order within 90 days, the court shall file a judgment against the respondent for the amount due the State.

~~(c) The court may require payment of the attorney or guardian ad litem fee from a person other than the juvenile as provided in G.S. 7A-450.1, 7A-450.2, and 7A-450.3. In no event shall the parent or guardian be required to pay the fees for a court-appointed attorney or guardian ad litem in an abuse, neglect, or dependency proceeding unless the juvenile has been adjudicated to be abused, neglected, or dependent, or, in a proceeding to terminate parental rights, unless the parent's rights have been terminated. A person who does not comply with the court's order of payment may be punished for contempt as provided in G.S. 5A-21.~~"

SECTION 3. This act is effective when it becomes law.

SENATE BILL 594:
Recoupment by Court-Appointed Attorneys.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Kinnaird
Date:	April 14, 2005	**Summary by:**	Ben Popkin
Version:	First Edition		Committee Counsel

SUMMARY: ***Senate Bill 594 would amend the law governing recoupment for legal services provided to indigent persons who are financially able to pay a portion of the value of the services provided. The bill would exempt indigent persons from paying for legal services rendered to perfect an appeal to the appellate division or in post-conviction proceedings if all of the matters raised are vacated, reversed or remanded for a new trial or resentencing. The bill would also allow the court to hold a parent responsible for payment of an attorney or guardian ad litem in cases where a juvenile has been adjudicated to be abused, neglected or dependent or where the parent's rights have been terminated. The act would be effective when it becomes law.***

CURRENT LAW:

Section 1: Current recoupment statutes appear to direct entry of judgment in criminal appeals whenever the defendant's conviction is upheld[1]. It is unclear whether current statutes direct entry of civil judgment when the only relief available in the appellate courts is a new sentencing hearing.

Section 2: Current statutes do not appear to authorize recoupment when counsel is provided to an adult in an abuse, neglect, or dependency, or termination of parental rights proceeding[2].

BILL ANALYSIS:

Section 1: The bill would revise G.S. 7A-455(c) to clarify that recoupment of fees for legal services rendered is not appropriate when the appellant prevailed on the issues raised on appeal.

Section 2: The bill would clarify that a parent may be held responsible for paying the fees of a court-appointed attorney or guardian ad litem in those cases where a juvenile has been adjudicated to be abused, neglected or dependent, or in cases where the parent's rights have been terminated. The bill would call for persons ordered to reimburse the State for attorney or guardian ad litem fees to do so within 90 days, or have a judgment against them filed by the court.

S594-SMSS-001

[1] G.S. 7A-455(c).
[2] G.S. 7B-603.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 666*

Short Title:	Planned Community Act Amendment.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO ALLOW ATTORNEYS' FEES TO BE AWARDED TO THE PREVAILING PARTY IN AN ACTION TO ENFORCE PROVISIONS OF THE ARTICLES OF INCORPORATION, DECLARATION, BYLAWS, OR RULES OF A PLANNED COMMUNITY CREATED PRIOR TO JANUARY 1, 1999, IF RECOVERY OF ATTORNEYS' FEES IS ALLOWED IN THE DECLARATION, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 47F-1-102(c) reads as rewritten:

"(c) Notwithstanding the provisions of subsection (a) of this section, G.S. 47F-3-102(1) through (6) and (11) through (17) (Powers of owners' association), G.S. 47F-3-107(a), (b), and (c) (Upkeep of planned community; responsibility and assessments for damages), G.S. 47F-3-115 (Assessments for common expenses), and G.S. 47F-3-116 (Lien for assessments), apply to all planned communities created in this State before January 1, 1999, unless the articles of incorporation or the declaration expressly provides to the ~~contrary.~~ contrary, and G.S. 47F-3-120 (Declaration limits on attorneys' fees) applies to all planned communities created in this State before January 1, 1999. These sections apply only with respect to events and circumstances occurring on or after January 1, 1999, and do not invalidate existing provisions of the declaration, bylaws, or plats and plans of those planned communities. G.S. 47F-1-103 (Definitions) also applies to all planned communities created in this State before January 1, 1999, to the extent necessary in construing any of the preceding sections."

SECTION 2. This act is effective when it becomes law.

Senate Bill 666:
Planned Community Act Amendment

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	April 13, 2005
Introduced by:	Sen. Hartsell	**Summary by:**	Kory Goldsmith
Version:	First Edition		Committee Counsel

SUMMARY: ***Senate Bill 666 provides statutory authorization for provisions that allow a the prevailing party to collect attorneys' fees in actions to enforce the articles of incorporation, declaration, by-laws or rules of a planned community that was created before January 1, 1999 if those fees are allowed in the instrument that created the planned community.***

The act would be effect with the bill becomes law.

CURRENT LAW: North Carolina courts have held that a prevailing party in a lawsuit may not collect their attorneys' fees unless there is specific statutory authorization to do so. The North Carolina Planned Community Act includes in it a specific authorization for the collection of attorneys' fees if the instrument that created the planned community (the "declaration") also allows for the collection of attorneys fees. See G.S. 47F-3-120 below.

In general, Chapter 47E (Planned Community Act) does not apply to planned communities that were created before January 1, 1999. This means that even if the declaration of a pre-1999 planned community allowed for the prevailing party to collect attorneys' fees, there was no statutory authorization to support that.

§ 47F-3-120. Declaration limits on attorneys' fees.

Except as provided in G.S. 47F-3-116, in an action to enforce provisions of the articles of incorporation, the declaration, bylaws, or duly adopted rules or regulations, the court may award reasonable attorneys' fees to the prevailing party if recovery of attorneys' fees is allowed in the declaration.

§ 47F-1-102. Applicability.

(a) This Chapter applies to all planned communities created within this State on or after January 1, 1999, except as otherwise provided in this section.

(b) This Chapter does not apply to a planned community created within this State on or after January 1, 1999:

(1) Which contains no more than 20 lots (including all lots which may be added or created by the exercise of development rights) unless the declaration provides or is amended to provide that this Chapter does apply to that planned community; or

(2) In which all lots are restricted exclusively to nonresidential purposes, unless the declaration provides or is amended to provide that this Chapter does apply to that planned community.

(c) Notwithstanding the provisions of subsection (a) of this section, G.S. 47F-3-102(1) through (6) and (11) through (17) (Powers of owners' association), G.S. 47F-3-107(a), (b), and (c) (Upkeep of planned community; responsibility and assessments for damages), G.S.

47F-3-115 (Assessments for common expenses), and G.S. 47F-3-116 (Lien for assessments), apply to all planned communities created in this State before January 1, 1999, unless the articles of incorporation or the declaration expressly provides to the contrary. These sections apply only with respect to events and circumstances occurring on or after January 1, 1999, and do not invalidate existing provisions of the declaration, bylaws, or plats and plans of those planned communities. G.S. 47F-1-103 (Definitions) also applies to all planned communities created in this State before January 1, 1999, to the extent necessary in construing any of the preceding sections.

(d) Notwithstanding the provisions of subsections (a) and (c) of this section, any planned community created prior to January 1, 1999, may elect to make the provisions of this Chapter applicable to it by amending its declaration to provide that this Chapter shall apply to that planned community. The amendment may be made by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated or any smaller majority the declaration specifies. To the extent the procedures and requirements for amendment in the declaration conflict with the provisions of this subsection, this subsection shall control with respect to any amendment to provide that this Chapter applies to that planned community.

(e) This Chapter does not apply to planned communities or lots located outside this State.

State of North Carolina
General Statutes Commission
9001 Mail Service Center
RALEIGH, NORTH CAROLINA
27699-9001

MEMORANDUM

TO: Senate Judiciary II Committee

FROM: General Statutes Commission

DATE: April 1, 2005

RE: **Senate Bill 666 (Planned Community Act Amendment)**

G.S. 47F-1-102(c) lists sections of the North Carolina Planned Community Act that apply to planned communities created within this State before January 1, 1999, the effective date of the Act. This bill adds to that list G.S. 47F-3-120, which allows a court to award attorneys' fees to the prevailing party in an action to enforce the articles of incorporation, declaration, bylaws, or rules of a planned community, if recovery of attorneys' fees is allowed in the declaration. The amendment thus provides statutory authority for the recovery of attorneys' fees in cases where a planned community was created before January 1, 1999, and its declaration expressly authorized the recovery of attorneys' fees. " As a general rule, a party cannot recover attorneys' fees 'unless the recovery is expressly authorized by statute.' " McGinnis Point Owners Association, Inc. v. Joyner, 135 N.C. App. 752, 756, 522 S.E.2d 317, 320 (1999) (quoting Stillwell Enterprises, Inc. v. Interstate Equipment Co., 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980)).

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 667*

Short Title:	Subordination Agreement/Registra. Amendments.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO VALIDATE CERTAIN SUBORDINATION AGREEMENTS AND TO CLARIFY THE LAW ON THE PRIORITY OF INSTRUMENTS REGISTERED IN THE OFFICE OF THE REGISTER OF DEEDS, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 39-6.6 reads as rewritten:

"**§ 39-6.6. Subordination agreements.**

(a) A ~~written commitment or agreement to subordinate or that subordinates an interest in real property signed by a person entitled to priority~~ subordination agreement shall be given effect in accordance with its terms and is not required to state any interest rate, principal amount secured, or other financial terms. ~~For purposes of this section, an "interest in real property" shall include all rights, title, and interest in and to land, buildings, and other improvements of an owner, tenant, subtenant, secured lender, materialman, judgment creditor, lienholder, or other person, whether the interest in real property is evidenced by a deed, easement, lease, sublease, deed of trust, mortgage, assignment of leases and rents, judgment, claim of lien, or any other record, instrument, document, or entry of court.~~

(b) The trustee of a deed of trust shall not be a necessary party to a subordination agreement unless the deed of trust provides otherwise.

(c) For purposes of G.S. 1-47, a ~~commitment or~~ subordination agreement ~~described in subsection (a) of this section~~ is deemed a conveyance of an interest in real property.

(d) ~~The~~ This section is not exclusive. No subordination agreement that is otherwise valid shall be invalidated by ~~failure to comply with the provisions of~~ this section.

(e) This section applies to a subordination agreement regardless of when the agreement was signed by the party or parties thereto, except that this section does not

apply to an agreement that (i) is the subject of litigation pending on the effective date of this subsection, and (ii) was filed or recorded before October 1, 2003.

(f) In this section:

(1) 'Interest in real property' includes all rights, title, and interest in and to land, buildings, and other improvements of an owner, tenant, subtenant, secured lender, materialman, judgment creditor, lienholder, or other person, whether the interest in real property is evidenced by a deed, easement, lease, sublease, deed of trust, mortgage, assignment of leases and rents, judgment, claim of lien, or any other record, instrument, document, or entry of court.

(2) 'Subordination agreement' means a written commitment or agreement to subordinate or that subordinates an interest in real property signed by a person entitled to priority."

SECTION 2. G.S. 47-18(a) reads as rewritten:

"(a) No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainer or lesser but from the time of registration thereof in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county. Unless otherwise stated either on the ~~recorded~~ registered instrument or on a separate ~~recorded~~ registered instrument duly executed by the party whose priority interest is adversely affected, (i) instruments registered in the ~~public record shall be presumed to~~ office of the register of deeds shall have priority based on the order of ~~recordation~~ registration as determined by the time of ~~recordation. If~~ registration, and (ii) if instruments are ~~recorded~~ registered simultaneously, then ~~the order of recordation~~ the instruments shall be presumed ~~as follows, in order of priority:~~ to have priority as determined by:

(1) The earliest document number set forth on the ~~recorded~~ registered instrument.

(2) The sequential book and page number set forth on the ~~document~~ registered instrument if no document number is set forth on the ~~recorded~~ registered instrument.

The ~~presumptions~~ presumption created by this subsection ~~are~~ is rebuttable."

SECTION 3. G.S. 47-20(a) reads as rewritten:

"(a) No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this Article; provided however that any transaction subject to the provisions of the Uniform Commercial Code (Chapter 25 of the General Statutes) is controlled by the provisions of that act and not by this section. Unless otherwise stated either on the ~~recorded~~ registered instrument or on a separate ~~recorded~~ registered instrument duly executed by the party whose priority interest is adversely affected, (i) instruments registered in the

~~public record shall be presumed to~~ office of the register of deeds shall have priority based on the order of ~~recordation~~ registration as determined by the time of ~~recordation. If~~ registration, and (ii) if instruments are ~~recorded~~ registered simultaneously, then ~~the order of recordation~~ the instruments shall be presumed ~~as follows, in order of priority:~~ to have priority as determined by:

(1) The earliest document number set forth on the ~~recorded~~ registered instrument.

(2) The sequential book and page number set forth on the ~~document~~ registered instrument if no document number is set forth on the ~~recorded~~ registered instrument.

The ~~presumptions~~ presumption created by this subsection ~~are~~ is rebuttable."

SECTION 4. This act is effective when it becomes law.

State of North Carolina
General Statutes Commission
9001 Mail Service Center
RALEIGH, NORTH CAROLINA
27699-9001

MEMORANDUM

TO: Senate Judiciary II Committee

FROM: General Statutes Commission

DATE: April 1, 2005

RE: **Senate Bill 667 (Subordination Agreement/Registration Amendments)**

This bill is recommended at the request of the North Carolina Bankers Association to validate certain subordination agreements and to clarify the law on the priority of instruments registered in the office of the register of deeds.

Section 1 amends G.S. 39-6.6, which provides that a subordination agreement shall be given effect in accordance with its terms and is not required to state any interest rate, principal amount secured, or other financial terms. In a subordination agreement, the holder of a lien on real property agrees to have the lien become junior in priority to a subsequent lien on the property. One example of a subordination agreement involves real property sold subject to a purchase money mortgage, in which the buyer is authorized to subject the property to a subsequent construction mortgage that will have priority over the purchase money mortgage. G.S. 39-6.6 was enacted in 2003 in response to Smith v. Martin, 124 N.C. App. 592, 478 S.E.2d 228 (1996), and MCB Limited v. McGowan, 86 N.C. App. 607, 359 S.E.2d 50 (1987) (opinions added requirement to state interest rate, etc.). The statute became effective October 1, 2003, and applies to subordination agreements filed or recorded on or after that date.

Section 1 extends the applicability of G.S. 39-6.6 to subordination agreements that were filed or recorded before October 1, 2003, to allow them to be enforced according to their terms, as long as they are not the subject of litigation pending on the effective date of the bill. The bill also makes minor stylistic and technical changes throughout G.S. 39-6.6.

Sections 2 and 3 make identical amendments to G.S. 47-18(a) and G.S. 47-20(a) to conform terminology by substituting " registered" and " registration" for " recorded" and " recordation," respectively, and to make other terminology and formatting changes.

Section 4 makes the bill effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 689

Short Title:	Copies of Files/Appointed Appellate Attorneys.	(Public)
Sponsors:	Senators Kinnaird; and Rand.	
Referred to:	Judiciary II.	

March 21, 2005

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THAT THE CLERK OF SUPERIOR COURT IS RESPONSIBLE FOR PROVIDING COPIES OF THE TRIAL FILE TO APPOINTED APPELLATE COUNSEL IN INDIGENT CASES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7A-452 is amended by adding a new subsection to read:

"(e) In cases in which an indigent person has entered notice of appeal and appellate counsel has been appointed by the Office of Indigent Defense Services, the clerk of superior court shall make a copy of the complete trial division file in the case, make a copy of documentary exhibits upon request, and furnish those files and any requested exhibits to the appointed attorney."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 689:
Copies of Files/Appointed Appellate Attorneys.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Kinnaird
Date:	April 14, 2005	**Summary by:**	Ben Popkin
Version:	First Edition		Committee Counsel

SUMMARY: ***Senate Bill 689 would clarify that the clerk of superior court is responsible for providing appointed appellate counsel in indigent cases with copies of the complete trial division file, including any requested documentary exhibits. The act would be effective when it becomes law.***

CURRENT LAW: Upon notice of appeal by indigent criminal defendants, the court completes two forms that order the clerk of superior court to furnish the appellate defender with "...all documents on file in the case" upon counsel's request[1]. Most counties' clerks of court provide copies to the appointed appellate counsel as directed. Several counties, however, refuse to make copies for the appointed appellate counsel, requiring them instead to drive to the courthouse to make their own copies of the file.

BILL ANALYSIS: This bill would clarify that the responsibility for making copies of a complete trial division case file and all requested documentary exhibits for appointed appellate counsel rests with the clerks of court, not the appointed counsel.

BACKGROUND: In those counties where the clerk of superior court requires that appointed counsel comes to the courthouse to make their own copies, the Office of Indigent Defense Services is required to use State funds to pay the attorney for their time[2]. That rate is $65.00 per hour in non-capital cases and $85.00 per hour in capital cases.

S689-SMSS-001

[1] AOC-CR-350; AOC-J-160.
[2] G.S. 7A-452(b).

CORRECTED NOTICE

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	April 19, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 679	North Carolina Uniform Trust Code.	Senator Hagan
SB 1087	Limited Driving Privilege for DWLR.	Senator Kerr
SB 488	Exploitation of Elder or Disabled Adults/POA.	Senator Dannelly
SB 686	Meth. Lab Prevention Act.	Senator Dalton
SB 559	Expunction/Convictions of Nonviolent Crimes.	Senator Kinnaird

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, April 19, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 679	North Carolina Uniform Trust Code.	Senator Hagan
SB 1087	Limited Driving Privilege for DWLR.	Senator Kerr
SB 488	Exploitation of Elder or Disabled Adults/POA.	Senator Dannelly
SB 686	Meth. Lab Prevention Act.	Senator Dalton
SB 559	Expunction/Convictions of Nonviolent Crimes.	Senator Kinnaird

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

April 19, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on April 19, 2005, with sixteen members present. Senator Hartsell introduced the pages Jordan Parker, Margarita Shirley, Caroline McKay and Ashley Colavito and thanked them for serving.

SB 679 (North Carolina Uniform Trust Code.) Senator Hartsell called for a motion to adopt the Proposed Committee Substitute for the purpose of discussion. Senator Apodaca moved for adoption, all voted and the motion carried. Senator Hartsell recognized Senator Hagan to explain the bill. After explaining the bill, Senator Hagan invited Mr. John H. Slayton, President of The Trust Company of the South, to speak on the bill. Mr. Mike Godwin, Attorney, also spoke on the bill. Questions from Senators Dorsett, Webster, Kerr, Dalton and Bingham were answered by Mr. John Slayton and Senator Hagan. Senator Kerr requested that the committee have at least a week to study the bill. The bill will be taken up again at the Tuesday meeting.

SB 488 (Exploitation of Elder or Disabled Adults/POA.) Senator Hartsell recognized Senator Dannelly to explain the Proposed Committee Substitute. Questions from Senators Forrester and Allran were answered by Ben Popkin, Staff Attorney. Senator Webster congratulated Senator Dannelly on the bill. Senator Apodaca moved for a favorable report. All voted and the motion carried.

SB 1087 (Limited Driving Privilege for DWLR) Senator Kerr was recognized by Senator Hartsell to explain the Proposed Committee Substitute. Senator Hartsell asked for a motion to accept the Proposed Committee Substitute for discussion. Senator Bingham moved that it be accepted, all voted and the motion carried. Senator Kerr explained the bill and Kory Goldsmith, Staff Attorney, added to the explanation. Questions by Senator Goodall, Dorsett, Webster, and Bingham were answered by Kory Goldsmith, Senator Kerr and Senator Snow. Senator Dannelly moved for a favorable report. The motion carried and the bill was referred to Finance.

SB 559 (Expunction/Convictions of Nonviolent Crimes) Senator Hartsell asked for a motion to suspend the rules to hear this bill again at the Thursday meeting. Senator Apodaca moved this be accepted. All voted, the motion carried and the bill will be heard at the Thursday meeting.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, April 21, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **488** Exploitation of Elder or Disabled Adults/POA.

Draft Number:	PCS65304
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, April 19, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **1087** Limited Driving Privilege for DWLR.

Draft Number:	PCS75288
Sequential Referral:	None
Recommended Referral:	Finance
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — **Name of Committee**

4/19/05 — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Paul Stark	NC Bankers Assn.
~~Matt Osborne~~	AOC
Gary Robertson	AP
Kathleen Edwards	UNC-CH Legis. Reporting Service
Erin Kenney	NC Conservation Network
Melissa Lovell	NCDOT
Lee Hodges	NCCLH
Ron Ottaviano	Wachovia
Barbara Canada	BBCOR
Stacey Flannery	NCHCFA

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 4/19/05

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Mary Bethune	DAAS
Kerry Page	NC SBI
Jerry Rattley	SBI
[illegible]	NCAGO
JAY J. CHAUDHURI	NCAGO
LAUREN CHEN	NCAGO
Eddie Caldwell	NC SHERIFFS' ASSN.
Sarah Krishnaraj	Sen. Kinnaids office
Nancy Warren	NCDAAS
ANDY ELLEN	NCRMA
FRAN PRESTON	NCRMA

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Amy Hibbs	Hibbs & Co
Portia Mosley	NCDOT
Ernie Seneca	Gov's office
Graham Holderness	ABC&H
Paul Kahle	JHA H
Doug Heron	NC BAR ~~ASSOC~~
Melissa Wright	Sen Hagan's Office
ANDREW HOLTON	Sen. Garrou's office
John McHugh	GOV office
Suzanne Buckley	n

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 488*

Short Title:	Exploitation of Elder or Disabled Adults/POA.	(Public)
Sponsors:	Senators Dannelly; Berger of Franklin, Clodfelter, Dorsett, Goodall, Graham, Lucas, Malone, and Pittenger.	
Referred to:	Judiciary II.	

March 15, 2005

A BILL TO BE ENTITLED

AN ACT TO MAKE IT UNLAWFUL FOR A CARETAKER TO EXPLOIT AN ELDER OR DISABLED ADULT IN ANY SETTING.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-32.3(c) reads as rewritten:

"**§ 14-32.3. Domestic abuse, neglect, and exploitation of disabled or elder adults.**

...

(c) Exploitation. – A person is guilty of exploitation if that person is a caretaker of a disabled or elder adult ~~who is residing in a domestic setting,~~ and knowingly, willfully and with the intent to permanently deprive the owner of property or money: (i) makes a false representation, (ii) abuses a position of trust or fiduciary duty, or (iii) coerces, commands, or threatens, and, as a result of the act, the disabled or elder adult gives or loses possession and control of property or money.

If the loss of property or money is of a value of more than one thousand dollars ($1,000) the caretaker is guilty of a Class H felony. If the loss of property or money is of a value of one thousand dollars ($1,000) or less, the caretaker is guilty of a Class 1 misdemeanor."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on and after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

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SENATE BILL 488*
PROPOSED COMMITTEE SUBSTITUTE S488-CSSS-4 [v.3]

4/11/2005 12:35:33 PM

Short Title: Exploitation of Elder or Disabled Adults/POA. (Public)

Sponsors:

Referred to:

March 15, 2005

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If the loss of property or money is of a value of more than one thousand dollars ($1,000) the caretaker is guilty of a Class H felony. If the loss of property or money is of a value of one thousand dollars ($1,000) or less, the caretaker is guilty of a Class 1 misdemeanor."

SECTION 2. G.S. 14-32.3(d)(1) reads as rewritten:

"(1) Caretaker. – A person who has the responsibility for the care of a disabled or elder adult as a result of family relationship or who has assumed the responsibility for the care of a disabled or elder adult voluntarily or by contract. For purposes of this section, "Caretaker" shall include an attorney-in-fact for a disabled or elder adult."

SECTION 3. This act becomes effective December 1, 2005, and applies to offenses committed on and after that date.

SENATE BILL 488:
Exploitation of Elder or Disabled Adults/POA.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Dannelly
Date:	April 19, 2005	**Summary by:**	Ben Popkin
Version:	Proposed Committee Substitute - First Edition		Committee Counsel

SUMMARY: ***Senate Bill 488 would expand the reach of the existing criminal offense, "Domestic abuse, neglect, and exploitation of disabled or elder adults", by removing the requirement that the victim be residing in a domestic setting. The Proposed Committee Substitute would clarify that attorneys-in-fact for disabled or elder adults would be considered to be caretakers for the purposes of this offense. The act would become effective December 1, 2005 and would apply to offenses committed on and after that date.***

CURRENT LAW: A person is guilty of this offense if the following elements exist[1]:

(1) the person is a caretaker of a

(2) disabled adult or elder adult

(3) who is residing in a domestic setting, *and*

(4) with malice, knowingly and willfully

(5) abuses, neglects, or exploits the victim[2], *and*

(6) as a result of the act, or failure to act, the victim suffers mental or physical injury from the abuse[3] or neglect[4]; or gives or loses possession or control of property or money[5].

Persons violating this statute are punished according to the following scheme:

Cases of abuse are punished as Class H felonies, rising to Class F felony if injury suffered is serious.

Cases of neglect are punished as Class I felonies, rising to Class G felony if injury suffered is serious.

Cases of exploitation are punished as Class 1 misdemeanors if the value of the loss of property or money is $1,000 or less; rising to Class H felony if the value is more than $1,000.

BILL ANALYSIS: The bill would expand the applicability of current law by removing element three from the required elements (above), which requires the victim to be residing in a domestic setting. Abuse, neglect or exploitation of disabled or elder adults by their caretakers *in any setting* would now be prohibited by General Statute 14-32.3. An attorney-in-fact would be considered to be a caretaker for the purposes of this statute.

S488-SMSS-001

[1] G.S. 14-32.3(a), (b) and (c).
[2] G.S. 14-32.3(a), (b) and (c).
[3] G.S. 14-32.3(a).
[4] G.S. 14-32.3(b).
[5] G.S. 14-32.3(c).

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: Senate Bill 488 (First Edition)

SHORT TITLE: Exploitation of Elder or Disabled Adults/POA.

SPONSOR(S): Senator Dannelly

FISCAL IMPACT

Yes (X) No ( ) No Estimate Available ( )

	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10
GENERAL FUND					
Correction	Exact amount cannot be determined; no substantial impact anticipated.				
Judicial	Exact amount cannot be determined; no substantial impact anticipated.				
LOCAL GOVERNMENTS	Exact amount cannot be determined; no substantial impact anticipated.				
ADDITIONAL PRISON BEDS*	Exact number cannot be determined; no substantial impact anticipated.				
POSITIONS: (cumulative)	Exact number cannot be determined; no additional positions anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch; Local Governments

EFFECTIVE DATE: December 1, 2005

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: This bill would amend G.S. 14-32.3(c) to eliminate as an element of the offense of exploitation of an elder or disabled adult that the victim must be residing in a domestic setting. As a result, any caretaker of an elder or disabled adult who intentionally deprives such person of property through false representation, abuse of trust, or coercion would be guilty of a Class H felony if the property is of a value greater than $1,000 and a Class 1 misdemeanor if the property is of a value equal to or less than $1,000.

General

Because this bill would make the offense of exploitation of an elder or disabled adult applicable to additional individuals, it would be expected to result in additional Class 1 misdemeanor and Class H felony charges and convictions and would consequently incur a fiscal impact. As the offense would apply to a new class of individuals, we have no historical data from which to estimate the exact number of additional charges and convictions that would result. However, due to the small number of charges and convictions for this offense under current G.S. 14-32.3(c), the numbers of additional charges and convictions resulting from the bill are not expected to be significant, and the cost associated with this legislation is not expected to be substantial.

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2005 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory group, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.*

In FY 2003-04, there were three felony Class H and two misdemeanor Class 1 convictions under current G.S. 14-32.3(c) for exploitation of an elder or disabled adult. Because this bill would make this offense applicable to a new class of individuals, the Sentencing Commission has no historical data from which to estimate how the legislation would impact prison population.

Class 1 Misdemeanors: In FY 2003-04, 19 percent of Class 1 misdemeanants received active sentences, and the average estimated sentence length was 43 days. DOC reimburses the county for housing offenders sentenced to between thirty and ninety days at a rate of $18 per offender per day. Because active sentences of less than ninety days are served in county jails, Class 1 misdemeanor convictions resulting from this legislation are not expected to significantly impact prison population.

Class H Felonies: In FY 2003-04, 37 percent of Class H felony convictions resulted in active sentences. If, for example, there were three additional Class H convictions for this offense per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and two additional prison beds the second year. The average annual operating cost for one prison bed in FY 2006-07 will be an estimated $24,740.

Non-Active Sentences: In FY 2003-04, 50 percent of Class H convictions resulted in intermediate sanctions and 13 percent in community sanctions; two percent of Class 1 misdemeanants received intermediate sanctions and 79 percent received community punishment. Probation officers in the Division of Community Correction (DCC) supervise offenders with intermediate sanctions at an estimated cost of $10.94 per day for the first six months and $1.87 per day thereafter. (This cost

estimate is based on the average cost and duration of intensive probation, the most common intermediate sanction.) The estimated cost for a supervised community offender is $1.87 per day.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks, and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

For calendar year 2004, AOC data indicates that 13 defendants were charged with a Class H felony and 3 defendants were charged with a Class 1 misdemeanor for exploitation of an elder or disabled adult. As this bill would make this offense applicable to a new class of individuals, no data is available to estimate the number of additional charges that might result from this bill. For any new Class 1 misdemeanor or Class H felony charge due to this bill, there would be additional court and preparation time needed to process the charge, thus increasing district and superior court workload, respectively. AOC estimates the costs to process one Class 1 misdemeanor or one Class H felony charge as shown in Table 1 below. Based on prior-year data, the majority of charges that are not dismissed are likely to be settled via guilty plea.

Table 1: CY 2004 Estimated Per Charge Settlement Costs

	Settled via Trial			Settled via Guilty Plea
Offense Class	*Court/Attorney Costs*	*Indigent Defense*	*Total*	-
Class 1 Misdemeanor	$1,880	$1,333	$3,213	$284
Class H Felony	$4,096	$2,100	$6,196	$359

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission.

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Aaron Paul and Jim Mills

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

DATE: April 18, 2005

Signed Copy Located in the NCGA Principal Clerk's Offices

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 679

Short Title:	North Carolina Uniform Trust Code.	(Public)
Sponsors:	Senator Hagan.	
Referred to:	Judiciary II.	

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO ADOPT A REVISED VERSION OF THE UNIFORM TRUST CODE FOR NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 36A of the General Statutes is recodified as Article 6 of Chapter 32 of the General Statutes. G.S. 36A-63, G.S. 36A-66.1, and Article 6 of Chapter 36A are recodified in Article 15 of Chapter 53 of the General Statutes as G.S. 53-163.1 through G.S. 53-163.7. The remainder of Chapter 36A of the General Statutes is repealed.

SECTION 2. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 36C.**

"**North Carolina Uniform Trust Code.**

"Article 1.

"General Provisions and Definitions.

"**§ 36C-1-101. Short title.**

This Chapter may be cited as the North Carolina Uniform Trust Code.

"**§ 36C-1-102. Scope.**

This Chapter applies to any express trust, private or charitable, with additions to the trust, wherever and however created. The term "express trust" includes both testamentary and inter vivos trusts, regardless of whether the trustee is required to account to the clerk of superior court. This Chapter also applies to any trust created for or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. This Chapter does not apply to constructive trusts, resulting trusts, conservatorships, estates, trust accounts as defined in G.S. 53-146.2, 54-109.57, 54B-130, and 54C-166, trust funds subject to G.S. 90-210.61, custodial arrangements pursuant to G.S. 33A-1 through G.S. 33A-24 and G.S. 33B-1 through G.S. 33B-22, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary

purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or any arrangement under which a person is nominee or escrowee for another.

"**§ 36C-1-103. Definitions.**

In this Chapter:

(1) "Action", with respect to an act of a trustee, includes a failure to act.

(2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.

(3) "Beneficiary" means a person who:

a. Has a present or future beneficial interest in a trust, vested or contingent, including the owner of an interest by assignment or transfer; or

b. In a capacity other than that of trustee, holds a power of appointment over trust property.

(4) "Charitable trust" means a trust, including a split-interest trust as described in section 4947 of the Internal Revenue Code, created for a charitable purpose described in G.S. 36C-4-405(a).

(5) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

(6) "General guardian" means a general guardian as that term is defined in G.S. 35A-1202(7).

(7) "Guardian of the estate" means a guardian of the estate as that term is defined in G.S. 35A-1202(9).

(8) "Guardian of the person" means a guardian of the person as that term is defined in G.S. 35A-1202(10).

(9) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

(10) "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended from time to time. Each reference to a provision of the Internal Revenue Code shall include any successor to that provision.

(11) "Jurisdiction", with respect to a geographic area, includes a state or country.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(13) "Power of withdrawal" means a presently exercisable general power of appointment other than a power:

a. Exercisable by a trustee and limited by an ascertainable standard; or

b. Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

(14) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.

(15) "Qualified beneficiary" means a living beneficiary who, on the date the beneficiary's qualification is determined:

a. Is a distributee or permissible distributee of trust income or principal;

b. Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in sub-subdivision a. of this subdivision terminated on that date without causing the trust to terminate; or

c. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(16) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

(17) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

(18) "Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.

(19) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(20) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or established in a judicial proceeding.

(21) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments to the instrument, and any modifications permitted by court order.

(22) "Trustee" includes an original, additional, and successor trustee, and a co-trustee, whether or not appointed or confirmed by a court. The term does not include trustees in mortgages and deeds of trusts.

"**§ 36C-1-104. Knowledge.**

(a) Subject to subsection (b) of this section, a person has knowledge of a fact if the person:

(1) Has actual knowledge of it;

(2) Has received notice or notification of it; or

(3) From all the facts and circumstances known to the person at the time in question, has reason to know it.

(b) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the employee's regular duties or the employee knows a matter involving the trust would be materially affected by the information.

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

(a) Except as otherwise provided in the terms of the trust, this Chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

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

(1) The requirements for creating a trust;

(2) The duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

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

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

(5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5;

(6) The effect of an exculpatory term under G.S. 36C-10-1008;

(7) The rights under G.S. 36C-10-1010 through G.S. 36C-10-1013 of a person other than a trustee or beneficiary;

(8) Periods of limitation for commencing a judicial proceeding;

(9) The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and

(10) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in G.S. 36C-2-203 and G.S. 36C-2-204.

"**§ 36C-1-106. Common law of trusts; principles of equity.**

The common law of trusts and principles of equity supplement this Chapter, except to the extent modified by this Chapter or another statute of this State.

"**§ 36C-1-107. Governing law.**

The meaning and effect of the terms of a trust are determined by:

(1) The law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or

(2) In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

"**§ 36C-1-108. Principal place of administration.**

(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(1) A trustee's principal place of business is located in, or a trustee is a resident of, the designated jurisdiction; or

(2) All or part of the administration occurs in the designated jurisdiction.

(b) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee may transfer the trust's principal place of administration to another jurisdiction in accordance with the provisions of this subsection:

(1) If the trustee is transferring the trust's principal place of administration to another state, the trustee shall provide written notice of the proposed transfer to the qualified beneficiaries of the trust not less than 60 days before initiating the transfer. If no qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice, the trustee may make the transfer. If a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice, the authority of the trustee to transfer the trust's principal place of administration in accordance with the provisions of this section terminates.

(2) If the trustee is transferring the trust's principal place of administration to a jurisdiction outside of the United States, the trustee shall provide written notice of the proposed transfer to the qualified beneficiaries of the trust and the transfer cannot be made until the written consent of all the qualified beneficiaries is obtained.

(c) Anytime a trustee is required to provide a qualified beneficiary with written notice of a proposed transfer of a trust's principal place of administration, the notice of proposed transfer must include:

(1) The name of the jurisdiction to which the principal place of administration is to be transferred;

(2) The address and telephone number at the new location at which the trustee can be contacted;

(3) An explanation of the reasons for the proposed transfer;
(4) The date on which the proposed transfer is anticipated to occur; and
(5) If the proposed transfer is to another state, the date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(d) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to G.S. 36C-7-704.

"**§ 36C-1-109. Methods and waiver of notice.**

(a) Notice to a person under this Chapter or the sending of a document to a person under this Chapter must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed electronic message.

(b) Notice otherwise required under this Chapter, or a document otherwise required to be sent under this Chapter, need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(c) Notice under this Chapter, or the sending of a document under this Chapter, may be waived by the person to be notified or sent the document.

(d) Notice of a judicial proceeding must be given as provided in Article 2 of this Chapter.

"**§ 36C-1-110. Others treated as qualified beneficiaries.**

(a) A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under this Chapter if the charitable organization, on the date the charitable organization's qualification is being determined:

(1) Is a distributee or permissible distributee of trust income or principal;
(2) Would be a distributee or permissible distributee of trust income or principal upon the termination of the interest of other distributees or permissible distributees then receiving or eligible to receive distributions, but the termination of those interests would not cause the trust to terminate; or
(3) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(b) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in G.S. 36C-4-408 or G.S. 36C-4-409 has the rights of a qualified beneficiary under this Chapter.

"**§ 36C-1-111. Nonjudicial settlement agreements.**

(a) For purposes of this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(b) Interested persons may enter into a binding nonjudicial settlement agreement with respect to any of the following matters involving a trust:

(1) The approval of a trustee's report or accounting;

(2) Direction to a trustee to perform or refrain from performing a particular administrative act or the grant to a trustee of any necessary or desirable administrative power, including a power granted pursuant to G.S. 36C-8-816;

(3) The resignation or appointment of a trustee and the determination of a trustee's compensation;

(4) Transfer of a trust's principal place of administration; and

(5) Liability of a trustee for any action taken pursuant to subdivisions (1) through (4) of this subsection.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this Chapter or other applicable law.

(d) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in Article 3 of this Chapter was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

"**§ 36C-1-112. Rules of construction.**

The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.

"Article 2.

"Judicial Proceedings.

"**§ 36C-2-201. Role of court in administration of trust.**

(a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by a party or as provided by law.

(b) A trust is not subject to continuing judicial supervision, except as provided in G.S. 36C-2-208 and G.S. 36C-2-209, unless ordered by the court.

(c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

"**§ 36C-2-202. Jurisdiction over trustee and beneficiary.**

(a) By accepting the trusteeship of a trust having its principal place of administration in this State, or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution

from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

"**§ 36C-2-203. Subject matter jurisdiction.**

(a) The clerks of superior court of this State have original jurisdiction over all proceedings concerning the internal affairs of trusts. Except as provided in subdivision (9) of this subsection, the clerk of superior court's jurisdiction is exclusive. Proceedings concerning the internal affairs of the trust are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument. These include proceedings:

(1) To appoint or remove a trustee;

(2) To permit a trustee to resign or renounce; however, unless the trustee is required to account to the clerk of superior court, when the governing instrument names or provides a procedure to name a successor trustee, and the successor trustee is willing to serve, no trustee shall be required to initiate a proceeding to resign or renounce as trustee;

(3) To review trustees' fees pursuant to Article 5A of Chapter 32 of the General Statutes and review and settle interim or final accounts;

(4) To (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust as provided in G.S. 37A-1-104.3;

(5) To transfer a trust's principal place of administration;

(6) To require a trustee to provide bond and determine the amount of the bond, excuse a requirement of bond, reduce the amount of bond, release the surety, or permit the substitution of another bond with the same or different sureties;

(7) To make such orders with respect to a trust for the care of animals as provided in G.S. 36C-4-408;

(8) To make such orders with respect to a noncharitable trust without an ascertainable beneficiary as provided in G.S. 36C-4-409; and

(9) To ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments, and to determine the existence or nonexistence of trusts created other than by will and the existence or nonexistence of any immunity, power, privilege, duty, or right. Upon motion of a party, the clerk of superior court may determine that a proceeding to determine an issue listed in this subdivision shall be

originally heard by the superior court division of the General Court of Justice.

(b) Nothing in this section shall be construed (i) to confer upon the clerk of superior court any authority to regulate or supervise the actions of a trustee except to the extent that the trustee's actions are inconsistent with the provisions of the governing instrument or of State law; or (ii) to confer upon any party any additional right, remedy, or cause of action not otherwise conferred by law.

(c) Nothing in this section affects the right of a person to file an action for declaratory relief under the provisions of Article 26 of Chapter 1 of the General Statutes. In the event either the petitioner or respondent in a trust proceeding requests declaratory relief under the provisions of Article 26 of Chapter 1 of the General Statutes, either party may move for a transfer of the proceeding to the superior court division of the General Court of Justice as provided in Article 21 of Chapter 7A of the General Statutes. In absence of removal to superior court, the provisions of Article 26 of Chapter 1 of the General Statutes shall apply to a trust proceeding to the extent not inconsistent with this Article.

(d) The clerk of superior court shall not, over the objection of a party, entertain proceedings under this section involving a trust having its principal place of administration in another state, except:

(1) When all appropriate parties could not be bound by litigation in the courts of the state in which the trust had its principal place of administration; or

(2) When the interests of justice otherwise would be seriously impaired.

The clerk of superior court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust has its principal place of administration, or the clerk of superior court may grant a continuance or enter any other appropriate order.

(e) Any party to a proceeding before the clerk of superior court may appeal from the decision of the clerk to a superior court judge as provided for estate matters in G.S. 1-301.3.

(f) Without otherwise limiting the jurisdiction of the superior court division of the General Court of Justice, proceedings concerning the internal affairs of trusts shall not include, and, therefore, the clerk of superior court shall not have jurisdiction under subsection (a) of the following:

(1) Actions to reform, terminate, or modify a trust as provided by G.S. 36C-4-410 through G.S. 36C-4-416;

(2) Actions by or against creditors or debtors of a trust;

(3) Actions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud, and negligence;

(4) Actions to enforce a charitable trust under G.S. 36C-4-405A; and

(5) Actions to amend or reform a charitable trust under G.S. 36C-4A-1.

"**§ 36C-2-204. Venue.**

In any trust proceeding or action, whether brought before the clerk of superior court or the superior court division of the General Court of Justice, the following rules apply notwithstanding any other applicable Rule of Civil Procedure or provision of Chapter 1 of the General Statutes:

(1) If the trustee is required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is the place where the accountings are filed.

(2) If the trustee is not required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is:

a. In the case of an inter vivos trust, in any county of this State in which the trust has its principal place of administration or where any beneficiary resides; or

b. In the case of a testamentary trust, in any county of this State in which the trust has its principal place of administration, where any beneficiary resides, or in which the testator's estate was administered.

(3) Unless otherwise designated in the governing instrument, the principal place of administration of the trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if the trustee has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the governing instrument, is:

a. The usual place of business of the corporate trustee if there is but one corporate or co-trustee; or

b. The usual place of business or residence of any of the co-trustees.

(4) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in any county of this State in which a beneficiary resides, in any county in which trust property is located, in the county of this State specified in the trust instrument, if any county is so specified, or if the trust is created by will, in the county in which the decedent's estate was or is being administered.

"**§ 36C-2-205. Commencement of proceedings, pleadings, consolidation, and joinder.**

(a) Contested Proceedings. – Trust proceedings before the clerk of superior court brought against adverse parties shall be commenced as is prescribed for civil actions. Upon the filing of the petition or complaint, the clerk of superior court shall docket the cause as an estate matter. All parties not joined as petitioners shall be joined as respondents. The clerk of superior court shall issue the summons for the respondents.

The clerk of superior court may order that additional persons be joined as respondents and shall issue the summons for the additional persons. The summons shall notify the respondents to appear and answer the petition within 10 days after its service upon the respondents. The summons shall comply with the requirements set forth in G.S. 1-394 for a special proceeding summons except that the clerk of superior court shall indicate on the summons by appropriate words that the summons is issued in an estate matter and not in a special proceeding or in a civil action and shall be served upon the respondents in accordance with Rule 4 of the Rules of Civil Procedure. After the time for responding to the petition or complaint has expired, any party or the clerk of superior court may give notice to all parties of a hearing.

(b) Uncontested Proceedings. – Trust proceedings before the clerk of superior court in which all the parties join in the proceeding shall be commenced by the filing of a petition, setting forth the facts entitling the petitioners to relief and the nature of the relief demanded. In such proceedings, the clerk of superior court may hear and decide the petition summarily.

(c) Pleadings. – The petition or complaint filed in a trust proceeding before the clerk of superior court shall contain a short and plain statement of the claim which is sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions, intended to be proved showing that the pleaders entitled to relief, and a demand for judgment for the relief to which the pleader is entitled. Each averment of a pleading should be simple, concise, and direct. No technical forms of pleadings or motions are required. A party may set forth two or more statements of a claim or defense alternatively or hypothetically. The signature of an attorney or party constitutes a certificate by that attorney or party that (i) the attorney or party has read the pleading, motion, or other paper; (ii) that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (iii) that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. All pleadings shall be so construed as to do substantial justice.

(d) Extensions of Time. – The clerk of superior court, for cause shown at any time in the clerk's discretion, with or without motion or notice, may enter an order enlarging the period of time within which an act is required or permitted by this Article, by any applicable Rules of Civil Procedure or by order of the court, if the request is made before the expiration of the period originally prescribed, but not to exceed 10 days, nor more than once. Upon motion made after the expiration of the specified period, the clerk of superior court may permit the act where the failure to act was the result of excusable neglect. Notwithstanding any other provision of this subsection, the parties to a proceeding may enter into binding stipulations, without approval of the clerk of superior court, enlarging the time within which an act is required or permitted by this

Article, by any applicable Rules of Civil Procedure or by order of the court, not to exceed 30 days.

(e) Rules of Civil Procedure. – Unless the clerk of superior court otherwise directs, Rules 5, 6(a), 6(d), 6(e), 18, 19, 20, 21, 24, and 45 of the Rules of Civil Procedure shall apply to trust proceedings. Upon motion of a party or the clerk of superior court, the clerk may further direct that the following Rules of Civil Procedure shall apply: 15, 16, 17, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37; however, nothing in Rule 17 shall require the appointment of a guardian ad litem for a party represented except as provided under G.S. 36C-3-305. In applying these Rules to a trust proceeding pending before the clerk of superior court, the term "judge" shall be construed as "clerk of superior court."

(f) Consolidation. – When a trust proceeding pending before the clerk of superior court and a civil action pending before the superior court division of the General Court of Justice involve a common question of law or fact, upon the court's motion or motion of a party to either the trust proceeding or the civil action, a superior court judge may order a consolidation of the trust proceeding and civil action, and the judge may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. Upon the entry of an order consolidating a trust proceeding and civil action, the jurisdiction for all matters pending in both the trust proceeding and the civil action shall be vested in the superior court.

(g) Joinder. – In any civil action pending before a superior court division of the General Court of Justice, a party asserting a claim for relief as an original claim, counterclaim, cross claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party notwithstanding the fact that such claims may otherwise be within the exclusive jurisdiction of the clerk of superior court.

(h) Orders Upon Consolidation/Joinder. – Upon the consolidation of a trust proceeding and civil action or joinder of claims pursuant to subsection (f) or (g) of this section, the clerk of superior court or the judge may make such orders as appropriate to protect the interests of the parties and to avoid unnecessary costs or delay. Notwithstanding the consolidation or joinder of claims pursuant to subsection (f) or (g) of this section, the clerk of court's exclusive jurisdiction as set forth in G.S. 36C-2-203(a) shall not be stayed unless so ordered by the court.

"**§ 36C-2-206. Representation of parties.**

In any trust proceeding or action, whether brought before the clerk of superior court or in the superior court division of the General Court of Justice, the following rules apply notwithstanding any other applicable Rule of Civil Procedure or provision of Chapter 1 of the General Statutes:

(1) Parties shall be represented as provided in Article 3 of this Chapter.

(2) In the case of any party represented by another as provided in subdivision (1) of this section, service of process shall be made by serving such representative.

"**§ 36C-2-207. Waiver of notice.**

A party, or the representative of the party as provided in G.S. 36C-2-206, may waive notice by a writing signed by the party, the representative, or the attorney of the party or the representative, and filed in the proceeding.

"**§ 36C-2-208. Accounting to clerk.**

(a) No trustee, including a trustee appointed by the clerk of superior court, shall be required to account to the clerk of superior court unless the trust instrument directs that the trustee shall be required to account to the clerk of superior court or unless the trustee is otherwise required by law to account to the clerk of superior court.

(b) If the trustee is required to account to the clerk of superior court, the trustee shall not be permitted to resign as trustee until a final account of the trust estate is filed with the clerk of superior court and until the court shall be satisfied that the account is true and correct, unless the terms of the trust instrument provide otherwise.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, pursuant to a proceeding brought under G.S. 36C-4-405A, the clerk of superior court may require a trustee of a charitable trust to account to the clerk of superior court.

"**§ 36C-2-209. Qualification and accounting of trustee of a testamentary trust.**

(a) For any testamentary trust created under a will of a decedent executed before January 1, 2004, the trustee shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of superior court of the county where the will is probated inventories of the assets that come into the trustee's hands and annual and final accounts of the trust that are the same as required of executors and administrators. The power of the clerk of superior court to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts shall be the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. This subsection shall not apply to the extent that the will makes a different provision.

(b) For any testamentary trust created under a will of a decedent executed on or after January 1, 2004, the provisions of which direct the trustee to account to the clerk of superior court, the trustee shall first qualify under the laws applicable to executors and shall file in the office of the clerk of superior court of the county where the will is probated inventories of the assets that come into the trustee's hands and annual and final accounts of the trust that are the same as are required of executors and administrators. The power of the clerk of superior court to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts shall be the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. No trustee, including a trustee appointed by the clerk of superior court, shall be required to account to the clerk of superior court unless the will directs that the trustee shall be required to account to the clerk of superior court or unless otherwise required by law.

(c) The Administrative Office of the Courts may adopt rules regulating the registration or indexing of testamentary trusts.

"Article 3.

"Representation.

"**§ 36C-3-301. Representation: basic effect.**

(a) Notice to a person who may represent and bind another person under this Article has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this Article is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in G.S. 36C-4-411 and G.S. 36C-6-602, a person who under this Article may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this Article with respect to the termination or modification of trust under G.S. 36C-4-411(a).

"**§ 36C-3-302. Representation by holder of general testamentary power of appointment.**

The sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, shall represent other persons to the extent that their interests, as permissible appointees, takers in default, or otherwise, are subject to the power. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

"**§ 36C-3-303. Representation by fiduciaries, parents, and other persons.**

To the extent that there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) A general guardian or a guardian of the estate may represent and bind the estate that the guardian controls.

(2) A guardian of the person may represent and bind the ward if a general guardian or guardian of the estate of the ward's estate has not been appointed.

(3) An agent under a power of attorney having authority to act with respect to the particular question or dispute may represent and bind the principal.

(4) A trustee may represent and bind the beneficiaries of the trust.

(5) A personal representative of a decedent's estate may represent and bind persons interested in the estate.

(6) A parent may represent and bind the parent's minor child if a general guardian, guardian of the estate, or guardian of the person for the child

has not been appointed. If a disagreement arises between parents seeking to represent the same minor child, the parent who is a beneficiary of the trust which is the subject of the representation shall be entitled to represent the minor child or, if no parent is a beneficiary of the trust which is the subject of the representation, a parent who is a lineal descendant of the settlor shall be entitled to represent the minor child, or if no parent is a lineal descendant of the settlor, a guardian ad litem shall be appointed to represent the minor child.

(7) A person may represent and bind that person's unborn issue.

"**§ 36C-3-304. Representation by person having substantially identical interest.**

Unless otherwise represented under this Article, a minor, an incapacitated or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent that there is no conflict of interest between the representative and the person represented.

"**§ 36C-3-305. Appointment of representative; scope of representation.**

(a) If the court determines that an interest is not represented under this Article, or that the otherwise available representation might be inadequate, the court may appoint a guardian ad litem to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated or unborn individual, or a person whose identity or location is unknown. A guardian ad litem may be appointed to represent several persons or interests.

(b) Any representative under this Article may act on behalf of the individual represented with respect to any matter arising under this Chapter, whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a representative, including a guardian ad litem, may base a decision to consent to an action upon a finding that living members of the individual's family would generally benefit from that action.

"Article 4.

"Creation, Validity, Modification, and Termination of Trust.

"**§ 36C-4-401. Methods of creating trust.**

A trust may be created by:

(1) Transfer of property by a settlor to a person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

(2) Declaration by the owner of property that the owner holds identifiable property as trustee unless the transfer of title of that property is otherwise required by law; or

(3) Exercise of a power of appointment in favor of a trustee.

"**§ 36C-4-401A. 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 policy or elsewhere using the policy as collateral security;

(4) To assign the policy; or

(5) To exercise any other right in connection with the policy commonly known as an incident of ownership of that policy.

The term "life insurance policy" includes life, annuity, and endowment contracts, or any variation or combination of those contracts, and any agreement entered into by an insurance company in connection with life, annuity, or endowments contracts.

(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 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 group life, industrial life, accident, and health insurance policies having death benefits.

(c) A testator 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 that beneficiary a trustee named or to be named in the testator's 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 trustee makes claim to the proceeds within six months after the death of the testator, payments shall be made to the personal representative of the estate of the testator 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 testator to

estate or 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 that may properly become part of such trust, but the proceeds shall not become part of the testator's estate for purposes of trust administration unless the will expressly so provides.

"**§ 36C-4-402. Requirements for creation.**

(a) A trust is created only if:

(1) The settlor has capacity to create a trust;

(2) The settlor indicates an intention to create the trust;

(3) The trust has a definite beneficiary or is:

a. A charitable trust;

b. A trust for the care of an animal, as provided in G.S. 36C-4-408;

c. A trust for a noncharitable purpose, as provided in G.S. 36C-4-409;

(4) The trustee has duties to perform; and

(5) The same person is not the sole trustee and sole beneficiary.

(b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

"**§ 36C-4-403. Trusts created in other jurisdictions.**

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

(1) The settlor was domiciled, had a place of abode, or was a national;

(2) A trustee was domiciled or had a place of business; or

(3) Any trust property was located.

"**§ 36C-4-404. Trust purposes.**

A trust may be created only to the extent that its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.

"**§ 36C-4-405. Charitable purposes.**

(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, benevolent, literary, governmental, or municipal purposes, or other purposes the achievement of which is beneficial to the community.

(b) It is the policy of the State of North Carolina that gifts for charitable purposes, whether in trust or otherwise, are valid, notwithstanding the fact that the gift

is made in general terms, and this section shall be construed liberally to effect this policy.

(c) No gift for charitable purposes, whether in trust or otherwise, is void or invalid because:

(1) The gift is in general terms or is uncertain as to the specific charitable purposes;

(2) When the gift is made in trust, the trustee is granted discretionary powers in the selection and designation of the beneficiaries of that charitable trust or in carrying out the purpose of that trust;

(3) The trustee or other recipient of the gift is given no specific instructions, powers, or duties as to the manner or means of carrying out those charitable purposes; or

(4) The gift contravenes any statute or rule against perpetuities.

(d) When any gift is made in general terms, the trustee or other recipient of the gift shall have the right and power:

(1) To select from time to time one or more specific charitable beneficiaries or purposes for which any trust or property or income shall be held and administered; and

(2) To determine the means to accomplish those charitable purposes, unless otherwise provided, including the creation of corporations or other legal entities for those purposes.

(e) For purposes of this section, the reference to a "gift" or "gifts" includes both inter vivos and testamentary gifts, grants, and other transfers.

"**§ 36C-4-405A. Enforcement of charitable gift or trust.**

(a) The settlor of a charitable trust, the Attorney General, the district attorney, a beneficiary, or any other interested party may maintain a proceeding to enforce a charitable trust, including the following:

(1) A proceeding to require a trustee to make a selection as may be necessary to establish the charitable beneficiaries or purposes for which the trust was established, as provided in subsections (d)(1) and (d)(2) of G.S. 36C-4-405;

(2) A proceeding for breach of fiduciary duty if there is reason to believe that the trust property has been mismanaged through negligence or fraud; and

(3) A proceeding for an accounting of the trustee's administration of the trust.

(b) The donor of a charitable gift, the Attorney General, the district attorney, or any other interested party may maintain a proceeding to enforce the gift, including a proceeding to require the recipient of the gift to make a selection as may be necessary to establish the charitable beneficiaries or purposes for which the gift was intended, as provided in subsections (d)(1) and (d)(2) of G.S. 36C-4-405.

"**§ 36C-4-406. Creation of trust induced by fraud, duress, or undue influence.**

A trust is voidable to the extent that its creation was induced by fraud, duress, or undue influence.

"**§ 36C-4-407. Evidence of oral trust.**

Except as required by a statute other than this Chapter, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

"**§ 36C-4-408. Trust for care of animal.**

(a) Subject to the provisions of this section, a trust for the care of one or more designated domestic or pet animals alive at the time of creation of the trust is valid.

(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of the designated animal or animals.

(c) The trust terminates at the death of the animal or last surviving animal. Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(1) As directed in the trust instrument;

(2) If the trust was created in a preresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will;

(3) If no taker is produced by the application of subdivision (1) or (2) of this subsection, to the transferor or the transferor's heirs determined as of the date of the transferor's death under Chapter 29 of the General Statutes.

(d) The intended use of the principal or income can be enforced by a person designated for that purpose in the trust instrument or, if none, by a person appointed by the clerk of superior court having jurisdiction over the decedent's estate upon application to the clerk of superior court by a person.

(e) Except as ordered by the clerk of superior court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, bond, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(f) A governing instrument shall be liberally construed to bring the transfer within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.

(g) The clerk of superior court may reduce the amount of the property transferred, if the clerk of superior court determines that the amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c) of this section.

(h) If no trustee is designated or if no designated trustee agrees to serve or is able to serve, the clerk of superior court shall name a trustee. The clerk of superior court may

order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. The clerk of superior court may also make such other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of this section.

"**§ 36C-4-409. Noncharitable trust without ascertainable beneficiary.**

Except as otherwise provided in G.S. 36C-4-408 or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than 21 years.

(2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent that the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, or otherwise to the settlor's successors in interest.

(4) Notwithstanding subdivisions (1) through (3) of this section, a trust, contract, or other arrangement to provide for the care of a cemetery lot, grave, crypt, niche, mausoleum, columbarium, grave marker, or monument is valid without regard to remoteness of vesting, duration of the arrangement, or lack of definite beneficiaries to enforce the trust, provided that the trust, contract, or other arrangement meets the requirements of G.S. 28A-19-10, Article 4 of Chapter 65 of the General Statutes, Article 9 of Chapter 65 of the General Statutes, or other applicable law. This section does not repeal or supersede G.S. 36C-4-413.

"**§ 36C-4-410. Modification or termination of trust; proceedings for approval or disapproval.**

(a) In addition to the methods of termination prescribed by G.S. 36C-4-411 through G.S. 36C-4-414, a trust terminates to the extent that the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411 through G.S. 36C-4-416, or trust combination or division under G.S. 36C-4-417, may be commenced by a trustee or beneficiary, and a proceeding to approve or disapprove a proposed modification or termination under

G.S. 36C-4-411 may be commenced by the settlor. The settlor of a charitable trust may maintain a proceeding to modify the trust under G.S. 36C-4-413. A trustee shall be a necessary party to any proceeding under this section.

(c) Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-411. Modification or termination of noncharitable irrevocable trust by consent.**

(a) A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's general guardian or the guardian of the estate with the approval of the court supervising the guardianship if an agent is not so authorized; or by the settlor's guardian of the person with the approval of the court supervising the guardianship if an agent is not so authorized and a general guardian or guardian of the estate has not been appointed.

(b) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries, if the court concludes that modification is not inconsistent with a material purpose of the trust.

(c) Where the beneficiaries of an irrevocable trust seek to compel a termination of the trust and the continuance of the trust is necessary to carry out a material purpose of the trust, or where the beneficiaries seek to compel a modification of the trust in a manner that is inconsistent with its material purpose, the trust may be modified or terminated, in the discretion of the court, only if the court determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust.

(d) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a), (b) or (c) of this section, the modification or termination may be approved by the court if the court is satisfied that:

(1) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) The interests of a beneficiary who does not consent will be adequately protected.

(e) Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.**

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

(c) Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-413. Cy pres.**

(a) Except as otherwise provided in subsection (d) of this section, if a charitable trust becomes unlawful, impracticable, impossible to achieve, or wasteful:

(1) The trust does not fail, in whole or in part;

(2) The trust property does not revert to the settlor or the settlor's successors in interest; and

(3) The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(b) The settlor or a trustee of a charitable trust, the Attorney General, a beneficiary or any other interested party may maintain a cy pres proceeding under Article 2 of this Chapter.

(c) In every cy pres proceeding, the Attorney General shall be notified and given an opportunity to be heard.

(d) This section shall not be applicable if the settlor has provided, either directly or indirectly, for an alternative plan in the event that the charitable trust is or becomes unlawful, impracticable, impossible to achieve, or wasteful. However, if the alternative plan is also a charitable trust and that trust fails, the intention shown in the original plan shall prevail in the application of this section.

"**§ 36C-4-414. Modification or termination of uneconomic trust.**

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value of less than fifty thousand dollars ($50,000) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. The trustee may enter into an agreement or make other provisions that the trustee deems necessary or appropriate to protect the interests of the beneficiaries and to carry out the intent and purpose of the trust. The provisions of this subsection shall not apply where the instrument creating the trust, by specific reference to this section, or to former G.S. 36A-125.6, provides that it shall not apply. The trustee shall not be liable for that termination and distribution notwithstanding the existence or potential existence of other beneficiaries who are not sui juris. Any beneficiary receiving a distribution from a trust terminated under this

section shall incur no liability and shall not be required to account to anyone for such distribution.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(c) This section does not apply to an easement for conservation or preservation.

(d) Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-415. Reformation to correct mistakes.**

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-416. Modification to achieve settlor's tax objectives.**

To achieve a settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect. Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-417. Combination and division of trusts.**

(a) Unless otherwise provided in the trust instrument, after notice to the qualified beneficiaries, a trustee may:

(1) Consolidate the assets of more than one trust and administer the assets as one trust under the terms of one of the trusts if the terms of the trusts are substantially similar and the beneficiaries of the trusts are identical; or

(2) Divide one trust into two or more separate trusts if the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust.

(b) In dividing a trust into two or more separate trusts, a trustee shall accomplish the division by severing the trusts on a fractional basis and funding the separate trusts either (i) with a pro rata portion of each asset held by the undivided trust; or (ii) on a non-pro rata basis based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding.

(c) In any case where two separate identical trusts are created pursuant to this section, one of which is fully exempt from the federal generation-skipping transfer tax and one of which is fully subject to that tax, the trustee may thereafter, to the extent possible consistent with the terms of the trust, determine the value of any mandatory or discretionary distributions to trust beneficiaries on the basis of the combined value of both trusts, but may satisfy those distributions by a method other than pro rata from the

separate trusts in a manner designed to minimize the current and potential generation-skipping transfer tax.

"**§ 36C-4-418. Distribution upon termination of trust.**

Upon termination of a trust under G.S. 36C-4-411, the trustee shall distribute the trust property as agreed by the beneficiaries. Upon termination of a trust under G.S. 36C-4-412 or G.S. 36C-4-414, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. If any trust property becomes distributable to a minor or incompetent under this Article it may be distributed:

(1) To the guardian of the estate or general guardian of the beneficiary;

(2) In accordance with the North Carolina Uniform Transfer to Minors Act, Chapter 33A of the General Statutes; or

(3) In accordance with the North Carolina Custodial Trust Act, Chapter 33B of the General Statutes.

"**§ 36C-4-419. Effect of inalienable interest on modification or termination.**

The court, in exercising its discretion to modify or terminate an irrevocable trust pursuant to the provisions of G.S. 36C-4-411, 36C-4-412 or 36C-4-413 shall consider provisions making the interest of a beneficiary inalienable, including those described in Article 5, but the court is not precluded from the exercise of that discretion solely because of such provisions.

"Article 4A.

"Tax Status of Charitable Trusts.

"**§ 36C-4A-1. Prohibited transactions.**

(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 trust instrument of each trust which is a private foundation described in section 509 of the Internal Revenue Code (including each nonexempt charitable trust described in section 4947(a)(1) of the Internal Revenue Code which is treated as a private foundation) and the trust instrument of each nonexempt split-interest trust described in section 4947(a)(2) of the Internal Revenue Code (but only to the extent that section 508(e) of the Internal Revenue Code is applicable to such nonexempt split-interest trust under section 4947(a)(2) of the Internal Revenue 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 Internal Revenue Code; the trust shall not engage in any act of self-dealing which would subject it to tax under section 4941 of the Internal Revenue Code; the trust shall not retain any excess business holdings which would subject it to tax under section 4943 of the Internal Revenue Code; the trust shall not make any investments which would subject it to tax under section 4944 of the Internal Revenue Code; and the trust shall not make any taxable expenditures which would subject it to tax under section 4945 of the Internal Revenue Code." With respect to any such trust created prior to January 1, 1970, this section shall apply only for its taxable years beginning on or after January 1, 1972.

(b) 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 (a) of this section, the governing instrument of each trust that is a nonexempt charitable trust described in section 4947(a)(1) of the Internal Revenue Code shall be deemed to contain the following provisions:

(1) The trust shall be operated exclusively for charitable, educational, religious and scientific purposes within the meaning of section 501(c)(3) and section 170(c)(2) of the Internal Revenue Code.

(2) Upon any dissolution, winding up, or liquidation of the trust, its assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or shall be distributed to the federal government, or a state or local government for a public purpose.

(c) The trustee of any trust described in this section may either:

(1) Without judicial proceedings, amend the trust to expressly exclude the application of this section by executing a written amendment to the trust instrument and filing a duplicate original of the amendment with the Attorney General. Upon filing of the amendment, this section shall not apply to that trust.

(2) Institute a proceeding under Article 2 of this Chapter seeking reformation of the trust instrument.

"**§ 36C-4A-2. Reformation of charitable remainder trust.**

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 that passes from the decedent under a will or trust to a person, or for a use, described in section 2055(a) of the Internal Revenue Code, to meet the requirements of subsections 2055(e)(2)(A) or (B) of the Internal Revenue Code, then in order that the deduction shall nevertheless be allowable under section 2055(e)(3) of the Internal Revenue Code, the court may, on application of any trustee or interested party with either (i) the written consent of the qualified beneficiaries, or (ii) a finding that the interest of those beneficiaries is substantially preserved, order an amendment to the trust so that the remainder interest is in a trust that is a charitable remainder annuity trust, a charitable remainder unitrust (as those terms are described in section 664 of the Internal Revenue Code), or a pooled income fund (as that term is described in section 642(c)(5) of the Internal Revenue Code), or so that any other interest of a charitable beneficiary is in the form of a guaranteed annuity or is a fixed percentage distributed yearly of the fair market value of the property (to be determined yearly), in accordance with the provisions of section 2055(e)(2)(B) of the Internal Revenue Code. In every such proceeding, the Attorney General shall be notified, and given an opportunity to be heard.

"Article 4B.

"Charitable Remainder Trust Administration Act.

"**§ 36C-4B-1. Short title.**

This Article shall be known as the Charitable Remainder Administration Trust Act.

"**§ 36C-4B-2. General rule.**

Notwithstanding any provisions in the laws of this State or in the governing instruments to the contrary, any charitable remainder annuity trust and any charitable remainder unitrust that cannot qualify for a deduction for federal tax purposes under section 2055 or section 2522 of the Internal Revenue Code in the absence of this Article shall be administered in accordance with this Article.

"**§ 36C-4B-3. Definitions.**

The following definitions apply to this Article unless the context clearly requires otherwise:

(1) "Charitable remainder trust" means a trust that provides for a specified distribution at least annually for either life or a term of years to one or more beneficiaries, at least one of which is not a charity (hereinafter referred to as "beneficiaries"), with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity. For purposes of this Article, only a charitable remainder annuity trust or a charitable remainder unitrust is considered a charitable remainder trust.

(2) "Charitable remainder annuity trust" means a charitable remainder trust:

a. From which a sum certain (that is not less than five percent (5%) of the initial net fair market value of all property placed in trust) is to be paid at least annually to one or more persons (at least one of which is not an organization described in section 170(c) of the Internal Revenue Code and, in the case of individuals, only to an individual who was living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of that individual or those individuals; however, in the case of an individual, the amount to be paid to that individual may be subject to a qualified contingency according to the terms of the governing instrument;

b. From which no amount other than the payments described in sub-subdivision a. of this subdivision may be paid to and/or for the use of anyone other than an organization that is or was described in section 170(c) of the Internal Revenue Code; and

c. Following the termination of the payments described in sub-subdivision a. of this subdivision, the remainder interest in the trust is to be transferred to, or for the use of, an organization that is or was described in section 170(c) of the Internal Revenue Code or is to be retained by the trust for such a use.

(3) "Charitable remainder unitrust" means a charitable remainder trust:

a. From which a fixed percentage (that is not less than five percent (5%)) of the net fair market value of its assets, valued annually, is to be paid at least annually to one or more persons (at least one of which is not an organization described in section 170(c) of the Internal Revenue Code and, in the case of individuals, only to an individual who was living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of that individual or those individuals; however, in the case of an individual, the amount to be paid to that individual may be made subject to a qualified contingency according to the terms of the governing instrument;

b. From which no amount other than the payments described in sub-subdivision a. of this subdivision may be paid to or for the use of anyone other than an organization that is or was an organization described in section 170(c) of the Internal Revenue Code; and

c. Following the termination of the payments described in sub-subdivision a. of this subdivision, the remainder interest in the trust is to be transferred to, or for the use of, an organization that is or was described in section 170(c) of the Internal Revenue Code, or is to be retained by the trust for such a use.

Notwithstanding the provisions of sub-subdivisions a. and b. of this subdivision, the trust instrument may provide that the trustee shall pay to the income beneficiary for any year (i) the amount of the trust income if that amount is less than the amount required to be distributed under sub-subdivision a. of this subdivision, and (ii) any amount of the trust income that exceeds the amount required to be distributed under sub-subdivisions a of this subdivision to the extent that (by reason of sub-subdivision a.) the aggregate of the amounts paid in prior years is less than the aggregate of the required amounts.

(4) "Qualified contingency" means any provision of the governing instrument that provides that, upon the happening of a contingency, the payments made to an individual noncharitable beneficiary of a charitable remainder trust will terminate not later than those payments would otherwise terminate under the governing instrument.

"**§ 36C-4B-4. Administrative provisions applicable to both charitable remainder annuity trusts and charitable remainder unit trusts.**

(a) Creation of Remainder Interests in Charity. – Upon the termination of the noncharitable interests, the trustee shall distribute all of the then principal and income of the trust, other than any amount due the noncharitable beneficiary or beneficiaries, to

the designated charity or charities, or shall hold the property in trust for the designated charity or charities in accordance with the terms of the trust document.

(b) Selection of Alternate Charitable Beneficiary if Remaindermen Do Not Qualify Under Section 170(c) of the Internal Revenue Code at Time of Distribution. – If the designated charity is not an organization described in section 170(c) of the Internal Revenue Code at the time when any principal or income of the trust is to be distributed to it, the trustee shall distribute the principal or income to one or more organizations then described in section 170(c) of the Internal Revenue Code selected in accordance with the terms of the trust instrument. If the trust instrument does not provide for a method of selecting alternate charitable beneficiaries that are then qualified under section 170(c) of the Internal Revenue Code, the trustee shall, in the trustee's sole discretion, select alternate trust beneficiaries that are qualified under section 170(c) of the Internal Revenue Code.

(b1) Selection of Alternative Charitable Beneficiary if Remaindermen Do Not Qualify Under Section 170(b)(1)(A) of the Internal Revenue Code at Time of Distribution. – Notwithstanding the provisions of subsection (b) of this section, if the designated charity is, at the time of the creation of the trust, an organization described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code, and if the designated charity is not an organization described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code when any principal or income of the trust is to be distributed to it, the trustee shall distribute the principal or income to one or more organizations then described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code selected in accordance with the terms of the governing instrument; however, in the event that the governing instrument does not provide a method of selecting alternative charitable beneficiaries that are then described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code, the trustee shall, in his sole discretion, select one or more alternative charitable beneficiaries that are described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code and shall distribute the principal or income to the organization or organizations so selected in such shares as the trustee, in the trustee's sole discretion, shall determine.

(c) Prohibitions Governing Trustees. – Except for payment of the annuity amount or the unitrust amount to the beneficiaries, whichever is applicable, the trustee is prohibited from engaging in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code, retaining any excess business holdings as defined in section 4943(c) of the Internal Revenue Code that would subject the trust to tax under section 4943 of the Code, making any investments that would subject the trust to tax under section 4944 of the Internal Revenue Code, and making any taxable expenditures as defined in section 4945(d) of the Code. The trustee shall make distributions at a time and in a manner as not to subject the trust to tax under section 4942 of the Internal Revenue Code.

(d) Distribution to Charity During Term of Noncharitable Interests and Distributions in Kind. – If the governing instrument of the trust provides for distribution

to charity during the term of the noncharitable interests, the trustee may pay to the designated charity the amounts specified in the governing instrument that exceed the annuity amount or the unitrust amount payable to any of the beneficiaries for the taxable year of the trust in which the income is earned. If the governing instrument of the trust provides for distribution to charity in kind, the adjusted basis for federal income tax purposes of any trust property the trustee distributes in kind to charity during the term of the noncharitable interests must be fairly representative of the adjusted basis for those purposes of all trust property available for distribution on the date of distribution.

(e) Investment Restrictions on Trustee. – Nothing in the trust instrument shall be construed to restrict the trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

(f) Distribution From Trust Used to Administer an Estate to Charitable Remainder Trust. – If the governing instrument of a revocable inter vivos trust provides that the revocable inter vivos trust will be used partially to administer the estate of the settlor or for some other purpose, and further provides the assets will then be distributed to another trust that is a charitable remainder trust, upon the death of the settlor, or upon the occurrence of any event that causes the trust to become irrevocable, then the trust shall become irrevocable, and the trustee of this trust shall perform any remaining duties or obligations provided for in the trust instrument and then transfer the property specified in the governing instrument to the trustee of the charitable remainder trust to be held, administered, and distributed in the manner and according to the terms and conditions provided by the charitable remainder trust.

(g) Payment of Taxes by Noncharitable Beneficiary. – In the case of any inter vivos charitable remainder trust that is liable to pay, from trust property, any federal estate, state inheritance, or other similar death taxes by reason of the death of the settlor of the trust, the interest of any noncharitable beneficiary of the trust shall terminate upon the death of the settlor unless the noncharitable beneficiary furnishes to the trust sufficient funds for payment of all those taxes attributable to the interest of the noncharitable beneficiary in the trust property, and the termination shall be deemed as the occurrence of a qualified contingency.

"**§ 36C-4B-5. Administrative provisions applicable to charitable remainder trusts only.**

(a) Creation of Annuity Amount for Period of Years or Life. – The trustee shall pay the annuity amount designated in the trust instrument to the beneficiaries named in the trust instrument during their lives (or if the governing instrument so provides, for a period of 20 years or less) in each taxable year of the trust. The annuity amount shall be paid annually or in more frequent equal or unequal installments if the governing instrument so provides. The annuity amount shall be paid from income and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the annuity amount shall be added to principal.

The total amount payable at least annually to a person or persons named in the trust document, at least one of which is not an organization described in section 170(c) of the Internal Revenue Code, may not be less than five percent (5%) of the initial net fair market value of the property placed in trust as finally determined for federal tax purposes, except as provided in subsection (g) of this section.

(b) Computation of Annuity Amount in Short and Final Taxable Years. – For a short taxable year and for the taxable year in which the noncharitable beneficiary's interest terminates by death or otherwise, the trustee shall prorate the annuity amount on a daily basis.

(c) Prohibition of Additional Contributions. – No additional contributions shall be made to the trust after the initial contribution.

(d) Deferral of Annuity Amount During Period of Administration or Settlement. – When property passes to the trust at the death of the settlor, the obligation to pay the annuity amount commences with the date of death of the settlor, but payment of the annuity amount may be deferred from the date of the settlor's death to the end of the taxable year in which complete funding of the trust occurs. Within a reasonable time after the end of the taxable year in which the complete funding of the trust occurs, the trustee must pay to the beneficiary, in the case of an underpayment, or must receive from the beneficiary, in the case of an overpayment, the difference between:

(1) Any annuity amounts actually paid, plus interest on those amounts computed at ten percent (10%) a year, compounded annually; and

(2) The annuity amounts payable, determined under the method described in Section 1.664-1(a)(5) of the federal income tax regulations, plus interest on those amounts computed at ten percent (10%) a year, compounded annually.

Notwithstanding the foregoing sentence, in computing any underpayment or overpayment of the annuity amounts, if the governing instrument was executed or last amended prior to August 9, 1984, and if the governing instrument does not specify that a ten percent (10%) rate of interest shall be used, the underpayment or overpayment of the annuity amounts shall be computed using an interest rate at six percent (6%) a year, compounded annually.

(e) Dollar Amount Annuity May Be Stated as Fraction or Percentage. – If the governing instrument of the trust states the amount of the annuity as a fraction or a percentage, the trustee shall pay to the beneficiaries in each taxable year of the trust during their lives an annuity amount equal to a percentage (that percentage being stipulated in the governing instrument of the trust and, in any event, being five percent (5%) or greater) of the initial net fair market value of the assets constituting the trust. In determining this amount, assets shall be valued at their values as finally determined for federal tax purposes. If the fiduciary incorrectly determines the initial net fair market value of the assets constituting the trust, then, within a reasonable period after a final determination, the trustee shall pay to the beneficiaries, in the case of an undervaluation or shall receive from the beneficiaries, in the case of an overvaluation, an amount

equal to the difference between the annuity amount properly payable and the annuity amount actually paid.

(f) Annuity Amount May Be Allocated Among Class of Noncharitable Beneficiaries in Discretion of Trustee. – If the governing instrument of the trust provides that the annuity trust amount may be allocated among a class of noncharitable beneficiaries in the discretion of the trustee, then the trustee shall pay the annuity amount, which is defined in the governing instrument of the trust, in each taxable year of the trust, to the member or members of the class of noncharitable beneficiaries in an amount and proportions as the trustee in the trustee's absolute discretion shall from time to time determine until the last of the noncharitable beneficiaries dies. The trustee may pay the entire annuity amount to one member of this class or may apportion it among the various members in a manner as the trustee from time to time deems advisable as long as the power to allocate does not cause any person to be treated as the owner of any part of the trust under the rules of section 671 through section 678 of the Internal Revenue Code. If the class provided for in the governing instrument is open, then the distribution shall be for a period of years not to exceed 20 years, notwithstanding a provision to the contrary in the trust instrument. If the class provided for in the governing instrument is closed at the creation of the trust, and all members of the class are ascertainable, the distribution may be for the lives of the members of the class or for a period not exceeding 20 years. The trustee shall pay the entire annuity amount for each taxable year annually and may not delay payment of the annuity amount.

(g) Reduction of Annuity Amount If Part of Corpus Is Paid to Charity at Expiration of Term of Years or on Death of Recipient. – If the governing instrument of the trust provides for the reduction of the annuity amount if part of the corpus is paid to charity at the expiration of a term of years or upon the death of a recipient, then during the term of years or during the joint lives of the noncharitable beneficiaries, the trustee shall, in each taxable year of the trust, pay a total annuity amount of at least five percent (5%) of the initial net fair market value of the assets placed in trust. Upon the expiration of the term of years or the death of a beneficiary, the trustee shall distribute an amount or percentage of the trust assets, as provided in the governing instrument of the trust, to the charity named in the governing instrument, and thereafter the trustee shall pay, annually or in more frequent installments, to the survivors for their lives, an annuity amount that in each taxable year of the trust, bears the same ratio to five percent (5%) of the initial net fair market value of the trust assets as the net fair market value of the trust assets valued as of the date of distribution, less the amount or percentage of trust assets distributed to the charity, bears to the net fair market value of the trust assets as of the date of distribution.

(h) Termination of Annuity Amount on Payment Date Preceding Termination of Noncharitable Interest. – If the governing instrument of the trust provides that payment of the annuity amount may terminate with the regular payment preceding the

termination of all noncharitable interests, then the trustee shall pay to the noncharitable beneficiary during the term of the noncharitable interest the annuity amount, defined in the trust document, in each taxable year of the trust. The obligation of the trustee to pay the annuity amount shall terminate with the payment preceding the death of the noncharitable beneficiary or other event that terminates the noncharitable interest.

(i) Retention of Testamentary Power to Revoke Noncharitable Interest. – If the governing instrument of the trust provides that the settlor of the trust retains the power, exercisable only by will, to revoke or terminate the interest of any recipient other than an organization described in section 170(c) of the Internal Revenue Code, then the trustee shall pay to the settlor during his life the annuity amount, as defined in the governing instrument of the trust and, upon the death of the settlor, if the noncharitable beneficiary survives the settlor, the trustee shall pay to the noncharitable beneficiary during his life the annuity amount equal to the amount paid to the settlor. The settlor shall have the power, exercisable only by will, to revoke and terminate the interest of the noncharitable beneficiary under the trust. Upon the first to occur of (i) the death of the survivor of the settlor and noncharitable beneficiary; or (ii) the death of the settlor if he effectively exercised his testamentary power to revoke and terminate the interest of the noncharitable beneficiary; the trustee shall distribute all of the then principal and income of the trust, other than any amount due the settlor or noncharitable beneficiary, to the charity named in the trust document or, if the governing instrument so provides, the trustee shall continue to hold the principal and income in trust for the charity or for the charitable purposes specified in the trust. No other retained power to terminate an interest in the trust shall be effective.

"**§ 36C-4B-6. Administrative provisions applicable to charitable remainder unitrusts only.**

(a) Creation of Unitrust Amount for a Period of Years or Life. – The trustee shall pay to the beneficiaries named in the trust investment in each taxable year of the trust during their lives or, if the governing instrument so provides, for a period not exceeding 20 years, a unitrust amount equal to a fixed percentage, as stated in the governing instrument of the trust, of the net fair market value of the trust assets valued annually on the date or by the method designated in the governing instrument of the trust or, if no date or method is specified, on the date or by the method selected by the trustee in his discretion, so long as the same valuation date or dates or valuation methods are used each year. The unitrust amount shall be paid annually or in more frequent equal or unequal installments if the governing instrument so provides. The unitrust amount shall be paid from income and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal. The fixed percentage to be paid at least annually to all beneficiaries cannot be less than five percent (5%).

(b) Unitrust Amount Expressed as the Lesser of Income or a Fixed Percentage. – If the governing instrument of the trust provides that the trustee shall pay, instead of a regular unitrust amount (the fixed percentage of the net fair market value of the trust

assets, determined annually), the amount of trust income for the taxable year to the extent that this amount is not greater than the amount required to be distributed as a regular unitrust amount for that taxable year or the amount of the trust income for the taxable year that exceeds the regular unitrust amount for that taxable year to the extent that the aggregate of the amounts paid in prior years is less than the aggregate of the regular unitrust amount for those prior years, then the trustee shall pay to the beneficiaries in each taxable year of the trust during their lives, or for a period not exceeding 20 years if the trust agreement so provides, an amount equal to the lesser of (i) the trust income for the taxable year, as defined in section 643(b) of the Internal Revenue Code and the regulations thereunder, and (ii) the percentage, as stated in the governing instrument, of the net fair market value of the trust assets valued as of the taxable year decreased as elsewhere provided if the taxable year is a short taxable year or is the taxable year in which the noncharitable interest terminates by death or otherwise, and increased as elsewhere provided if additional contributions are made in the taxable year.

If the governing instrument of the trust so provides and if the trust income for any taxable year exceeds the amount determined under (ii) above, the payment to beneficiaries shall also include the excess income to the extent that the aggregate of the amounts paid to beneficiaries in prior years is less than the percentage of the aggregate net fair market value of the trust assets, which percentage is defined in the governing instrument of the trust, for these years. Payments to beneficiaries shall be made annually or in more frequent equal or unequal installments if the governing instrument so provides. Any income of the trust in excess of these payments shall be added to principal.

(c) Adjustment for Incorrect Valuation. – If the fiduciary incorrectly determines the net fair market value of the trust assets for any taxable year, the trustee shall, within a reasonable period after the final determination of the correct value, pay to the beneficiaries, in the case of an undervaluation, or receive from the beneficiaries, in the case of an overvaluation, an amount equal to the difference between the unitrust amount properly payable and the unitrust amount actually paid.

(d) Computation of Unitrust Amount in Short and Final Taxable Years. – For a short taxable year and for the taxable year in which the noncharitable beneficiary's interest terminates by death or otherwise, the trustee shall prorate the unitrust amount on a daily basis. If a trust provides for a valuation date other than the first day of the taxable year, and the valuation date does not occur in a taxable year of the trust because the taxable year is either a short taxable year or is the taxable year in which the noncharitable interests terminate, the trust assets shall be valued as of the last day of the short taxable year or the day on which the noncharitable interests terminate, as appropriate.

(e) Additional Contributions. – If the governing instrument does not prohibit additional contributions and additional contributions are made to the trust after the

initial contribution in the trust, the unitrust amount for the taxable year in which the additional contributions are made shall be a fixed percentage, as stated in the governing instrument of the trust, of the sum of (i) the net fair market value of trust assets, excluding the additional contributions and any income from or appreciation of these contributions and (ii) that proportion of the value of the additional contributions excluded under (i) which the number of days in the period beginning with the date of contribution and ending with the earlier of the last day of the taxable year or the day the noncharitable beneficiary's interest terminated bears to the number of days in the period beginning on the first day of the taxable year and ending with the earlier of the last day in the taxable year or the day the noncharitable beneficiary's interest terminated. If no valuation date occurs after the contributions are made, the assets so added shall be valued as of the time of contribution.

(f) Deferral of Unitrust Amount During Period of Administration or Settlement. – When property passes to the trust at the death of the settlor, the obligation to pay the unitrust amount commences with the date of the settlor's death, but payment of the unitrust amount may be deferred from the date of the settlor's death to the end of the taxable year of the trust in which complete funding of the trust occurs. Within a reasonable time after the end of the taxable year in which the complete funding of the trust occurs, the trustee must pay to the beneficiary, in the case of an underpayment, or must receive from the beneficiary, in the case of an overpayment, the difference between:

(1) Any unitrust amounts actually paid, plus interest on those amounts computed at ten percent (10%) a year, compounded annually; and

(2) The unitrust amounts payable, determined under the method described in section 1.664-1(a)(5) of the federal income tax regulations, plus interest on those amounts computed at ten percent (10%) a year, compounded annually.

Notwithstanding the foregoing sentence, in computing any underpayment or overpayment of the unitrust amounts, if the governing instrument was executed or last amended prior to August 9, 1984, and if the governing instrument does not specify that a ten percent (10%) rate of interest shall be used, the underpayment or overpayment of the unitrust amounts shall be computed using an interest rate of six percent (6%) a year, compounded annually.

(g) Unitrust Amount May Be Allocated Among Class of Noncharitable Beneficiaries in Discretion of Trustee. – If the governing instrument of the trust provides that the unitrust amount may be allocated to a class of noncharitable beneficiaries in the discretion of the trustee, then the trustee shall pay, in each taxable year of the trust, the unitrust amount to the member or members of the class of noncharitable beneficiaries in amounts and proportions as the trustee in the trustee's absolute discretion shall from time to time determine until the last of the noncharitable beneficiaries dies. The trustee may pay the unitrust amount to any one member of the class or may apportion it among the various members in a manner that the trustee shall

from time to time deem advisable as long as the power to allocate does not cause any person to be treated as the owner of any part of the trust under the rules of section 671 through section 678 of the Internal Revenue Code. If the class provided for in the governing instrument is open, the distribution shall be for a period not exceeding 20 years, notwithstanding a provision to the contrary in the trust instrument. If the class provided for in the governing instrument is closed at the creation of the trust, and all members of the class are ascertainable, the distribution may be for the lives of the members of the class or for a period not exceeding 20 years. The trustee shall pay the entire unitrust amount for each taxable year annually and may not delay payment of the unitrust amount.

(h) Reduction of Unitrust Amount if Part of Corpus Is Paid to Charity at Expiration of Term of Years or on Death of a Recipient. – If the governing instrument of the trust provides for the reduction of the unitrust amount if part of the corpus is paid to charity at the expiration of a term of years or upon the death of a recipient, then during the term of years or during the joint lives of the noncharitable beneficiaries the trustee shall, in each taxable year of the trust, pay the total unitrust amount equal to a percentage of the net fair market value of the trust assets valued annually, which shall not be less than five percent (5%). Upon expiration of the term of years or the death of a recipient, the trustee shall distribute an amount or percentage of the trust assets, as provided in the governing instrument of the trust, to the charity named in the governing instrument, and thereafter the trustee shall pay to the survivors for their lives a unitrust amount in each taxable year of the trust equal to at least five percent (5%) (the actual percentage being defined in the trust instrument) of the net fair market value of the remaining trust assets valued annually.

(i) Termination of Unitrust Amount on Payment Date Preceding Termination of Noncharitable Interests. – If the governing instrument of the trust provides that payment of the unitrust amount may terminate with the regular payment preceding the termination of all noncharitable interests, then the trustee shall pay the unitrust amount to the noncharitable beneficiary in each taxable year of the trust during the term of the noncharitable interest. The obligation of the trustee to pay the unitrust amount terminates with the payment preceding the termination of the noncharitable interest by death or otherwise. The five percent (5%) requirement provided in subsection (a) of this section shall be met until the termination of all payments of the unitrust amount.

(j) Retention of Testamentary Power to Revoke Noncharitable Interest. – If the governing instrument of the trust provides that the settlor of the trust shall retain the power, exercisable only by will, to revoke or terminate the interest of any recipient other than an organization described in section 170(c) of the Internal Revenue Code, then the trustee shall pay the unitrust amount to the settlor during his life and, upon the death of the settlor, shall pay the unitrust amount to the noncharitable beneficiary during his life, provided the noncharitable beneficiary survives the settlor. The settlor shall have the power, exercisable only by will, to revoke and terminate the interest of the

noncharitable beneficiary under the trust. Upon the first to occur of (i) the death of the survivor of the settlor and the noncharitable beneficiary; or (ii) the death of the settlor if the settlor effectively exercised the testamentary power to revoke and terminate the interest of the noncharitable beneficiary; the trustee shall distribute all of the then principal and income of the trust, other than any amount due the noncharitable beneficiaries, to the charity named in the trust document or, if the governing instrument so provides, the trustee shall continue to hold the principal and income in trust for the charity or for the charitable purposes specified in the trust. No other retained power to terminate an interest in the trust shall be effective.

"**§ 36C-4B-7. Interpretation.**

This Article shall be interpreted and construed to effectuate its general purpose to cause all charitable remainder annuity trusts and all charitable remainder unitrusts to be administered in accordance with the provisions of section 2055 and section 2522 of the Internal Revenue Code and the regulations under those sections.

"Article 5.

"Creditors' Claims; Spendthrift and Discretionary Trusts.

"**§ 36C-5-501. Rights of beneficiary's creditor or assignee.**

(a) Except as provided in subsection (b) of this section, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to that relief as is appropriate under the circumstances.

(b) This section shall not apply and a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary, to the extent that a beneficiary's interest:

(1) Is subject to a spendthrift provision;

(2) Is a discretionary trust interest as defined in G.S. 36C-5-504(a)(2); or

(3) Is a protective trust interest as described in G.S. 36C-5-508.

"**§ 36C-5-502. Spendthrift provision.**

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust", or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this Article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

"**§ 36C-5-503. Exceptions to spendthrift provision.**

(a) As used in this section, the term "child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(b) Even if a trust contains a spendthrift provision, or if the beneficiary's interest is a discretionary trust interest as defined in G.S. 36C-5-504(a)(2) or a protective trust

interest as defined in G.S. 36C-5-508, a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances.

"**§ 36C-5-504. Discretionary trusts; effect of standard.**

(a) In this section:

(1) "Child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(2) "Discretionary trust interest" means an interest in a trust that is subject to the trustee's discretion, whether or not the discretion is expressed in the form of a standard of distribution. A discretionary trust interest shall include an interest in any one or any combination of the following:

a. A trust in which the amount to be received by the beneficiary, including whether or not the beneficiary, or a class of beneficiaries, is to receive anything at all, is within the discretion of the trustee.

b. A trust in which the trustee has no duty to pay or distribute any particular amount to the beneficiary, but has only a duty to pay or distribute to the beneficiary, or apply on behalf of the beneficiary, those sums that the trustee, in the trustee's discretion, determines are appropriate for the support, education, or maintenance of the beneficiary.

(b) A discretionary trust interest may not be transferred by the beneficiary and, except as otherwise provided in this Article, a creditor or assignee of a beneficiary may not reach such an interest or a distribution by the trustee before its receipt by the beneficiary.

(c) Except as provided in subsection (d) of this section, a creditor of a beneficiary may not compel a distribution from a trust in which the beneficiary has a discretionary trust interest even if the trustee has abused the trustee's discretion.

(d) To the extent that a trustee has not complied with a standard of distribution or has abused a discretion:

(1) A distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child; and

(2) The court shall direct the trustee to pay to the child such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(e) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(f) A creditor may not reach the interest of a beneficiary who is also a trustee or co-trustee, or otherwise compel a distribution, if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard.

"**§ 36C-5-505. Creditor's claim against settlor.**

(a) Whether or not the terms of a trust contain a spendthrift provision or the interest in the trust is a discretionary trust interest as defined in G.S. 36C-504(a)(2) or a protective trust interest as defined in G.S. 36C-5-508, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent that the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances, unless barred by G.S. 28A-19-3.

(b) The lapse, release, or waiver of a power of withdrawal shall not cause the holder to be treated as a settlor of the trust.

"**§ 36C-5-506. Overdue distribution.**

(a) In this section, "mandatory distribution" means a distribution of income or principal that the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term excludes a distribution subject to the exercise of the trustee's discretion, regardless of whether the terms of the trust (i) include a support or other standard to guide the trustee in making distribution decisions; or (ii) provide that the trustee "may" or "shall" make discretionary distributions, including distributions pursuant to a support or other standard.

(b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

"**§ 36C-5-507. Personal obligations of trustee.**

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

"**§ 36C-5-508. Protective trusts.**

Except with respect to an interest retained by the settlor, a "protective trust interest" means an interest in a trust in which the terms of the trust provide that the interest shall terminate or become discretionary if:

(1) The beneficiary alienates or attempts to alienate that interest; or

(2) Any creditor attempts to reach the beneficiary's interest by attachment, levy, or otherwise; or

(3) The beneficiary becomes insolvent or bankrupt.

"Article 6.

"Revocable Trusts.

"**§ 36C-6-601. Capacity of settlor of revocable trust.**

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

"**§ 36C-6-602. Revocation or amendment of revocable trust.**

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust without regard to the actual capacity of the settlor. This subsection does not apply to a trust created under an instrument executed before the effective date of this Chapter.

(b) If a revocable trust is created or funded by more than one settlor:

(1) To the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

(2) To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard the portion of the trust property attributable to that settlor's contribution.

(c) The settlor may revoke or amend a revocable trust:

(1) By substantial compliance with a method provided in the terms of the trust; or

(2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

a. A later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

b. By oral statement to the trustee if the trust was created orally; or

c. Any other written method delivered to the trustee manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(e) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power of attorney provided the exercise of the power of revocation or amendment does not alter the designation of beneficiaries to receive property on the settlor's death under the settlor's existing estate plan.

(f) A general guardian or a guardian of the estate of the settlor or, if no general guardian or guardian of the estate has been appointed, a guardian of the person of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship.

(g) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

"**§ 36C-6-603. Settlor's powers; powers of withdrawal.**

(a) While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors.

"**§ 36C-6-604. Limitation on action contesting validity of revocable trust; distribution of trust property.**

(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

(1) Three years after the settlor's death; or

(2) 120 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

(1) The trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) A potential contestant has notified the trustee of a possible judicial proceeding to contest the trust, and a judicial proceeding is commenced within 60 days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

"Article 7.

"Office of Trustee.

"**§ 36 C-7-701. Accepting or declining trusteeship.**

(a) Except as otherwise provided in subsection (c) of this section, a person designated as trustee accepts the trusteeship:

(1) By substantially complying with a method of acceptance provided in the terms of the trust; or

(2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time, not to exceed 120 days, after receiving written notice of the trusteeship shall be deemed to have rejected the trusteeship.

(c) A person designated as trustee, without accepting the trusteeship, may:

(1) Act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

(2) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

"**§ 36C-7-702. Trustee's bond.**

(a) A trustee shall provide bond to secure the performance of the trustee's duties if:

(1) The trust instrument was executed before January 1, 2006, unless the terms of the trust instrument provide otherwise;

(2) The trust instrument was executed on or after January 1, 2006, but only if the terms of the trust instrument require the trustee to provide bond;

(3) A beneficiary requests the trustee to provide bond, and the court finds the request to be reasonable; or

(4) The court finds that it is necessary for the trustee to provide bond in order to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

However, in no event shall bond be required of a trustee if the governing instrument directs otherwise.

(b) If bond is required, it shall be in a sum of double the value of the personal property to come into the trustee's hands if 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 trust estate if 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 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%) of that value, conditioned upon the faithful performance of the trustee's duties and for the payment to the persons entitled to receive property that may come into the trustee's hands. All bonds executed under the provisions of this Article shall be filed with the clerk of superior court.

(c) On petition of the trustee or a qualified beneficiary, the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties.

(d) As provided in G.S. 53-159 and G.S. 53-366(a)(10), banks and trust companies licensed to do trust business in this State need not give bond, even if required by the terms of the trust.

"**§ 36C-7-703. Co-trustees.**

(a) Co-trustees who are unable to reach a unanimous decision may act by majority decision if more than two are serving. Unanimity is required when only two co-trustees are serving.

(b) If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust and exercise all trustee powers, except those powers that the remaining trustees are prohibited from exercising under the trust instrument or by law.

(c) A co-trustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity, or the co-trustee has properly delegated the performance of the function to another trustee.

(d) If a co-trustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust.

(e) A trustee may delegate to a co-trustee with the consent of the co-trustee the performance of any function other than those the settlor reasonably expected the trustees to perform jointly. The following functions shall not be deemed to be those that the settlor reasonably expected the trustees to perform jointly:

(1) Establish and maintain bank accounts for the trust and issue checks for the trust.

(2) Maintain inventories, accountings, and income and expense records of the trust.

(3) Enter any safety deposit box rented by the trust.

(4) Employ persons as advisors or assistants in the performance of administrative duties, including agents, attorneys, accountants, brokers, appraisers, and custodians.

(5) List trust property for taxes and prepare and file tax returns for the trust.

(6) Collect and give receipts for claims and debts of the trust.

(7) Pay debts, claims, costs of administration, and taxes of the trust.

(8) Compromise, adjust, or otherwise settle any claim by or against the trust and release, in whole or in part, a claim belonging to the trust.

(9) Have custody of the trust property.

The list of functions contained in this subsection is not intended to be exclusive of others that may be delegated to a co-trustee in accordance with this subsection.

(f) Except as otherwise provided in subsection (g) of this section, a trustee who does not join in an action of another trustee is not liable for the action.

(g) Each trustee shall exercise reasonable care to:

(1) Avoid enabling a co-trustee to commit a serious breach of trust; and

(2) Compel a co-trustee to redress a serious breach of trust.

(h) Notwithstanding subsection (f) or (g) of this section, a trustee who has not joined in an action approved by a majority of the other trustees shall not be liable for the action, nor shall a dissenting trustee who joins in an action at the direction of the majority of the trustees but who notified in writing any co-trustee of the dissent at or before the time of the action be liable for the action, unless that trustee had knowledge that the action taken involved intentional misconduct or was taken with an intention to directly or indirectly provide an improper personal benefit to one or more trustees approving the action.

(i) Notwithstanding any other provision of this section to the contrary, if two or more trustees own shares of corporate stock or other securities, their acts with respect to voting shall have the following effect:

(1) If only one votes, in person or by proxy, the act binds all;

(2) If more than one vote, in person or by proxy, the act binds all; and

(3) If more than one vote, in person or by proxy, but the vote is evenly split on any particular matter, each faction is entitled to vote the stock or other securities in question proportionately.

"**§ 36C-7-704. Vacancy in trusteeship; appointment of successor.**

(a) A vacancy in a trusteeship occurs if:

(1) A person designated as trustee rejects the trusteeship;

(2) A person designated as trustee cannot be identified or does not exist;

(3) A trustee resigns;

(4) A trustee is disqualified or removed;

(5) A trustee dies; or

(6) A general guardian, guardian of the estate, or guardian of the person is appointed for an individual serving as trustee.

(b) If one or more co-trustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

(c) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:

(1) By a person designated in the terms of the trust or appointed pursuant to the terms of the trust to act as successor trustee;
(2) By a person appointed by unanimous agreement of the qualified beneficiaries; or
(3) By a person appointed by the court.

(d) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:
(1) By a person designated in the terms of the trust or appointed pursuant to the terms of the trust to act as successor trustee;
(2) By a person selected by majority agreement of the charitable organizations expressly designated to receive distributions under the terms of the trust; or
(3) By a person appointed by the court.

(e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

(f) A 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 governing instrument or unless the order appointing the successor trustee provides otherwise.

"**§ 36C-7-705. Resignation of trustee.**

(a) A trustee may resign:
(1) Upon at least 30 days' notice in writing to the qualified beneficiaries, the settlor, if living, and all co-trustees; or
(2) With the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

"**§ 36C-7-706. Removal of trustee.**

(a) For the reasons set forth in subsection (b) of this section, the settlor, a co-trustee, or a beneficiary of an irrevocable trust may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:
(1) The trustee has committed a serious breach of trust;
(2) Lack of cooperation among co-trustees substantially impairs the administration of the trust;
(3) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
(4) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of all of the

beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order appropriate relief under G.S. 36C-10-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

"**§ 36C-7-707. Delivery of property by former trustee.**

(a) Unless a co-trustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the co-trustee, successor trustee, or other person entitled to it. A former trustee shall execute those documents transferring title to trust property as may be appropriate to facilitate administration of the trust, and in the event that the former trustee fails to do so, the clerk of superior court may order the former trustee to execute those documents, or the clerk of superior court may transfer title.

"**§ 36C-7-708. Compensation of trustee.**

(a) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation determined in accordance with the provisions of Article 5A of Chapter 32 of the General Statutes.

(b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified.

"**§ 36C-7-709. Reimbursement of expenses.**

A trustee is entitled to be reimbursed out of the trust property for expenses properly incurred in the administration of the trust as provided in G.S. 32-58.

"Article 8.

"Duties and Powers of Trustee.

"**§ 36C-8-801. Duty to administer trust.**

Upon acceptance of a trusteeship, a trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this Chapter.

"**§ 36C-8-802. Duty of loyalty.**

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in G.S. 36C-10-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests, is voidable by a beneficiary affected by the transaction, without regard to whether the transaction is fair to the beneficiary, unless:

(1) The transaction was authorized by the terms of the trust;
(2) The transaction was approved by the court;
(3) The beneficiary did not commence a judicial proceeding within the time allowed by G.S. 36C-10-1005;
(4) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with G.S. 36C-10-1009; or
(5) The transaction involves a contract entered into, or claim acquired by, the trustee before the person became or contemplated becoming trustee.

(c) In determining whether a sale, encumbrance, or other transaction involving the investment or management of trust property is affected by a conflict of interest between the trustee's fiduciary and personal interests, the transaction is rebuttably presumed to be affected by such a conflict if the trustee enters into the transaction with:
(1) The trustee's spouse or a parent of the trustee's spouse;
(2) The trustee's descendants, siblings, ancestors, or their spouses;
(3) An agent, attorney, employee, officer, director, member, manager, or partner of the trustee, or an entity that controls, is controlled by, or is under common control with the trustee; or
(4) Any other person or entity in which the trustee, or a person that owns a significant interest in the trust, has an interest or relationship that might affect the trustee's best judgment;

(d) A transaction between a trustee and a beneficiary that does not concern trust property, but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary, and from which the trustee obtains an advantage, is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f) Notwithstanding subsection (c) of this section:
(1) An investment by a trustee in securities of an investment company, investment trust, or pooled investment vehicle in which the trustee has an investment, or to which the trustee, or its affiliate, provides services is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of Article 9 of this Chapter. The trustee may be compensated by the investment company, investment trust, or pooled investment vehicle for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under G.S. 36C-8-813 to receive a copy of the trustee's annual report

of the rate and method by which the compensation was determined; and

(2) Payment made by a trustee to an attorney, broker, accountant, or agent for services performed on behalf of the trust in the ordinary course of business shall not be deemed to be affected by a conflict between the trustee's personal and fiduciary interests if the payment is consistent with payments generally made in the community for the same or similar services.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect to appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(h) This section does not preclude the following transactions, if fair to the beneficiaries:

(1) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(2) Payment of reasonable compensation to the trustee;

(3) A transaction between a trust and another trust, decedent's estate, or guardianship, or similar relationship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) A deposit of trust money in a regulated financial-service institution operated by the trustee or an affiliate of the trustee; or

(5) An advance by the trustee of money for the protection of the trust.

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

"**§ 36C-8-803. Impartiality.**

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

"**§ 36C-8-804. Prudent administration.**

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

"**§ 36C-8-805. Cost of administration.**

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

"**§ 36C-8-806. Trustee's skills.**

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

"**§ 36C-8-807. Delegation by trustee.**

(a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with subsection (a) of this section is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

"**§ 36C-8-808. Powers to direct.**

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust, or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

"**§ 36C-8-809. Control and protection of trust property.**

A trustee shall take reasonable steps to take control of and protect the trust property.

"**§ 36C-8-810. Record keeping and identification of trust property.**

(a) A trustee shall keep adequate records of the administration of the trust.

(b) A trustee shall keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in subsection (d) of this section, a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

"**§ 36C-8-811. Enforcement and defense of claims.**

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

"**§ 36C-8-812. Collecting trust property.**

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee.

"**§ 36C-8-813. Duty to inform and report.**

(a) The trustee is under a duty to a qualified beneficiary to give that beneficiary upon request and at reasonable times complete and accurate information as to the nature and amount of the trust property and to permit the beneficiary, or the beneficiary's representative, to inspect the subject matter of the trust and the accounts and other documents relating to the trust.

(b) Notwithstanding the provisions of subsection (a) of this section:

(1) The duty of the trustee under subsection (a) of this section shall not include informing any beneficiary in advance of transactions relating to the trust property.

(2) A trustee shall be deemed to have discharged the trustee's duty under subsection (a) of this section as to a qualified beneficiary for matters disclosed by a report sent at least annually and at termination of the trust to the beneficiary that describes the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, and lists the trust assets and their respective market values (including estimated values of assets with uncertain values). No presumption shall arise that a trustee who does not comply with the provisions of this subdivision failed to discharge the trustee's duty under subsection (a) of this section.

(c) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this subsection. With respect to future reports and other information, a beneficiary may withdraw a waiver previously given.

(d) Subsection (b) of this section applies only to a trust created pursuant to a trust instrument executed on or after the effective date of this Chapter.

"**§ 36C-8-814. Discretionary powers; tax savings.**

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of terms such as "absolute", "sole", or "uncontrolled", a trustee abuses the trustee's discretion in exercising or failing to exercise a discretionary power if the trustee acts with bad faith, acts dishonestly, acts with an improper motive, even though not a dishonest motive, or if the trustee fails to use the trustee's judgment in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) Subject to subsection (d) of this section, and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

(1) A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power that would, except for this subsection, constitute in whole or in part a general power of appointment may not exercise that power in favor of the trustee/beneficiary, the trustee/beneficiary's estate, the trustee/beneficiary's creditors, or the creditors of the trustee/beneficiary's estate.

(2) Notwithstanding the provisions of subdivision (1) of this subsection, if the trust confers on the trustee the power to make discretionary distributions to or for the trustee's personal benefit, the trustee may exercise the power in accordance with an ascertainable standard.

(3) The trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

For purposes of this subsection, a "general power of appointment" means any power that would cause the income to be taxed to the trustee in his individual capacity under section 678 of the Internal Revenue Code and any power that would be a general power of appointment, in whole or in part, under section 2041(b)(1) or section 2514(c) of the Internal Revenue Code.

(c) A power whose exercise is limited or prohibited by subsection (b) of this section may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) of this section does not apply to:

(1) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in section 2056(b)(5) or section 2523(e) of the Internal Revenue Code, was previously allowed;

(2) Any trust during any period that the trust may be revoked or amended by its settlor; or

(3) A trust, if contributions to the trust qualify for the annual exclusion under section 2503(c) of the Internal Revenue Code.

(e) If a trust created under a will or trust instrument for the benefit of the spouse of the settlor of the trust, other than a trust that provides that upon the termination of the income interest that the entire remaining trust estate be paid to the estate of the spouse, requires that all the income of the trust be paid not less frequently than annually to the spouse and a federal estate or gift tax marital deduction is claimed with respect to the trust, then, unless the trust instrument specifically provides otherwise by reference to this section, any investment in or retention of unproductive property as an asset of the trust is subject to the power of the spouse to require either that the asset be made

productive of income, or that it be converted to assets productive of income, within a reasonable period of time.

"**§ 36C-8-815. General powers of trustee.**

(a) A trustee, without authorization by the court, may exercise:

(1) Powers conferred by the terms of the trust; or

(2) Except as limited by the terms of the trust:

a. All powers over the trust property that an unmarried competent owner has over individually owned property;

b. Any other powers appropriate to achieve the proper investment, management, administration or distribution of the trust property; and

c. Any other powers conferred by this Chapter.

(b) The exercise of a power is subject to the fiduciary duties prescribed by this Article.

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

Without limiting the authority conferred by G.S. 36C-8-816, a trustee may:

(1) Collect and control trust property and accept or reject additions to the trust property from a settlor or any other person;

(2) Invest and reinvest trust property as the trustee deems advisable in accordance with the provisions of the trust, and to acquire or sell property, for cash or on credit, at public or private sale;

(3) Exchange, partition, or otherwise change the character of trust property;

(4) Deposit trust money in an account in a regulated financial services institution, including an institution operated by the trustee or an affiliate of the trustee upon compliance with any applicable requirements for the deposit;

(5) Borrow money, with or without security, including from a corporate trustee's lending department, renew or modify loans, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(6) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, venture, agricultural operation, or other form of business or enterprise, form and transfer, assign, and convey to that form of business or enterprise all or any part of the trust property in exchange for the stock, securities, or obligations of that form of business or enterprise, continue any business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization, or contributing additional capital;

(7) With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:

a. Vote, or give general or limited proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement, or execute waivers, consents, or objections with respect to those securities;

b. Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

c. Pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights;

d. Deposit the securities with a depositary or other regulated financial-service institution; and

e. Consent, directly or through a committee or other agent, to the merger, consolidation, reorganization, readjustment of capital or financial structure, lease, sale, dissolution, or liquidation of a business enterprise, and elect whether to participate as a member of a class in any litigation involving the securities;

(8) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing party walls or buildings or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries, make contracts, licenses, leases, conveyances, or grants of every nature and kind with respect to crops, gravel, sand, oil, gas, timber and forest products, other usufructs or natural resources, and other benefits or incidents of the real property;

(9) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust at the expense of the trust;

(12) Abandon, relinquish any or all rights to, or decline to administer property of no value or of insufficient benefit or value to the trust to justify its collection or continued administration;

(13) With respect to possible liability for violation of environmental law:
a. Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;
b. Take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;
c. Decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;
d. Compromise claims against the trust which may be asserted for an alleged violation of environmental law; and
e. Pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;
(14) Pay or contest any claim, compromise, adjust or otherwise settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;
(15) Pay from the trust property taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust and the protection of the trust property;
(16) Exercise elections with respect to federal, state, and local taxes;
(17) Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights under such a plan, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;
(18) Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and acquire a lien on future distributions for repayment of those loans;
(19) Pledge trust property to guarantee loans made by others to a beneficiary;
(20) Appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, limit those powers the appointed trustee may exercise and the duties for

which the appointed trustee is responsible, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

a. Paying it to the beneficiary's general guardian or the guardian of the beneficiary's estate or, if the beneficiary does not have a general guardian or guardian of the beneficiary's estate, the guardian of the beneficiary's person;

b. Paying it to a custodian under a uniform transfer to minors act or custodial trustee under a uniform custodial trust act and, for that purpose, creating a custodianship or custodial trust for the benefit of the beneficiary;

c. Paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

d. Managing it as a separate fund on the beneficiary's behalf.

A trustee making payments under this subdivision does not have any duty to see to the application of the payments so made, if the trustee exercised due care in the selection of the person, including the minor or incompetent, to whom the payments were made, and the receipt of that person shall be full acquittance to the trustee;

(22) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares without regard to the income tax basis or other special tax attributes of such assets, as the trustee finds to be most practicable and for the best interests of the distributees, value the trust property for those purposes, and adjust for resulting differences in valuation; and to distribute trust property in kind or in cash, or partially in kind and partially in cash, in divided or undivided interests;

(23) Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) Make, execute, and deliver contracts and other instruments, including instruments under seal, that are useful to achieve or facilitate the exercise of the trustee's powers;

(26) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it;

(27) Employ as advisors or assistants in the performance of administrative duties, or delegate administrative duties in the manner provided in G.S. 36C-8-807, to persons, firms, and corporations, including agents, auditors, accountants, brokers, attorneys-at-law, attorneys-in-fact, investment advisors, appraisers, custodians, rental agents, realtors, and tax specialists;

(28) Bid on property at a foreclosure sale, or acquire property from a mortgagor or obligor without foreclosure, and to retain the property so bid on or taken over without foreclosure;

(29) Divide one trust into several trusts and make distributions from those trusts in the manner provided in G.S. 36C-4-417;

(30) Request an order from the court for the sale of real or personal property under Article 29A of Chapter 1 of the General Statutes, or for the exchange, partition, or other disposition or change in the character of, or for the grant of options or other rights in or to, such property; and

(31) Distribute the assets of an inoperative trust consistent with the authority granted under the provisions of G.S. 28A-22-10.

"**§ 36C-8-817. Distribution upon termination.**

Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

"Article 9.

"Uniform Prudent Investor Act.

"**§ 36C-9-901. Prudent investor rule; applicability.**

(a) Except as otherwise provided in subsection (b) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this Article.

(b) The prudent investor rule is a default rule and may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust which govern or direct investments in a manner inconsistent with this Article. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the terms of the trust.

(c) The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorize any investment or strategy permitted under this Article: "Chapter 36A", "investments in accordance with Article 15 of Chapter 36A", "investments in accordance with Article 9 of Chapter 36C", "investments

permissible by law for investment of trust funds", "legal investments", "authorized investments", "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital", "prudent man rule", "prudent trustee rule", "prudent person rule", and "prudent investor rule". This Article also applies where a trust contains no investment standard.

(d) This Article does not apply to:

(1) Unless the provisions of the trust provide otherwise by specific reference to this Article:

a. Trusts under any federal employee retirement income security statute or other retirement or pension trusts;

b. Trusts that are created by legislative act;

c. Trusts that are created by or pursuant to premarital or postmarital agreements, divorce settlements, settlements of other proceedings or disputes;

d. Transfers under the Uniform Transfers to Minors Act;

e. Transfers under the Uniform Custodial Trust Act; or

f. Honorary trusts, trusts for pets, and trusts for cemetery lots.

(2) Trusts imposed or required under another chapter of the General Statutes or by rule in which the investment of the trust funds is regulated by the other chapter or by rule, unless a provision of the other chapter or the rule provides otherwise by a specific reference to this Article.

"**§ 36C-9-902. Standard of care; portfolio strategy; risk and return objectives.**

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are any of the following that are relevant to the trust or its beneficiaries:

(1) General economic conditions;

(2) The possible effect of inflation or deflation;

(3) The expected tax consequences of investment decisions or strategies;

(4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

(5) The expected total return from income and the appreciation of capital;
(6) Other resources of the beneficiaries known to the trustee;
(7) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and
(8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this Article.

"**§ 36C-9-903. Diversification.**

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

"**§ 36C-9-904. Duties at inception of trusteeship.**

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this Chapter.

"**§ 36C-9-905. Reviewing compliance.**

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

"**§ 36C-9-906. Effect on charitable remainder trusts.**

Nothing in this Article shall prevent the application of Article 4B of this Chapter to a "charitable remainder trust" as defined in G.S.36C-4B-3(1).

"**§ 36C-9-907. Short title.**

This Article may be cited as the "North Carolina Uniform Prudent Investor Act."

"Article 10.

"Liability of Trustees and Rights of Persons Dealing with Trustees.

"**§ 36C-10-1001. Remedies for breach of trust.**

(a) A violation by a trustee of a duty the trustee owes under a trust is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:
(1) Compel the trustee to perform the trustee's duties;
(2) Enjoin the trustee from committing a breach of trust;
(3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
(4) Order a trustee to account;
(5) Appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) Suspend the trustee;
(7) Remove the trustee as provided in G.S. 36C-7-706;
(8) Reduce or deny compensation to the trustee;
(9) Subject to G.S. 36C-10-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
(10) Order any other appropriate relief.

(c) The court may, for cause shown, relieve a trustee from liability for any breach of trust, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for a breach of trust.

"**§ 36C-10-1002. Damages for breach of trust.**

(a) A trustee who commits a breach of trust is liable for the greater of:
(1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
(2) The profit the trustee made by reason of the breach.

(b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

"**§ 36C-10-1003. Liability in absence of breach.**

(a) A trustee is accountable for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust. Nothing in this section limits a trustee's right to compensation under G.S. 36C-7-708 or payments allowed under G.S. 36C-8-802(f).

(b) Absent a breach of trust, a trustee is not liable for a loss or depreciation in the value of trust property or for not having made a profit.

"**§ 36C-10-1004. Attorney's fees and costs.**

In a judicial proceeding involving the administration of a trust, the court may award costs and expenses, including reasonable attorney fees, as provided in the General Statutes.

"**§ 36C-10-1005. Limitation of action against trustee.**

Limitation of actions on judicial proceedings involving trusts shall be governed by applicable provisions of Chapter 1 of the General Statutes, except that no proceeding against a trustee for breach of trust may be commenced more than five years after the first to occur of: (i) the removal, resignation, or death of the trustee; (ii) the termination of the beneficiary's interest in the trust; or (iii) the termination of the trust.

"**§ 36C-10-1006. Reliance on trust instrument.**

A trustee who acts in reasonable reliance on the terms of the trust as expressed in a trust instrument is not liable for a breach of trust to the extent that the breach resulted from the reliance.

"**§ 36C-10-1007. Event affecting administration or distribution.**

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

"**§ 36C-10-1008. Exculpation of trustee.**

A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.

"**§ 36C-10-1009. Beneficiary's consent, release, or ratification.**

(a) A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) At the time of the consent, release, or ratification, the beneficiary did not have knowledge of the beneficiary's rights or of the material facts relating to the breach.

(b) No consideration is required for the consent, release, or ratification to be valid.

"**§ 36C-10-1010. Limitation on personal liability of trustee.**

(a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in making the contract disclosed the fiduciary capacity. The addition of the phrases "trustee," or "as trustee," or similar designations to the signature of a trustee on a written contract shall be deemed prima facie evidence of a disclosure of fiduciary capacity.

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim. Any judgment rendered in favor of a claimant in such a judicial proceeding against a trust may be recovered from the trust property,

without proof that the trustee could have obtained reimbursement from the trust if the trustee had paid the claim.

(d) A trustee shall be entitled to indemnity from the trust for any claim, other than a breach of trust, for which the trustee is liable:

(1) If the claim arose from a common incident of activity in which the trustee was properly engaged for the trust;

(2) If the trustee was not personally at fault; or

(3) To the extent that the trustee's actions increased the value of trust property.

(e) A decision by a trustee not to inspect property, or to decline to accept property, shall not create any inference as to liability, under any environmental law, with respect to that property. A trustee shall have no liability for a decrease in value of property in a trust by reason of the trustee's compliance with any environmental law, including reporting requirements.

"**§ 36C-10-1011. Interest as general partner.**

(a) Except as otherwise provided in subsection (c) of this section or unless personal liability is imposed in the contract, a trustee who holds, in a fiduciary capacity, an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership if the fiduciary capacity was disclosed. The addition of the phrases "trustee", or "as trustee", or similar designations to the signature of a trustee on a written partnership document shall be deemed prima facie evidence of a disclosure of fiduciary capacity.

(b) A trustee who holds, in a fiduciary capacity, an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault. This subsection does not apply to additional ownership interests of the trustee held in a nonfiduciary capacity.

(c) If the settlor transfers an existing general partnership interest to a revocable trust, the settlor remains personally liable for partnership obligations as if the settlor were a general partner.

"**§ 36C-10-1012. Protection of person dealing with trustee.**

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that

the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

(f) A person is not required to obtain a certification under G.S. 36C-10-1013 in order to be entitled to the protections of this section.

"**§ 36C-10-1013. Certification of trust.**

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(1) The existence of the trust and the date the trust instrument was executed;

(2) The identity of the settlor, unless withheld pursuant to a provision in the trust instrument;

(3) The identity and address of the currently acting trustee;

(4) The powers of the trustee;

(5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) The authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;

(7) The trust's taxpayer identification number; and

(8) The manner of taking title to trust property.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that the person relying upon the certification holds a copy of all or part of the trust instrument.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

"Article 11.

"Miscellaneous Provisions.

"**§ 36C-11-1101. Uniformity of application and construction.**

In applying and construing this Chapter, consideration may be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 36C-11-1102. Electronic records and signatures.**

The provisions of this Chapter governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of those records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

"**§ 36C-11-1103. Severability clause.**

If any provision of this Chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Chapter that can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable."

SECTION 3. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 36D.**

"**North Carolina Community Trust for Persons with Severe Chronic Disabilities.**

"**§ 36D-1. Title; findings.**

(a) This Article shall be known and may be cited as the "North Carolina Community Trust for Persons with Severe Chronic Disabilities Act".

(b) The General Assembly finds that it is in the public interest to encourage activities by voluntary associations and private citizens that will supplement and augment those services provided by local, State, and federal government agencies in discharge of their responsibilities toward individuals with severe chronic disabilities. The General Assembly further finds that, as a result of changing social, economic, and demographic trends, families of persons with severe chronic disabilities are increasingly aware of the need for a vehicle by which they can assure ongoing individualized personal concern for a severely disabled family member who may survive his parents or other family members, and provide for the efficient management of small legacies or

trust funds to be used for the benefit of such a disabled person. In a number of other states voluntary associations have established foundations or trusts intended to be responsive to these concerns. Therefore, the General Assembly finds that North Carolina will benefit by the enactment of enabling legislation expressly authorizing the formation of community trusts in accordance with criteria set forth by statute and administered by the Secretary of State, pursuant to Chapter 55A of the General Statutes. These community trusts permit the pooling of resources contributed by families or persons with philanthropic intent, along with the reservation of portions of these funds for the use and benefit of designated beneficiaries.

(c) This Article shall be liberally construed and applied to promote its underlying purposes and policies, which are, among others, to:

(1) Encourage the orderly establishment of community trusts for the benefit of persons with severe chronic disabilities;

(2) Ensure that community trusts are administered properly and that the managing boards of the trusts are free from conflicts of interest;

(3) Facilitate sound administration of trust funds for persons with severe chronic disabilities by allowing family members and others to pool resources in order to make professional management investment more efficient;

(4) Provide parents of persons with severe chronic disabilities peace of mind in knowing that a means exists to ensure that the interests of their children who have severe chronic disabilities are properly looked after and managed after the parents die or become incapacitated;

(5) Help make guardians available for persons with severe chronic disabilities who are incompetent, when no other family member is available for this purpose;

(6) Encourage the availability of private resources to purchase for persons with severe chronic disabilities goods and services that are not available through any governmental or charitable program and to conserve these resources by limiting purchases to those that are not available from other sources;

(7) Encourage the inclusion, as beneficiaries of community trusts, of persons who lack resources and whose families are indigent, in a way that does not diminish the resources available to other beneficiaries whose families have contributed to the trust; and

(8) Remove the disincentives that discourage parents and others from setting aside funds for the future protection of persons with severe chronic disabilities by ensuring that the interest of beneficiaries in community trusts are not considered assets or income that would disqualify them from any governmental or charitable entitlement program with an economic means test.

"**§ 36D-2. Definitions.**

As used in this Article, unless the context clearly requires otherwise:

(1) "Beneficiary" means any person with a severe chronic disability who has qualified as a member of the community trust program and who has the right to receive those services and benefits vested with the management of the business and affairs of a corporation, formed for the purpose of managing a community trust, irrespective of the name by which the group is designated.

(2) "Community trust" means a nonprofit organization that offers the following services:

a. Administration of special trust funds for persons with severe chronic disabilities;

b. Follow along services;

c. Guardianship for persons with severe chronic disabilities who are incompetent, when no other family member or immediate friend is available for this purpose; and

d. Advice and counsel to persons who have been appointed as individual guardians of the persons or estates of persons with severe chronic disabilities.

(3) "Follow along services" means those services offered by community trusts that are designed to ensure that the needs of each beneficiary are being met for as long as may be required and may include periodic visits to the beneficiary and to the places where the beneficiary receives services, participation in the development of individualized plans being made by service providers for the beneficiary, and other similar services consistent with the purposes of this Article.

(4) "Severe chronic disability" means a physical or mental impairment that is expected to give rise to a long-term need for specialized health, social, and other services, and which makes the person with the disability dependent upon others for assistance to secure these services.

(5) "Trustee" means any member of the board of a corporation, formed for the purpose of managing a community trust, whether that member is designated as a trustee, director, manager, governor, or by any other title.

(6) "Surplus trust funds" means funds accumulated in the trust from contributions made on behalf of an individual beneficiary that, after the death of the beneficiary, are determined by the board to be in excess of the actual cost of providing services during the beneficiary's lifetime, including the beneficiary's share of administrative costs.

"**§ 36D-3. Scope.**

This Article applies to every community trust established in this State. In addition to meeting the other requirements of this Article, every board that administers a community trust shall incorporate as a nonprofit corporation pursuant to Chapter 55A of the General Statutes. Except as otherwise provided in this Chapter, the provisions of Chapter 55A of the General Statutes apply to the community trusts.

"**§ 36D-4. Administration; powers and duties.**

(a) Every community trust shall be administered by a board. The board shall be comprised of no less than nine and no more than 21 members, at least one-third of whom shall be parents or relatives of persons with severe chronic disabilities. No board member shall be a provider of habilitative, health, social, or educational services to persons with severe chronic disabilities or an employee of such a service provider. The board may, however, allow service providers to serve on the board in an advisory capacity. Board members shall be selected, to the maximum extent possible, from geographic areas throughout the area served by the trust.

The certificate of incorporation filed with the Secretary of State pursuant to Chapter 55A of the General Statutes shall, in addition to the requirements set forth in that Chapter, demonstrate that the requirements of this section have been met.

(b) Notwithstanding any other provision of law, no trustee may be compensated for services provided as a member of the board of a community trust. No fees or commissions shall be paid to these trustees; however, a trustee may be paid for necessary expenses incurred by the trustee and may receive indemnification as permitted under Chapter 55A of the General Statutes.

(bl) For every community trust incorporated under this Article, the corporation itself shall be considered the trustee of any funds administered by it. No individual board member shall be considered to be trustee of any fund deposited on behalf of any individual beneficiary with severe chronic disabilities.

(c) The board shall adopt bylaws that shall include a declaration delineating the primary geographic area serviced by the trust and the principal services to be provided and shall file the bylaws with the Secretary of State.

(d) The board may retain paid staff as it considers necessary to provide follow along services to the extent required by each beneficiary. The community trust may authorize the expenditure of funds for any goods or services that, in its sole discretion, it determines will promote the well-being of any beneficiary, including recreational services. The community trust may pay for the burial of any beneficiary. The community trust, however, may not expend funds for any goods or services of comparable quality to those available to any particular beneficiary through any governmental or charitable program, insurance, or other sources. The community trust may expend funds to meet the reasonable costs of administering the community trust.

(e) The community trust is not required to provide services to a beneficiary who is a competent adult and who has refused to accept the services. Further, the community trust shall not provide services of a nature or in a manner that would be contrary to the

public policy of this State at the time the services are to be provided. In either case, the community trust may offer alternate services that are consistent with the purposes of this Article and in keeping with the best interests of the beneficiary.

(f) The community trust may accept appointment as guardian of the person, guardian of the estate, or guardian of both on behalf of any beneficiary. If the community trust accepts appointment as guardian of the person of an individual, it shall assign a staff member to carry out its responsibilities as the guardian. The community trust may, upon request, offer consultative and professional assistance to an individual, private or public guardian of any of its beneficiaries.

(g) The community trust may accept contributions, bequests, and designations under life insurance policies to the community trust on behalf of individuals with severe chronic disabilities for the purpose of qualifying them as beneficiaries.

(h) At the time a contribution, bequest, or assignment of insurance proceeds is made, the trustor shall receive a written statement of the services to be provided to the beneficiary. The statement shall include a starting date for the delivery of services or the condition precedent, such as the death of the trustor, which shall determine the starting date. The statement shall describe the frequency with which services shall be provided and their duration, and the criteria or procedures for modifying the program of services from time to time in the best interests of the beneficiary.

"**§ 36D-5. Accountability.**

Along with the annual report filed with the Secretary of State pursuant to Chapter 55A of the General Statutes, the community trust shall file an itemized statement that shows the funds collected for the year, income earned, salaries, other expenses incurred, and the opening and final trust balances. A copy of this statement shall be made available, upon request, to any beneficiary, trustor, or designee of the trustor. In addition, once annually, each trustor or the trustor's designee shall receive a detailed individual statement of the services provided to the trustor's beneficiary during the previous 12 months and the services to be provided during the following 12 months. The community trust shall make a copy of the individual statement available to any beneficiary, upon request.

"**§ 36D-6. Gifts, surplus trust funds.**

The community trust may accept gifts and use surplus trust funds for the purpose of qualifying as beneficiary any indigent person whose family members lack the resources to make a full contribution on that person's behalf. The extent and character of the services and selection of beneficiaries are at the discretion of the community trust. The community trust may not use surplus trust funds to make any charitable contribution on behalf of any beneficiary or any group or class of beneficiaries. The community trust may accept gifts to meet start-up costs, reduce the charges to the trust for the cost of administration, and for any other purpose that is consistent with this Article. Gifts made to the trust for an unspecified purpose shall be used by the community trust either to qualify indigent persons whose families lack the means to qualify them as beneficiaries of the trust or to meet any start-up costs that the trust incurs.

"**§ 36D-7. Special requests on behalf of beneficiary.**

The community trust may agree to fulfill any special requests made on behalf of a beneficiary as long as the requests are consistent with this Article and provided that an adequate contribution has been made for this purpose on behalf of a beneficiary. The community trust may agree to serve as trustee for any individual trust created on behalf of a beneficiary, regardless of whether the trust is revocable or irrevocable, has one or more remaindermen or contingent beneficiaries, or any other condition, so long as the individual trust is consistent with the purposes of this Article.

"**§ 36D-8. Irrevocability; impossibility of fulfillment.**

A community trust for persons with severe chronic disabilities is irrevocable, but the trustees in their sole discretion may provide compensation for any contribution to the trust to any trustor who, upon good cause, withdraws a beneficiary designated by the trustor from the trust, or if it becomes impossible to fulfill the conditions of the trust with regard to an individual beneficiary for reasons other than the death of the beneficiary.

"**§ 36D-9. Beneficiary's interest in trust not asset for income eligibility determination.**

Notwithstanding any provisions of Chapter 108A of the General Statutes, the beneficiary's interest in any community trust shall not be deemed to be an asset for the purpose of determining income eligibility for any publicly operated program, nor shall that interest be reached in satisfaction of a claim for support and maintenance of the beneficiary. No agency shall reduce the benefits of services available to any individual because that person is the beneficiary of a community trust.

"**§ 36D-10. Trust not subject to law against perpetuities; restraints on alienation.**

A community trust shall not be subject to or held to be in violation of any principle of law against perpetuities or restraints on alienation or perpetual accumulations of trusts.

"**§ 36D-11. Settlement; trustee limitations.**

The community trust shall settle a community trust by filing a final accounting in the superior court. In addition, at anytime prior to the settlement of the final account, the community trust, the Secretary of State, or the Attorney General may bring an action for the dissolution of a nonprofit corporation in the superior court for the purpose of terminating the trust or merging it with another charitable trust.

No trustee or any private individual shall be entitled to share in the distribution of any of the trust assets upon dissolution, merger, or settlement of the community trust. Upon dissolution, merger, or settlement, the superior court shall distribute all of the remaining net assets of the community trust in a manner that is consistent with the purposes of this Article."

SECTION 4. G.S. 32-28 and G.S. 32-34 are repealed.

SECTION 5. G.S. 28A-13-6 reads as rewritten:

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

~~(a) As used in this section, the term "personal representatives" includes testamentary trustees.~~

(b) If a will expressly makes provision for the execution of any of the powers of personal representatives by all of them or by any one or more of them, the provisions of the will govern.

~~(c) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which such personal representatives qualified, provide that any one or more of the following powers of personal representatives 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 personal representative or representatives;~~

~~(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 estate and give receipts therefor;~~

~~(6) Pay claims against and debts of the estate;~~

~~(7) Compromise claims in favor of or against the estate;~~

~~(8) Have custody of property of the estate.~~

(c1) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which such personal representatives qualified, provide that any one or more of the following powers of personal representatives may be exercised by any designated one or more of them:

(1) Establish and maintain bank accounts for the trust and issue checks for the trust.

(2) Maintain inventories, accountings, and income and expense records of the trust.

(3) Enter any safety deposit box rented by the trust.

(4) Employ persons as advisors or assistants in the performance of administrative duties, including agents, attorneys, accountants, brokers, appraisers and custodians.

(5) List trust property for taxes and prepare and file tax returns for the trust.

(6) Collect and give receipts for claims and debts of the trust.

(7) Pay debts, claims, costs of administration, and taxes of the trust.

(8) Compromise, adjust or otherwise settle any claim by or against the trust and release, in whole or in part, a claim belonging to the trust.

(9) Have custody of the trust property.

(d) Subject to subsection (b) of this section, if two or more personal representatives own shares of corporate stock or other securities, their acts with respect to voting shall have the following effect:

(1) If only one votes, in person or by proxy, his act binds all;

(2) If more than one vote, in person or by proxy, the act of the majority so voting binds all;

(3) If more than one vote, in person or by proxy, but the vote is evenly split on any particular matter, each faction is entitled to vote the stock or other securities in question proportionately.

(e) Subject to the provisions of subsections (b), ~~(c)~~ (c1), 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.

(f) No personal representative shall be relieved of liability on his bond or otherwise by entering into any agreement under this section."

SECTION 6. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

SECTION 7.(a) Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C does not apply and the superseded law applies.

Except as otherwise provided in Chapter 36C, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2

of this act, that statute continues to apply to the right even if it has been repealed or superseded.

SECTION 7.(b) Sections 1 through 5 of this act become effective January 1, 2006. The remainder of this act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 679
PROPOSED COMMITTEE SUBSTITUTE S679-CSRH-10 [v.2]

4/18/2005 9:46:44 PM

Short Title: North Carolina Uniform Trust Code. (Public)

Sponsors:

Referred to:

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO ADOPT A REVISED VERSION OF THE UNIFORM TRUST CODE FOR NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 36A of the General Statutes is recodified as Article 7 of Chapter 32 of the General Statutes. G.S. 36A-63, G.S. 36A-66.1, and Article 6 of Chapter 36A are recodified in Article 15 of Chapter 53 of the General Statutes as G.S. 53-163.1 through G.S. 53-163.7. The remainder of Chapter 36A of the General Statutes is repealed.

SECTION 2. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 36C.**

"**North Carolina Uniform Trust Code.**

"Article 1.

"General Provisions and Definitions.

"**§ 36C-1-101. Short title.**

This Chapter may be cited as the North Carolina Uniform Trust Code.

"**§ 36C-1-102. Scope.**

This Chapter applies to any express trust, private or charitable, with additions to the trust, wherever and however created. The term "express trust" includes both testamentary and inter vivos trusts, regardless of whether the trustee is required to account to the clerk of superior court. This Chapter also applies to any trust created for or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. This Chapter does not apply to constructive trusts, resulting trusts, conservatorships, estates, trust accounts as defined in G.S. 53-146.2, 54-109.57, 54B-130, and 54C-166, trust funds subject to G.S. 90-210.61, custodial arrangements under G.S. 33A-1 through G.S. 33A-24 and G.S. 33B-1 through G.S. 33B-22, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting

trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or any arrangement under which a person is nominee or escrowee for another.

"**§ 36C-1-103. Definitions.**

In this Chapter:

(1) "Action", with respect to an act of a trustee, includes a failure to act.

(2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.

(3) "Beneficiary" means a person who:

a. Has a present or future beneficial interest in a trust, vested or contingent, including the owner of an interest by assignment or transfer; or

b. In a capacity other than that of trustee, holds a power of appointment over trust property.

(4) "Charitable trust" means a trust, including a split-interest trust as described in section 4947 of the Internal Revenue Code, created for a charitable purpose described in G.S. 36C-4-405(a).

(5) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

(6) "General guardian" means a general guardian as that term is defined in G.S. 35A-1202(7).

(7) "Guardian of the estate" means a guardian of the estate as that term is defined in G.S. 35A-1202(9).

(8) "Guardian of the person" means a guardian of the person as that term is defined in G.S. 35A-1202(10).

(9) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

(10) "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended from time to time. Each reference to a provision of the Internal Revenue Code shall include any successor to that provision.

(11) "Jurisdiction", with respect to a geographic area, includes a state or country.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(13) "Power of withdrawal" means a presently exercisable general power of appointment other than a power:

a. Exercisable by a trustee and limited by an ascertainable standard; or

b. Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

(14) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.

(15) "Qualified beneficiary" means a living beneficiary who, on the date the beneficiary's qualification is determined:

a. Is a distributee or permissible distributee of trust income or principal;

b. Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in sub-subdivision a. of this subdivision terminated on that date without causing the trust to terminate; or

c. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(16) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

(17) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

(18) "Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.

(19) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(20) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or established in a judicial proceeding.

(21) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments to the instrument, and any modifications permitted by court order.

(22) "Trustee" includes an original, additional, and successor trustee, and a co-trustee, whether or not appointed or confirmed by a court. The term does not include trustees in mortgages and deeds of trusts.

"**§ 36C-1-104. Knowledge.**

(a) Subject to subsection (b) of this section, a person has knowledge of a fact if the person:

(1) Has actual knowledge of it;

(2) Has received notice or notification of it; or

(3) From all the facts and circumstances known to the person at the time in question, has reason to know it.

(b) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the employee's regular duties or the employee knows a matter involving the trust would be materially affected by the information.

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

(a) Except as otherwise provided in the terms of the trust, this Chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

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

(1) The requirements for creating a trust;

(2) The duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

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

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

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

(6) The effect of an exculpatory term under G.S. 36C-10-1008;

(7) The rights under G.S. 36C-10-1010 through G.S. 36C-10-1013 of a person other than a trustee or beneficiary;

(8) Periods of limitation for commencing a judicial proceeding;

(9) The power of the court to take any action and exercise any jurisdiction as may be necessary in the interests of justice; and

(10) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in G.S. 36C-2-203 and G.S. 36C-2-204.

"**§ 36C-1-106. Common law of trusts; principles of equity.**

The common law of trusts and principles of equity supplement this Chapter, except to the extent modified by this Chapter or another statute of this State.

"**§ 36C-1-107. Governing law.**

The meaning and effect of the terms of a trust are determined by:

(1) The law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or

(2) In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

"**§ 36C-1-108. Principal place of administration.**

(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(1) A trustee's principal place of business is located in, or a trustee is a resident of, the designated jurisdiction; or

(2) All or part of the administration occurs in the designated jurisdiction.

(b) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee may transfer the trust's principal place of administration to another jurisdiction in accordance with this subsection:

(1) If the trustee is transferring the trust's principal place of administration to another state, the trustee must provide written notice of the proposed transfer to the qualified beneficiaries of the trust not less than 60 days before initiating the transfer. If no qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice, the trustee may make the transfer. If a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice, the authority of the trustee to transfer the trust's principal place of administration in accordance with this section terminates.

(2) If the trustee is transferring the trust's principal place of administration to a jurisdiction outside of the United States, the trustee must provide written notice of the proposed transfer to the qualified beneficiaries of the trust and the transfer cannot be made until the written consent of all the qualified beneficiaries is obtained.

(c) Any time a trustee is required to provide a qualified beneficiary with written notice of a proposed transfer of a trust's principal place of administration, the notice of proposed transfer must include:

(1) The name of the jurisdiction to which the principal place of administration is to be transferred;

(2) The address and telephone number at the new location at which the trustee can be contacted;

(3) An explanation of the reasons for the proposed transfer;

(4) The date on which the proposed transfer is anticipated to occur; and

(5) If the proposed transfer is to another state, the date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(d) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed under G.S. 36C-7-704.

"**§ 36C-1-109. Methods and waiver of notice.**

(a) Notice to a person under this Chapter or the sending of a document to a person under this Chapter must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed electronic message.

(b) Notice otherwise required under this Chapter, or a document otherwise required to be sent under this Chapter, need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(c) The person to be notified or to be sent a document may waive notice under this Chapter.

(d) Notice of a judicial proceeding must be given as provided in Article 2 of this Chapter.

"**§ 36C-1-110. Others treated as qualified beneficiaries.**

(a) A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under this Chapter if the charitable organization, on the date the charitable organization's qualification is being determined:

(1) Is a distributee or permissible distributee of trust income or principal;

(2) Would be a distributee or permissible distributee of trust income or principal upon the termination of the interest of other distributees or permissible distributees then receiving or eligible to receive distributions, but the termination of those interests would not cause the trust to terminate; or

(3) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(b) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in G.S. 36C-4-408 or G.S. 36C-4-409 has the rights of a qualified beneficiary under this Chapter.

"**§ 36C-1-111. Nonjudicial settlement agreements.**

(a) For purposes of this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(b) Interested persons may enter into a binding nonjudicial settlement agreement with respect to any of the following matters involving a trust:

(1) The approval of a trustee's report or accounting;

(2) Direction to a trustee to perform or refrain from performing a particular administrative act or the grant to a trustee of any necessary or desirable administrative power, including a power granted under G.S. 36C-8-816;

(3) The resignation or appointment of a trustee and the determination of a trustee's compensation;

(4) Transfer of a trust's principal place of administration; and

(5) Liability of a trustee for any action taken under subdivisions (1) through (4) of this subsection.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this Chapter or other applicable law.

(d) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in Article 3 of this Chapter was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

"**§ 36C-1-112. Rules of construction.**

The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.

"Article 2.

"Judicial Proceedings.

"**§ 36C-2-201. Role of court in administration of trust.**

(a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by a party or as provided by law.

(b) A trust is not subject to continuing judicial supervision, except as provided in G.S. 36C-2-208 and G.S. 36C-2-209, unless ordered by the court.

(c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

"**§ 36C-2-202. Jurisdiction over trustee and beneficiary.**

(a) By accepting the trusteeship of a trust having its principal place of administration in this State, or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

"**§ 36C-2-203. Subject matter jurisdiction.**

(a) The clerks of superior court of this State have original jurisdiction over all proceedings concerning the internal affairs of trusts. Except as provided in subdivision (9) of this subsection, the clerk of superior court's jurisdiction is exclusive. Proceedings concerning the internal affairs of the trust are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument. These include proceedings:

(1) To appoint or remove a trustee;

(2) To permit a trustee to resign or renounce; however, unless the trustee is required to account to the clerk of superior court, when the governing instrument names or provides a procedure to name a successor trustee, and the successor trustee is willing to serve, no trustee is required to initiate a proceeding to resign or renounce as trustee;

(3) To review trustees' fees under Article 5A of Chapter 32 of the General Statutes and review and settle interim or final accounts;

(4) To (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust as provided in G.S. 37A-1-104.3;

(5) To transfer a trust's principal place of administration;

(6) To require a trustee to provide bond and determine the amount of the bond, excuse a requirement of bond, reduce the amount of bond, release the surety, or permit the substitution of another bond with the same or different sureties;

(7) To make orders with respect to a trust for the care of animals as provided in G.S. 36C-4-408;

(8) To make orders with respect to a noncharitable trust without an ascertainable beneficiary as provided in G.S. 36C-4-409; and

(9) To ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments, and to determine the existence or nonexistence of trusts created other than by will and the existence or nonexistence of any immunity, power, privilege, duty, or right. Upon motion of a party, the clerk of superior court may determine that a proceeding to determine an issue listed in this subdivision shall be originally heard by the superior court division of the General Court of Justice.

(b) Nothing in this section shall be construed (i) to confer upon the clerk of superior court any authority to regulate or supervise the actions of a trustee except to the extent that the trustee's actions are inconsistent with the governing instrument or of State law; or (ii) to confer upon any party any additional right, remedy, or cause of action not otherwise conferred by law.

(c) Nothing in this section affects the right of a person to file an action for declaratory relief under Article 26 of Chapter 1 of the General Statutes. In the event either the petitioner or respondent in a trust proceeding requests declaratory relief under Article 26 of Chapter 1 of the General Statutes, either party may move for a transfer of the proceeding to the superior court division of the General Court of Justice as provided in Article 21 of Chapter 7A of the General Statutes. In absence of removal to superior court, Article 26 of Chapter 1 of the General Statutes shall apply to a trust proceeding to the extent consistent with this Article.

(d) The clerk of superior court shall not, over the objection of a party, entertain proceedings under this section involving a trust having its principal place of administration in another state, except:

(1) When all appropriate parties could not be bound by litigation in the courts of the state in which the trust had its principal place of administration; or

(2) When the interests of justice otherwise would be seriously impaired.

The clerk of superior court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust has its principal place of administration, or the clerk of superior court may grant a continuance or enter any other appropriate order.

(e) Any party to a proceeding before the clerk of superior court may appeal from the decision of the clerk to a superior court judge as provided for estate matters in G.S. 1-301.3.

(f) Without otherwise limiting the jurisdiction of the superior court division of the General Court of Justice, proceedings concerning the internal affairs of trusts shall not include, and, therefore, the clerk of superior court shall not have jurisdiction under subsection (a) of this section of the following:

(1) Actions to reform, terminate, or modify a trust as provided by G.S. 36C-4-410 through G.S. 36C-4-416;

(2) Actions by or against creditors or debtors of a trust;

(3) Actions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud, and negligence;

(4) Actions to enforce a charitable trust under G.S. 36C-4-405A; and

(5) Actions to amend or reform a charitable trust under G.S. 36C-4A-1.

"**§ 36C-2-204. Venue.**

In any trust proceeding or action, whether brought before the clerk of superior court or the superior court division of the General Court of Justice, the following rules apply notwithstanding any other applicable Rule of Civil Procedure or provision of Chapter 1 of the General Statutes:

(1) If the trustee is required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is the place where the accountings are filed.

(2) If the trustee is not required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is:

a. In the case of an inter vivos trust, in any county of this State in which the trust has its principal place of administration or where any beneficiary resides; or

b. In the case of a testamentary trust, in any county of this State in which the trust has its principal place of administration, where any beneficiary resides, or in which the testator's estate was administered.

(3) Unless otherwise designated in the governing instrument, the principal place of administration of the trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if the trustee has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the governing instrument, is:

a. The usual place of business of the corporate trustee if there is but one corporate or co-trustee; or

b. The usual place of business or residence of any of the co-trustees.

(4) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in any county of this State in which a beneficiary resides, in any county in which trust property is located, in the county of this State specified in the trust instrument, if any county is so specified, or if the trust is created by will, in the county in which the decedent's estate was or is being administered.

"**§ 36C-2-205. Commencement of proceedings, pleadings, consolidation, and joinder.**

(a) Contested Proceedings. – Trust proceedings before the clerk of superior court brought against adverse parties shall be commenced as is prescribed for civil actions. Upon the filing of the petition or complaint, the clerk of superior court shall docket the cause as an estate matter. All parties not joined as petitioners shall be joined as respondents. The clerk of superior court shall issue the summons for the respondents. The clerk of superior court may order that additional persons be joined as respondents and shall issue the summons for the additional persons. The summons shall notify the respondents to appear and answer the petition within 10 days after its service upon the respondents. The summons shall comply with the requirements set forth in G.S. 1-394 for a special proceeding summons except that the clerk of superior court shall indicate on the summons by appropriate words that the summons is issued in an estate matter and not in a special proceeding or in a civil action and shall be served upon the respondents in accordance with Rule 4 of the Rules of Civil Procedure. After the time for responding to the petition or complaint has expired, any party or the clerk of superior court may give notice to all parties of a hearing.

(b) Uncontested Proceedings. – Trust proceedings before the clerk of superior court in which all the parties join in the proceeding shall be commenced by the filing of a petition, setting forth the facts entitling the petitioners to relief and the nature of the relief demanded. In these proceedings, the clerk of superior court may hear and decide the petition summarily.

(c) Pleadings. – The petition or complaint filed in a trust proceeding before the clerk of superior court shall contain a short and plain statement of the claim which is sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions, intended to be proved showing that the pleaders entitled to relief, and a demand for judgment for the relief to which the pleader is entitled. Each averment of a pleading should be simple, concise, and direct. No

technical forms of pleadings or motions are required. A party may set forth two or more statements of a claim or defense alternatively or hypothetically. The signature of an attorney or party constitutes a certificate by that attorney or party that (i) the attorney or party has read the pleading, motion, or other paper; (ii) to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. All pleadings shall be so construed as to do substantial justice.

(d) Extensions of Time. – The clerk of superior court, for cause shown at any time in the clerk's discretion, with or without motion or notice, may enter an order enlarging the period of time within which an act is required or permitted by this Article, by any applicable Rules of Civil Procedure or by order of the court, if the request is made before the expiration of the period originally prescribed, but not to exceed 10 days, nor more than once. Upon motion made after the expiration of the specified period, the clerk of superior court may permit the act where the failure to act was the result of excusable neglect. Notwithstanding any other provision of this subsection, the parties to a proceeding may enter into binding stipulations, without approval of the clerk of superior court, enlarging the time within which an act is required or permitted by this Article, by any applicable Rules of Civil Procedure or by order of the court, not to exceed 30 days.

(e) Rules of Civil Procedure. – Unless the clerk of superior court otherwise directs, Rules 5, 6(a), 6(d), 6(e), 18, 19, 20, 21, 24, and 45 of the Rules of Civil Procedure shall apply to trust proceedings. Upon motion of a party or the clerk of superior court, the clerk may further direct that the following Rules of Civil Procedure shall apply: Rules 15, 16, 17, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37; however, nothing in Rule 17 requires the appointment of a guardian ad litem for a party represented except as provided under G.S. 36C-3-305. In applying these Rules to a trust proceeding pending before the clerk of superior court, the term "judge" shall be construed as "clerk of superior court."

(f) Consolidation. – When a trust proceeding pending before the clerk of superior court and a civil action pending before the superior court division of the General Court of Justice involve a common question of law or fact, upon the court's motion or motion of a party to either the trust proceeding or the civil action, a superior court judge may order a consolidation of the trust proceeding and civil action, and the judge may make orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. Upon the entry of an order consolidating a trust proceeding and civil action, the jurisdiction for all matters pending in both the trust proceeding and the civil action shall be vested in the superior court.

(g) Joinder. – In any civil action pending before a superior court division of the General Court of Justice, a party asserting a claim for relief as an original claim, counterclaim, cross claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as that party has against an

opposing party notwithstanding the fact that the claims may otherwise be within the exclusive jurisdiction of the clerk of superior court.

(h) Orders Upon Consolidation/Joinder. – Upon the consolidation of a trust proceeding and civil action or joinder of claims under subsection (f) or (g) of this section, the clerk of superior court or the judge may make such orders as appropriate to protect the interests of the parties and to avoid unnecessary costs or delay. Notwithstanding the consolidation or joinder of claims under subsection (f) or (g) of this section, the clerk of court's exclusive jurisdiction as set forth in G.S. 36C-2-203(a) shall not be stayed unless so ordered by the court.

"**§ 36C-2-206. Representation of parties.**

In any trust proceeding or action, whether brought before the clerk of superior court or in the superior court division of the General Court of Justice, the following rules apply notwithstanding any other applicable Rule of Civil Procedure or provision of Chapter 1 of the General Statutes:

(1) Parties shall be represented as provided in Article 3 of this Chapter.

(2) In the case of any party represented by another as provided in subdivision (1) of this section, service of process shall be made by serving such representative.

"**§ 36C-2-207. Waiver of notice.**

A party, or the representative of the party as provided in G.S. 36C-2-206, may waive notice by a writing signed by the party, the representative, or the attorney of the party or the representative, and filed in the proceeding.

"**§ 36C-2-208. Accounting to clerk.**

(a) No trustee, including a trustee appointed by the clerk of superior court, is required to account to the clerk of superior court unless the trust instrument directs that the trustee is required to account to the clerk of superior court or unless the trustee is otherwise required by law to account to the clerk of superior court.

(b) If the trustee is required to account to the clerk of superior court, the trustee shall not be permitted to resign as trustee until a final account of the trust estate is filed with the clerk of superior court and until the court is satisfied that the account is true and correct, unless the terms of the trust instrument provide otherwise.

(c) Notwithstanding subsections (a) and (b) of this section, under a proceeding brought under G.S. 36C-4-405A, the clerk of superior court may require a trustee of a charitable trust to account to the clerk of superior court.

"**§ 36C-2-209. Qualification and accounting of trustee of a testamentary trust.**

(a) For any testamentary trust created under a will of a decedent executed before January 1, 2004, the trustee shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of superior court of the county where the will is probated inventories of the assets that come into the trustee's hands and annual and final accounts of the trust that are the same as required of executors and administrators. The power of the clerk of superior court to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts is the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. This subsection shall not apply to the extent that the will makes a different provision.

(b) For any testamentary trust created under a will of a decedent executed on or after January 1, 2004, that directs the trustee to account to the clerk of superior court, the trustee shall first qualify under the laws applicable to executors and shall file in the office of the clerk of superior court of the county where the will is probated inventories of the assets that come into the trustee's hands and annual and final accounts of the trust that are the same as are required of executors and administrators. The power of the clerk of superior court to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts is the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. No trustee, including a trustee appointed by the clerk of superior court, is required to account to the clerk of superior court unless the will directs that the trustee is required to account to the clerk of superior court or unless otherwise required by law.

(c) The Administrative Office of the Courts may adopt rules regulating the registration or indexing of testamentary trusts.

"Article 3.

"Representation.

"**§ 36C-3-301. Representation: basic effect.**

(a) Notice to a person who may represent and bind another person under this Article has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this Article is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in G.S. 36C-4-411 and G.S. 36C-6-602, a person who under this Article may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this Article with respect to the termination or modification of trust under G.S. 36C-4-411(a).

"**§ 36C-3-302. Representation by holder of general testamentary power of appointment.**

The sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, shall represent other persons to the extent that their interests, as permissible appointees, takers in default, or otherwise, are subject to the power. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

"**§ 36C-3-303. Representation by fiduciaries, parents, and other persons.**

To the extent that there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) A general guardian or a guardian of the estate may represent and bind the estate that the guardian controls.

(2) A guardian of the person may represent and bind the ward if a general guardian or guardian of the estate of the ward's estate has not been appointed.

(3) An agent under a power of attorney having authority to act with respect to the particular question or dispute may represent and bind the principal.

(4) A trustee may represent and bind the beneficiaries of the trust.

(5) A personal representative of a decedent's estate may represent and bind persons interested in the estate.

(6) A parent may represent and bind the parent's minor child if a general guardian, guardian of the estate, or guardian of the person for the child has not been appointed. If a disagreement arises between parents seeking to represent the same minor child, the parent who is a beneficiary of the trust that is the subject of the representation is entitled to represent the minor child or, if no parent is a beneficiary of the trust that is the subject of the representation, a parent who is a lineal descendant of the settlor is entitled to represent the minor child, or if no parent is a lineal descendant of the settlor, a guardian ad litem shall be appointed to represent the minor child.

(7) A person may represent and bind that person's unborn issue.

"**§ 36C-3-304. Representation by person having substantially identical interest.**

Unless otherwise represented under this Article, a minor, an incapacitated or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent that there is no conflict of interest between the representative and the person represented.

"**§ 36C-3-305. Appointment of representative; scope of representation.**

(a) If the court determines that an interest is not represented under this Article, or that the otherwise available representation might be inadequate, the court may appoint a guardian ad litem to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated or unborn individual, or a person whose identity or location is unknown. A guardian ad litem may be appointed to represent several persons or interests.

(b) Any representative under this Article may act on behalf of the individual represented with respect to any matter arising under this Chapter, whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a representative, including a guardian ad litem, may base a decision to consent to an action upon a finding that living members of the individual's family would generally benefit from that action.

"Article 4.

"Creation, Validity, Modification, and Termination of Trust.

"**§ 36C-4-401. Methods of creating trust.**

A trust may be created by:

(1) Transfer of property by a settlor to a person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

(2) Declaration by the owner of property that the owner holds identifiable property as trustee unless the transfer of title of that property is otherwise required by law; or

(3) Exercise of a power of appointment in favor of a trustee.

"**§ 36C-4-401A. 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 policy or elsewhere using the policy as collateral security;

(4) To assign the policy; or

(5) To exercise any other right in connection with the policy commonly known as an incident of ownership of that policy.

The term "life insurance policy" includes life, annuity, and endowment contracts, or any variation or combination of those contracts, and any agreement entered into by an insurance company in connection with life, annuity, or endowments contracts.

(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 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 under 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 group life, industrial life, accident, and health insurance policies having death benefits.

(c) A testator 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 that beneficiary a trustee named or to be named in the testator's 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 trustee

makes claim to the proceeds within six months after the death of the testator, payments shall be made to the personal representative of the estate of the testator unless it is otherwise provided by an alternative designation or by the policy or plan. The proceeds received by the trustee is not subject to claims against the estate of the testator to estate or 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 that may properly become part of the trust, but the proceeds shall not become part of the testator's estate for purposes of trust administration unless the will expressly so provides.

"**§ 36C-4-402. Requirements for creation.**

(a) A trust is created only if:

(1) The settlor has capacity to create a trust;

(2) The settlor indicates an intention to create the trust;

(3) The trust has a definite beneficiary or is:

a. A charitable trust;

b. A trust for the care of an animal, as provided in G.S. 36C-4-408;

c. A trust for a noncharitable purpose, as provided in G.S. 36C-4-409;

(4) The trustee has duties to perform; and

(5) The same person is not the sole trustee and sole beneficiary.

(b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

"**§ 36C-4-403. Trusts created in other jurisdictions.**

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

(1) The settlor was domiciled, had a place of abode, or was a national;

(2) A trustee was domiciled or had a place of business; or

(3) Any trust property was located.

"**§ 36C-4-404. Trust purposes.**

A trust may be created only to the extent that its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.

"**§ 36C-4-405. Charitable purposes.**

(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, benevolent, literary, governmental, or municipal purposes, or other purposes the achievement of which is beneficial to the community.

(b) It is the policy of the State that a gift for charitable purposes, whether in trust or otherwise, is valid, notwithstanding the fact that the gift is made in general terms, and this section shall be construed liberally to effect this policy.

(c) No gift for charitable purposes, whether in trust or otherwise, is void or invalid because:

(1) The gift is in general terms or is uncertain as to the specific charitable purposes;

(2) When the gift is made in trust, the trustee is granted discretionary powers in the selection and designation of the beneficiaries of that charitable trust or in carrying out the purpose of that trust;

(3) The trustee or other recipient of the gift is given no specific instructions, powers, or duties as to the manner or means of carrying out those charitable purposes; or

(4) The gift contravenes any statute or rule against perpetuities.

(d) When any gift is made in general terms, the trustee or other recipient of the gift may:

(1) Select from time to time one or more specific charitable beneficiaries or purposes for which any trust or property or income is held and administered; and

(2) Determine the means to accomplish those charitable purposes, unless otherwise provided, including the creation of corporations or other legal entities for those purposes.

(e) For purposes of this section, the reference to a "gift" includes both inter vivos and testamentary gifts, grants, and other transfers.

"**§ 36C-4-405A. Enforcement of charitable gift or trust.**

(a) The settlor of a charitable trust, the Attorney General, the district attorney, a beneficiary, or any other interested party may maintain a proceeding to enforce a charitable trust, including the following:

(1) A proceeding to require a trustee to make a selection as may be necessary to establish the charitable beneficiaries or purposes for which the trust was established, as provided in subsections (d)(1) and (d)(2) of G.S. 36C-4-405;

(2) A proceeding for breach of fiduciary duty if there is reason to believe that the trust property has been mismanaged through negligence or fraud; and

(3) A proceeding for an accounting of the trustee's administration of the trust.

(b) The donor of a charitable gift, the Attorney General, the district attorney, or any other interested party may maintain a proceeding to enforce the gift, including a proceeding to require the recipient of the gift to make a selection as may be necessary to establish the charitable beneficiaries or purposes for which the gift was intended, as provided in subsections (d)(1) and (d)(2) of G.S. 36C-4-405.

"**§ 36C-4-406. Creation of trust induced by fraud, duress, or undue influence.**

A trust is voidable to the extent that its creation was induced by fraud, duress, or undue influence.

"**§ 36C-4-407. Evidence of oral trust.**

Except as required by a State statute other than this Chapter, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

"**§ 36C-4-408. Trust for care of animal.**

(a) Subject to this section, a trust for the care of one or more designated domestic or pet animals alive at the time of creation of the trust is valid.

(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of the designated animal or animals.

(c) The trust terminates at the death of the animal or last surviving animal. Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(1) As directed in the trust instrument;

(2) If the trust was created in a preresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will;

(3) If no taker is produced by the application of subdivision (1) or (2) of this subsection, to the transferor or the transferor's heirs determined as of the date of the transferor's death under Chapter 29 of the General Statutes.

(d) The intended use of the principal or income can be enforced by a person designated for that purpose in the trust instrument or, if none, by a person appointed by the clerk of superior court having jurisdiction over the decedent's estate upon application to the clerk of superior court by a person.

(e) Except as ordered by the clerk of superior court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, bond, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(f) A governing instrument shall be liberally construed to bring the transfer within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.

(g) The clerk of superior court may reduce the amount of the property transferred, if the clerk of superior court determines that the amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c) of this section.

(h) If no trustee is designated or if no designated trustee agrees to serve or is able to serve, the clerk of superior court must name a trustee. The clerk of superior court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. The

clerk of superior court may also make other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of this section.

"**§ 36C-4-409. Noncharitable trust without ascertainable beneficiary.**

Except as otherwise provided in G.S. 36C-4-408 or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than 21 years.

(2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent that the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, or otherwise to the settlor's successors in interest.

(4) Notwithstanding subdivisions (1) through (3) of this section, a trust, contract, or other arrangement to provide for the care of a cemetery lot, grave, crypt, niche, mausoleum, columbarium, grave marker, or monument is valid without regard to remoteness of vesting, duration of the arrangement, or lack of definite beneficiaries to enforce the trust, provided that the trust, contract, or other arrangement meets the requirements of G.S. 28A-19-10, Article 4 of Chapter 65 of the General Statutes, Article 9 of Chapter 65 of the General Statutes, or other applicable law. This section does not repeal or supersede G.S. 36C-4-413.

"**§ 36C-4-410. Modification or termination of trust; proceedings for approval or disapproval.**

(a) In addition to the methods of termination prescribed by G.S. 36C-4-411 through G.S. 36C-4-414, a trust terminates to the extent that the trust is revoked or expires under its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411 through G.S. 36C-4-416, or trust combination or division under G.S. 36C-4-417. A settler may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411. The settlor of a charitable trust may maintain a proceeding to modify the trust under G.S. 36C-4-413. A trustee is a necessary party to any proceeding under this section.

(c) Jurisdiction of a proceeding brought under this section is as provided in G.S. 36C-2-203.

"§ 36C-4-411. Modification or termination of noncharitable irrevocable trust by consent.

(a) A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's general guardian or the guardian of the estate with the approval of the court supervising the guardianship if an agent is not so authorized; or by the settlor's guardian of the person with the approval of the court supervising the guardianship if an agent is not so authorized and a general guardian or guardian of the estate has not been appointed.

(b) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries, if the court concludes that modification is consistent with a material purpose of the trust.

(c) Where the beneficiaries of an irrevocable trust seek to compel a termination of the trust and the continuance of the trust is necessary to carry out a material purpose of the trust, or where the beneficiaries seek to compel a modification of the trust in a manner that is inconsistent with its material purpose, the trust may be modified or terminated, in the discretion of the court, only if the court determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust.

(d) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a), (b) or (c) of this section, the modification or termination may be approved by the court if the court is satisfied that:

(1) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) The interests of a beneficiary who does not consent will be adequately protected.

(e) Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"§ 36C-4-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

(c) Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-413. Cy pres.**

(a) Except as otherwise provided in subsection (d) of this section, if a charitable trust becomes unlawful, impracticable, impossible to achieve, or wasteful:

(1) The trust does not fail, in whole or in part;

(2) The trust property does not revert to the settlor or the settlor's successors in interest; and

(3) The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(b) The settlor or a trustee of a charitable trust, the Attorney General, a beneficiary or any other interested party may maintain a cy pres proceeding under Article 2 of this Chapter.

(c) In every cy pres proceeding, the Attorney General shall be notified and given an opportunity to be heard.

(d) This section is not applicable if the settlor has provided, either directly or indirectly, for an alternative plan in the event that the charitable trust is or becomes unlawful, impracticable, impossible to achieve, or wasteful. However, if the alternative plan is also a charitable trust and that trust fails, the intention shown in the original plan shall prevail in the application of this section.

"**§ 36C-4-414. Modification or termination of uneconomic trust.**

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value of less than fifty thousand dollars ($50,000) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. The trustee may enter into an agreement or make other provisions that the trustee deems necessary or appropriate to protect the interests of the beneficiaries and to carry out the intent and purpose of the trust. This subsection shall not apply where the instrument creating the trust, by specific reference to this section, or to former G.S. 36A-125.6, provides that it shall not apply. The trustee shall not be liable for that termination and distribution notwithstanding the existence or potential existence of other beneficiaries who are not sui juris. Any beneficiary receiving a distribution from a trust terminated under this section shall incur no liability and shall not be required to account to anyone for such distribution.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration.

(c) This section does not apply to an easement for conservation or preservation.

(d) Jurisdiction of a proceeding brought under this section is as provided in G.S. 36C-2-203.

"**§ 36C-4-415. Reformation to correct mistakes.**

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law,

whether in expression or inducement. Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-416. Modification to achieve settlor's tax objectives.**

To achieve a settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect. Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-417. Combination and division of trusts.**

(a) Unless otherwise provided in the trust instrument, after notice to the qualified beneficiaries, a trustee may:

(1) Consolidate the assets of more than one trust and administer the assets as one trust under the terms of one of the trusts if the terms of the trusts are substantially similar and the beneficiaries of the trusts are identical; or

(2) Divide one trust into two or more separate trusts if the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust.

(b) In dividing a trust into two or more separate trusts, a trustee shall accomplish the division by severing the trusts on a fractional basis and funding the separate trusts either (i) with a pro rata portion of each asset held by the undivided trust; or (ii) on a non-pro rata basis based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding.

(c) In any case where two separate identical trusts are created under this section, one of which is fully exempt from the federal generation-skipping transfer tax and one of which is fully subject to that tax, the trustee may thereafter, to the extent possible consistent with the terms of the trust, determine the value of any mandatory or discretionary distributions to trust beneficiaries on the basis of the combined value of both trusts, but may satisfy those distributions by a method other than pro rata from the separate trusts in a manner designed to minimize the current and potential generation-skipping transfer tax.

"**§ 36C-4-418. Distribution upon termination of trust.**

Upon termination of a trust under G.S. 36C-4-411, the trustee shall distribute the trust property as agreed by the beneficiaries. Upon termination of a trust under G.S. 36C-4-412 or G.S. 36C-4-414, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. If any trust property becomes distributable to a minor or incompetent under this Article it may be distributed:

(1) To the guardian of the estate or general guardian of the beneficiary;

(2) In accordance with the North Carolina Uniform Transfer to Minors Act, Chapter 33A of the General Statutes; or

(3) In accordance with the North Carolina Custodial Trust Act, Chapter 33B of the General Statutes.

"**§ 36C-4-419. Effect of inalienable interest on modification or termination.**

The court, in exercising its discretion to modify or terminate an irrevocable trust under G.S. 36C-4-411, 36C-4-412 or 36C-4-413 shall consider provisions making the interest of a beneficiary inalienable, including those described in Article 5, but the court is not precluded from the exercise of that discretion solely because of such provisions.

"Article 4A.

"Tax Status of Charitable Trusts.

"**§ 36C-4A-1. Prohibited transactions.**

(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) of this section, the trust instrument of each trust that is a private foundation described in section 509 of the Internal Revenue Code (including each nonexempt charitable trust described in section 4947(a)(1) of the Internal Revenue Code that is treated as a private foundation) and the trust instrument of each nonexempt split-interest trust described in section 4947(a)(2) of the Internal Revenue Code (but only to the extent that section 508(e) of the Internal Revenue Code is applicable to the nonexempt split-interest trust under section 4947(a)(2) of the Internal Revenue Code) is considered to contain the following provisions: "The trust shall make distributions at any time and in any manner as not to subject it to tax under section 4942 of the Internal Revenue Code; the trust shall not engage in any act of self-dealing which would subject it to tax under section 4941 of the Internal Revenue Code; the trust shall not retain any excess business holdings that would subject it to tax under section 4943 of the Internal Revenue Code; the trust shall not make any investments that would subject it to tax under section 4944 of the Internal Revenue Code; and the trust shall not make any taxable expenditures that would subject it to tax under section 4945 of the Internal Revenue Code." With respect to any trust created before January 1, 1970, this section shall apply only for its taxable years beginning on or after January 1, 1972.

(b) 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 (a) of this section, the governing instrument of each trust that is a nonexempt charitable trust described in section 4947(a)(1) of the Internal Revenue Code is considered to contain the following provisions:

(1) The trust shall be operated exclusively for charitable, educational, religious and scientific purposes within the meaning of section 501(c)(3) and section 170(c)(2) of the Internal Revenue Code.

(2) Upon any dissolution, winding up, or liquidation of the trust, its assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or shall be distributed to the federal government, or a state or local government for a public purpose.

(c) The trustee of any trust described in this section may do one of the following:

(1) Without judicial proceedings, amend the trust to expressly exclude the application of this section by executing a written amendment to the

trust instrument and filing a duplicate original of the amendment with the Attorney General. Upon filing of the amendment, this section shall not apply to that trust.

(2) Institute a proceeding under Article 2 of this Chapter seeking reformation of the trust instrument.

"**§ 36C-4A-2. Reformation of charitable remainder trust.**

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 that passes from the decedent under a will or trust to a person, or for a use, described in section 2055(a) of the Internal Revenue Code, to meet the requirements of subsections 2055(e)(2)(A) or (B) of the Internal Revenue Code, then in order that the deduction shall nevertheless be allowable under section 2055(e)(3) of the Internal Revenue Code, the court may, on application of any trustee or interested party with either (i) the written consent of the qualified beneficiaries, or (ii) a finding that the interest of those beneficiaries is substantially preserved, order an amendment to the trust so that the remainder interest is in a trust that is a charitable remainder annuity trust, a charitable remainder unitrust (as those terms are described in section 664 of the Internal Revenue Code), or a pooled income fund (as that term is described in section 642(c)(5) of the Internal Revenue Code), or so that any other interest of a charitable beneficiary is in the form of a guaranteed annuity or is a fixed percentage distributed yearly of the fair market value of the property (to be determined yearly), in accordance with section 2055(e)(2)(B) of the Internal Revenue Code. In every proceeding under this section, the Attorney General shall be notified, and given an opportunity to be heard.

"Article 4B.

"Charitable Remainder Trust Administration Act.

"**§ 36C-4B-1. Short title.**

This Article shall be known as the Charitable Remainder Administration Trust Act.

"**§ 36C-4B-2. General rule.**

Notwithstanding any provisions in the laws of this State or in the governing instruments to the contrary, any charitable remainder annuity trust and any charitable remainder unitrust that cannot qualify for a deduction for federal tax purposes under section 2055 or section 2522 of the Internal Revenue Code in the absence of this Article shall be administered in accordance with this Article.

"**§ 36C-4B-3. Definitions.**

The following definitions apply to this Article unless the context clearly requires otherwise:

(1) "Charitable remainder trust" means a trust that provides for a specified distribution at least annually for either life or a term of years to one or more beneficiaries, at least one of which is not a charity (hereinafter referred to as "beneficiaries"), with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity. For purposes of this Article, only a charitable remainder annuity trust or a charitable remainder unitrust is considered a charitable remainder trust.

(2) "Charitable remainder annuity trust" means a charitable remainder trust:

a. From which a sum certain (that is not less than five percent (5%) of the initial net fair market value of all property placed in trust) is to be paid at least annually to one or more persons (at least one of which is not an organization described in section 170(c) of the Internal Revenue Code and, in the case of individuals, only to an individual who was living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of that individual or those individuals; however, in the case of an individual, the amount to be paid to that individual may be subject to a qualified contingency according to the terms of the governing instrument;

b. From which no amount other than the payments described in sub-subdivision a. of this subdivision may be paid to or for or both to and for the use of anyone other than an organization that is or was described in section 170(c) of the Internal Revenue Code; and

c. Following the termination of the payments described in sub-subdivision a. of this subdivision, the remainder interest in the trust is to be transferred to, or for the use of, an organization that is or was described in section 170(c) of the Internal Revenue Code or is to be retained by the trust for that use.

(3) "Charitable remainder unitrust" means a charitable remainder trust:

a. From which a fixed percentage (that is not less than five percent (5%)) of the net fair market value of its assets, valued annually, is to be paid at least annually to one or more persons (at least one of which is not an organization described in section 170(c) of the Internal Revenue Code and, in the case of individuals, only to an individual who was living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of that individual or those individuals; however, in the case of an individual, the amount to be paid to that individual may be made subject to a qualified contingency according to the terms of the governing instrument;

b. From which no amount other than the payments described in sub-subdivision a. of this subdivision may be paid to or for the use of anyone other than an organization that is or was an organization described in section 170(c) of the Internal Revenue Code; and

c. Following the termination of the payments described in sub-subdivision a. of this subdivision, the remainder interest in the trust is to be transferred to, or for the use of, an organization

that is or was described in section 170(c) of the Internal Revenue Code, or is to be retained by the trust for such a use.

Notwithstanding sub-subdivisions a. and b. of this subdivision, the trust instrument may provide that the trustee shall pay to the income beneficiary for any year (i) the amount of the trust income if that amount is less than the amount required to be distributed under sub-subdivision a. of this subdivision, and (ii) any amount of the trust income that exceeds the amount required to be distributed under sub-subdivision a of this subdivision to the extent that (by reason of sub-subdivision a.) the aggregate of the amounts paid in prior years is less than the aggregate of the required amounts.

(4) "Qualified contingency" means any provision of the governing instrument that provides that, upon the happening of a contingency, the payments made to an individual noncharitable beneficiary of a charitable remainder trust will terminate not later than those payments would otherwise terminate under the governing instrument.

"**§ 36C-4B-4. Administrative provisions applicable to both charitable remainder annuity trusts and charitable remainder unit trusts.**

(a) Creation of Remainder Interests in Charity. – Upon the termination of the noncharitable interests, the trustee shall distribute all of the then principal and income of the trust, other than any amount due the noncharitable beneficiary or beneficiaries, to the designated charity or charities, or shall hold the property in trust for the designated charity or charities in accordance with the terms of the trust document.

(b) Selection of Alternate Charitable Beneficiary if Remaindermen Do Not Qualify Under Section 170(c) of the Internal Revenue Code at Time of Distribution. – If the designated charity is not an organization described in section 170(c) of the Internal Revenue Code at the time when any principal or income of the trust is to be distributed to it, the trustee must distribute the principal or income to one or more organizations then described in section 170(c) of the Internal Revenue Code selected in accordance with the terms of the trust instrument. If the trust instrument does not provide for a method of selecting alternate charitable beneficiaries that are then qualified under section 170(c) of the Internal Revenue Code, the trustee must, in the trustee's sole discretion, select alternate trust beneficiaries that are qualified under section 170(c) of the Internal Revenue Code.

(bl) Selection of Alternative Charitable Beneficiary if Remaindermen Do Not Qualify Under Section 170(b)(1)(A) of the Internal Revenue Code at Time of Distribution. – Notwithstanding subsection (b) of this section, if the designated charity is, at the time of the creation of the trust, an organization described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code, and if the designated charity is not an organization described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code when any principal or income of the trust is to be distributed to it, the trustee must distribute the principal or income to one or more organizations then described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code selected in accordance with the terms of the governing instrument; however, in the

event that the governing instrument does not provide a method of selecting alternative charitable beneficiaries that are then described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code, the trustee shall, in his sole discretion, select one or more alternative charitable beneficiaries that are described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code and must distribute the principal or income to the organization or organizations so selected in shares as the trustee, in the trustee's sole discretion, shall determine.

(c) Prohibitions Governing Trustees. – Except for payment of the annuity amount or the unitrust amount to the beneficiaries, whichever is applicable, the trustee is prohibited from engaging in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code, retaining any excess business holdings as defined in section 4943(c) of the Internal Revenue Code that would subject the trust to tax under section 4943 of the Code, making any investments that would subject the trust to tax under section 4944 of the Internal Revenue Code, and making any taxable expenditures as defined in section 4945(d) of the Code. The trustee shall make distributions at a time and in a manner as not to subject the trust to tax under section 4942 of the Internal Revenue Code.

(d) Distribution to Charity During Term of Noncharitable Interests and Distributions in Kind. – If the governing instrument of the trust provides for distribution to charity during the term of the noncharitable interests, the trustee may pay to the designated charity the amounts specified in the governing instrument that exceed the annuity amount or the unitrust amount payable to any of the beneficiaries for the taxable year of the trust in which the income is earned. If the governing instrument of the trust provides for distribution to charity in kind, the adjusted basis for federal income tax purposes of any trust property the trustee distributes in kind to charity during the term of the noncharitable interests must be fairly representative of the adjusted basis for those purposes of all trust property available for distribution on the date of distribution.

(e) Investment Restrictions on Trustee. – Nothing in the trust instrument shall be construed to restrict the trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

(f) Distribution From Trust Used to Administer an Estate to Charitable Remainder Trust. – If the governing instrument of a revocable inter vivos trust provides that the revocable inter vivos trust will be used partially to administer the estate of the settlor or for some other purpose, and further provides the assets will then be distributed to another trust that is a charitable remainder trust, upon the death of the settlor, or upon the occurrence of any event that causes the trust to become irrevocable, then the trust shall become irrevocable, and the trustee of this trust shall perform any remaining duties or obligations provided for in the trust instrument and then transfer the property specified in the governing instrument to the trustee of the charitable remainder trust to be held, administered, and distributed in the manner and according to the terms and conditions provided by the charitable remainder trust.

(g) Payment of Taxes by Noncharitable Beneficiary. – In the case of any inter vivos charitable remainder trust that is liable to pay, from trust property, any federal

estate, state inheritance, or other similar death taxes by reason of the death of the settlor of the trust, the interest of any noncharitable beneficiary of the trust shall terminate upon the death of the settlor unless the noncharitable beneficiary furnishes to the trust sufficient funds for payment of all those taxes attributable to the interest of the noncharitable beneficiary in the trust property, and the termination shall be deemed as the occurrence of a qualified contingency.

"**§ 36C-4B-5. Administrative provisions applicable to charitable remainder trusts only.**

(a) Creation of Annuity Amount for Period of Years or Life. – In each taxable year of the trust, the trustee shall pay the annuity amount designated in the trust instrument to the beneficiaries named in the trust instrument during their lives or, if the governing instrument so provides, for a period of 20 years or less. The annuity amount shall be paid annually or in more frequent equal or unequal installments if the governing instrument so provides. The annuity amount shall be paid from income and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the annuity amount shall be added to principal.

The total amount payable at least annually to a person or persons named in the trust document, at least one of which is not an organization described in section 170(c) of the Internal Revenue Code, may not be less than five percent (5%) of the initial net fair market value of the property placed in trust as finally determined for federal tax purposes, except as provided in subsection (g) of this section.

(b) Computation of Annuity Amount in Short and Final Taxable Years. – For a short taxable year and for the taxable year in which the noncharitable beneficiary's interest terminates by death or otherwise, the trustee shall prorate the annuity amount on a daily basis.

(c) Prohibition of Additional Contributions. – No additional contributions shall be made to the trust after the initial contribution.

(d) Deferral of Annuity Amount During Period of Administration or Settlement. – When property passes to the trust at the death of the settlor, the obligation to pay the annuity amount commences with the date of death of the settlor, but payment of the annuity amount may be deferred from the date of the settlor's death to the end of the taxable year in which complete funding of the trust occurs. Within a reasonable time after the end of the taxable year in which the complete funding of the trust occurs, the trustee must pay to the beneficiary, in the case of an underpayment, or must receive from the beneficiary, in the case of an overpayment, the difference between:

(1) Any annuity amounts actually paid, plus interest on those amounts computed at ten percent (10%) a year, compounded annually; and

(2) The annuity amounts payable, determined under the method described in Section 1.664-1(a)(5) of the federal income tax regulations, plus interest on those amounts computed at ten percent (10%) a year, compounded annually.

Notwithstanding the foregoing sentence, in computing any underpayment or overpayment of the annuity amounts, if the governing instrument was executed or last amended before August 9, 1984, and if the governing instrument does not specify that

a ten percent (10%) rate of interest shall be used, the underpayment or overpayment of the annuity amounts must be computed using an interest rate at six percent (6%) a year, compounded annually.

(e) Dollar Amount Annuity May Be Stated as Fraction or Percentage. – If the governing instrument of the trust states the amount of the annuity as a fraction or a percentage, the trustee must pay to the beneficiaries in each taxable year of the trust during their lives an annuity amount equal to a percentage (that percentage being stipulated in the governing instrument of the trust and, in any event, being five percent (5%) or greater) of the initial net fair market value of the assets constituting the trust. In determining this amount, assets shall be valued at their values as finally determined for federal tax purposes. If the fiduciary incorrectly determines the initial net fair market value of the assets constituting the trust, then, within a reasonable period after a final determination, the trustee shall pay to the beneficiaries, in the case of an undervaluation or shall receive from the beneficiaries, in the case of an overvaluation, an amount equal to the difference between the annuity amount properly payable and the annuity amount actually paid.

(f) Annuity Amount May Be Allocated Among Class of Noncharitable Beneficiaries in Discretion of Trustee. – If the governing instrument of the trust provides that the annuity trust amount may be allocated among a class of noncharitable beneficiaries in the discretion of the trustee, then the trustee must pay the annuity amount, which is defined in the governing instrument of the trust, in each taxable year of the trust, to the member or members of the class of noncharitable beneficiaries in an amount and proportions as the trustee in the trustee's absolute discretion shall from time to time determine until the last of the noncharitable beneficiaries dies. The trustee may pay the entire annuity amount to one member of this class or may apportion it among the various members in a manner as the trustee from time to time considers advisable as long as the power to allocate does not cause any person to be treated as the owner of any part of the trust under the rules of section 671 through section 678 of the Internal Revenue Code. If the class provided for in the governing instrument is open, then the distribution must be for a period of years not to exceed 20 years, notwithstanding a provision to the contrary in the trust instrument. If the class provided for in the governing instrument is closed at the creation of the trust, and all members of the class are ascertainable, the distribution may be for the lives of the members of the class or for a period not exceeding 20 years. The trustee shall pay the entire annuity amount for each taxable year annually and may not delay payment of the annuity amount.

(g) Reduction of Annuity Amount If Part of Corpus Is Paid to Charity at Expiration of Term of Years or on Death of Recipient. – If the governing instrument of the trust provides for the reduction of the annuity amount if part of the corpus is paid to charity at the expiration of a term of years or upon the death of a recipient, then during the term of years or during the joint lives of the noncharitable beneficiaries, the trustee shall, in each taxable year of the trust, pay a total annuity amount of at least five percent (5%) of the initial net fair market value of the assets placed in trust. Upon the expiration of the term of years or the death of a beneficiary, the trustee shall

distribute an amount or percentage of the trust assets, as provided in the governing instrument of the trust, to the charity named in the governing instrument, and thereafter the trustee shall pay, annually or in more frequent installments, to the survivors for their lives, an annuity amount that in each taxable year of the trust, bears the same ratio to five percent (5%) of the initial net fair market value of the trust assets as the net fair market value of the trust assets valued as of the date of distribution, less the amount or percentage of trust assets distributed to the charity, bears to the net fair market value of the trust assets as of the date of distribution.

(h) Termination of Annuity Amount on Payment Date Preceding Termination of Noncharitable Interest. – If the governing instrument of the trust provides that payment of the annuity amount may terminate with the regular payment preceding the termination of all noncharitable interests, then the trustee must pay to the noncharitable beneficiary during the term of the noncharitable interest the annuity amount, defined in the trust document, in each taxable year of the trust. The obligation of the trustee to pay the annuity amount shall terminate with the payment preceding the death of the noncharitable beneficiary or other event that terminates the noncharitable interest.

(i) Retention of Testamentary Power to Revoke Noncharitable Interest. – If the governing instrument of the trust provides that the settlor of the trust retains the power, exercisable only by will, to revoke or terminate the interest of any recipient other than an organization described in section 170(c) of the Internal Revenue Code, then the trustee shall pay to the settlor during the settlor's life the annuity amount, as defined in the governing instrument of the trust and, upon the death of the settlor, if the noncharitable beneficiary survives the settlor, the trustee must pay to the noncharitable beneficiary during that beneficiary's life the annuity amount equal to the amount paid to the settlor. The settlor shall have the power, exercisable only by will, to revoke and terminate the interest of the noncharitable beneficiary under the trust. Upon the first to occur of (i) the death of the survivor of the settlor and noncharitable beneficiary; or (ii) the death of the settlor if the settler effectively exercised the settlor's testamentary power to revoke and terminate the interest of the noncharitable beneficiary; the trustee must distribute all of the then principal and income of the trust, other than any amount due the settlor or noncharitable beneficiary, to the charity named in the trust document or, if the governing instrument so provides, the trustee must continue to hold the principal and income in trust for the charity or for the charitable purposes specified in the trust. No other retained power to terminate an interest in the trust is effective.

"**§ 36C-4B-6. Administrative provisions applicable to charitable remainder unitrusts only.**

(a) Creation of Unitrust Amount for a Period of Years or Life. – The trustee shall pay to the beneficiaries named in the trust investment in each taxable year of the trust during their lives or, if the governing instrument so provides, for a period not exceeding 20 years, a unitrust amount equal to a fixed percentage, as stated in the governing instrument of the trust, of the net fair market value of the trust assets valued annually on the date or by the method designated in the governing instrument of the trust or, if no date or method is specified, on the date or by the method selected by the trustee in

the trustee's discretion, so long as the same valuation date or dates or valuation methods are used each year. The unitrust amount is paid annually or in more frequent equal or unequal installments if the governing instrument so provides. The unitrust amount is paid from income and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount is added to principal. The fixed percentage to be paid at least annually to all beneficiaries cannot be less than five percent (5%).

(b) Unitrust Amount Expressed as the Lesser of Income or a Fixed Percentage. – If the governing instrument of the trust provides that the trustee shall pay, instead of a regular unitrust amount (the fixed percentage of the net fair market value of the trust assets, determined annually), the amount of trust income for the taxable year to the extent that this amount is not greater than the amount required to be distributed as a regular unitrust amount for that taxable year or the amount of the trust income for the taxable year that exceeds the regular unitrust amount for that taxable year to the extent that the aggregate of the amounts paid in prior years is less than the aggregate of the regular unitrust amount for those prior years, then the trustee must pay to the beneficiaries in each taxable year of the trust during their lives, or for a period not exceeding 20 years if the trust agreement so provides, an amount equal to the lesser of (i) the trust income for the taxable year, as defined in section 643(b) of the Internal Revenue Code and the regulations under that section, and (ii) the percentage, as stated in the governing instrument, of the net fair market value of the trust assets valued as of the taxable year decreased as elsewhere provided if the taxable year is a short taxable year or is the taxable year in which the noncharitable interest terminates by death or otherwise, and increased as elsewhere provided if additional contributions are made in the taxable year.

If the governing instrument of the trust so provides and if the trust income for any taxable year exceeds the amount determined under (ii) above, the payment to beneficiaries also must include the excess income to the extent that the aggregate of the amounts paid to beneficiaries in prior years is less than the percentage of the aggregate net fair market value of the trust assets, which percentage is defined in the governing instrument of the trust, for these years. Payments to beneficiaries must be made annually or in more frequent equal or unequal installments if the governing instrument so provides. Any income of the trust in excess of these payments must be added to principal.

(c) Adjustment for Incorrect Valuation. – If the fiduciary incorrectly determines the net fair market value of the trust assets for any taxable year, the trustee must, within a reasonable period after the final determination of the correct value, pay to the beneficiaries, in the case of an undervaluation, or receive from the beneficiaries, in the case of an overvaluation, an amount equal to the difference between the unitrust amount properly payable and the unitrust amount actually paid.

(d) Computation of Unitrust Amount in Short and Final Taxable Years. – For a short taxable year and for the taxable year in which the noncharitable beneficiary's interest terminates by death or otherwise, the trustee shall prorate the unitrust amount on a daily basis. If a trust provides for a valuation date other than the first day of the

taxable year, and the valuation date does not occur in a taxable year of the trust because the taxable year is either a short taxable year or is the taxable year in which the noncharitable interests terminate, the trust assets must be valued as of the last day of the short taxable year or the day on which the noncharitable interests terminate, as appropriate.

(e) Additional Contributions. – If the governing instrument does not prohibit additional contributions and additional contributions are made to the trust after the initial contribution in the trust, the unitrust amount for the taxable year in which the additional contributions are made must be a fixed percentage, as stated in the governing instrument of the trust, of the sum of (i) the net fair market value of trust assets, excluding the additional contributions and any income from or appreciation of these contributions and (ii) that proportion of the value of the additional contributions excluded under (i) which the number of days in the period beginning with the date of contribution and ending with the earlier of the last day of the taxable year or the day the noncharitable beneficiary's interest terminated bears to the number of days in the period beginning on the first day of the taxable year and ending with the earlier of the last day in the taxable year or the day the noncharitable beneficiary's interest terminated. If no valuation date occurs after the contributions are made, the assets so added are valued as of the time of contribution.

(f) Deferral of Unitrust Amount During Period of Administration or Settlement. – When property passes to the trust at the death of the settlor, the obligation to pay the unitrust amount commences with the date of the settlor's death, but payment of the unitrust amount may be deferred from the date of the settlor's death to the end of the taxable year of the trust in which complete funding of the trust occurs. Within a reasonable time after the end of the taxable year in which the complete funding of the trust occurs, the trustee must pay to the beneficiary, in the case of an underpayment, or must receive from the beneficiary, in the case of an overpayment, the difference between:

(1) Any unitrust amounts actually paid, plus interest on those amounts computed at ten percent (10%) a year, compounded annually; and

(2) The unitrust amounts payable, determined under the method described in section 1.664-1(a)(5) of the federal income tax regulations, plus interest on those amounts computed at ten percent (10%) a year, compounded annually.

Notwithstanding the foregoing sentence, in computing any underpayment or overpayment of the unitrust amounts, if the governing instrument was executed or last amended before August 9, 1984, and if the governing instrument does not specify that a ten percent (10%) rate of interest shall be used, the underpayment or overpayment of the unitrust amounts shall be computed using an interest rate of six percent (6%) a year, compounded annually.

(g) Unitrust Amount May Be Allocated Among Class of Noncharitable Beneficiaries in Discretion of Trustee. – If the governing instrument of the trust provides that the unitrust amount may be allocated to a class of noncharitable beneficiaries in the discretion of the trustee, then the trustee must pay, in each taxable

year of the trust, the unitrust amount to the member or members of the class of noncharitable beneficiaries in amounts and proportions as the trustee in the trustee's absolute discretion shall from time to time determine until the last of the noncharitable beneficiaries dies. The trustee may pay the unitrust amount to any one member of the class or may apportion it among the various members in a manner that the trustee shall from time to time consider advisable as long as the power to allocate does not cause any person to be treated as the owner of any part of the trust under the rules of section 671 through section 678 of the Internal Revenue Code. If the class provided for in the governing instrument is open, the distribution must be for a period not exceeding 20 years, notwithstanding a provision to the contrary in the trust instrument. If the class provided for in the governing instrument is closed at the creation of the trust, and all members of the class are ascertainable, the distribution may be for the lives of the members of the class or for a period not exceeding 20 years. The trustee shall pay the entire unitrust amount for each taxable year annually and may not delay payment of the unitrust amount.

(h) Reduction of Unitrust Amount if Part of Corpus Is Paid to Charity at Expiration of Term of Years or on Death of a Recipient. – If the governing instrument of the trust provides for the reduction of the unitrust amount if part of the corpus is paid to charity at the expiration of a term of years or upon the death of a recipient, then during the term of years or during the joint lives of the noncharitable beneficiaries the trustee shall, in each taxable year of the trust, pay the total unitrust amount equal to a percentage of the net fair market value of the trust assets valued annually, which shall not be less than five percent (5%). Upon expiration of the term of years or the death of a recipient, the trustee shall distribute an amount or percentage of the trust assets, as provided in the governing instrument of the trust, to the charity named in the governing instrument, and thereafter the trustee shall pay to the survivors for their lives a unitrust amount in each taxable year of the trust equal to at least five percent (5%) (the actual percentage being defined in the trust instrument) of the net fair market value of the remaining trust assets valued annually.

(i) Termination of Unitrust Amount on Payment Date Preceding Termination of Noncharitable Interests. – If the governing instrument of the trust provides that payment of the unitrust amount may terminate with the regular payment preceding the termination of all noncharitable interests, then the trustee must pay the unitrust amount to the noncharitable beneficiary in each taxable year of the trust during the term of the noncharitable interest. The obligation of the trustee to pay the unitrust amount terminates with the payment preceding the termination of the noncharitable interest by death or otherwise. The five percent (5%) requirement provided in subsection (a) of this section shall be met until the termination of all payments of the unitrust amount.

(j) Retention of Testamentary Power to Revoke Noncharitable Interest. – If the governing instrument of the trust provides that the settlor of the trust shall retain the power, exercisable only by will, to revoke or terminate the interest of any recipient other than an organization described in section 170(c) of the Internal Revenue Code, then the trustee must pay the unitrust amount to the settlor during the settlor's life and, upon the death of the settlor, shall pay the unitrust amount to the noncharitable

beneficiary during the charitable beneficiary's life, provided the noncharitable beneficiary survives the settlor. The settlor shall have the power, exercisable only by will, to revoke and terminate the interest of the noncharitable beneficiary under the trust. Upon the first to occur of (i) the death of the survivor of the settlor and the noncharitable beneficiary; or (ii) the death of the settlor if the settlor effectively exercised the testamentary power to revoke and terminate the interest of the noncharitable beneficiary; the trustee shall distribute all of the then principal and income of the trust, other than any amount due the noncharitable beneficiaries, to the charity named in the trust document or, if the governing instrument so provides, the trustee shall continue to hold the principal and income in trust for the charity or for the charitable purposes specified in the trust. No other retained power to terminate an interest in the trust is effective.

"**§ 36C-4B-7. Interpretation.**

This Article shall be interpreted and construed to effectuate its general purpose to cause all charitable remainder annuity trusts and all charitable remainder unitrusts to be administered in accordance with section 2055 and section 2522 of the Internal Revenue Code and the regulations under those sections.

"Article 5.

"Creditors' Claims; Spendthrift and Discretionary Trusts.

"**§ 36C-5-501. Rights of beneficiary's creditor or assignee.**

(a) Except as provided in subsection (b) of this section, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to that relief as is appropriate under the circumstances.

(b) This section shall not apply and a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary, to the extent that a beneficiary's interest:

(1) Is subject to a spendthrift provision;

(2) Is a discretionary trust interest as defined in G.S. 36C-5-504(a)(2); or

(3) Is a protective trust interest as described in G.S. 36C-5-508.

"**§ 36C-5-502. Spendthrift provision.**

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust", or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this Article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

"**§ 36C-5-503. Exceptions to spendthrift provision.**

(a) As used in this section, the term "child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(b) Even if a trust contains a spendthrift provision, or if the beneficiary's interest is a discretionary trust interest as defined in G.S. 36C-5-504(a)(2) or a protective trust interest as defined in G.S. 36C-5-508, a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to relief that is appropriate under the circumstances.

"**§ 36C-5-504. Discretionary trusts; effect of standard.**

(a) In this section:

(1) "Child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(2) "Discretionary trust interest" means an interest in a trust that is subject to the trustee's discretion, whether or not the discretion is expressed in the form of a standard of distribution. A discretionary trust interest shall include an interest in any one or any combination of the following:

a. A trust in which the amount to be received by the beneficiary, including whether or not the beneficiary, or a class of beneficiaries, is to receive anything at all, is within the discretion of the trustee.

b. A trust in which the trustee has no duty to pay or distribute any particular amount to the beneficiary, but has only a duty to pay or distribute to the beneficiary, or apply on behalf of the beneficiary, those sums that the trustee, in the trustee's discretion, determines are appropriate for the support, education, or maintenance of the beneficiary.

(b) The beneficiary may not transfer a discretionary trust interest. Except as otherwise provided in this Article, a creditor or assignee of a beneficiary may not reach a discretionary trust interest or a distribution by the trustee before its receipt by the beneficiary.

(c) Except as provided in subsection (d) of this section, a creditor of a beneficiary may not compel a distribution from a trust in which the beneficiary has a discretionary trust interest even if the trustee has abused the trustee's discretion.

(d) To the extent that a trustee has not complied with a standard of distribution or has abused a discretion:

(1) A distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child; and

(2) The court shall direct the trustee to pay to the child an amount that is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(e) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(f) A creditor may not reach the interest of a beneficiary who is also a trustee or co-trustee, or otherwise compel a distribution, if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard.

"**§ 36C-5-505. Creditor's claim against settlor.**

(a) Whether or not the terms of a trust contain a spendthrift provision or the interest in the trust is a discretionary trust interest as defined in G.S. 36C-504(a)(2) or a protective trust interest as defined in G.S. 36C-5-508, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent that the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances, unless barred by G.S. 28A-19-3.

(b) The lapse, release, or waiver of a power of withdrawal shall not cause the holder to be treated as a settlor of the trust.

"**§ 36C-5-506. Overdue distribution.**

(a) In this section, "mandatory distribution" means a distribution of income or principal that the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term excludes a distribution subject to the exercise of the trustee's discretion, regardless of whether the terms of the trust (i) include a support or other standard to guide the trustee in making distribution decisions; or (ii) provide that the trustee "may" or "shall" make discretionary distributions, including distributions under a support or other standard.

(b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

"**§ 36C-5-507. Personal obligations of trustee.**

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

"**§ 36C-5-508. Protective trusts.**

Except with respect to an interest retained by the settlor, a "protective trust interest" means an interest in a trust in which the terms of the trust provide that the interest terminates or becomes discretionary if:

(1) The beneficiary alienates or attempts to alienate that interest; or

(2) Any creditor attempts to reach the beneficiary's interest by attachment, levy, or otherwise; or

(3) The beneficiary becomes insolvent or bankrupt.

"Article 6.

"Revocable Trusts.

"§ 36C-6-601. Capacity of settlor of revocable trust.

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

"§ 36C-6-602. Revocation or amendment of revocable trust.

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust without regard to the actual capacity of the settlor. This subsection does not apply to a trust created under an instrument executed before the effective date of this Chapter.

(b) If a revocable trust is created or funded by more than one settlor:

(1) To the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

(2) To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard the portion of the trust property attributable to that settlor's contribution.

(c) The settlor may revoke or amend a revocable trust:

(1) By substantial compliance with a method provided in the terms of the trust; or

(2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

a. A later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

b. By oral statement to the trustee if the trust was created orally; or

c. Any other written method delivered to the trustee manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(e) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power of attorney provided the exercise of the power of revocation or amendment does not alter the designation of beneficiaries to receive property on the settlor's death under the settlor's existing estate plan.

(f) A general guardian or a guardian of the estate of the settlor or, if no general guardian or guardian of the estate has been appointed, a guardian of the person of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship.

(g) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

"**§ 36C-6-603. Settlor's powers; powers of withdrawal.**

(a) While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors.

"**§ 36C-6-604. Limitation on action contesting validity of revocable trust; distribution of trust property.**

(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

(1) Three years after the settlor's death; or

(2) 120 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

(1) The trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) A potential contestant has notified the trustee of a possible judicial proceeding to contest the trust, and a judicial proceeding is commenced within 60 days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

"Article 7.

"Office of Trustee.

"**§ 36 C-7-701. Accepting or declining trusteeship.**

(a) Except as otherwise provided in subsection (c) of this section, a person designated as trustee accepts the trusteeship:

(1) By substantially complying with a method of acceptance provided in the terms of the trust; or

(2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time, not to exceed 120 days, after receiving written notice of the trusteeship is considered to have rejected the trusteeship.

(c) A person designated as trustee, without accepting the trusteeship, may:

(1) Act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

(2) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

"**§ 36C-7-702. Trustee's bond.**

(a) A trustee shall provide bond to secure the performance of the trustee's duties if:

(1) The trust instrument was executed before January 1, 2006, unless the terms of the trust instrument provide otherwise;

(2) The trust instrument was executed on or after January 1, 2006, but only if the terms of the trust instrument require the trustee to provide bond;

(3) A beneficiary requests the trustee to provide bond, and the court finds the request to be reasonable; or

(4) The court finds that it is necessary for the trustee to provide bond in order to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

However, in no event shall bond be required of a trustee if the governing instrument directs otherwise.

(b) If bond is required, it shall be in a sum of double the value of the personal property to come into the trustee's hands if 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 trust estate if 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 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%) of that value, conditioned upon the faithful performance of the trustee's duties and for the payment to the persons entitled to receive property that may come into the trustee's hands. All bonds executed under this Article shall be filed with the clerk of superior court.

(c) On petition of the trustee or a qualified beneficiary, the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties.

(d) As provided in G.S. 53-159 and G.S. 53-366(a)(10), banks and trust companies licensed to do trust business in this State need not give bond, even if required by the terms of the trust.

"**§ 36C-7-703. Co-trustees.**

(a) Co-trustees who are unable to reach a unanimous decision may act by majority decision if more than two are serving. Unanimity is required when only two co-trustees are serving.

(b) If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust and exercise all trustee powers, except those powers that the remaining trustees are prohibited from exercising under the trust instrument or by law.

(c) A co-trustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity, or the co-trustee has properly delegated the performance of the function to another trustee.

(d) If a co-trustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust.

(e) A trustee may delegate to a co-trustee with the consent of the co-trustee the performance of any function other than those the settlor reasonably expected the trustees to perform jointly. The following functions are not considered to be those that the settlor reasonably expected the trustees to perform jointly:

(1) Establish and maintain bank accounts for the trust and issue checks for the trust.

(2) Maintain inventories, accountings, and income and expense records of the trust.

(3) Enter any safety deposit box rented by the trust.

(4) Employ persons as advisors or assistants in the performance of administrative duties, including agents, attorneys, accountants, brokers, appraisers, and custodians.

(5) List trust property for taxes and prepare and file tax returns for the trust.

(6) Collect and give receipts for claims and debts of the trust.

(7) Pay debts, claims, costs of administration, and taxes of the trust.

(8) Compromise, adjust, or otherwise settle any claim by or against the trust and release, in whole or in part, a claim belonging to the trust.

(9) Have custody of the trust property.

The list of functions contained in this subsection is not intended to be exclusive of others that may be delegated to a co-trustee in accordance with this subsection.

(f) Except as otherwise provided in subsection (g) of this section, a trustee who does not join in an action of another trustee is not liable for the action.

(g) Each trustee shall exercise reasonable care to:

(1) Avoid enabling a co-trustee to commit a serious breach of trust; and

(2) Compel a co-trustee to redress a serious breach of trust.

(h) Notwithstanding subsection (f) or (g) of this section, a trustee who has not joined in an action approved by a majority of the other trustees is not liable for the action. Notwithstanding subsection (f) or (g) of this section, a dissenting trustee who joins in an action at the direction of the majority of the trustees but who notified in

writing any co-trustee of the dissent at or before the time of the action is not liable for the action, unless that trustee had knowledge that the action taken involved intentional misconduct or was taken with an intention to directly or indirectly provide an improper personal benefit to one or more trustees approving the action.

(i) Notwithstanding any other provision of this section to the contrary, if two or more trustees own shares of corporate stock or other securities, their acts with respect to voting shall have the following effect:

(1) If only one votes, in person or by proxy, the act binds all;

(2) If more than one vote, in person or by proxy, the act binds all; and

(3) If more than one vote, in person or by proxy, but the vote is evenly split on any particular matter, each faction is entitled to vote the stock or other securities in question proportionately.

"**§ 36C-7-704. Vacancy in trusteeship; appointment of successor.**

(a) A vacancy in a trusteeship occurs if:

(1) A person designated as trustee rejects the trusteeship;

(2) A person designated as trustee cannot be identified or does not exist;

(3) A trustee resigns;

(4) A trustee is disqualified or removed;

(5) A trustee dies; or

(6) A general guardian, guardian of the estate, or guardian of the person is appointed for an individual serving as trustee.

(b) If one or more co-trustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

(c) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:

(1) By a person designated in the terms of the trust or appointed under the terms of the trust to act as successor trustee;

(2) By a person appointed by unanimous agreement of the qualified beneficiaries; or

(3) By a person appointed by the court.

(d) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:

(1) By a person designated in the terms of the trust or appointed under the terms of the trust to act as successor trustee;

(2) By a person selected by majority agreement of the charitable organizations expressly designated to receive distributions under the terms of the trust; or

(3) By a person appointed by the court.

(e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

(f) A successor trustee shall succeed to all the rights, powers, and privileges, and is subject to all the duties, liabilities, and responsibilities that were imposed upon the

original trustee, unless a contrary intent appears from the governing instrument or unless the order appointing the successor trustee provides otherwise.

"**§ 36C-7-705. Resignation of trustee.**

(a) A trustee may resign:

(1) Upon at least 30 days' notice in writing to the qualified beneficiaries, the settlor, if living, and all co-trustees; or

(2) With the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

"**§ 36C-7-706. Removal of trustee.**

(a) For the reasons set forth in subsection (b) of this section, the ~~settlor~~settler of an irrevocable trust, a co-trustee of an irrevocable trust, or a beneficiary of an irrevocable trust may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

(1) The trustee has committed a serious breach of trust;

(2) Lack of cooperation among co-trustees substantially impairs the administration of the trust;

(3) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(4) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is consistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order appropriate relief under G.S. 36C-10-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

"**§ 36C-7-707. Delivery of property by former trustee.**

(a) Unless a co-trustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the co-trustee, successor trustee, or other person entitled to it. A former trustee shall execute those documents transferring title to trust property as may be appropriate to facilitate administration of the trust, and in the event that the former trustee fails to do so, the clerk of superior court may order the former trustee to execute those documents, or the clerk of superior court may transfer title.

"**§ 36C-7-708. Compensation of trustee.**

(a) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation determined in accordance with Article 5A of Chapter 32 of the General Statutes.

(b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified.

"**§ 36C-7-709. Reimbursement of expenses.**

A trustee is entitled to be reimbursed out of the trust property for expenses properly incurred in the administration of the trust as provided in G.S. 32-58.

"Article 8.

"Duties and Powers of Trustee.

"**§ 36C-8-801. Duty to administer trust.**

Upon acceptance of a trusteeship, a trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this Chapter.

"**§ 36C-8-802. Duty of loyalty.**

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in G.S. 36C-10-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests, is voidable by a beneficiary affected by the transaction, without regard to whether the transaction is fair to the beneficiary, unless:

(1) The terms of the trust authorized the transaction;

(2) The court approved the transaction;

(3) The beneficiary did not commence a judicial proceeding within the time allowed by G.S. 36C-10-1005;

(4) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with G.S. 36C-10-1009; or

(5) The transaction involves a contract entered into, or claim acquired by, the trustee before the person became or contemplated becoming trustee.

(c) In determining whether a sale, encumbrance, or other transaction involving the investment or management of trust property is affected by a conflict of interest between the trustee's fiduciary and personal interests, the transaction is rebuttably presumed to be affected by a conflict of interest if the trustee enters into the transaction with:

(1) The trustee's spouse or a parent of the trustee's spouse;

(2) The trustee's descendants, siblings, ancestors, or their spouses;

(3) An agent, attorney, employee, officer, director, member, manager, or partner of the trustee, or an entity that controls, is controlled by, or is under common control with the trustee; or

(4) Any other person or entity in which the trustee, or a person that owns a significant interest in the trust, has an interest or relationship that might affect the trustee's best judgment;

(d) A transaction between a trustee and a beneficiary that does not concern trust property, but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary, and from which the trustee obtains an advantage, is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f) Notwithstanding subsection (c) of this section:

(1) An investment by a trustee in securities of an investment company, investment trust, or pooled investment vehicle in which the trustee has an investment, or to which the trustee, or its affiliate, provides services is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of Article 9 of this Chapter. The investment company, investment trust, or pooled investment vehicle may compensate the trustee for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under G.S. 36C-8-813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined; and

(2) Payment made by a trustee to an attorney, broker, accountant, or agent for services performed on behalf of the trust in the ordinary course of business is not considered to be affected by a conflict between the trustee's personal and fiduciary interests if the payment is consistent with payments generally made in the community for the same or similar services.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect to appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(h) This section does not preclude the following transactions, if fair to the beneficiaries:

(1) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(2) Payment of reasonable compensation to the trustee;

(3) A transaction between a trust and another trust, decedent's estate, or guardianship, or similar relationship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) A deposit of trust money in a regulated financial-service institution operated by the trustee or an affiliate of the trustee; or

(5) An advance by the trustee of money for the protection of the trust.

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

"**§ 36C-8-803. Impartiality.**

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

"**§ 36C-8-804. Prudent administration.**

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

"**§ 36C-8-805. Cost of administration.**

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

"**§ 36C-8-806. Trustee's skills.**

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

"**§ 36C-8-807. Delegation by trustee.**

(a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with subsection (a) of this section is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

"**§ 36C-8-808. Powers to direct.**

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee must act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust, or the trustee knows the attempted exercise would

constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

"**§ 36C-8-809. Control and protection of trust property.**

A trustee shall take reasonable steps to take control of and protect the trust property.

"**§ 36C-8-810. Record keeping and identification of trust property.**

(a) A trustee shall keep adequate records of the administration of the trust.

(b) A trustee shall keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in subsection (d) of this section, a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

"**§ 36C-8-811. Enforcement and defense of claims.**

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

"**§ 36C-8-812. Collecting trust property.**

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee.

"**§ 36C-8-813. Duty to inform and report.**

(a) The trustee is under a duty to a qualified beneficiary to give that beneficiary upon request and at reasonable times complete and accurate information as to the nature and amount of the trust property and to permit the beneficiary, or the beneficiary's representative, to inspect the subject matter of the trust and the accounts and other documents relating to the trust.

(b) Notwithstanding subsection (a) of this section:

(1) The duty of the trustee under subsection (a) of this section shall not include informing any beneficiary in advance of transactions relating to the trust property.

(2) A trustee is considered to have discharged the trustee's duty under subsection (a) of this section as to a qualified beneficiary for matters disclosed by a report sent at least annually and at termination of the trust to the beneficiary that describes the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, and lists the trust assets and their respective market values, including estimated values of assets with uncertain values. No presumption shall arise that a trustee who does not comply

with this subdivision failed to discharge the trustee's duty under subsection (a) of this section.

(c) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. With respect to future reports and other information, a beneficiary may withdraw a waiver previously given.

(d) Subsection (b) of this section applies only to a trust created under a trust instrument executed on or after the effective date of this Chapter.

"**§ 36C-8-814. Discretionary powers; tax savings.**

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of terms such as "absolute", "sole", or "uncontrolled", a trustee abuses the trustee's discretion in exercising or failing to exercise a discretionary power if the trustee acts with bad faith, acts dishonestly, acts with an improper motive, even though not a dishonest motive, or if the trustee fails to use the trustee's judgment in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) Subject to subsection (d) of this section, and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

(1) A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power that would, except for this subsection, constitute in whole or in part a general power of appointment may not exercise that power in favor of the trustee/beneficiary, the trustee/beneficiary's estate, the trustee/beneficiary's creditors, or the creditors of the trustee/beneficiary's estate.

(2) Notwithstanding subdivision (1) of this subsection, if the trust confers on the trustee the power to make discretionary distributions to or for the trustee's personal benefit, the trustee may exercise the power in accordance with an ascertainable standard.

(3) The trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

For purposes of this subsection, a "general power of appointment" means any power that would cause the income to be taxed to the trustee in his individual capacity under section 678 of the Internal Revenue Code and any power that would be a general power of appointment, in whole or in part, under section 2041(b)(1) or section 2514(c) of the Internal Revenue Code.

(c) A power whose exercise is limited or prohibited by subsection (b) of this section may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) of this section does not apply to:

(1) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in section 2056(b)(5) or section 2523(e) of the Internal Revenue Code, was previously allowed;

(2) Any trust during any period that the trust may be revoked or amended by its settlor; or

(3) A trust, if contributions to the trust qualify for the annual exclusion under section 2503(c) of the Internal Revenue Code.

(e) If a trust created under a will or trust instrument for the benefit of the spouse of the settlor of the trust, other than a trust that provides that upon the termination of the income interest that the entire remaining trust estate be paid to the estate of the spouse, requires that all the income of the trust be paid not less frequently than annually to the spouse and a federal estate or gift tax marital deduction is claimed with respect to the trust, then, unless the trust instrument specifically provides otherwise by reference to this section, any investment in or retention of unproductive property as an asset of the trust is subject to the power of the spouse to require either that the asset be made productive of income, or that it be converted to assets productive of income, within a reasonable period of time.

"**§ 36C-8-815. General powers of trustee.**

(a) A trustee, without authorization by the court, may exercise:

(1) Powers conferred by the terms of the trust; or

(2) Except as limited by the terms of the trust:

a. All powers over the trust property that an unmarried competent owner has over individually owned property;

b. Any other powers appropriate to achieve the proper investment, management, administration or distribution of the trust property; and

c. Any other powers conferred by this Chapter.

(b) The exercise of a power is subject to the fiduciary duties prescribed by this Article.

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

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

(1) Collect and control trust property and accept or reject additions to the trust property from a settlor or any other person;

(2) Invest and reinvest trust property as the trustee considers advisable in accordance with the trust, and to acquire or sell property, for cash or on credit, at public or private sale;

(3) Exchange, partition, or otherwise change the character of trust property;

(4) Deposit trust money in an account in a regulated financial services institution, including an institution operated by the trustee or an affiliate of the trustee upon compliance with any applicable requirements for the deposit;

(5) Borrow money, with or without security, including from a corporate trustee's lending department, renew or modify loans, and mortgage or

pledge trust property for a period within or extending beyond the duration of the trust;

(6) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, venture, agricultural operation, or other form of business or enterprise, form and transfer, assign, and convey to that form of business or enterprise all or any part of the trust property in exchange for the stock, securities, or obligations of that form of business or enterprise, continue any business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization, or contributing additional capital;

(7) With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:

a. Vote, or give general or limited proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement, or execute waivers, consents, or objections with respect to those securities;

b. Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

c. Pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights;

d. Deposit the securities with a depositary or other regulated financial service institution; and

e. Consent, directly or through a committee or other agent, to the merger, consolidation, reorganization, readjustment of capital or financial structure, lease, sale, dissolution, or liquidation of a business enterprise, and elect whether to participate as a member of a class in any litigation involving the securities;

(8) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing party walls or buildings or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries, make contracts, licenses, leases, conveyances, or grants of every nature and kind with respect to crops, gravel, sand, oil, gas, timber and forest products, other usufructs or natural resources, and other benefits or incidents of the real property;

(9) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust at the expense of the trust;

(12) Abandon, relinquish any or all rights to, or decline to administer property of no value or of insufficient benefit or value to the trust to justify its collection or continued administration;

(13) With respect to possible liability for violation of environmental law:

a. Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

b. Take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

c. Decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

d. Compromise claims against the trust that may be asserted for an alleged violation of environmental law; and

e. Pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

(14) Pay or contest any claim, compromise, adjust or otherwise settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

(15) Pay from the trust property taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust and the protection of the trust property;

(16) Exercise elections with respect to federal, state, and local taxes;

(17) Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights under that plan, annuity, or life insurance, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

(18) Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable

under the circumstances, and acquire a lien on future distributions for repayment of those loans;

(19) Pledge trust property to guarantee loans made by others to a beneficiary;

(20) Appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, limit those powers the appointed trustee may exercise and the duties for which the appointed trustee is responsible, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

a. Paying it to the beneficiary's general guardian or the guardian of the beneficiary's estate or, if the beneficiary does not have a general guardian or guardian of the beneficiary's estate, the guardian of the beneficiary's person;

b. Paying it to a custodian under a uniform transfer to minors act or custodial trustee under a uniform custodial trust act and, for that purpose, creating a custodianship or custodial trust for the benefit of the beneficiary;

c. Paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

d. Managing it as a separate fund on the beneficiary's behalf.

A trustee making payments under this subdivision does not have any duty to see to the application of the payments so made, if the trustee exercised due care in the selection of the person, including the minor or incompetent, to whom the payments were made, and the receipt of that person shall be full acquittance to the trustee;

(22) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares without regard to the income tax basis or other special tax attributes of the assets, as the trustee finds to be most practicable and for the best interests of the distributees, value the trust property for those purposes, and adjust for resulting differences in valuation; and to distribute trust property in kind or in cash, or partially in kind and partially in cash, in divided or undivided interests;

(23) Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) Make, execute, and deliver contracts and other instruments, including instruments under seal, that are useful to achieve or facilitate the exercise of the trustee's powers;

(26) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it;

(27) Employ as advisors or assistants in the performance of administrative duties, or delegate administrative duties in the manner provided in G.S. 36C-8-807, to persons, firms, and corporations, including agents, auditors, accountants, brokers, attorneys-at-law, attorneys-in-fact, investment advisors, appraisers, custodians, rental agents, realtors, and tax specialists;

(28) Bid on property at a foreclosure sale, or acquire property from a mortgagor or obligor without foreclosure, and retain the property so bid on or taken over without foreclosure;

(29) Divide one trust into several trusts and make distributions from those trusts in the manner provided in G.S. 36C-4-417;

(30) Request an order from the court for the sale of real or personal property under Article 29A of Chapter 1 of the General Statutes, or for the exchange, partition, or other disposition or change in the character of, or for the grant of options or other rights in or to, such property; and

(31) Distribute the assets of an inoperative trust consistent with the authority granted under G.S. 28A-22-10.

"**§ 36C-8-817. Distribution upon termination.**

Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

"Article 9.

"Uniform Prudent Investor Act.

"**§ 36C-9-901. Prudent investor rule; applicability.**

(a) Except as otherwise provided in subsection (b) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this Article.

(b) The prudent investor rule is a default rule and may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust that govern or direct investments in a manner inconsistent with this Article. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the terms of the trust.

(c) The following terms or comparable language in a trust, unless otherwise limited or modified, authorize any investment or strategy permitted under this Article: "Chapter 36A", "investments in accordance with Article 15 of Chapter 36A", "investments in accordance with Article 9 of Chapter 36C", "investments permissible by law for investment of trust funds", "legal investments", "authorized investments", "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital", "prudent man rule", "prudent trustee rule", "prudent person rule", and "prudent investor rule". This Article also applies where a trust contains no investment standard.

(d) This Article does not apply to:

(1) Unless the trust provides otherwise by specific reference to this Article:

a. Trusts under any federal employee retirement income security statute or other retirement or pension trusts;

b. Trusts that are created by legislative act;

c. Trusts that are created by or under premarital or postmarital agreements, divorce settlements, settlements of other proceedings or disputes;

d. Transfers under the Uniform Transfers to Minors Act;

e. Transfers under the Uniform Custodial Trust Act; or

f. Honorary trusts, trusts for pets, and trusts for cemetery lots.

(2) Trusts imposed or required under another chapter of the General Statutes or by rule in which the investment of the trust funds is regulated by the other chapter or by rule, unless a provision of the other chapter or the rule provides otherwise by a specific reference to this Article.

"**§ 36C-9-902. Standard of care; portfolio strategy; risk and return objectives.**

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are any of the following that are relevant to the trust or its beneficiaries:

(1) General economic conditions;

(2) The possible effect of inflation or deflation;

(3) The expected tax consequences of investment decisions or strategies;

(4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in

closely held enterprises, tangible and intangible personal property, and real property;

(5) The expected total return from income and the appreciation of capital;

(6) Other resources of the beneficiaries known to the trustee;

(7) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this Article.

"**§ 36C-9-903. Diversification.**

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

"**§ 36C-9-904. Duties at inception of trusteeship.**

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this Chapter.

"**§ 36C-9-905. Reviewing compliance.**

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

"**§ 36C-9-906. Effect on charitable remainder trusts.**

Nothing in this Article shall prevent the application of Article 4B of this Chapter to a "charitable remainder trust" as defined in G.S.36C-4B-3(1).

"**§ 36C-9-907. Short title.**

This Article may be cited as the "North Carolina Uniform Prudent Investor Act."

"Article 10.

"Liability of Trustees and Rights of Persons Dealing with Trustees.

"**§ 36C-10-1001. Remedies for breach of trust.**

(a) A violation by a trustee of a duty the trustee owes under a trust is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

(1) Compel the trustee to perform the trustee's duties;

(2) Enjoin the trustee from committing a breach of trust;

(3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;

(4) Order a trustee to account;

(5) Appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) Suspend the trustee;

(7) Remove the trustee as provided in G.S. 36C-7-706;
(8) Reduce or deny compensation to the trustee;
(9) Subject to G.S. 36C-10-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
(10) Order any other appropriate relief.

(c) The court may, for cause shown, relieve a trustee from liability for any breach of trust, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for a breach of trust.

"**§ 36C-10-1002. Damages for breach of trust.**

(a) A trustee who commits a breach of trust is liable for the greater of:
(1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
(2) The profit the trustee made by reason of the breach.

(b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

"**§ 36C-10-1003. Liability in absence of breach.**

(a) A trustee is accountable for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust. Nothing in this section limits a trustee's right to compensation under G.S. 36C-7-708 or payments allowed under G.S. 36-8-802(f).

(b) Absent a breach of trust, a trustee is not liable for a loss or depreciation in the value of trust property or for not having made a profit.

"**§ 36C-10-1004. Attorney's fees and costs.**

In a judicial proceeding involving the administration of a trust, the court may award costs and expenses, including reasonable attorney fees, as provided in the General Statutes.

"**§ 36C-10-1005. Limitation of action against trustee.**

Applicable provisions of Chapter 1 of the General Statutes govern the limitation of actions on judicial proceedings involving trusts, except that no proceeding against a trustee for breach of trust may be commenced more than five years after the first to occur of: (i) the removal, resignation, or death of the trustee; (ii) the termination of the beneficiary's interest in the trust; or (iii) the termination of the trust.

"**§ 36C-10-1006. Reliance on trust instrument.**

A trustee who acts in reasonable reliance on the terms of the trust as expressed in a trust instrument is not liable for a breach of trust to the extent that the breach resulted from the reliance.

"**§ 36C-10-1007. Event affecting administration or distribution.**

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

"**§ 36C-10-1008. Exculpation of trustee.**

A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.

"**§ 36C-10-1009. Beneficiary's consent, release, or ratification.**

(a) A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) At the time of the consent, release, or ratification, the beneficiary did not have knowledge of the beneficiary's rights or of the material facts relating to the breach.

(b) No consideration is required for the consent, release, or ratification to be valid.

"**§ 36C-10-1010. Limitation on personal liability of trustee.**

(a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in making the contract disclosed the fiduciary capacity. The addition of the phrase "trustee," or "as trustee," or a similar designation to the signature of a trustee on a written contract is considered prima facie evidence of a disclosure of fiduciary capacity.

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim. Any judgment rendered in favor of a claimant in such a judicial proceeding against a trust may be recovered from the trust property, without proof that the trustee could have obtained reimbursement from the trust if the trustee had paid the claim.

(d) A trustee is entitled to indemnity from the trust for any claim, other than a breach of trust, for which the trustee is liable:

(1) If the claim arose from a common incident of activity in which the trustee was properly engaged for the trust;

(2) If the trustee was not personally at fault; or

(3) To the extent that the trustee's actions increased the value of trust property.

(e) A decision by a trustee not to inspect property, or to decline to accept property, shall not create any inference as to liability, under any environmental law, with respect to that property. A trustee shall have no liability for a decrease in value of property in a trust by reason of the trustee's compliance with any environmental law, including reporting requirements.

"**§ 36C-10-1011. Interest as general partner.**

(a) Except as otherwise provided in subsection (c) of this section or unless personal liability is imposed in the contract, a trustee who holds, in a fiduciary capacity, an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership if the fiduciary capacity was disclosed. The addition of the phrase "trustee" or "as trustee" or a similar designation to the signature of a trustee on a written partnership document is considered prima facie evidence of a disclosure of fiduciary capacity.

(b) A trustee who holds, in a fiduciary capacity, an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault. This subsection does not apply to additional ownership interests of the trustee held in a nonfiduciary capacity.

(c) If the settlor transfers an existing general partnership interest to a revocable trust, the settlor remains personally liable for partnership obligations as if the settlor were a general partner.

"**§ 36C-10-1012. Protection of person dealing with trustee.**

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

(f) A person is not required to obtain a certification under G.S. 36C-10-1013 in order to be entitled to the protections of this section.

"**§ 36C-10-1013. Certification of trust.**

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(1) The existence of the trust and the date the trust instrument was executed;

(2) The identity of the settlor, unless withheld under a provision in the trust instrument;

(3) The identity and address of the currently acting trustee;

(4) The powers of the trustee;

(5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) The authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;

(7) The trust's taxpayer identification number; and

(8) The manner of taking title to trust property.

(b) Any trustee may sign or otherwise authenticate a certification of trust.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that the person relying upon the certification holds a copy of all or part of the trust instrument.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

"Article 11.

"Miscellaneous Provisions.

"**§ 36C-11-1101. Uniformity of application and construction.**

In applying and construing this Chapter, consideration may be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 36C-11-1102. Electronic records and signatures.**

The provisions of this Chapter governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of those records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

"**§ 36C-11-1103. Severability clause.**

If any provision of this Chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Chapter that can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable."

SECTION 3. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 36D.**

"**North Carolina Community Trust for Persons with Severe Chronic Disabilities.**

"**§ 36D-1. Title; findings.**

(a) This Article shall be known and may be cited as the "North Carolina Community Trust for Persons with Severe Chronic Disabilities Act".

(b) The General Assembly finds that it is in the public interest to encourage activities by voluntary associations and private citizens that will supplement and augment those services provided by local, State, and federal government agencies in discharge of their responsibilities toward individuals with severe chronic disabilities. The General Assembly further finds that, as a result of changing social, economic, and demographic trends, families of persons with severe chronic disabilities are increasingly aware of the need for a vehicle by which they can assure ongoing individualized personal concern for a severely disabled family member who may survive that disabled person's parents or other family members, and provide for the efficient management of small legacies or trust funds to be used for the benefit of that disabled person. In a number of other states, voluntary associations have established foundations or trusts intended to be responsive to these concerns. Therefore, the General Assembly finds that North Carolina will benefit by the enactment of enabling legislation expressly authorizing the formation of community trusts in accordance with criteria set forth by statute and administered by the Secretary of State, under Chapter 55A of the General Statutes. These community trusts permit the pooling of resources contributed by families or persons with philanthropic intent, along with the reservation of portions of these funds for the use and benefit of designated beneficiaries.

(c) This Article shall be liberally construed and applied to promote its underlying purposes and policies, which are, among others, to:

(1) Encourage the orderly establishment of community trusts for the benefit of persons with severe chronic disabilities;

(2) Ensure that community trusts are administered properly and that the managing boards of the trusts are free from conflicts of interest;

(3) Facilitate sound administration of trust funds for persons with severe chronic disabilities by allowing family members and others to pool resources in order to make professional management investment more efficient;

(4) Provide parents of persons with severe chronic disabilities peace of mind in knowing that a means exists to ensure that the interests of their children who have severe chronic disabilities are properly looked after and managed after the parents die or become incapacitated;

(5) Help make guardians available for persons with severe chronic disabilities who are incompetent, when no other family member is available for this purpose;

(6) Encourage the availability of private resources to purchase for persons with severe chronic disabilities goods and services that are not available through any governmental or charitable program and to conserve these resources by limiting purchases to those that are not available from other sources;

(7) Encourage the inclusion, as beneficiaries of community trusts, of persons who lack resources and whose families are indigent, in a way that does not diminish the resources available to other beneficiaries whose families have contributed to the trust; and

(8) Remove the disincentives that discourage parents and others from setting aside funds for the future protection of persons with severe chronic disabilities by ensuring that the interest of beneficiaries in community trusts are not considered assets or income that would disqualify them from any governmental or charitable entitlement program with an economic means test.

"**§ 36D-2. Definitions.**

As used in this Article, unless the context clearly requires otherwise:

(1) "Beneficiary" means any person with a severe chronic disability who has qualified as a member of the community trust program and who has the right to receive those services and benefits vested with the management of the business and affairs of a corporation, formed for the purpose of managing a community trust, irrespective of the name by which the group is designated.

(2) "Community trust" means a nonprofit organization that offers the following services:

a. Administration of special trust funds for persons with severe chronic disabilities;

b. Follow along services;

c. Guardianship for persons with severe chronic disabilities who are incompetent, when no other family member or immediate friend is available for this purpose; and

d. Advice and counsel to persons who have been appointed as individual guardians of the persons or estates of persons with severe chronic disabilities.

(3) "Follow along services" means (i) those services offered by community trusts that are designed to ensure that the needs of each beneficiary are being met for as long as may be required and may include periodic visits to the beneficiary and to the places where the beneficiary receives services, (ii) participation in the development of individualized plans being made by service providers for the beneficiary, and (iii) other similar services consistent with the purposes of this Article.

(4) "Severe chronic disability" means a physical or mental impairment that is expected to give rise to a long-term need for specialized health, social, and other services, and that makes the person with the disability dependent upon others for assistance to secure these services.

(5) "Trustee" means any member of the board of a corporation, formed for the purpose of managing a community trust, whether that member is designated as a trustee, director, manager, governor, or by any other title.

(6) "Surplus trust funds" means funds accumulated in the trust from contributions made on behalf of an individual beneficiary that, after the death of the beneficiary, are determined by the board to be in excess of the actual cost of providing services during the beneficiary's lifetime, including the beneficiary's share of administrative costs.

"**§ 36D-3. Scope.**

This Article applies to every community trust established in this State. In addition to meeting the other requirements of this Article, every board that administers a community trust shall incorporate as a nonprofit corporation under Chapter 55A of the General Statutes. Except as otherwise provided in this Chapter, Chapter 55A of the General Statutes applies to community trusts.

"**§ 36D-4. Administration; powers and duties.**

(a) Every community trust shall be administered by a board. The board shall be comprised of no less than nine and no more than 21 members, at least one-third of whom are parents or relatives of persons with severe chronic disabilities. No board member shall be a provider of habilitative, health, social, or educational services to persons with severe chronic disabilities or an employee of such a service provider. The board may, however, allow service providers to serve on the board in an advisory capacity. Board members shall be selected, to the maximum extent possible, from geographic areas throughout the area served by the trust.

The certificate of incorporation filed with the Secretary of State under Chapter 55A of the General Statutes shall, in addition to the requirements set forth in that Chapter, demonstrate that the requirements of this section have been met.

(b) Notwithstanding any other law, no trustee may be compensated for services provided as a member of the board of a community trust. No fees or commissions shall

be paid to these trustees; however, a trustee may be paid for necessary expenses incurred by the trustee and may receive indemnification as permitted under Chapter 55A of the General Statutes.

(b1) For every community trust incorporated under this Article, the corporation itself is considered the trustee of any funds administered by it. No individual board member is considered to be trustee of any fund deposited on behalf of any individual beneficiary with severe chronic disabilities.

(c) The board shall adopt bylaws that include a declaration delineating the primary geographic area serviced by the trust and the principal services to be provided. The board shall file the bylaws with the Secretary of State.

(d) The board may retain paid staff as it considers necessary to provide follow along services to the extent required by each beneficiary. The community trust may authorize the expenditure of funds for any goods or services, including recreational services, which the board, in its sole discretion, determines will promote the well-being of any beneficiary. The community trust may pay for the burial of any beneficiary. The community trust, however, may not expend funds for any goods or services of comparable quality to those available to any particular beneficiary through any governmental or charitable program, insurance, or other sources. The community trust may expend funds to meet the reasonable costs of administering the community trust.

(e) The community trust is not required to provide services to a beneficiary who is a competent adult and who has refused to accept the services. Further, the community trust shall not provide services of a nature or in a manner that would be contrary to the public policy of this State at the time the services are to be provided. In either case, the community trust may offer alternate services that are consistent with the purposes of this Article and in keeping with the best interests of the beneficiary.

(f) The community trust may accept appointment as guardian of the person, guardian of the estate, or guardian of both on behalf of any beneficiary. If the community trust accepts appointment as guardian of the person of an individual, it shall assign a staff member to carry out its responsibilities as the guardian. The community trust may, upon request, offer consultative and professional assistance to an individual, private or public guardian of any of its beneficiaries.

(g) The community trust may accept contributions, bequests, and designations under life insurance policies to the community trust on behalf of individuals with severe chronic disabilities for the purpose of qualifying them as beneficiaries.

(h) At the time a contribution, bequest, or assignment of insurance proceeds is made, the trustor shall receive a written statement of the services to be provided to the beneficiary. The statement shall include a starting date for the delivery of services or the condition precedent, such as the death of the trustor, which shall determine the starting date. The statement shall describe the frequency with which services shall be provided and their duration, and the criteria or procedures for modifying the program of services from time to time in the best interests of the beneficiary.

"**§ 36D-5. Accountability.**

Along with the annual report filed with the Secretary of State under Chapter 55A of the General Statutes, the community trust shall file an itemized statement that shows the

funds collected for the year, income earned, salaries, other expenses incurred, and the opening and final trust balances. A copy of this statement shall be made available, upon request, to any beneficiary, trustor, or designee of the trustor. In addition, once annually, each trustor or the trustor's designee shall receive a detailed individual statement of the services provided to the trustor's beneficiary during the previous 12 months and the services to be provided during the following 12 months. The community trust shall make a copy of the individual statement available to any beneficiary, upon request.

"**§ 36D-6. Gifts, surplus trust funds.**

The community trust may accept gifts and use surplus trust funds for the purpose of qualifying as beneficiary any indigent person whose family members lack the resources to make a full contribution on that person's behalf. The extent and character of the services and selection of beneficiaries are at the discretion of the community trust. The community trust may not use surplus trust funds to make any charitable contribution on behalf of any beneficiary or any group or class of beneficiaries. The community trust may accept gifts to meet start-up costs, reduce the charges to the trust for the cost of administration, and for any other purpose that is consistent with this Article. Gifts made to the trust for an unspecified purpose shall be used by the community trust either to qualify indigent persons whose families lack the means to qualify them as beneficiaries of the trust or to meet any start-up costs that the trust incurs.

"**§ 36D-7. Special requests on behalf of beneficiary.**

The community trust may agree to fulfill any special requests made on behalf of a beneficiary as long as the requests are consistent with this Article and provided that an adequate contribution has been made for this purpose on behalf of a beneficiary. The community trust may agree to serve as trustee for any individual trust created on behalf of a beneficiary, regardless of whether the trust is revocable or irrevocable, has one or more remaindermen or contingent beneficiaries, or any other condition, so long as the individual trust is consistent with the purposes of this Article.

"**§ 36D-8. Irrevocability; impossibility of fulfillment.**

A community trust for persons with severe chronic disabilities is irrevocable, but the trustees in their sole discretion may provide compensation for any contribution to the trust to any trustor who, upon good cause, withdraws a beneficiary designated by the trustor from the trust, or if it becomes impossible to fulfill the conditions of the trust with regard to an individual beneficiary for reasons other than the death of the beneficiary.

"**§ 36D-9. Beneficiary's interest in trust not asset for income eligibility determination.**

Notwithstanding any provisions of Chapter 108A of the General Statutes, the beneficiary's interest in any community trust is not considered to be an asset for the purpose of determining income eligibility for any publicly operated program, nor shall that interest be reached in satisfaction of a claim for support and maintenance of the beneficiary. No agency shall reduce the benefits of services available to any individual because that person is the beneficiary of a community trust.

"**§ 36D-10. Trust not subject to law against perpetuities; restraints on alienation.**

A community trust shall not be subject to or held to be in violation of any principle of law against perpetuities or restraints on alienation or perpetual accumulations of trusts.

"**§ 36D-11. Settlement; trustee limitations.**

The community trust shall settle a community trust by filing a final accounting in the superior court. In addition, at any time before the settlement of the final account, the community trust, the Secretary of State, or the Attorney General may bring an action for the dissolution of a nonprofit corporation in the superior court for the purpose of terminating the trust or merging it with another charitable trust.

No trustee or any private individual is entitled to share in the distribution of any of the trust assets upon dissolution, merger, or settlement of the community trust. Upon dissolution, merger, or settlement, the superior court shall distribute all of the remaining net assets of the community trust in a manner that is consistent with the purposes of this Article."

SECTION 4. G.S. 32-28 and G.S. 32-34 are repealed.

SECTION 5. G.S. 28A-13-6 reads as rewritten:

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

~~(a) As used in this section, the term "personal representatives" includes testamentary trustees.~~

(b) If a will expressly makes provision for the execution of any of the powers of personal representatives by all of them or by any one or more of them, the provisions of the will govern.

~~(c) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which such personal representatives qualified, provide that any one or more of the following powers of personal representatives 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 personal representative or representatives;~~

~~(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 estate and give receipts therefor;~~

~~(6) Pay claims against and debts of the estate;~~

~~(7) Compromise claims in favor of or against the estate;~~

~~(8) Have custody of property of the estate.~~

(c1) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which the personal representatives qualified, provide that any designated one or more of the personal representatives may exercise one or more of the following powers:

(1) Establish and maintain bank accounts for the trust and issue checks for the trust.
(2) Maintain inventories, accountings, and income and expense records of the trust.
(3) Enter any safety deposit box rented by the trust.
(4) Employ persons as advisors or assistants in the performance of administrative duties, including agents, attorneys, accountants, brokers, appraisers and custodians.
(5) List trust property for taxes and prepare and file tax returns for the trust.
(6) Collect and give receipts for claims and debts of the trust.
(7) Pay debts, claims, costs of administration, and taxes of the trust.
(8) Compromise, adjust or otherwise settle any claim by or against the trust and release, in whole or in part, a claim belonging to the trust.
(9) Have custody of the trust property.

(d) Subject to subsection (b) of this section, if two or more personal representatives own shares of corporate stock or other securities, their acts with respect to voting shall have the following effect:
(1) If only one votes, in person or by proxy, ~~his~~ that personal representative's act binds all;
(2) If more than one vote, in person or by proxy, the act of the majority so voting binds all;
(3) If more than one vote, in person or by proxy, but the vote is evenly split on any particular matter, each faction is entitled to vote the stock or other securities in question proportionately.

(e) Subject to ~~the provisions of~~ subsections (b), ~~(c)~~ (c1), 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~~ the personal representative joins at the direction of the majority of the personal representatives, if ~~he~~ that personal representative expressed his or her dissent in writing to any other personal representative at or before the time of such joinder.

(f) No personal representative shall be relieved of liability on his or her bond or otherwise by entering into any agreement under this section."

SECTION 6. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

SECTION 7.(a) Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial

proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded.

SECTION 7.(b) Sections 1 through 5 of this act become effective January 1, 2006. The remainder of this act is effective when it becomes law.

Summary of North Carolina Uniform Trust Code

Introduction

The Uniform Trust Code ("UTC") was promulgated by the Uniform Law Commissioners in 2000 as the first truly national codification of the law of trusts. The UTC draws from existing statutory and common law sources, including the Restatements of the Law of Trusts 2nd and 3rd. It also contains elements of reform to reflect modern needs. As of October 2004 at least ten states have enacted the UTC, and numerous groups in other states have the UTC under study.

Unlike some states, North Carolina does not have a substantial body of statutory trust law, and some of what we do have is in need of amendment. The Uniform Trust Act, enacted in 1939 as Article 6 of Chapter 36A and adopted by only a few states, was not a complete codification of trust law, and several of its provisions are outmoded in light of modern practices. The more recent Trust Administration Act, enacted in 2002 as Article 3 of Chapter 36A, was helpful in granting the clerks of superior court jurisdiction to deal with trust matters, but it has raised questions concerning the extent of that jurisdiction and the application of the rules of civil procedure.

The promulgation of the UTC presented an opportunity to codify, clarify and improve the North Carolina trust law. With this objective in mind, the Legislative Committee of the Estate Planning and Fiduciary Law Section of the North Carolina Bar Association began its study of the UTC in 2001. The proposed North Carolina Uniform Trust Code ("NCUTC"), a modified version of the UTC, is the product of the Legislative Committee's three-year study.

The NCUTC, which replaces Chapter 36A with a new Chapter 36C, should be very beneficial to lawyers and judges alike by filling any gaps that exist in our trust law, while at the same time providing a modern practice approach in dealing with trust issues. It makes a number of beneficial changes and additions in our existing law. For example,

- Jurisdictional and procedural issues in the Trust Administration Act have been clarified. The Trust Administration Act gave the clerk of superior court original jurisdiction over "internal affairs" of the trust. The NCUTC clarifies that certain actions, including actions for damages, do not constitute such "internal affairs." The NCUTC also clarifies the application of rules of civil procedure in proceedings before the clerk.

- The representation provisions that now exist in the Trust Administration Act for trust proceedings before the clerk are applicable to trust proceedings before a superior court judge.

- Article 11 of Chapter 36A contains provisions for the modification and termination of a trust which are similar to those in the NCUTC. However, the NCUTC adds rules to reform a trust because of mistakes of law or fact and to achieve tax objectives.

- The NCUTC contains special rules pertaining to revocable trusts which are added to our trust law. Where an instrument is silent, the instrument is deemed to be revocable. This reverses the presumption under our existing common law.

- The current provisions in Chapter 36A require court approval for the transfer of administration to another jurisdiction and for the resignation and appointment of a trustee where the governing instrument is silent. The NCUTC allows for the transfer, resignation and appointment of a trustee by consent of the beneficiaries.

- The provisions in Chapter 36A contain inflexible provisions in dealing with conflict of law issues. For example, trustees cannot sell or make loans to a related party without a court order. The NCUTC allows such transfers to occur with the consent of the beneficiaries.

Summary of Articles

In General

The NCUTC, like the UTC, is divided into 11 articles. The first and eleventh articles do not address substantive topics, but deal with general provisions like definitions and rules of statutory interpretation. The nine substantive articles are Article 2, Judicial Proceedings; Article 3, Representation; Article 4, Creation, Validity, Modification, and Termination of Trusts; Article 5, Creditor's Claims, Spendthrift and Discretionary Trusts; Article 6, Revocable Trusts; Article 7, Office of Trustee; Article 8, Duties and Powers of Trustee; Article 9, The Uniform Prudent Investor Act (which recodifies provisions of Article 15 of Chapter 36A); and Article 10, Liability of Trustees and Rights of Persons Dealing with Trustee. It is not possible to provide a complete summary of the entire NCUTC, but what follows highlights central characteristics of this important code.

Article 1
General Provisions and Definitions

Article 1 sets forth the definitions and rules that govern application of the NCUTC.

G.S. 36C-1-101 states that Chapter 36C of the North Carolina General Statutes shall be known as the "North Carolina Uniform Trust Code."

G.S. 36C-1-102 specifies the scope of the NCUTC by describing the types of trusts to which it applies. The description of these trusts was based on the provisions of G.S. 36A-22.1 of the Trust Administration Act.

G.S. 36C-1-103 is one of the NCUTC's most important sections because it contains the definitions that apply throughout the entire NCUTC. Of specific importance are the following definitions:

- "Qualified beneficiary" – not all beneficiaries of a trust are qualified beneficiaries. Under the NCUTC, qualified beneficiaries receive more

rights than normal beneficiaries. A qualified beneficiary is one of the following three types of beneficiaries: (i) a permissible distributee of income or principal, (ii) a beneficiary who would be a permissible distributee of income or principal if the current present interest in the trust terminated, or (iii) a beneficiary who would receive a distribution of trust assets if the trust terminated.

- "Settlor" – is not just the person who creates the trust. A settlor is any person who contributes assets to a trust unless another person has the power to revoke the trust or withdraw the assets contributed.

- "Terms of a trust" mean the actual provisions of the trust instrument and any provisions established through a judicial proceeding.

G.S. 36C-1-104 specifies when persons, particularly persons who work in organizations (e.g., corporate trustees), are deemed to have acquired knowledge of a fact.

G.S. 36C-1-105 states that the NCUTC is primarily a default statute the provisions of which can be overridden in the terms of a trust. The UTC contained fourteen items that could not be overridden. The NCUTC deletes the following four of these leaving the settlor free to provide what he wishes with respect to such matters:

- the power of the court under UTC Section 706 to require or dispense with a bond.

- the power of the court under UTC Section 708 to adjust a trustee's compensation specified in the instrument.

- the duty of the trustee under UTC Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports. Note: G.S. 36C-8-813 has been re-written to delete this duty. Under G.S. 36C-8-813, a trustee's only duty is to give a qualified beneficiary "upon request and at reasonable times complete and accurate information as to the nature and amount of the trust property and to permit such beneficiary, or such beneficiary's representative, to inspect the subject matter of the trust and the accounts and other documents relating to the trust." This language is derived from the Restatement of the Law of Trust (2nd) which has been quoted with approval by our courts.

- the duty of the trustee under UTC Section 813(a) to respond to the request of a qualified beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust.

G.S. 36C-1-106 clarifies that the NCUTC is supplemented by the common law of trusts and principles of equity.

G.S. 36C-1-107 provides that the terms of a trust may set forth the jurisdiction or jurisdictions whose laws will govern the trust. The designation of jurisdiction in the terms of a trust will be binding unless designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. If a trust is silent as to which jurisdiction's laws will apply, the laws of the jurisdiction having the most significant relationship to the matter at issue will control.

G.S. 36C-1-108 allows a trustee to change a trust's principal place of administration without going to court if certain conditions are met. If the trustee seeks to change the trust's principal place of administration to a jurisdiction within the United States, the trustee must provide all qualified beneficiaries with sixty days advance notice. If no qualified beneficiary objects to the proposed transfer, the trustee may proceed with changing the principal place of administration of the trust. If a qualified beneficiary does object, the trustee would not be able to make the change without going to court and obtaining an order permitting the transfer. If the trustee seeks to change the trust's principal place of administration to a jurisdiction outside of the United States, the trustee cannot make the change without first securing the written consent of all qualified beneficiaries.

G.S. 36C-1-109 specifies the methods for giving notice and excludes from the NCUTC's notice requirements persons whose identity or location is unknown and not reasonably ascertainable. This section does not apply to judicial proceedings. Notice of a judicial proceeding must be given as provided in Article 2.

G.S. 36C-1-110 states when a charitable organization or person entitled to enforce a trust for animals or a noncharitable purpose may be treated as a qualified beneficiary.

G.S. 36C-1-111 allows "interested persons" (as that term is defined in this section) to enter into nonjudicial settlement agreements only in five instances dealing primarily with administrative matters. The virtual representation provisions of Article 3 apply in determining who are interested persons. A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court.

G.S. 36C-1-112 provides that North Carolina's specific rules on construction of wills also apply to the construction of trusts.

Article 2
Judicial Proceedings

Article 2 deals with judicial proceedings concerning trusts. The Trust Administration Act provided the clerk of superior court with jurisdiction in certain trust proceedings. As discussed below, this Article clarifies the jurisdiction of the clerk of superior court and the superior court trial division.

G.S. 36C-2-201 states that a court may intervene in the administration of a trust to the extent that jurisdiction is properly invoked by a party or is provided by law. This section does

not change existing law. It also reiterates existing law that a trust is not subject to judicial supervision, except as expressly provided in G.S. 36C-2-208 (relating to accountings to the clerk) and G.S. 36C-2-209 (relating to qualifications and accountings of trustees of testamentary trusts). As described below G.S. 36C-2-208 and G.S. 36C-2-209 are recodifications of existing law.

G.S. 36C-2-202 specifies that by accepting a trusteeship of a trust having its principal place of administration in this State or by moving the principal place of administration of a trust to this State, a trustee submits personally to the jurisdiction of this State in any matter involving the trust. Additionally, a beneficiary of a trust, by accepting a distribution from a trust, submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust. This section does not preclude other means of obtaining jurisdiction over a trust, beneficiary or other person receiving property from the trust. This section is consistent with existing law.

G.S. 36C-2-203 incorporates the former provisions of G.S.36A-23.1, 36A-25.1 and 36A-27 of the Trust Administration Act. The section has been revised to clarify the jurisdiction between the clerk of superior court and superior court trial division. Subsection (f) is new and provides a nonexclusive list of jurisdiction which, pursuant to existing case law, lies exclusively with the superior court division of the general court of justice, not the clerk of court. This section retains the provisions of the Trust Administration Act providing that nothing in the section affects the right of a person to file for declaratory relief under the provisions of Article 26 of Chapter. To prevent forum shopping between the clerk and superior court trial division, subsection (c) gives a party the right to remove a trust proceeding to superior court if relief under the declaratory judgment act is requested. Subsection (d) incorporates former G.S. 36A-25.1 (dealing with jurisdiction over foreign trusts). Subsection (e) incorporates former G.S. 36A-27 (appeal).

G.S. 36C-2-204 incorporates the venue provisions under the Trust Administration Act contained in G.S. 36A-24.1. Subsection (d) adds a provision of the UTC which provides that if a trust has no trustee, venue for a trust proceeding involving the appointment of a trustee is any county in this State in which a beneficiary resides, the trust is located, in the county as specified in the trust instrument or if the trust is created by will, in a county in which the decedent's estate was or is being administered.

G.S. 36C-2-205 is a revision of G.S. 36A-26.1 setting forth the manner in which a trust proceeding is commenced and other procedural requirements. As with G.S. 36A-26.1, this section incorporates the procedures for the pleading requirements that exist for special proceedings, but specifies that trust proceedings are to be docketed as an estate matter. Additionally, the rules of pleading have been clarified. This section does not allow a clerk to enter a default judgment in a trust proceeding. This section does allow for the consolidation of trust proceedings which are pending both before the clerk of superior court and a civil action pending before the superior court division of the general court of justice if they involve a common question of law or fact. To consolidate a matter, a motion must be made to the judge of the superior court trial division. Similarly, parties can join claims for relief in a civil action pending before a superior court division notwithstanding such joined claims may otherwise be within the exclusive jurisdiction of the clerk. Subsection (h) allows the clerk and superior court

judge to make such orders as appropriate to protect the interest of the parties to avoid unnecessary cost or delay in connection with any motion for consolidation or joinder of claims. Until otherwise ordered by superior court judge, the clerk of superior court's exclusive jurisdiction as set forth in subsection (a) is not stayed notwithstanding a motion to consolidate or joinder of claims.

G.S. G.S. 36C-2-206 is consistent with G.S. 36A-26.3 dealing with representation of parties. However, this section does clarify that representation provisions apply to both trust proceedings before the clerk of superior court and in the trial division of the superior court. Under current law, apparently the representation provisions of G.S. 36A-26.3 applied only to trust proceedings before the clerk.

G.S. 36C-2-207 incorporates former G.S. 36A-26.2 by providing that any interested party or person representing an interested party may waive notice by writing signed by the person or the person's attorney and filed in the proceeding.

G.S. 36C-2-208 sets forth when accountings must be filed with the clerk of superior court. It incorporates current law contained in G.S. 36A-29.

G.S. 36C-2-209 incorporates the provisions of G.S. 36A-107 and 108 regarding the qualification and accounting requirements for trustees of testamentary trusts and rules relating to the registration or indexing of testamentary trusts.

Article 3
Representation

Article 3 deals with the rather complex issues of who may represent whom in transactions or proceedings relating to a trust. The representation provisions are similar to those existing in G.S. 36A-26.3 of the Trust Administration Act relating to proceedings before the clerk of superior court.

G.S. 36C-3-301 is the introductory section, laying out the scope of the article. The representation principles of this article have numerous applications under the NCUTC. They apply for purposes of settlement of disputes, whether by a court or nonjudicially. As noted above, the provisions change existing North Carolina law in that representation applies not only to proceedings before the clerk of the superior court but also to proceedings before the superior court division of the general court of justice. They apply for the giving of required notices and for the giving of consents to certain actions.

G.S. 36C-3-302 deals with representation by the holder of a general power of appointment (both presently exercisable and testamentary general powers of appointment).

G.S. 36C-3-303 deals with representation by a fiduciary, whether of an estate, trust, conservatorship, or guardianship. The section also allows a parent without a conflict of interest to represent and bind a minor or unborn child. If a disagreement arises between parents seeking to represent the same minor child, the parent who is either a beneficiary of or a lineal descendant

of the settlor of the trust shall be entitled to represent the minor child. A person may also represent and bind such person's unborn issue.

G.S. 36C-3-304 is the virtual representation provision. It provides for representation of and the giving of a binding consent by another person having a substantially identical interest with respect to the particular issue. G.S. 36C-3-304 is broader than existing North Carolina law in that it permits a person with a substantially identical interest to represent not only minor and unborn or unascertained persons, but also incapacitated persons and persons whose identity or location is unknown.

G.S. 36C-3-305 authorizes the court to appoint a representative to represent the interests of unrepresented persons or persons for whom the court concludes the other available representation might be inadequate. This section is broader than existing North Carolina law in that a representative may be appointed to represent someone whose identity is known but cannot be located. In addition, this section authorizes the representative to act on behalf of a party without regard to whether or not a judicial proceeding is pending and to take into consideration benefits accruing generally to the party's family.

The provisions of Article 3 are subject to modification in the terms of the trust. Settlors are free to specify their own methods for providing substituted notice and obtaining substituted consent.

Article 4
Creation, Validity, Modification and Termination of a Trust

G.S. 36C-4-401 specifies the methods by which trusts are created, that is, by transfer of property, self-declaration, or exercise of a power of appointment. This section modifies the UTC and common law rule that transfer of title to property is not required where the owner of the property declares himself as trustee of the property. As modified, a valid declaration of trust may only be created by complying with state law provisions governing delivery of property by transfer of title.

G.S. 36C-4-401A recodifies G.S. 36A-100 expressly confirming that an unfunded trust is valid where the trust is the designated beneficiary of a life insurance policy, retirement benefits or a pourover provision in a will. This matter is dealt with by implication in G.S. 36C-401(1), which validates a trust by transfer of property through a disposition taking effect upon the settlor's death.

G.S. 36C-4-402 lists the requirements for creation of a trust. Whatever method to create the trust may have been employed, the settlor must have the capacity and indicate an intention to create a trust. In addition, there must be a definite beneficiary or the trust must be a charitable trust, a trust for animals (specially provided for as a kind of honorary trust), or a trust for a noncharitable purpose (also a kind of honorary trust).

G.S. 36C-4-403 addresses the validity in the enacting jurisdiction of trusts created in other jurisdictions. A trust not created by will is validly created if its creation complied with the law of specified jurisdictions in which the settlor or trustee had a significant contact.

G.S. 36C-4-404 forbids trusts for illegal or impossible purposes, and requires that a trust and its terms must be for the benefit of its beneficiaries. This section recites the permitted purposes of a charitable trust. Subsections (b) through (e) of this section incorporate existing provisions in G.S. 36A-49 and G.S. 36A-52 validating gifts for charitable purposes even though expressed in general terms.

G.S. 36C-4-405A incorporates existing North Carolina statutory provisions for enforcement of charitable gifts and charitable trusts. This section provides that a trust induced by fraud, duress or undue influence may be invalidated. North Carolina courts have consistently recognized fraud, duress and undue influence as reasons to invalidate a will; but there are no cases extending the concept to the creation of a trust. This section makes a trust induced by fraud, duress or undue influence voidable rather than void so that either a trustee or a third party dealing with the trustee would not be at risk if the trust is later determined to have been invalid unless that trustee or third party had knowledge of the grounds for the invalidity.

G.S. 36C-4-407 codifies existing North Carolina common law validating oral trusts. North Carolina courts have repeatedly recognized oral trusts, including oral trusts for realty, where the "clear and convincing evidence" standard is met. The remaining sections address what are often referred to as "honorary" trusts, although such trusts are valid and enforceable under the NCUTC.

G.S. 36C-4-408 covers a trust for the care of a domestic or pet animal. This section is based on existing provisions in G.S. 36A-147, which is more limited than the UTC, which covers any animal living during the settlor's lifetime.

G.S. 36C-4-409 allows creation of a trust for another noncharitable purpose such as maintenance of a cemetery lot.

G.S. 36C-4-410 is substantially similar to existing North Carolina law in that it establishes a non-exclusive procedure for modification and termination of an irrevocable trust.

G.S. 36C-4-411(a) is similar to G.S. 36A-123.3 in providing for termination or modification upon beneficiary consent if the settlor concurs, but is broader than existing North Carolina law in that it permits the consent of a settlor to be given by an attorney-in-fact, a guardian of the estate or a guardian of the person of the settlor. Subsections (b) and (c) are consistent with G.S. 36A-125.4 in permitting the court to modify or terminate the trust if all beneficiaries consent where the circumstances outweigh the interests in accomplishing a material purpose of the trust.

G.S. 36C-4-412 authorizes the court to modify or terminate a trust in response to unanticipated circumstances or due to ineffective administrative terms.

G.S. 36C-4-413 codifies and at the same time modifies the doctrine of cy pres, at least as applied in most states. This section authorizes the court to apply cy pres not only if the original means becomes impossible or unlawful but also if the means become impracticable or wasteful. This section also creates a presumption of general charitable intent. Upon failure of the settlor's original plan, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide. Subsection (b) is based on existing North Carolina law authorizing

the Attorney General to maintain a proceeding to enforce a charitable trust, but this subsection expands existing law in that it also authorizes a settlor, trustee, qualified beneficiary or other interested party to maintain such a proceeding.

G.S. 36C-4-414 authorizes the court to modify or terminate a trust if continued administration under the trust's existing terms would be uneconomical. This section also authorizes a trustee to terminate a trust valued at less than $50,000. These provisions are consistent with G.S. 36A-125.6.

G.S. 36C-4-415 authorizes the court to reform a trust to correct a mistake of law or fact. Reformation of inter vivos instruments as a remedy to correct a mistake of law or fact is well established. However, there is no comparable North Carolina statutory provision authorizing a court to reform an unambiguous trust to conform to the settlor's intent. G.S. 36C-4-415 would permit the introduction of parol evidence, even where contradicted by the plain meaning of the words in the instrument, to show the settlor's intent and the existence of a mistake of fact or law. However, the evidence must be clear and convincing to protect against the possibility of unreliable or fraudulent evidence.

G.S. 36A-4-416 authorizes the court to modify a trust to achieve the settlor's tax objectives.

G.S. 36A-4-417 authorizes a trustee to combine or divide a trust.

G.S. 36C-4-418 is based on G.S. 36A-125.10 which provides for trust property distributable to a minor upon termination of a trust to be distributed to the minor's guardian of the estate or general guardian, to a custodian for the benefit of the minor under the North Carolina Uniform Transfer to Minors Act, or to a trustee for the benefit of the minor under the North Carolina Custodial Trust Act.

G.S. 36C-4-419 requires the court in exercising its discretion to modify or terminate an irrevocable trust under G.S. 36C-4-411, G.S. 36C-4-412, and G.S. 36C-4-413 to consider provisions making the interest of a beneficiary inalienable, but the court is not precluded from the exercise of that discretion solely because of such provisions. This is consistent with G.S. 36A-125.8.

The requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. Nor may the settlor negate the court's ability to modify or terminate a trust as provided in G.S. 36C-4-410 through 416. However, a settlor is free to restrict or modify the trustee's power to terminate an uneconomic trust as provided in G.S. 36C-4-414, and the trustee's power to combine and divide trusts as provided in G.S. 36C-4-417.

Articles 4A
Tax Status of Charitable Trusts

Articles 4A recodifies G.S. 36A-54 and G.S. 36A-53(b) dealing with the tax status of charitable trusts that are intended to preserve the favorable tax treatment of gifts to such trusts.

Article 4B
Charitable Trust Administration Act

Article 4B recodifies the existing Charitable Trust Administration Act in Article 4A of Chapter 36A.

Article 5
Creditor's Claims, Spendthrift and Discretionary Trusts

Article 5 deals with creditor claims against the interests of a beneficiary or a settlor. The NCUTC's version of Article 5 includes certain provisions to preserve current North Carolina law with regard to discretionary trusts.

G.S. 36C-5-501 provides that a spendthrift provision in a trust restricts a beneficiary's creditor from attaching the beneficiary's interest in the trust until there is a distribution to the beneficiary. The NCUTC adds additional protection for not only spendthrift trusts, but discretionary and protective trusts as well (as they are defined in later sections of Article 5). If there is no spendthrift, discretionary, or protective trust provision, a creditor of a beneficiary may attach a distribution interest before it is distributed. G.S. 36C-5-501(b) seeks to protect a trustee who makes distributions from a spendthrift, discretionary or protective trust to or for the benefit of a beneficiary from liability for the distribution.

G.S. 36C-5-502 states that a spendthrift provision is created simply by general reference to "spendthrift trust" in the trust instrument.

G.S. 36C-5-503 differs from the UTC which provides for three "exception" creditors – creditors who could attach a beneficiary's interest in a trust even if protected by a spendthrift provision. These exception creditors were: (1) child support orders; (2) spousal maintenance orders; and (3) a creditor for services provided to protect the beneficiary's interest in the trust. However, the only exception creditor to a spendthrift trust allowed in this section is for a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance.

G.S. 36C-5-504 seeks to preserve much of G.S. 36A-115 because of the concern of some practitioners that the UTC might eliminate the availability of discretionary trusts for asset protection and Medicaid planning. The definition of a "discretionary trust interest" in G.S. 36C-5-504(a) includes both the definition of a "discretionary" trust interest from G.S. 36A-115(b)(1), and the definition of a "support" trust from G.S. 36A-115(b)(2).

G.S. 36C-5-504(c) states clearly that a creditor of a beneficiary cannot compel a distribution from a discretionary trust even if the trustee has abused its discretion. As with spendthrift trusts, the only exception creditor will be a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance. However, a child's claim against a discretionary trust interest will be limited to those cases where a trustee has not complied with a standard of distribution or has abused its discretion. Under 36C-8-814(a), a trustee will abuse its discretion if the trustee acts with bad faith, acts dishonestly, acts with an improper even

though not a dishonest motive, or if the trustee fails to use the trustee's judgment in accordance with the terms and purposes of the trust and the interests of the beneficiaries. This language, which differs significantly from the UTC, was taken from the opinion in *Lineback v. Stout*, 79 N.C. App. 292, 339 S.E. 2d 103 (1986).

G.S. 36C-5-505 provides that creditors of the settlor of a revocable trust may attach the corpus of the trust. In addition, a creditor may reach the maximum amount that may be distributed to the settlor in an irrevocable trust.

G.S. 36C-5-506 adds a definition of "mandatory distribution" to prevent this section from being interpreted to require distributions from discretionary trusts as defined in G.S. § 36C-5-504(a)(2).

G.S. 36C-5-507 provides that trust property is exempt from the personal obligations of the trustee.

G.S. 36C-5-508 adds to the UTC provisions regarding a protective trust, similar to G.S. 36A-115(b)(3), as an additional way to preserve assets from creditors.

Article 6
Revocable Trusts

G.S. 36C-6-601 provides that the capacity of a person to establish and fund a revocable trust is the same as that applicable to a will. North Carolina law has no present standard of capacity for trusts.

G.S. 36C-6-602 provides that all trusts are presumed revocable unless the instrument creating the trust expressly provides to the contrary. This reverses the present North Carolina common law rule. This section also states that the settlor's suitably authorized attorney-in-fact or guardian may amend the revocable trust but not in such a fashion as to change the settlor's existing estate plan.

G.S. 36C-6-603 provides that while the settlor of a revocable trust is living, the beneficiaries' rights are subject to the control of the settlor or the settlor's agents. With certain exceptions, however, persons with powers of withdrawal from a trust are deemed to have the authority of the settlor to the extent of that portion of the trust subject to the power.

G.S. 36C-6-604 states that the validity of the formerly revocable trust that becomes irrevocable when the settlor dies cannot be challenged upon the elapsing of three years after the decedent's death. This is similar to the present statute of limitations governing caveats to wills.

Article 7
Office of Trustee

Article 7 deals with acceptance of the trust by the trustee, bond for the trustee, decision-making by co-trustees, and like matters.

G.S. 36C-7-701 contains provisions regarding accepting or declining the trusteeship that are substantially the same as existing North Carolina law.

G.S. 36C-7-702 retains North Carolina's existing law regarding circumstances where a trustee shall be required to give bond. This differs from the UTC, which would allow the court to require a bond even where the governing instrument directs otherwise. In addition, North Carolina law, as incorporated in this section, gives more guidance regarding the amount of the bond, where one is required.

G.S. 36C-7-703 provides for general rules applicable to co-trustees that are similar to existing North Carolina law. However, this section goes further to protect a co-trustee who does not join in an action so long as there is no intentional misconduct or improper personal benefit to one or more of the trustees approving the action.

G.S. 36C-7-704 contains provisions regarding a vacancy in the trusteeship and appointment of a successor which are similar to existing North Carolina law. This section adds a provision that is consistent with existing North Carolina law clarifying the powers and duties of a successor trustee.

G.S. 36C-7-705, unlike existing North Carolina law, permits a trustee to resign without court approval by giving notice to qualified beneficiaries, even where the governing instrument does not address trustee resignation.

G.S. 36C-7-706 provides for removal of a trustee on several grounds based on malfeasance or on a change of circumstances if not inconsistent with a material purpose. This section did not adopt a UTC provision allowing removal at the request of beneficiaries.

G.S. 36C-7-707 offers an additional remedy not in the UTC in cases where the former trustee does not execute the proper documentation to transfer title to the trust property to the successor in that it gives the clerk of superior court authority to order the former trustee to execute such documents or to transfer title.

G.S. 36C-7-708 dealing with trustee's fees refers to the provisions of Article 5A of Chapter 32 for determination of fees of trustees where the fees are not specified in the instrument.

G.S. 36C-7-709 dealing with trustee expenses refers to Article 5A of Chapter 32 regarding reimbursement of a trustee's expenses out of trust property.

Article 8
Duties and Powers of Trustee

Article 8 articulates the basic fiduciary obligations of a trustee, except for those articulated in the Uniform Prudent Investor Act.

Many of the sections in Article 8 reflect duties that are not seen as an extension of current North Carolina law because the duties are ones that have been applicable under common law,

current statutes or the prudent person rule. In some cases, the North Carolina Uniform Prudent Investor Act made these duties specifically applicable to a trustee's investment and management duties and Article 8 clarifies that these duties apply to all activities of the trustee.

The sections referred to by the foregoing are: G.S. 36C-8-801 regarding the duty to administer the trust, G.S. 36C-8-803 regarding impartiality, G.S. 36C-8- 804 regarding prudent administration, G.S. 36C-8-805 regarding costs of administration, G.S. 36C-8- 806 regarding the trustee's skills, G.S. 36C-8-807 regarding delegation by trustee, G.S. 36C-8-809 regarding control and protection of trust property, G.S. 36C-8-810 regarding recordkeeping and identification of trust property, G.S. 36C-8-811 regarding enforcement and defense of claims, G.S. 36C-8- 812 regarding collecting trust property and G.S. 36C-8-817 regarding distribution upon termination.

G.S. 36C-8-802 speaks to the basic duty of loyalty that requires the trustee to manage the trust solely for the beneficiaries and to avoid conflicts of interest between trustee's interests and beneficiaries' interests. This section represents a modernization of the current North Carolina statutes dealing with the duty of loyalty and conflicts of interest. Under G.S. 36C-8-802, any conflict of interest is waivable by a beneficiary. This section also allows the application of virtual representation in obtaining consent from beneficiaries for a conflict of interest transaction.

G.S. 36C-8-808 introduces the concept of a trust protector or advisor being named with the power to direct the trustee in certain respects and naming a person who would have the power to modify or terminate the trust.

G.S. 36C-8-813 restates the common law duty to provide the beneficiaries with information regarding the trust and its property. Consistent with existing North Carolina law, a settlor may specifically limit what information is given to the beneficiaries.

G.S. 36C-8-814, as discussed in the summary of Article 5, sets out the standard for determining when a trustee has abused its discretion. This section also updates tax savings provisions of existing law precluding a trustee from exercising discretion to make distributions from a trust for his or her own benefit that are not limited to an ascertainable standard.

G.S. 36C-8-815 broadens the automatic powers that apply by default to every trustee when the instrument does not contain powers.

G.S. 36C-8-816 grants to all trustees specific powers similar to the powers listed in G.S. 36A-136 and that can currently be incorporated in an instrument under G.S. 32-27. The powers are broader than those listed in G.S. 36A-136 in that a trustee may sell real property without court order even though the power is not expressed in the trust instrument. In addition, the trustee can borrow funds for any purpose and not just to pay taxes and expenses.

Article 9
Uniform Prudent Investor Act

Article 9 reenacts the North Carolina Prudent Investor Act, Article 15 of Chapter 36A, as a part of the UTC.

G.S. 36C-9-901 recodifies former section 36A-161 regarding the applicability of the prudent investor rule recodifies.

G.S. 36C-9-902 recodifies former 36A-162 regarding the standard of care, portfolio strategy and risk and return objectives.

G.S. 36C-9-903 recodifies former section 36A-163 regarding diversification.

G.S. 36C-9-904 recodifies former section 36A-164 regarding duties at the inception of the trusteeship.

G.S. 36C-9-905 recodifies former section 36A-168 regarding compliance with the prudent investor rule.

G.S. 36C-9-906 recodifies former section 36A-170 regarding the effect on charitable remainder trusts.

G.S. 36C-9-907 recodifies former section 36A-172 referring to the short title

Other sections of the North Carolina Prudent Investor Act were repealed because, as noted in the summary of Article 8, Article 8 contains substantially similar provisions applicable to the administration of trusts in general and not just to investment duties. These provisions include G.S. 36C-8-802(a) regarding the duty of loyalty, G.S. 36C-8-803 regarding impartiality, G.S. 36C-8-805 regarding investment costs, and G.S. 36C-8-807 regarding delegation of management functions. Similarly G.S. 36C-11-1103 makes the language of former 36A-173 regarding severability applicable to any provision of the NCUTC, and G.S. 36C-11-1106 covers the effective date provisions formerly provided by 36A-171.

Article 10
Liability of Trustees and Rights of Persons Dealing with Trustee

Article 10 provides for remedies when there is breach of an obligation by the trustee, who and under what circumstances there is a right of action by anybody, and a trustee's immunity from personal liability when doing business with others on behalf of the trust.

G.S. 36C-10-1001 provides that a breach of duty to a beneficiary invokes a court's equity powers to compel performance, suspend the trustee, remove the trustee, and enter other orders to remedy a breach of trust. As provided under existing North Carolina law, the court also may relieve from liability, either prospectively or retrospectively, a trustee who acts honestly and reasonably.

G.S. 36C-10-1002 requires damages for breach of trust to restore the trust's position as if breach had not occurred, or to provide the trust with profits made from the breach if that amount is greater.

G.S. 36C-10-1003 provides that the trustee's is responsible to account for all profits, but does not insure that the trust will be profitable.

G.S. 36C-10-1004 dealing with attorneys' fees refers to existing North Carolina statutes governing the award of attorneys' fees.

G.S. 36C-10-1005 providing for limitations of actions against the trustee refers to existing North Carolina statutes governing limitation of actions, except that no action may be brought more than five years after (a) the removal, resignation, or death of trustee, (b) termination of the beneficiary's interest in the trust, or (c) termination of the trust.

G.S. 36C-10-1006 provides that a trustee is not liable for good faith reliance on a trust instrument.

G.S. 36C-10-1007 provides that a trustee is not liable for lack of knowledge of an event affecting trust administration if the trustee exercises reasonable care to learn of such events.

G.S. 36C-10-1008 precludes a trust instrument from exculpating the trustee for bad faith or reckless indifference.

G.S. 36C-10-1009 allows a beneficiary to consent or ratify a breach, or release trustee from liability for a breach, provided the trustee did not obtain the consent, ratification or release by improper conduct and the beneficiary is aware of the material facts.

G.S. 36C-10-1010 absolves a trustee from personal liability to third parties for contracts on behalf of the trust so long as the fiduciary status of the trustee is disclosed. A trustee is not liable for a tort action against the trust unless the trustee also has personal liability. A trustee is entitled to indemnity from the trust on an equitable basis.

G.S. 36C-10-1011 allows a trustee to hold an interest in a general partnership as trustee without personal liability.

G.S. 36C-10-1012 provides that a third party dealing with a trust is not liable for any breach of the trustee's obligations to the beneficiaries resulting from the transaction, unless the third party has knowledge of the actual breach by the trustee.

G.S. 36C-10-1013 permits a trustee to furnish a third party dealing with the trust a certification of its important provisions in lieu of the actual trust document.

Article 11
Miscellaneous Provisions

G.S. 36C-11-1101 states that in construing the provisions of the NCUTC consideration may be given to the need to promote uniformity of the law with respect to its subject matter among states that enact the UTC.

G.S. 36C-11-1102 provides for electronic records and signatures.

G.S. 36C-11-1103 contains a severability provision if any portion of the Code is held to be invalid.

G.S. 36C-11-1104 states that the NCUTC is to take effect on January 1, 2006.

G.S. 36C-11-1105 states existing relationships to which the NCUTC applies when it takes effect.

NORTH CAROLINA UNIFORM TRUST CODE
DISPOSITION OF PROVISIONS OF CHAPTER 36A

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
Article 1 §§36A-1 through 12	**Investment and Deposit of Trust Funds**	Recodified as Article 6 of Chapter 32	
Article 2 §§36A-13 through 21	**Removal of Fiduciary Funds**	Repealed	§§36C-1-108(b) through (e) adopt §§108(b) through (e) of the UTC which provides for transfer of a trust's principal place of administration without court order. §36C-2-203(a)(7) gives the clerk exclusive jurisdiction with respect to transfer of a trust's principal place of administration. §35A-1281 provides for the transfer of a ward's funds.
Article 3 §36A-22.1	**Trust Administration** Definitions	Repealed	§§36C-1-102 and 103 adopt §§102 and 103 of the UTC which have substantially similar provisions.
§36A-23.1	Court: jurisdiction of trusts	Repealed	§36C-2-203 has substantially the same provisions with modifications adding (i) proceedings in which the clerk's jurisdiction is exclusive and (ii) exceptions to the exclusive jurisdiction of the clerk.
§36A-24.1	Trust proceedings; venue	Recodified as §§36C-2-204 (a), (b) and (c)	
§36A-25.1	Trust proceedings; dismissal of matters relating to foreign trusts	Recodified as §36C-2-203(d)	
§36A-26.1	Trust proceedings; necessary parties	Repealed	§36C-2-205 has similar provisions but with substantial additions relating to procedure, including commencement of contested and uncontested proceedings, pleadings, extensions of time, application of Rules of Civil Procedure and consolidation.
§36A-26.2	Waiver of notice	Recodified as §36C-2-207	
§36A-26.3	When parties represented by others	Repealed	§§36C-3-301 through 305 adopt §§301 through 305 of the UTC which have similar rules relating to representation of the parties and which are applicable to trust proceedings before a judge as well as those before the clerk.
§36A-27	Appeal	Recodified as §36C-2-203(e)	

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
§36A-29	Accounting to the clerk	Recodified as §§36C-2-208(a) and (b)	
§36A-31	When bond required	Recodified as §36C-7-702	
§36A-32	Rights and duties devolve on successor	Recodified as §36C-7-704(f)	
§36A-33	Appointment of successor trustee on clerk's own motion	Repealed	§§36C-7-704(c) and (e) adopt §§704(c) and (e) of the UTC which have provisions relating to the appointment of a successor trustee by the court.
§36A-36	Appointment of special trustee	Repealed	§36C-7-704(e) adopts §704(e) of the UTC which has substantially similar provisions.
§36A-37	Consolidation, merger, reorganization, reincorporation, or transfer of assets and liabilities by a corporate trustee	Repealed	§53-17 has substantially similar provisions.
§36A-39	Powers of co-trustees	Repealed	§36A-7-703(b) adopts §703(b) of the UTC which was modified to include language in 36A-39.
§36A-40	Vesting of title	Repealed	§36C-7-707(b) adopts §707(b) of the UTC which has provisions relating to delivery of property to the successor trustee. It was modified to include language in 36A-40 requiring the former trustee to transfer title to assets.
Article 4 §§36A-47	**Charitable Trusts** Trustees to file accounts; Exceptions	Repealed	§36C-2-208 has provisions relating to trust accounts, including charitable trust accounts.
§36A-48	Actions for account; court to enforce trust	Repealed	§36C-2-208(c) has similar provisions relating to accounts of charitable trusts.
§36A-49	Not void for indefiniteness; title in trustees; vacancies	Repealed	§36C-4-405 contains similar provisions to the effect that a charitable trust is not invalid because the charitable purposes are in general terms. §36C-7-704(d) contains provisions relating to trustee vacancies in charitable trusts.
§36A-50	Trusts created in other states valid	Repealed	§36C-4-403 adopts §403 of the UTC containing similar provisions relating to trusts created in other jurisdictions.

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
§36A-51	Application of 36A-50	Repealed	Not necessary to bring forward.
§36A-52	Gifts, etc. for religious, educational, charitable or benevolent uses or purposes	Repealed	§§36C-4-405(b), (c) and (d) contain similar provisions to the effect that charitable gifts are not invalid because the charitable purposes are in general terms. §36C-4-405(e) contains provisions relating to enforcement of charitable trusts which are similar to those in 36A-52(c)..
§36A-53	Charitable Trust Administration Act	Repealed	§36C-413 contains similar provisions as those in 36A-53(a) relating to the cy pres doctrine. §36C-4A-2 recodifies §36A-53(b) relating to reformation of a charitable remainder trust.
§36A-54	Charitable trusts tax exempt status	Recodified as Article 4A of 36C	
Article 4A §§36A-59.1 through 59.7	**Charitable Remainder Trusts Administration Act**	Recodified as §§36C-4B-1 through 6 of Article 4B of Chapter 36C	
Article 4B §§36A-59.10 through 59.20	**North Carolina Community Trust Act**	Recodified as Chapter 36D	
Article 5 §36A-60	**Uniform Trusts Act** Definitions	Repealed	Definitions no longer necessary in light of repeal of entire Uniform Trust Act.
§36A-61	Bank account to pay special debts	Repealed	Not necessary to bring forward.
§36A-62	Loan of trust funds	Repealed	§§36C-8-802(b) and (c) adopt §§802(b) and (c) of the UTC relating to transactions involving a conflict of interest which may be valid if, among other things, they are consented to by the beneficiaries. This is a change in N.C. law which allowed loans to a trustee only if approved by the court. See §§36A-79 and 80.
§36A-63	Funds held by a corporation exercising fiduciary powers awaiting investment or distribution	Recodified in Article 14 of Chapter 53	

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
§36A-64	Loan to trust	Repealed	§36C-8-802(i)(5) adopts §802(h)(5) of the UTC which is a provision similar to §36A-64 authorizing a trustee to make a loan to the trust if fair to the beneficiaries.
§36A-65	Trustee loaning from one trust to another trust	Repealed	§36C-8-802(i)(3) adopts §802(h)(3) of the UTC relating to transactions between trusts.
§36A-66	Trustee buying from or selling to self	Repealed	§§36C-8-802(b) and (c) adopt §§802(b) and (c) of the UTC relating to sales involving a conflict of interest which may be valid if, among other things, they are consented to by the beneficiaries. This is a change from N.C. law which allowed sales to the trustee only if approved by the court. See §§36A-79 and 36A-80.
§36A-66.1	Investments in securities by banks or trust companies	Recodified in Article 14 of Chapter 53	
§36A-66.2	Trustee investment in mutual funds advised by trustee	Repealed	§36C-8-802(f) adopts §802(f) of the UTC which has substantially similar provisions.
§36A-67	Corporate trustee buying its own stock	Repealed	§36C-8-802(b) adopts §802(b) of the Code relating to trustee conflict of interest which should apply to trustee buying its own stock.
§36A-68	Trustee selling assets from one trust to another trust	Repealed	§36C-8-802(i)(3) adopts §802(h)(3) of the UTC relating to transactions between trusts.
§36A-69	Voting stock	Repealed	§36C-8-802(h) adopts §802(g) of the UTC relating to voting of stock.
§36A-70	Trustees holding stock or other securities in name of nominee	Repealed	§36C-8-816(7)(b) authorizes a trustee generally to hold a security in the name of a nominee without disclosure of the trust. Remaining provisions of §36A-70 not necessary to bring forward.
§36A-71	Bank and trust company assets kept separate, records of securities	Repealed	§36C-8-810(b) adopts §810(b) of the UTC requiring a trustee to keep assets separate.
§36A-72	Powers attached to office	Repealed	Not necessary to bring forward.
§36A-73	Powers exercisable by one of more trustees	Repealed	§36C-7-703 adopts §703 of the UTC concerning actions by co-trustees. It has provisions similar to 36A-73(d) requiring majority rule. §36C-7-703(i) recodifies 36A-73(c) relating to voting of stock by co-trustee.

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
§36A-74	Contracts of trustee	Repealed	§§36C-10-1010(a) and (c) adopt §§1010(a) and (c) of the UTC concerning personal liability of the trustee in making contracts and the right to sue the trustee in the trustee's representative capacity.
§36A-75	Exoneration or reimbursement for torts	Repealed	§36C-10-1010(d) contains similar provisions relating to indemnity of the trustee.
§36A-76	Tort liability of trust estate	Repealed	§§36C-10-1010(b) and (c) adopt §§1010(b) and (c) of the UTC relating to personal liability of the trustee for torts and the right to sue the trustee in the trustee's representative capacity.
§37A-77	Withdrawals from mingled trust funds	Repealed	Not necessary to bring forward.
§36A-78	Power of settlor	Repealed	§36C-8-802(b)(1) adopts §802(b)(1) of the UTC permitting transactions involving a conflict of interest if authorized by the terms of the trust.
§36A-79	Power of beneficiary	Repealed	§36C-8-802(b)(4) adopts §802(b)(4) of the UTC relating to the power of the beneficiary to consent to transactions involving a conflict of interest. See also §36C-10-1009 which adopts §1009 of the UTC relating to powers of beneficiary to release the trustee from a breach of trust.
§36A-80	Power of the court	Repealed	§36C-10-1001(c) contains substantially similar provisions. In addition, §36C-8-802(b)(2) permits transactions involving a conflict of interest if authorized by the court.
§36A-81	Liabilities for violation of Article	Repealed	§36C-10-1001 adopts §1001 of the UTC relating to remedies for breach of trust which include the remedies provided in §36A-81.
§36A-82	Uniformity of interpretation	Repealed	
§36A-83	Short title	Repealed	
§36A-84	Time of taking effect	Repealed	
Article 6 §36A-90 through 94	**Uniform Common Trust Fund Act**	Recodified in Article 14 of Chapter 53	

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
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	Recodified as 36C-4-401A	The comments to §36C-4-401 (§401 of the UTC) state that the designation of a trustee as beneficiary of a life insurance policy or employee benefit plan "has long been understood to be a property interest sufficient to create a trust." The recodification of §36A-100 as 36C-4-401A makes this clear.
§36A-101	Applicability and construction of Article	Repealed	Not necessary to bring forward.
Article 8	**Testamentary Trustees**		
§36A-107	Trustees in wills to qualify and file inventories and accounts	Recodified as 36C-2-209(a) and (b)	
§36A-108	Registration and indexing	Recodified as 36C-2-209(c)	
Article 9	**Alienability of Beneficial Interest; Spendthrift trust**		
§36A-115	Alienability of beneficiary's interest; spendthrift trusts	Repealed	§§36C-5-501 through 507 adopt §§501 through 507 of the UTC relating to spendthrift trusts with modifications which keep intact the inalienability of interests in discretionary, support and protective trusts as provided in §36A-115.
Article 10	**Trust Accounts in Financial Institutions**		
§36A-120	Payable on Death accounts in financial institution	Repealed	Not necessary to bring forward.
Article 11A	**Modification and Termination of Irrevocable Trusts**		
§36A-125.1	Definitions	Repealed	§36C-1-103 adopts §103 of the UTC which has substantially similar definitions.
§36A-125.2	Modification or termination where settlor is sole beneficiary	Repealed	§36C-4-411(a) adopts §411(a) of the UTC which covers modification and termination when the settlor is sole beneficiary.

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
§36A-125.3	Modification or termination by consent of settlor and beneficiaries	Repealed	§§36C-4-411(a) and (e) adopt §§411(a) and (e) of the UTC which have substantially similar provisions.
§36A-125.4	Modification or termination by consent of beneficiaries	Repealed	§36C-4-411(b) adopts §411(b) of the UTC which has substantially similar provisions as modified in 36C-4-411(c) to add existing language in §36A-125.4 granting court power to modify or terminate a trust even if inconsistent with a material purpose of the trust.
§36A-125.5	Provisions relating to consent of beneficiaries	Repealed	§36C-3-305(c) adopts §305(c) of the UTC which has substantially the same provisions as the second sentence of 36A-125.5(1) although the former has broader application. The first sentence of 36A-125.5(1) and 36A-125.5(2) and (3) were not necessary to bring forward.
§36A-125.6	Modification or termination of a small trust	Repealed	§36C-4-414 adopts §414 of the UTC which has substantially similar provisions as modified to add existing language in 36A-125.6.
§36A-125.7	Modification or termination because of changed circumstances	Repealed	§36C-4-412 adopts §412 of the UTC which has substantially similar provisions.
§36A-125.8	Inalienability of the beneficiary's interest	Repealed	§36C-4-411(d) contains substantially similar provisions concerning the effect of provisions making the beneficiary's interest in a trust inalienable.
§36A-125.9	Tax consequences	Repealed	Not necessary to bring forward.
§36A-125.10	Distribution to minors or incompetents	Recodified as the second sentence of §36C-4-418	
§36A-125.11	Procedure	Repealed	§36C-4-410(b) adopts §410(b) of the UTC which has provisions substantially similar to §36A-125.11(b) but omits reference in §36A-125.11(a) to actions under the Declaratory Judgment Act.
§36A-125.12	Exclusiveness of remedy	Repealed	Not necessary to bring forward.

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
Article 12	**Marital Deduction Trusts**		
§36A-130	Marital deduction trusts	§36A-130(a) is recodified as §36A-8-814(e). §36A-130(b) is repealed.	§36A-130(b) is no longer necessary in light of current IRS regulations.
Article 13	**Powers of Trustees**		
§36A-135	Applicability	Repealed	§36C-1-101 adopts §101 of the UTC which has similar rules regarding applicability.
§36A-136	Powers of a trustee	Repealed	§36C-8-816 adopts §816 of the UTC which contains similar powers of the trustee but with some modifications and additions. The most significant change grants the trustee the power to sell or dispose of real property without a judicial sale even in the absence of specific authority to sell or dispose of the real property granted in the trust agreement. Compare §36A-8-816(2) and (3) with §36A-136(8).
§36A-137	Disposition of personal property without court order	Repealed	Not necessary since 36C-8-816 (2) and (3) grants the power to dispose of personal property without court order.
§36A-138	Disposition of personal property by court order	Repealed	§36C-8-816(30) contains substantially similar provisions.
§36A-139	Disposition of real property without court order	Repealed	Not necessary since 36C-8-816 (2) and (3) grants the power to dispose of real property without court order.
§36A-140	Disposition of real property by court order	Repealed	§36C-8-816(30) contains substantially similar provisions.
§36A-141	Distribution of assets of inoperative trust	Repealed	§36C-8-816(31) contains substantially similar provisions.
Article 14	**Honorary Trusts; Trusts for Pets; Trusts for Cemetery Lots**		
§36A-145	Honorary trusts	Repealed	§36C-4-409(a) adopts §409(1) of the UTC which has substantially similar provisions.
§36A-146	Trusts for cemetery lots	Recodified as §36C-4-409(d)	

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
§36A-147	Trusts for pets	Recodified as §36C-4-408	
§36A-148	Termination of small trusts	Repealed	Not necessary to bring forward.
Article 15	North Carolina Uniform Prudent Investor Act		
§36A-161	Prudent investor rule; applicability	Recodified as §36C-9-901	
§36A-162	Standard of care; portfolio strategy; risk and return objectives	Recodified as §36C-9-902	
§36A-163	Diversification	Recodified as §36C-9-903	
§36A-164	Duties at inception of trusteeship	Recodified as §36C-9-904	
§36A-165	Loyalty	Repealed	§36C-8-802(a) adopts §802(a) of the UTC containing substantially similar provisions applicable to the administration of trusts in general, including investment of trust assets.
§36A-166	Impartiality	Repealed	§36C-8-803 adopts §803 of the UTC containing substantially similar provisions applicable to the administration of trusts in general, including investment of trust assets.
§36A-167	Investment costs	Repealed	§36C-8-804 adopts §804 of the UTC containing substantially similar provisions applicable to the costs of administration of trusts in general, including investment costs.
§36A-168	Reviewing compliance	Recodified as §36C-9-905	
§36A-169	Delegation of investment and management functions	Repealed	§36C-8-804 adopts §804 of the UTC containing substantially similar provisions applicable to the administration of trusts in general, including delegation of investment functions.
§36A-170	Effect on charitable remainder trusts	Recodified as 36C-9-906	
§36A-171	Application to existing trusts	Repealed	§36C-11-1105 adopts §1105 of the Code containing substantially similar provisions applicable to the UTC in general, including the Prudent Investor Act.
§36A-172	Short title	Recodified as §36C-9-907	
§36A-173	Severability	Repealed	§36C-11-1103 adopts§1103 of the UTC which has identical language applicable to any provision of the UTC, including the Prudent Investor Act.

NORTH CAROLINA UNIFORM TRUST CODE
DISPOSITION OF PROVISIONS OF CHAPTER 32

CHAPTER 32	DESCRIPTION	DISPOSITION	COMMENTS
Article 1 §§32-1 through 13	**Uniform Fiduciaries Act**	No change	
Article 3 §§32-25 through 27	**Powers of Fiduciaries**	No change	
§32-28	Appointment of Ancillary Trustee	Repealed	§36-8-816(20) adopts §816(20) of the UTC relating to appointment of ancillary trustee with modifications.
Article 4 §32-34	**Restrictions on Exercise of Power for Fiduciary's Benefit**	Repealed	§§36-8-814(b) and (c) adopt §§814(b) and (c) of the UTC relating to restrictions on exercise of powers for trustee-beneficiary's benefit.
Article 6 §§32-53 through 62	**Compensation of Trustees and Other Fiduciaries**	No change	
Article 7	Investment and Deposit of Trust Funds	New Article	Article 1 of Chapter 36A is recodified as Article 6 of Chapter 32.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 1087

Short Title:	Limited Driving Privilege for DWLR.	(Public)
Sponsors:	Senator Kerr.	
Referred to:	Judiciary II.	

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO ALLOW CERTAIN PERSONS WITH A REVOKED DRIVERS LICENSE TO OBTAIN A LIMITED DRIVING PRIVILEGE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-179.3(b) reads as rewritten:

"(b) Eligibility.

(1) A person convicted of the offense of impaired driving under G.S. 20-138.1 is eligible for a limited driving privilege if:

a. At the time of the offense he held either a valid driver's license or a license that had been expired for less than one year;

b. At the time of the offense he had not within the preceding seven years been convicted of an offense involving impaired driving;

c. Punishment Level Three, Four, or Five was imposed for the offense of impaired driving;

d. Subsequent to the offense he has not been convicted of, or had an unresolved charge lodged against him for, an offense involving impaired driving; and

e. The person has obtained and filed with the court a substance abuse assessment of the type required by G.S. 20-17.6 for the restoration of a drivers license.

A person whose North Carolina driver's license is revoked because of a conviction in another jurisdiction substantially similar to impaired driving under G.S. 20-138.1 is eligible for a limited driving privilege if he would be eligible for it had the conviction occurred in North Carolina. Eligibility for a limited driving privilege following a revocation under G.S. 20-16.2(d) is governed by G.S. 20-16.2(e1).

(2) Any person whose licensing privileges are forfeited pursuant to G.S. 15A-1331A is eligible for a limited driving privilege if the court finds that at the time of the forfeiture, the person held either a valid

drivers license or a drivers license that had been expired for less than one year and:

a. The person is supporting existing dependents or must have a drivers license to be gainfully employed; or

b. The person has an existing dependent who requires serious medical treatment and the defendant is the only person able to provide transportation to the dependent to the health care facility where the dependent can receive the needed medical treatment.

The limited driving privilege granted under this subdivision must restrict the person to essential driving related to the purposes listed above, and any driving that is not related to those purposes is unlawful even though done at times and upon routes that may be authorized by the privilege.

(3) Except where other conditions or restrictions are provided by law for a particular motor vehicle offense, any person whose licensing privileges have been revoked for a motor vehicle offense other than an impaired driving offense is eligible for a limited driving privilege if the court finds that the person is supporting existing dependents or must have a drivers license to be gainfully employed, and the court finds good cause for granting a limited driving privilege. The limited driving privilege granted under this section may, in the court's discretion, authorize the person to drive for essential purposes related to any of the activities in subsection (a) of this section."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 1087
PROPOSED COMMITTEE SUBSTITUTE S1087-CSRC-17 [v.1]

4/18/2005 6:07:12 PM

Short Title: Limited Driving Privilege for DWLR. (Public)

Sponsors:

Referred to:

March 24, 2005

A BILL TO BE ENTITLED

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a. At the time of the offense he held either a valid driver's license or a license that had been expired for less than one year;

b. At the time of the offense he had not within the preceding seven years been convicted of an offense involving impaired driving;

c. Punishment Level Three, Four, or Five was imposed for the offense of impaired driving;

d. Subsequent to the offense he has not been convicted of, or had an unresolved charge lodged against him for, an offense involving impaired driving; and

e. The person has obtained and filed with the court a substance abuse assessment of the type required by G.S. 20-17.6 for the restoration of a drivers license.

A person whose North Carolina driver's license is revoked because of a conviction in another jurisdiction substantially similar to impaired driving under G.S. 20-138.1 is eligible for a limited driving privilege if he would be eligible for it had the conviction occurred in North Carolina. Eligibility for a limited driving privilege following a revocation under G.S. 20-16.2(d) is governed by G.S. 20-16.2(e1).

(2) Any person whose licensing privileges are forfeited pursuant to G.S. 15A-1331A is eligible for a limited driving privilege if the court

finds that at the time of the forfeiture, the person held either a valid drivers license or a drivers license that had been expired for less than one year and:

a. The person is supporting existing dependents or must have a drivers license to be gainfully employed; or

b. The person has an existing dependent who requires serious medical treatment and the defendant is the only person able to provide transportation to the dependent to the health care facility where the dependent can receive the needed medical treatment.

The limited driving privilege granted under this subdivision must restrict the person to essential driving related to the purposes listed above, and any driving that is not related to those purposes is unlawful even though done at times and upon routes that may be authorized by the privilege.

(3) Except as otherwise provided by law for a particular motor vehicle offense, any person whose licensing privileges have been revoked for a motor vehicle offense other than an impaired driving offense is eligible for a limited driving privilege if the court finds that the person is supporting existing dependents or must have a drivers license to be gainfully employed. The limited driving privilege granted under this subdivision may, in the court's discretion, authorize the person to drive for essential purposes related to any of the activities in subsection (a) of this section. This subdivision shall not apply to a person whose license has been revoked for an impaired driving offense and who has subsequently been found guilty of violating G.S. 20-28."

SECTION 2. This act becomes effective October 1, 2005..

SENATE BILL 1087:
Limited Driving Privilege for DWLR

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	April 19, 2005
Introduced by:	Sen. Kerr	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	First Edition S1087-CSRC-17[v.1]		

SUMMARY: ***Senate Bill 1087 would allow a person whose drivers license has been revoked for a motor vehicle offense to obtain limited driving privileges if the court finds there is good cause and the person is supporting existing dependents or must have a drivers license to be gainfully employed. The limited privileges would not be available if the license had been revoked for an impaired driving offense or if a limited driving privilege was available under another provision of the law.***

The Proposed Committee Substitute prohibits a person whose license was revoked for an impaired driving offense, who subsequently drives and is found guilty of driving while license revoked, from being eligible for limited driving privileges under this new provision.

The act would become effective October 1, 2005.

CURRENT LAW: G.S. 20-16 lists a number of offenses for which the Division of Motor Vehicles (DMV) may revoke a person's driver's license. These include the accumulation of 12 or more drivers license points in a three year period, fraudulent use of a license, any offense committed in another state that if committed in this State would be grounds for suspension or revocation, and certain speeding violations[1]. G.S. 20-17 lists a number of offenses for which the DMV is required to revoke a person's driver's license. These include manslaughter resulting from the operation of a motor vehicle, impaired driving under G.S. 20-138.1 or 138.2[2], failure to stop and render aid, two convictions of reckless driving is a 12 month period, and conviction of assault with a motor vehicle. G.S. 50-13.12 and G.S. 110-142.2 both authorize a court to revoke a driver's license of a person who is delinquent with their child support payments.

Unless otherwise provided by law, the period of revocation is for one year[3]. A person is convicted of driving while license revoked is guilty of a Class 1 misdemeanor and the license is revoked for an additional year. The license is revoked for 2 years upon a second offense, and permanently revoked upon conviction of a third offense.[4]

G.S. 20-16.1 provides a process by which a court may grant limited driving privileges to a person who has been convicted of certain speeding violations. G.S. 20-179.3 authorizes a court to grant limited driving privileges to a person who has been convicted of impaired driving and who at the time of the offense:

- Held a valid license or whose license had been expired for less than one year.
- Had not been convicted of an impaired driving offense within seven years of the current conviction.

---

[1] See also G.S. 20-16.1.
[2] G.S. 20-16.2 requires the revocation of a license for refusing to take a breath test.
[3] G.S. 20-19(f).
[4] G.S. 20-28(a).

- Received a Level Three, Four, or Five punishment.
- Had no charges of impaired driving after the offense.
- Obtains a substance abuse assessment.

The limited privilege may be used to drive to employment, maintain a household, obtain education, participate in court-ordered treatment or assessment, community service related to probation, and emergency medical care.

BILL ANALYSIS: Senate Bill 1087 would allow a court to grant limited driving privileges to a person who has been convicted of a motor vehicle offense. The provision would not apply if the person's license had been revoked for an impaired driving offense or if another provision of law would allow for limited driving privileges. The bill does not define what a "motor vehicle offense" would be, and the term is not defined elsewhere in statute. However, it appears that at least the following offenses would be covered:

- Accumulation within a 3-year period of 12 or more drivers license points or eight or more points in the three-year period immediately following the reinstatement of a license which has been suspended or revoked because of a conviction for one or more traffic offenses.
- Unlawful or fraudulent use of such license or a learner's permit.
- Commission of an offense in another state, which if committed in this State would be grounds for suspension or revocation.
- Failure to stop and render aid in violation of G.S. 20-166(a) or (b).
- Perjury or the making of a false affidavit or statement under oath to the DMV relating to the ownership of motor vehicles.
- Conviction, within a period of 12 months, of (i) two charges of reckless driving, (ii) two charges of aggressive driving, or (iii) one or more charges of reckless driving and one or more charges of aggressive driving.
- Conviction upon one charge of aggressive driving or reckless driving while engaged in the illegal transportation of intoxicants for the purpose of sale.
- Conviction of using a false or fictitious name or giving a false or fictitious address in any application for a driver's license, or learner's permit, or any renewal or duplicate thereof.
- Death by vehicle as defined in G.S. 20-141.4.
- A second or subsequent conviction of transporting an open container of alcoholic beverage under G.S. 20-138.7.

The limited privilege could be granted at the discretion of the court for good cause and the person is supporting existing dependents or must have a driver's license to be gainfully employed. The privilege could be used to drive to employment, maintain a household, obtain education, participate in court-ordered treatment or assessment, community service related to probation, and emergency medical care.

EFFECTIVE DATE: The act would become effective October 1, 2005

S1087e1-SMRC-CSRC-17[v.1]

Principal Clerk ____
Reading Clerk ____

TIME CHANGE

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	April 21, 2005	9:30 to 11:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 686	Meth. Lab Prevention Act.	Senator Dalton
SB 559	Expunction/Convictions of Nonviolent Crimes.	Senator Kinnaird
SB 846	Modernize Bail Bondsman Registration.	Senator Swindell IV
SB 797	Bail Bonds/Forfeitures & Remittances.	Senator Thomas
SB 775	Child Support Reforms.	Senator Snow, Jr.

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk ____
Reading Clerk ____

Please notice time change

SENATE
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AND
BILL SPONSOR NOTICE

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Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, April 21, 2005, 9:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 686	Meth. Lab Prevention Act.	Senator Dalton
SB 559	Expunction/Convictions of Nonviolent Crimes.	Senator Kinnaird
SB 846	Modernize Bail Bondsman Registration.	Senator Swindell IV
SB 797	Bail Bonds/Forfeitures & Remittances.	Senator Thomas
SB 775	Child Support Reforms.	Senator Snow, Jr.

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

April 21, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on April 21, 2005, with eighteen members present. Senate Hartsell introduced the pages and thanked them for serving.

SB 686 (Meth. Lab Prevention Act.) Senator Hartsell asked for a motion to adopt the Proposed Committee Substitute for the purpose of discussion. Senator Apodaca so moved, all voted and the motion carried. Senator Dalton explained the bill. Questions by Senators Forrester, Bingham, Allran, Webster, and Jacumin were answered by Senators Dalton, Apodaca and Snow along with Ann Hamlin, representing the North Carolina State Bureau of Investigation and Gregg McCloud representing the office of the North Carolina Attorney General. Mr. Andy Ellen spoke on problems he perceived with the bill. Senator Apodaca moved for a favorable report of the Proposed Committee Substitute with a referral to Appropriations. All voted and the motion carried.

SB 559 (Expunction/Convictions of Nonviolent Crimes.) Senator Hartsell recognized Senator Kinnaird to explain the bill. Senator Kinnaird moved for adoption of the Proposed Committee Substitute for the purpose of discussion. All voted and the motion carried. Senator Kinnaird asked Ben Popkin to explain changes in the Proposed Committee Substitute. Senator Kinnaird then spoke on the bill. Senator Weinstein was recognized to speak on the bill. Questions by Senators Kerr, Kinnaird, Forrester, Bingham, Webster and Goodall were answered by Ben Popkin, Staff Attorney, Senator Hartsell and Pete Powell representing the Administrative Office of the Courts. Mr. Powell also spoke on the bill. Senator Webster moved to amend the bill and Senator Kinnaird accepted the amendment and then moved for its adoption. All voted and the motion carried. Senator Kinnaird then moved for a favorable report as amended, rolled into a new Committee Substitute with a referral to Finance. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, April 26, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **559** Expunction/Convictions of Nonviolent Crimes.

Draft Number:	PCS15233
Sequential Referral:	None
Recommended Referral:	Finance
Long Title Amended:	Yes

S.B. **686** Meth. Lab Prevention Act.

Draft Number:	PCS75296
Sequential Referral:	None
Recommended Referral:	Appropriations/Base Budget
Long Title Amended:	Yes

TOTAL REPORTED: 2

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____

S. B. No. 559

COMMITTEE SUBSTITUTE _____

DATE 4/21/05

Amendment No. _____
(to be filled in by Principal Clerk)

Rep.)
Sen.) Webster

moves to amend the bill on page 1, line 28

( ) WHICH CHANGES THE TITLE

by ~~in Section 1. of the bill~~

by deleting the phrase "or any"

and substituting "period of active sentence, period of post release supervision, or period of probation has been completed,"

and on page 2, line 1,

by deleting the phrase "period of probation".

SIGNED _____

ADOPTED X FAILED _____ TABLED _____

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 4/21/05

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John Bowdich	POA
Amy Hobbs	Hobbs & G
Sheila McKenna	NC DOJ
Bill Holmes	AP
Jerry Rattley	SBI
Van Shaw	SBI
John Mathis	[illegible]
Troy Page	NC Sentencing Commission
Pamela Best	POC
[illegible]	[illegible]
Lu Hodge	NCCH
Bill Scoggin	

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 4/21/05

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Tracey Early	News 14 Carolina
Mark Gregory	Kerr Drug
Andy Ellen	NCPHA
Fran Preston	NCMA
Mark Benson	Capitol Group
[illegible]	AG
Sean Chamberlain	SBI
Melissa Lovell	NC DOJ
Erin Kinney	NC Conservation Network
Rick Zechini	NC Assoc. of Realtors
[illegible]	NCLM
[illegible]	Schering-Plough

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 4/21/05

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
ANDREW HOLTON	Sen. Garrou's office
S Kevin McClees	McClees Consulting Inc.
Suzanne Fabic	[illegible]
Franklin Folger	NCDOL
Roz Savitt	NCCCR
John Snow	T.I.C.
Doug Heron	NC Bar Assoc
Brian Lewis	Covenant w NC's Children
Ron Kaylan	Kaylan Law Firm
Rob Schofield	NC Justice Ctr
[illegible]	ACLU
Stan Clive	DPH

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 4/21/05

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
[signature]	[signature]
[signature]	[signature]

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 686

Short Title:	Meth. Lab Prevention Act.	(Public)
Sponsors:	Senators Dalton, Snow; Albertson, Apodaca, Atwater, Berger of Franklin, Bingham, Blake, Boseman, Brown, Dannelly, Dorsett, Hagan, Hartsell, Holloman, Jacumin, Kerr, Lucas, Malone, Nesbitt, Purcell, Rand, Swindell, Thomas, and Weinstein.	
Referred to:	Judiciary II.	

March 21, 2005

A BILL TO BE ENTITLED

AN ACT TO ADD PSEUDOEPHEDRINE, A CRITICAL INGREDIENT IN THE MANUFACTURE OF THE ILLEGAL DRUG METHAMPHETAMINE, TO SCHEDULE V OF THE CONTROLLED SUBSTANCES LIST, TO APPROPRIATE FUNDS TO THE DEPARTMENT OF JUSTICE TO COMBAT THE MANUFACTURE OF METHAMPHETAMINE, TO MAKE THE MANUFACTURE OF METHAMPHETAMINE IN A DWELLING THAT IS ONE OF FOUR OR MORE CONTIGUOUS DWELLINGS AN AGGRAVATING FACTOR, AND TO AUTHORIZE THE LEGISLATIVE RESEARCH COMMISSION TO STUDY THE ISSUES RELATING TO THE ABUSE OF METHAMPHETAMINE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 90-93 reads as rewritten:

"**§ 90-93. Schedule V controlled substances.**

(a) This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a low potential for abuse relative to the substances listed in Schedule IV of this Article; currently accepted medical use in the United States; and limited physical or psychological dependence relative to the substances listed in Schedule IV of this Article. The following controlled substances are included in this schedule:

(1) Any compound, mixture or preparation containing any of the following limited quantities of narcotic drugs or salts thereof, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or

preparation valuable medicinal qualities other than those possessed by the narcotic alone:

a. Not more than 200 milligrams of codeine or any of its salts per 100 milliliters or per 100 grams.
b. Not more than 100 milligrams of dihydrocodeine or any of its salts per 100 milliliters or per 100 grams.
c. Not more than 100 milligrams of ethylmorphine or any of its salts per 100 milliliters or per 100 grams.
d. Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.
e. Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.
f. Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

(2) Repealed by Session Laws 1985, c. 172, s. 9.

(3) Stimulants. – Unless specifically exempted or excluded or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers and salts of isomers:

a. Repealed by Session Laws 1993, c. 319, s. 7.
b. Pyrovalerone.

(4) Any compound, mixture, or preparation containing any detectable quantity of pseudoephedrine base, its salts or optical isomers, or salts of optical isomers; however, this does not include compounds, mixtures, or preparations that are in liquid, liquid capsule, or gel capsule form if pseudoephedrine is not the only active ingredient.

(b) A Schedule V substance may be sold at retail without a prescription only by a registered pharmacist and no other person, agent or employee may sell a Schedule V substance even if under the direct supervision of a pharmacist.

(c) Notwithstanding the provisions of G.S. 90-93(b), after the pharmacist has fulfilled the responsibilities required of him in this Article, the actual cash transaction, credit transaction, or delivery of a Schedule V substance, may be completed by a nonpharmacist. A pharmacist may refuse to sell a Schedule V substance until he is satisfied that the product is being obtained for medicinal purposes only.

(d) A Schedule V substance may be sold at retail without a prescription only to a person at least 18 years of age. The pharmacist must require every retail purchaser of a Schedule V substance to furnish suitable identification, including proof of age when appropriate, in order to purchase a Schedule V substance. If the Schedule V substance is pseudoephedrine, then the retail purchaser must provide a photo identification showing the date of birth of the person. The name and address obtained from such identification shall be entered in the record of disposition to consumers.

(e) No person shall purchase, receive, or otherwise acquire more than nine grams of any mixture, product, or preparation containing the controlled substance described in

subdivision (a)(4) of this section within any 30-day period; however, this limit does not apply if the controlled substance is dispensed pursuant to a valid prescription.

(f) The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, by rule, may exempt other products from this Schedule that the Commission finds are not used in the illegal manufacture of methamphetamine or other dangerous controlled substances. A manufacturer of a drug product may apply for removal of the product from this Schedule if the product is determined by the Commission to have been formulated in such a way as to effectively prevent the conversion of the active ingredient into methamphetamine."

SECTION 2. There is appropriated from the General Fund to the Department of Justice the sum of eight hundred thirty-six thousand six hundred dollars ($836,000) for the 2005-2006 fiscal year to combat the illegal manufacture of methamphetamine. The funds appropriated by this act shall be used to create 13 new positions in the State Bureau of Investigation to combat illegal methamphetamine lab operations in North Carolina. These new positions shall include the following: six SBI drug chemists, two drug chemistry technicians, four SBI field agents, and one special agent supervisor who would oversee a coordinated statewide methamphetamine elimination strategy. These new positions are established beginning January 1, 2006.

SECTION 3. G.S. 15A-1340.16(d) is amended by adding a new subdivision to read:

"(16b) The offense is the manufacture of methamphetamine and was committed in a dwelling that is one of four or more contiguous dwellings."

SECTION 4.(a) The Legislative Research Commission may study the issues regarding the abuse of methamphetamine precursors used to make methamphetamine and any other issues that are relevant to that topic. In conducting the study, the Commission shall also consider how to address the problems presented by the abuse of methamphetamine, including educational and training programs that focus on curbing the use of methamphetamine in North Carolina. The Commission may also consider any other issues relevant to the study.

SECTION 4.(b) If the study authorized by this section is undertaken, the Legislative Research Commission shall appoint at a minimum the members to the study committee as provided by this subsection.

(1) The President Pro Tempore of the Senate shall appoint the following members:

a. One representative from the Office of the Attorney General.

b. One member of the Senate as appointed by the President Pro Tempore of the Senate.

c. One representative from the North Carolina Association of County Directors of Social Services.

d. One representative from the North Carolina Association of Community Pharmacists.

e. One representative from the Consumer Healthcare Products Association.

(2) The Speaker of the House of Representatives shall appoint the following members:

a. One member of the House of Representatives.

b. One representative from the Office of the Governor.

c. One representative from the North Carolina Retail Merchants Association.

d. One representative from the District Attorney's Association of North Carolina.

e. One representative from the North Carolina Sheriffs' Association, Inc.

SECTION 4.(c) The Legislative Research Commission may make an interim report to the 2005 General Assembly, Regular Session 2006, and shall make its final report to the 2007 General Assembly.

SECTION 4.(d) The Legislative Services Officer shall allocate funds appropriated to the General Assembly for the expenditures of the Legislative Services Commission in conducting this study.

SECTION 5. Sections 1 and 3 of this act become effective December 1, 2005, and apply to offenses committed on or after that date. The remainder of this act becomes effective July 1, 2005.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 686
PROPOSED COMMITTEE SUBSTITUTE S686-CSRH-8 [v.2]

4/20/2005 6:45:00 PM

Short Title: Meth. Lab Prevention Act. (Public)

Sponsors:

Referred to:

March 21, 2005

A BILL TO BE ENTITLED

AN ACT TO ADD PSEUDOEPHEDRINE, A CRITICAL INGREDIENT IN THE MANUFACTURE OF THE ILLEGAL DRUG METHAMPHETAMINE, TO SCHEDULE V OF THE CONTROLLED SUBSTANCES LIST; TO MAKE THE MANUFACTURE OF METHAMPHETAMINE IN A DWELLING THAT IS ONE OF FOUR OR MORE CONTIGUOUS DWELLINGS AN AGGRAVATING FACTOR; TO AUTHORIZE THE LEGISLATIVE RESEARCH COMMISSION TO STUDY THE ISSUES RELATING TO THE ABUSE OF METHAMPHETAMINE; AND TO MAKE TECHNICAL CHANGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 90-93 reads as rewritten:

"**§ 90-93. Schedule V controlled substances.**

(a) This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a low potential for abuse relative to the substances listed in Schedule IV of this Article; currently accepted medical use in the United States; and limited physical or psychological dependence relative to the substances listed in Schedule IV of this Article. The following controlled substances are included in this schedule:

(1) Any compound, mixture or preparation containing any of the following limited quantities of narcotic drugs or salts thereof, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic alone:

a. Not more than 200 milligrams of codeine or any of its salts per 100 milliliters or per 100 grams.

b. Not more than 100 milligrams of dihydrocodeine or any of its salts per 100 milliliters or per 100 grams.
c. Not more than 100 milligrams of ethylmorphine or any of its salts per 100 milliliters or per 100 grams.
d. Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.
e. Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.
f. Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

(2) Repealed by Session Laws 1985, c. 172, s. 9.

(3) ~~Stimulants.~~ Unless specifically exempted or excluded or unless listed in another schedule, any material, compound, mixture, or preparation ~~which~~ that contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers and salts of isomers:
a. Repealed by Session Laws 1993, c. 319, s. 7.
b. Pyrovalerone.

(4) Any compound, mixture, or preparation containing any detectable quantity of pseudoephedrine base, its salts or isomers, or salts of isomers; however, this does not include compounds, mixtures, or preparations that are in liquid, liquid capsule, or gel capsule form unless pseudoephedrine is the only active ingredient.

(b) A Schedule V substance may be sold at retail without a prescription only by a registered pharmacist and no other person, agent or employee may sell a Schedule V substance even if under the direct supervision of a pharmacist.

(c) Notwithstanding ~~the provisions of~~ G.S. 90-93(b), after the pharmacist has fulfilled the responsibilities required of him in this Article, a nonpharmacist may complete the actual cash transaction, credit transaction, or delivery of a Schedule V ~~substance, may be completed by a nonpharmacist.~~ substance. A pharmacist may refuse to sell a Schedule V substance until ~~he~~ the pharmacist is satisfied that the product is being obtained for medicinal purposes only.

(d) A Schedule V substance may be sold at retail without a prescription only to a person at least 18 years of age. The pharmacist must require every retail purchaser of a Schedule V substance to furnish suitable identification, including proof of age when appropriate, in order to purchase a Schedule V substance. If the Schedule V substance is pseudoephedrine, then the retail purchaser must provide a photo identification showing the date of birth of the person. The name and address obtained from ~~such~~ the identification shall be entered in the record of disposition to consumers.

(e) No person shall purchase, receive, or otherwise acquire more than nine grams of any mixture, product, or preparation containing the controlled substance described in subdivision (a)(4) of this section within any 30-day period; however, this limit does not apply if the controlled substance is dispensed under a valid prescription.

(f) Notwithstanding this section or any other law, a multi-state, wholesale distributor of the controlled substance described in subdivision (a)(4) of this section may continue to warehouse or store this substance in the same manner as the distributor warehoused or stored the substance before the effective date of this subsection.

(g) The Commission, by rule, may exempt other products from this Schedule that the Commission finds are not used in the illegal manufacture of methamphetamine or other dangerous controlled substances. A manufacturer of a drug product may apply for removal of the product from this Schedule if the Commission determines the product has been formulated in a way that effectively prevents the conversion of the active ingredient into methamphetamine."

SECTION 2. G.S. 15A-1340.16(d) is amended by adding a new subdivision to read:

"(16b) The offense is the manufacture of methamphetamine and was committed in a dwelling that is one of four or more contiguous dwellings."

SECTION 3.(a) The Legislative Research Commission may study the issues regarding the abuse of methamphetamine precursors used to make methamphetamine and any other issues that are relevant to that topic. In conducting the study, the Commission shall also consider how to address the problems presented by the abuse of methamphetamine, including educational and training programs that focus on curbing the use of methamphetamine in North Carolina. The Commission may also consider any other issues relevant to the study.

SECTION 3.(b) If the study authorized by this section is undertaken, the Legislative Research Commission shall appoint at a minimum the members to the study committee as provided by this subsection.

(1) The President Pro Tempore of the Senate shall appoint the following members:
   a. One representative from the Office of the Attorney General.
   b. One member of the Senate as appointed by the President Pro Tempore of the Senate.
   c. One representative from the North Carolina Association of County Directors of Social Services.
   d. One representative from the North Carolina Association of Community Pharmacists.
   e. One representative from the Consumer Healthcare Products Association.

(2) The Speaker of the House of Representatives shall appoint the following members:
   a. One member of the House of Representatives.
   b. One representative from the Office of the Governor.
   c. One representative from the North Carolina Retail Merchants Association.
   d. One representative from the District Attorney's Association of North Carolina.

e. One representative from the North Carolina Sheriffs' Association, Inc.

SECTION 3.(c) The Legislative Research Commission may make an interim report to the 2005 General Assembly, Regular Session 2006, and shall make its final report to the 2007 General Assembly.

SECTION 3.(d) The Legislative Services Officer shall allocate funds appropriated to the General Assembly for the expenditures of the Legislative Services Commission in conducting this study.

SECTION 4. Sections 1 and 2 of this act become effective December 1, 2005, and apply to offenses committed on or after that date. The remainder of this act becomes effective July 1, 2005.

Senate Bill 686:
Meth. Lab Prevention Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	April 21, 2005
Introduced by:	Sen. Dalton	**Summary by:**	Robin Johnson
Version:	First Edition S686-CSRH-8[v.2]		Committee Counsel

SUMMARY: ***The PCS would (i) add pseudoephedrine, an ingredient used to manufacture methamphetamine, to Schedule V of the Controlled Substance Act, (ii) make the manufacture of methamphetamine in a dwelling that is one of four or more contiguous dwellings an aggravating factor, (iii) authorize the Legislative Research Commission (LRC) to study issues related to methamphetamine abuse, and (iv) make technical changes.***

The PCS would allow multi-state, wholesale distributors to continue to warehouse or store pseudoephedrine in the manner they currently do. The PCS also makes technical changes.

BILL ANALYSIS:

ADD PSEUDOEPHEDRINE TO SCHEDULE V OF THE CONTROLLED SUBSTANCE ACT (Section 1)

CURRENT LAW: The Controlled Substance Act[1] categorizes by Schedules the different types of controlled substances subject to the Act. Schedule I controlled substances are those that have (i) a high potential for abuse, (ii) no currently accepted medical use in the United States, or (iii) a lack of accepted safety for use in treatment under medical supervision. Schedule V controlled substances have (i) a low potential for abuse relative to those listed in Schedules I-IV, (ii) currently accepted medical use in the United States, and (iii) limited physical or psychological dependence relative to the substances listed in Schedules III or IV. Schedule V substances include narcotics and stimulants. (Methamphetamine is a Schedule II substance.)

Schedule V substances may be sold at retail without a prescription only by a registered pharmacist, only for a medical purpose, and only to someone at least 18 years old. A nonpharmacist may complete the actual cash transaction, credit transaction, or delivery of a Schedule V substance. The pharmacist must require every retail purchaser of a Schedule V substance to furnish suitable identification. The purchaser's name and address must be entered in the record of disposition to consumers. This is not a public record, but may be disclosed at the pharmacist's discretion.[2]

Currently sold retail without a prescription, pseudoephedrine is a decongestant that comes as a regular tablet and capsule, extended-release (long-acting) tablet and capsule, liquid, and drops for children to take by mouth. Pseudoephedrine may be used to manufacture methamphetamine.

Unlawful possession of a Schedule V substance is a Class 2 misdemeanor. Assuming no prior convictions, the presumptive minimum sentence for a person convicted of a Class 2 misdemeanor is 1-30 days community punishment.

[1] Article 5 of Chapter 90 of the General Statutes.
[2] G.S. 90-85.36(c).

To unlawfully manufacture, deliver, or possess with intent to manufacture, sell or deliver, a Class V substance is a Class I felony. Assuming no prior convictions, the presumptive minimum sentence for a person convicted of a Class I felony is 4-6 months community punishment.

To unlawfully sell a Schedule V substance is a Class H felony, punishable by an absolute minimum of four months community service and an absolute maximum of 30 months active, depending on the defendant's prior record.

ANALYSIS: Section 1 of the bill would amend G.S. 90-93(a) to make the following changes:

- Add to the list of Schedule V substances pseudoephedrine when it is in the form of (i) a tablet or capsule or (ii) a liquid, liquid capsule, or gel capsule where it is the only active ingredient.
- Require the retail purchaser of pseudoephedrine to provide a photo identification showing the purchaser's birth date.
- Limit the purchase, receipt, or acquisition of pseudoephedrine without a prescription to nine grams within any 30-day period.
- Allow multi-state wholesale distributors to continue to warehouse or store pseudoephedrine in the same manner as they currently do.
- Authorize the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services (Commission), by rule, to exempt other products from Schedule V that the Commission finds are not used in the illegal manufacture of methamphetamine or other dangerous controlled substances. Drug manufacturers may apply for removal of a product from this Schedule if the Commission determines it has been formulated so that the active ingredient cannot be converted into methamphetamine.

Section 1 would become effective December 1, 2005, and would apply to offenses committed on or after that date.

AGGRAVATING FACTOR AND CONTIGUOUS DWELLINGS (Section 2)

CURRENT LAW: A court must consider evidence of aggravating or mitigating factors in felony sentencing.[3] If the court finds that aggravating or mitigating factors exist, it may depart from the presumptive ranges of sentences specified in the felony sentencing chart. The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists. The defense bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

The unlawful manufacture of methamphetamine is a Class C felony. Assuming no prior convictions, the presumptive minimum sentence for a person convicted of a Class C felony is 58-73 months active punishment.

ANALYSIS: Section 2 of Senate Bill 686 would amend G.S. 15A-1340.16(d) by adding a new subdivision (16b) so that, in a case involving the manufacture of methamphetamine, if the offense was committed in a dwelling that is one of four or more contiguous dwellings, this would be an aggravating factor to be considered in sentencing.

Section 2 would become effective December 1, 2005, and would apply to offenses committed on or after that date.

[3] G.S. 15A-1340.16.

LRC STUDY METHAMPHETAMINE ABUSE ISSUES (Section 3)

Section 3 of Senate Bill 686 would authorize the LRC to study issues concerning the abuse of methamphetamine precursors used to make methamphetamine. If the LRC opts to undertake this study, the committee would consist of 10 members, five appointed by the President Pro Tempore of the Senate and five appointed by the Speaker of the House of Representatives. The LRC would report to the 2006 or 2007 Session, or both.

This section would become effective July 1, 2005.

BACKGROUND: According to the Office of National Drug Control Policy (ONDCP), Methamphetamine is a growing threat to North Carolina. It. can be manufactured easily in clandestine laboratories (meth labs) using ingredients purchased in local stores. Over-the-counter cold medicines containing ephedrine or pseudoephedrine and other materials are "cooked" in meth labs to make methamphetamine.

Meth labs can be portable and so are easily dismantled, stored, or moved. This portability helps methamphetamine manufacturers avoid law enforcement authorities. Meth labs have been found in many different types of locations, including apartments, hotel rooms, rented storage spaces, and trucks. Methamphetamine labs have been known to be boobytrapped and lab operators are often well armed.

In 2004, 322 meth labs were found in North Carolina. (In 2001, only 34 were found.)

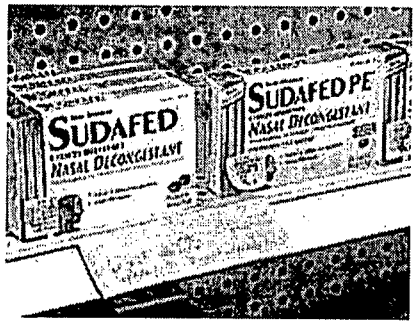
WRAL.com

Target Stores To Restrict Cold Drugs To Tackle Meth

Company Says Changes Coming In 2-3 Months

POSTED: 12:48 pm EDT April 18, 2005

ST. PAUL, Minn. -- Target stores nationwide are going to pull cold medicines from regular shelves and sell them only from pharmacy counters.



The restrictions apply to products that contain pseudoephedrine, an active ingredient used to make methamphetamine.

The changes will take effect within two to three months. Stores that don't have pharmacies won't sell the cold medicine products.

According to a news release from the company, Target is the first national retailer to voluntarily decide to place pseudoephedrine-based cough, cold and allergy products behind the pharmacy counter.

A number of states have enacted or are considering restrictions on the sale of cold medicine. In Oklahoma, officials have said its law has helped reduce meth lab seizures more than 80 percent.

"As a national retailer, it is becoming increasingly difficult to meet the requirements of each individual city, county and state law," said Mary Kelly, a Target official, in a news release. "Our new policy will allow us to be more consistent and will serve the interests of the communities in which we operate by helping to prevent manufacturing of this debilitating substance."

Target operates 1,330 stores in 47 states.

SURVEY

To combat the production of methamphetamine, do you think it's a good idea for states to limit sales of cold medicine containing pseudoephedrine?

- Yes, it's a good way to curb the problem.
- No, the restrictions go too far.
- No, the restrictions won't work.
- I don't know.

Vote

Results | Disclaimer

Previous Stories:

- March 23, 2005: State Anti-Meth Laws Restrict Cold Medicine Sales
- January 14, 2005: Stores Limit How Much Cold Medicine You Can Buy

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FOOD MARKETING INSTITUTE

NCL 100+ YEARS CONSUMER ADVOCACY National Consumers LEAGUE

FOR IMMEDIATE RELEASE

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Harris Interactive Survey of Nearly 3,000 U.S. Adults:

To Fight Meth Abuse, Consumers Can Live With Some Limits — But Don't Put My Cold Medicines Behind the Pharmacy Counter

First Poll of Its Kind Questions Limits Imposed or Considered by Congress, Many States

WASHINGTON, DC — April 4, 2005 — Putting the cough, cold and allergy products used to illegally make methamphetamine behind a pharmacy counter would create a hardship for more than four in 10 consumers (44 percent), according to a national survey conducted by Harris Interactive® released today. The survey of 2,900 U.S. adult consumers — the first to gauge their views on sales restrictions enacted or proposed in more than 30 states and Congress — was commissioned by the National Consumers League (NCL) and Food Marketing Institute (FMI).

Reinforcing this view, 62 percent do not believe restricting sales of these products to pharmacies is a reasonable measure to control meth production.

Consumers are far more receptive to less severe restrictions to combat the meth problem. Large majorities regard the following solutions as "somewhat" or "very reasonable":

- Putting such cough, cold and allergy products behind "a counter, not a pharmacy counter" — 71 percent.
- Putting them in a locked display case — 62 percent.
- Limiting the quantity of such products that people can buy — 84 percent.
- Restricting the age of purchasers — 74 percent.
- Requiring buyers to sign a log book and show a photo ID — 59 percent.

About 250 products on the market today contain the ingredient pseudoephedrine, which meth users cook down and extract to produce the illegal drug methamphetamine. According to law enforcement estimates, small-time abusers obtain such products from retailers to produce about 20 percent of the meth available in the U.S. The remaining 80 percent is made in large quantities by superlabs in Mexico, Canada and elsewhere.

To combat small-time production, Arkansas, Iowa, Kentucky, Oklahoma and Tennessee enacted laws restricting sales of some or all of these products to pharmacies, in some cases by classifying them as Schedule V drugs under the Controlled Substances Act. Oregon issued a regulation. Congress is considering the Combat Meth Act (S. 103, H.R. 314), which would place such products on Schedule V nationally, triggering a requirement in 17 states that these common over-the-counter drugs be dispensed only through a doctor's prescription.

"If sales of products containing pseudoephedrine must be restricted, the burden should not be borne by everyday consumers who depend on these products," said NCL President Linda Golodner. "This poll shows that many consumers are willing to live with some restrictions — but many also do not feel that restricting sales to pharmacies is reasonable. This may be because of pharmacies' limited hours and the fact they are not widely accessible in many low-income neighborhoods and rural areas."

"Many supermarkets are already helping law enforcement curb meth production by limiting sales of these products, by putting them behind counters or in glass cases," said FMI President and CEO Tim Hammonds. "We are training clerks to look out for suspicious purchases and to alert police, following the national Meth Watch program." (http://www.methwatch.com)

- more -

Both FMI and NCL support a federal law that would place the kinds of sales restrictions that most consumers support. Such a law would curb small-time meth production nationwide and free up law enforcement to focus on the superlabs and gangs that account for 80 percent of the problem. Both also believe that enforcement efforts and increased penalties should be aimed at stopping criminals, not law-abiding consumers.

Common Cough, Cold and Allergy Products Are Widely Used

The poll found that more than three-quarters of consumers (77 percent) have purchased such products in the past year. Greater proportions of those with children in the household (86 percent) and particularly mothers with children (90 percent) have purchased these drugs.

Among those who buy the products, half (50 percent) say it is "very important" to be able to do so "any time of the day." This figure increases in households with children (56 percent) and among mothers with children (61 percent).

Four-fifths of the respondents who purchase these drugs rely on them to relieve the symptoms of their colds and allergies, including 33 percent who rely on them "a lot."

Where Consumers Buy the Products

Consumers purchase the drugs at multiple outlets, led by discount stores (71 percent), drug stores (64 percent) and supermarkets (49 percent). Restricting sales to pharmacies would severely limit their availability in supermarkets since only 9,900 of the nation's 33,800 supermarkets have such departments.

Familiarity With the Meth Issue

Half the population (51 percent) is either very or somewhat familiar with the problem with meth abuse. Awareness is higher in the West (59 percent) and among families with children aged 13-17 (62 percent).

Methodology

The poll was conducted online from March 24-28. Based on responses by 2,906 U.S. adults, it has a sampling error of +/- 1.8 percent at the 95 percent confidence level. The data were weighted to be representative of the total U.S. adult population on the basis of region, age within gender, education, household income, race/ethnicity and propensity to be online.

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The National Consumers League, founded in 1899, is America's pioneer consumer organization. Its mission is to protect and promote social and economic justice for consumers and workers in the United States and abroad. For more information, visit www.nclnet.org.

Food Marketing Institute (FMI) conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of $340 billion — three-quarters of all food retail store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from 50 countries. For more information, visit www.fmi.org.

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GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 559

Short Title:	Expunction/Convictions of Nonviolent Crimes.	(Public)
Sponsors:	Senators Kinnaird; Cowell, Graham, Holloman, Lucas, Nesbitt, Shaw, and Weinstein.	
Referred to:	Judiciary II.	

March 15, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR THE EXPUNCTION OF CONVICTIONS FOR CERTAIN NONVIOLENT CRIMINAL OFFENSES.

The General Assembly of North Carolina enacts:

SECTION 1. Article 5 of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-149. Expunction of records for conviction of certain nonviolent criminal offenses if there are no subsequent criminal convictions for at least 15 years.**

(a) For purposes of this section, the term "nonviolent criminal offense" means a misdemeanor, Class H felony, or Class I felony; however, the term does not include any of the following:

(1) An offense that includes assault as an essential element of the offense.

(2) An offense for which the offender must register under Article 27A of Chapter 14 of the General Statutes.

(3) An offense that includes the possession or use of a firearm as an essential element of the offense.

(4) An offense for which the offender was armed with or used a firearm.

(5) An offense that is trafficking under G.S. 90-95(h).

(b) Whenever a person who has not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States, the laws of this State, or any other state, pleads guilty to or is guilty of a nonviolent criminal offense, the person may file a petition in the court where he or she was convicted for expunction of the nonviolent criminal offense from the person's criminal record. The petition cannot be filed earlier than 15 years after the date of the conviction or any period of probation, whichever occurs later. The petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he or she has been of good behavior for the 15-year period since the date of conviction of the nonviolent criminal offense in question and has not been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state.

(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which the petitioner lives and that the person's character and reputation are good.

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the nonviolent criminal offense in question or during the 15-year period following that conviction.

(5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner are outstanding.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented may call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the 15-year period that the judge deems desirable.

(c) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for 15 years from the date of conviction of the nonviolent criminal offense in question and the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner, then the court shall order that the petitioner be restored, in the contemplation of the law, to the status the petitioner occupied before the arrest or indictment or information for the nonviolent criminal offense. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his or her failure to recite or acknowledge such arrest, indictment, information, trial, or response to any inquiry made of the person for any purpose.

(d) The court shall also order that the conviction for the nonviolent criminal offense be expunged from the records of the court and direct all law enforcement agencies bearing record of the same to expunge their records of the conviction. The

clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief, or head of any other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation.

(e) Any person entitled to an expunction under this section may also apply to the court for an order expunging DNA records when the person's DNA record or profile has been included in the State DNA Database, and the person's DNA sample is stored in the State DNA Databank. A copy of the application for expunction of the DNA record or DNA sample shall be served on the district attorney for the judicial district in which the charges of the nonviolent criminal offense were brought not less than 20 days prior to the date of the hearing on the application. The order of expunction shall include the name and address of the defendant and the defendant's attorney and shall direct the SBI to send a letter documenting expunction as required by subsection (f) of this section.

(f) Upon receiving an order of expunction entered pursuant to subsection (c) of this section, the SBI shall purge the DNA record and all other identifying information from the State DNA Database and the DNA sample stored in the State DNA Databank covered by the order, except that the order shall not apply to other offenses committed by the individual that qualify for inclusion in the State DNA Database and the State DNA Databank. A letter documenting expunction of the DNA record and destruction of the DNA sample shall be sent by the SBI to the defendant and the defendant's attorney at the address specified by the court in the order of expunction.

(g) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his or her county, file with the Administrative Office of the Courts, the name of those persons granted expunctions under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the name of persons granted expunctions. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expunction.

(h) A person who files a petition for expunction of a criminal record under this section must pay the clerk of superior court a fee of sixty-five dollars ($65.00) at the time the petition is filed. Fees collected under this subsection shall be deposited in the General Fund. This subsection does not apply to petitions filed by an indigent."

SECTION 2. This act becomes effective December 1, 2005.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 559
PROPOSED COMMITTEE SUBSTITUTE S559-CSSS-7 [v.4]

4/18/2005 4:37:38 PM

Short Title: Expunction/Convictions of Nonviolent Crimes. (Public)

Sponsors:

Referred to:

March 15, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR THE EXPUNCTION OF CONVICTIONS FOR CERTAIN NONVIOLENT CRIMINAL OFFENSES, TO MAKE CONFORMING CHANGES TO EXISTING EXPUNCTION STATUTES, AND TO REQUIRE STATE AND NATIONAL CRIMINAL RECORD CHECKS WHEN EXPUNGING RECORDS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 5 of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-149. Expunction of records for conviction of certain nonviolent criminal offenses if there are no subsequent criminal convictions for at least 10 years.**

(a) For purposes of this section, the term 'nonviolent criminal offense' means a misdemeanor, Class H felony, or Class I felony; however, the term does not include any of the following:

(1) An offense that includes assault as an essential element of the offense.

(2) An offense for which the offender must register under Article 27A of Chapter 14 of the General Statutes.

(3) An offense that includes the possession or use of a firearm as an essential element of the offense.

(4) An offense for which the offender was armed with or used a firearm.

(5) An offense that is trafficking under G.S. 90-95(h).

(b) Whenever a person who has not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States, the laws of this State, or any other state, pleads guilty to or is guilty of a nonviolent criminal offense, the person may file a petition in the court where he or she was convicted for expunction of the nonviolent criminal offense from the person's criminal record. The petition cannot be filed earlier than 10 years after the date of the conviction or any

period of probation, whichever occurs later. The petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he or she has been of good behavior for the 10-year period since the date of conviction of the nonviolent criminal offense in question and has not been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state.

(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which the petitioner lives and that the person's character and reputation are good.

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

(4) An application on a form approved by the Administrative Office of the Courts requesting and authorizing a State and national criminal record check by the Department of Justice using any information required by the Administrative Office of the Courts to identify the individual, and a search of the confidential record of expungements maintained by the Administrative Office of the Courts. The application shall be forwarded to the Department of Justice and to the Administrative Office of the Courts, which shall conduct the searches, and report their findings to the court.

(5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner are outstanding.

The petition shall be served upon the district attorney of the court where the case was tried resulting in conviction. The district attorney shall have 10 days to file any objection to the petition and shall be notified as to the date of the hearing of the petition.

The judge to whom the petition is presented may call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the 10-year period that the judge deems desirable.

(c) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for 10 years from the date of conviction of the nonviolent criminal offense in question and the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner, then the court shall order that the petitioner be restored, in the contemplation of the law, to the status the petitioner occupied before the arrest, indictment, conviction or information for the nonviolent criminal offense. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his or her failure to recite or acknowledge such arrest, indictment, conviction, information, trial, or response to any inquiry made of the person for any purpose.

(d) The court shall also order that the conviction for the nonviolent criminal offense be expunged from the records of the court and direct all law enforcement agencies bearing record of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief, or head of any other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. Expunction of records may occur only once with respect to any person.

(e) Any other applicable State or local government agency shall expunge from its records entries made as a result of the charge or conviction ordered expunged under this section. The agency shall also reverse any administrative actions taken against a person whose record is expunged under this section as a result of the charges or convictions expunged. Notwithstanding any other provision of law, the normal fee for any reinstatement of a license or privilege resulting under this section shall be waived.

(f) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his or her county, file with the Administrative Office of the Courts, the names of those persons granted expunctions under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted expunctions. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expunction.

(g) A person who files a petition for expunction of a criminal record under this section must pay the clerk of superior court a fee of one hundred dollars ($100.00) at the time the petition is filed. Fifty dollars ($50.00) of the fee collected under this subsection shall be remitted to the North Carolina Department of Justice to pay the costs of the State Bureau of Investigation purging records pursuant to receipt of an order of expunction. The remaining fifty dollars ($50.00) of the fee shall be remitted to the Administrative Office of the Courts to pay the costs associated with implementation of the provisions of this section. This subsection does not apply to petitions filed by an indigent."

SECTION 2. G.S. 15A-145(a) reads as rewritten:

"(a) Whenever any person who has (i) not yet attained the age of 18 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor other than a traffic violation, or (ii) not yet attained the age of 21 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor possession of alcohol pursuant to G.S. 18B-302(b)(1), he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than two years after the date of the conviction or any period of

probation, whichever occurs later, and the petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he has been of good behavior for the two-year period since the date of conviction of the misdemeanor in question and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.

(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

~~(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the two-year period following that conviction.~~

(4) An application on a form approved by the Administrative Office of the Courts requesting and authorizing a State and national criminal record check by the Department of Justice using any information required by the Administrative Office of the Courts to identify the individual, and a search of the confidential record of expungements maintained by the Administrative Office of the Courts. The application shall be forwarded to the Department of Justice and to the Administrative Office of the Courts, which shall conduct the searches, and report their findings to the court.

(5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against him are outstanding.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the two-year period that he deems desirable."

SECTION 3. G.S. 15A-145 is amended by adding a new subsection to read:

"(c1) Any other applicable State or local government agency shall expunge from its records entries made as a result of the charge or conviction ordered expunged under this section. The agency shall also reverse any administrative actions taken against a person whose record is expunged under this section as a result of the charges or convictions

expunged. Notwithstanding any other provision of law, the normal fee for any reinstatement of a license or privilege resulting under this section shall be waived."

SECTION 4. G.S. 15A-146 is amended by adding a new subsection to read:

"(b3) Any other applicable State or local government agency shall expunge from its records entries made as a result of the charge or conviction ordered expunged under this section. The agency shall also reverse any administrative actions taken against a person whose record is expunged under this section as a result of the charges or convictions expunged. Notwithstanding any other provision of law, the normal fee for any reinstatement of a license or privilege resulting under this section shall be waived."

SECTION 5. G.S. 90-96(b) reads as rewritten:

"(b) Upon the dismissal of such person, and discharge of the proceedings against him under subsection (a) of this section, such person, if he were not over 21 years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. The applicant shall attach to the application the following:

(1) An affidavit by the applicant that he has been of good behavior during the period of probation since the decision to defer further proceedings on the offense in question and has not been convicted of any felony, or misdemeanor, other than a traffic violation, under the laws of the United States or the laws of this State or any other state;

(2) Verified affidavits by two persons who are not related to the applicant or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives, and that his character and reputation are good;

~~(3) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted, and, if different, the county of which the petitioner is a resident, showing that the applicant has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the offense in question or during the period of probation following the decision to defer further proceedings on the offense in question.~~

(3) An application on a form approved by the Administrative Office of the Courts requesting and authorizing a State and national criminal record check by the Department of Justice using any information required by the Administrative Office of the Courts to identify the individual, and a search of the confidential record of expungements maintained by the Administrative Office of the Courts. The application shall be forwarded to the Department of Justice and to the Administrative Office of the Courts, which shall conduct the searches, and report their findings to the court.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period deemed desirable.

If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over 21 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

The court shall also order that said conviction and the records relating thereto be expunged from the records of the court, and direct all law-enforcement agencies bearing records of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police or other arresting agency, as appropriate, and the sheriff, chief of police or other arresting agency, as appropriate, shall forward such order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation."

SECTION 6. G.S. 90-113.14(b) reads as rewritten:

"(b) Upon the dismissal of such person, and discharge of the proceedings against him under subsection (a) of this section, such person, if he were not over 21 years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. The applicant shall attach to the application the following:

(1) An affidavit by the applicant that he has been of good behavior during the period of probation since the decision to defer further proceedings on the misdemeanor in question and has not been convicted of any felony, or misdemeanor, other than a traffic violation, under the laws of the United States or the laws of this State or any other state;

(2) Verified affidavits by two persons who are not related to the applicant or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives, and that his character and reputation are good;

~~(3) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted, and, if different, the county of which the petitioner is a resident, showing that the applicant has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in~~

~~question or during the period of probation following the decision to defer further proceedings on the misdemeanor in question.~~

(3) An application on a form approved by the Administrative Office of the Courts requesting and authorizing a State and national criminal record check by the Department of Justice using any information required by the Administrative Office of the Courts to identify the individual, and a search of the confidential record of expungements maintained by the Administrative Office of the Courts. The application shall be forwarded to the Department of Justice and to the Administrative Office of the Courts, which shall conduct the searches, and report their findings to the court.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period deemed desirable.

If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over 21 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

The court shall also order that said conviction and the records relating thereto be expunged from the records of the court, and direct all law-enforcement agencies bearing records of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police or other arresting agency, as appropriate, and the sheriff, chief of police or other arresting agency, as appropriate, shall forward such order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation."

SECTION 7. This act becomes effective December 1, 2005 and applies to applications for expunction of records made on or after that date.

SENATE BILL 559:
Expunction/Convictions of Nonviolent Crimes.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Kinnaird
Date:	April 19, 2005	**Summary by:**	Ben Popkin
Version:	Proposed Committee Substitute [v.4]		Committee Counsel

SUMMARY: ***Senate Bill 559 would provide for the expunction of convictions for certain nonviolent criminal offenses. The bill would require a waiting period of 10 years after the conviction; no prior or subsequent felony or non-traffic misdemeanor offenses; and an affidavit attesting to the petitioner's character. The PCS would set the fee for filing an application for expunction at $100.00, to be divided equally between the Department of Justice and the Administrative Office of the Courts. The PCS would also replace the use of multiple affidavits when applying for an expunction with one State and national criminal record check, and would correct an oversight in current law by inserting a section directing State and local agencies to expunge their records. The act would become effective December 1, 2005 and would apply to applications for expunction of records made on or after that date.***

CURRENT LAW: Article 5 of the Criminal Procedure Act provides for the expunction of criminal records of certain criminal charges or convictions. Expunction is the process by which a record of criminal conviction is removed by order of the court, and the individual is restored to the status he or she occupied before the arrest or indictment. General Statute 15A-145 (Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor; expunction of certain other misdemeanors) allows a person convicted of a misdemeanor to file a petition for expunction of the misdemeanor from his or her criminal record if the person was under 18 at the time of a conviction or, in the case of a misdemeanor alcohol possession charge, the person was under 21 at the time of conviction. The petition may not be filed sooner than 2 years after the conviction or completion of probation and must include the following [1]:

1) an affidavit of good behavior for the two years following conviction, stating that the petitioner has not been convicted of any felony or non-traffic misdemeanor charge;

2) two affidavits of good character from persons unrelated to the petitioner;

3) a statement that the petition is a motion in the cause in the case wherein the petitioner was convicted; and

4) affidavits of the clerk of superior court, chief of police, and sheriff of the county of the offense and where the petitioner resides showing that petitioner has not been convicted of a felony or non-traffic misdemeanor offense prior to or in the two years since the conviction in question.

If the court finds in favor of the petitioner the clerk of superior court and the appropriate law enforcement agencies must expunge the record of the conviction. Other sections of Article 5 provide for "Expunction of records when charges are dismissed or there are finding of not guilty as a result of identity fraud"[2] and "Expunction of DNA records when charges are dismissed on appeal or pardon of innocence is granted."[3]

[1] G.S. 15A-145(a)(1) through (4).
[2] G.S. 15A-147.
[3] G.S. 15A-148.

BILL ANALYSIS: The bill would add a new section to Article 5 "Expunction of Records" of Chapter 15A "Criminal Procedure Act" of the General Statutes. The proposed G.S. 15A-149 – "Expunction of records for conviction of certain nonviolent criminal offenses if there are no subsequent criminal convictions for at least 10 years" would apply to persons with no criminal record prior to the conviction for which expunction is sought. "Nonviolent criminal offense" would include misdemeanors, Class H and Class I felonies, but would specifically exclude the following offenses:

- an offense that includes assault as an essential element of the offense;
- an offense included in Article 27A "Sex Offender and Public Protection Registration Programs"[4];
- an offense involving a firearm; and
- a drug trafficking offense[5].

The procedure to be followed by the petitioner is modeled along the lines of the existing procedures for expunction of records, but with a waiting period of 10 years from the date of conviction or completion of probation (whichever is later). The petition would require at least the following:

1) an affidavit of good behavior for the 10 years following conviction, stating that the petitioner has not been convicted of any felony or non-traffic misdemeanor charge during that time;

2) two affidavits of good character from persons unrelated to petitioner;

3) a statement that the petition is a motion in the cause in the case wherein the petitioner was convicted;

4) an application form authorizing the Administrative Office of the Courts and the Department of Justice to conduct a State and national criminal record check of the applicant and a search of the confidential record of expungements maintained by the Administrative Office of the Courts; and

5) an affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner are outstanding.

The bill would set the filing fee at $100.00, to be divided equally between the North Carolina Department of Justice and the Administrative Office of the Courts to cover costs associated with implementation of provisions of the bill.

If the court finds in favor of the petitioner the clerk of superior court and the appropriate law enforcement agencies will expunge their records of the conviction. The PCS also directs "any other applicable State or local government agency to expunge from its records entries made as a result of the charge or conviction ordered expunged...", and further directs the agency to reverse administrative actions taken against a person whose record is expunged, waiving fees normally charged for reinstatement of a license or privilege. The PCS makes conforming changes to existing expunction statutes[6], replacing the multiple affidavits showing no prior or subsequent criminal convictions with one State and national criminal record check conducted by the AOC and the DOJ, and adds a clause to Article 5 expunctions directing State and local agencies to expunge their records (in order to purge Department of Corrections records which is currently done only in G.S. 15A-147), in addition to court and law enforcement agency records.

SB559-SMSS-001

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[4] G.S. 14-208.5 through 14-208.32. (Article 27A of Chapter 14 of the General Statutes)
[5] G.S. 90-95(h).
[6] G.S. 15A-145; G.S. 15A-146; G.S. 90-96; and G.S. 90-113.14.

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	April 26, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 679	North Carolina Uniform Trust Code.	Senator Hagan
SB 671	Real Property Electronic Recording.	Senator Hartsell
SB 934	Notary Public Act.-AB	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, April 26, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 671	Real Property Electronic Recording.	Senator Hartsell
SB 679	North Carolina Uniform Trust Code.	Senator Hagan
SB 934	Notary Public Act.-AB	Senator Hartsell

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

April 26, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on April 26, 2005, with fifteen members present. He introduced and welcomed pages Stephen Kouba and Justin Siler and thanked them for serving.

SB 679 (North Carolina Uniform Trust Code.) In Senator Hagan's absence, Senator Hartsell presided and recognized Mr. James C. Stanford, Clerk of Superior Court from Orange County to speak on the bill. Senator Bingham moved for a favorable report for the Proposed Committee Substitute. All voted and the motion carried.

SB 671 (Real Property Electronic Recording.) Senator Allran chaired the committee and called for a motion to accept the Proposed Committee Substitute for the purpose of discussion. Senator Bingham so moved, all voted and the motion carried. Senator Hartsell explained the bill. Kory Goldsmith, Staff Attorney, explained handouts. Senator Snow presented an amendment. Mr. Richard Bowlin, attorney, presented a video demonstration explaining real property electric recording. Ms. Judy Gibson, Registrar of Deeds from Mecklenburg County, spoke on the process of electronic commerce and recording. Questions from Senators Dorsett, Bingham, Allran, Kinnaird, Apodaca and Webster were answered by Judy Gibson, Richard Bowlin and Hailey Montgomery, representing the office of the Secretary of State. Senator Hartsell noted that SB 671 and SB 934 will be heard at the Thursday, April 28th, meeting.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, April 28, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **679** North Carolina Uniform Trust Code.

Draft Number:	PCS85237
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 26, 2005

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
[signature]	Bar Assoc
Gary M Whaley	Investors Title - Chapel Hill
Nancy Ferguson	Chicago Title - Greensboro
Doug Heron	NC Bar Assoc
Robert Ply	World Vista
[signature]	[signature]
J E Creekman	First Citizens Bank
Mike Mann	NCBAA

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Floyd M. Lewis	General Statutes Commission
P. Bly Hall	"
DH Cathrun	EDL
Gayle P. Holder	Secretary of State
Joel Ed. Brown	Secretary of State
Haley Montgomery	SOS
Robert Wilson	S.O.S.
Anne Wimsatt	ASSt
Chris Vaughn	Carruthers & Roth, P.A.
J W Hipp	Guilford County Register of Deeds
Amanda W Garrett	Person County Register of Deeds

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Chip Killian	Register of Deeds Assn
Paul Stock	NC Bankers Assn.
Betty Turner	Bank of America
Andrew Ritter	Board of Examiners for Engineers & Surveyors
Melissa Jeanes	NC Society of Surveyors
Kathleen Edwards	UNC-CH Legis. Reporting Service
Judy Gibson	Mecklenburg Co. Register of Deeds
[illegible]	AOC
Tom Berry	NC Environ Defense
[illegible]	NAIFA
[illegible]	KCCH

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 679

Short Title:	North Carolina Uniform Trust Code.	(Public)
Sponsors:	Senator Hagan.	
Referred to:	Judiciary II.	

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO ADOPT A REVISED VERSION OF THE UNIFORM TRUST CODE FOR NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 36A of the General Statutes is recodified as Article 6 of Chapter 32 of the General Statutes. G.S. 36A-63, G.S. 36A-66.1, and Article 6 of Chapter 36A are recodified in Article 15 of Chapter 53 of the General Statutes as G.S. 53-163.1 through G.S. 53-163.7. The remainder of Chapter 36A of the General Statutes is repealed.

SECTION 2. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 36C.**

"**North Carolina Uniform Trust Code.**

"Article 1.

"General Provisions and Definitions.

"**§ 36C-1-101. Short title.**

This Chapter may be cited as the North Carolina Uniform Trust Code.

"**§ 36C-1-102. Scope.**

This Chapter applies to any express trust, private or charitable, with additions to the trust, wherever and however created. The term "express trust" includes both testamentary and inter vivos trusts, regardless of whether the trustee is required to account to the clerk of superior court. This Chapter also applies to any trust created for or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. This Chapter does not apply to constructive trusts, resulting trusts, conservatorships, estates, trust accounts as defined in G.S. 53-146.2, 54-109.57, 54B-130, and 54C-166, trust funds subject to G.S. 90-210.61, custodial arrangements pursuant to G.S. 33A-1 through G.S. 33A-24 and G.S. 33B-1 through G.S. 33B-22, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary

purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or any arrangement under which a person is nominee or escrowee for another.

"**§ 36C-1-103. Definitions.**

In this Chapter:

(1) "Action", with respect to an act of a trustee, includes a failure to act.

(2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.

(3) "Beneficiary" means a person who:

a. Has a present or future beneficial interest in a trust, vested or contingent, including the owner of an interest by assignment or transfer; or

b. In a capacity other than that of trustee, holds a power of appointment over trust property.

(4) "Charitable trust" means a trust, including a split-interest trust as described in section 4947 of the Internal Revenue Code, created for a charitable purpose described in G.S. 36C-4-405(a).

(5) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

(6) "General guardian" means a general guardian as that term is defined in G.S. 35A-1202(7).

(7) "Guardian of the estate" means a guardian of the estate as that term is defined in G.S. 35A-1202(9).

(8) "Guardian of the person" means a guardian of the person as that term is defined in G.S. 35A-1202(10).

(9) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

(10) "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended from time to time. Each reference to a provision of the Internal Revenue Code shall include any successor to that provision.

(11) "Jurisdiction", with respect to a geographic area, includes a state or country.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(13) "Power of withdrawal" means a presently exercisable general power of appointment other than a power:

a. Exercisable by a trustee and limited by an ascertainable standard; or

b. Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

(14) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.

(15) "Qualified beneficiary" means a living beneficiary who, on the date the beneficiary's qualification is determined:

a. Is a distributee or permissible distributee of trust income or principal;

b. Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in sub-subdivision a. of this subdivision terminated on that date without causing the trust to terminate; or

c. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(16) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

(17) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

(18) "Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.

(19) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(20) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or established in a judicial proceeding.

(21) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments to the instrument, and any modifications permitted by court order.

(22) "Trustee" includes an original, additional, and successor trustee, and a co-trustee, whether or not appointed or confirmed by a court. The term does not include trustees in mortgages and deeds of trusts.

"**§ 36C-1-104. Knowledge.**

(a) Subject to subsection (b) of this section, a person has knowledge of a fact if the person:

(1) Has actual knowledge of it;

(2) Has received notice or notification of it; or

(3) From all the facts and circumstances known to the person at the time in question, has reason to know it.

(b) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the employee's regular duties or the employee knows a matter involving the trust would be materially affected by the information.

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

(a) Except as otherwise provided in the terms of the trust, this Chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

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

(1) The requirements for creating a trust;

(2) The duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

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

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

(5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5;

(6) The effect of an exculpatory term under G.S. 36C-10-1008;

(7) The rights under G.S. 36C-10-1010 through G.S. 36C-10-1013 of a person other than a trustee or beneficiary;

(8) Periods of limitation for commencing a judicial proceeding;

(9) The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and

(10) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in G.S. 36C-2-203 and G.S. 36C-2-204.

"**§ 36C-1-106. Common law of trusts; principles of equity.**

The common law of trusts and principles of equity supplement this Chapter, except to the extent modified by this Chapter or another statute of this State.

"**§ 36C-1-107. Governing law.**

The meaning and effect of the terms of a trust are determined by:

(1) The law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or

(2) In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

"**§ 36C-1-108. Principal place of administration.**

(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(1) A trustee's principal place of business is located in, or a trustee is a resident of, the designated jurisdiction; or

(2) All or part of the administration occurs in the designated jurisdiction.

(b) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee may transfer the trust's principal place of administration to another jurisdiction in accordance with the provisions of this subsection:

(1) If the trustee is transferring the trust's principal place of administration to another state, the trustee shall provide written notice of the proposed transfer to the qualified beneficiaries of the trust not less than 60 days before initiating the transfer. If no qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice, the trustee may make the transfer. If a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice, the authority of the trustee to transfer the trust's principal place of administration in accordance with the provisions of this section terminates.

(2) If the trustee is transferring the trust's principal place of administration to a jurisdiction outside of the United States, the trustee shall provide written notice of the proposed transfer to the qualified beneficiaries of the trust and the transfer cannot be made until the written consent of all the qualified beneficiaries is obtained.

(c) Anytime a trustee is required to provide a qualified beneficiary with written notice of a proposed transfer of a trust's principal place of administration, the notice of proposed transfer must include:

(1) The name of the jurisdiction to which the principal place of administration is to be transferred;

(2) The address and telephone number at the new location at which the trustee can be contacted;

(3) An explanation of the reasons for the proposed transfer;
(4) The date on which the proposed transfer is anticipated to occur; and
(5) If the proposed transfer is to another state, the date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(d) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to G.S. 36C-7-704.

"**§ 36C-1-109. Methods and waiver of notice.**

(a) Notice to a person under this Chapter or the sending of a document to a person under this Chapter must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed electronic message.

(b) Notice otherwise required under this Chapter, or a document otherwise required to be sent under this Chapter, need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(c) Notice under this Chapter, or the sending of a document under this Chapter, may be waived by the person to be notified or sent the document.

(d) Notice of a judicial proceeding must be given as provided in Article 2 of this Chapter.

"**§ 36C-1-110. Others treated as qualified beneficiaries.**

(a) A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under this Chapter if the charitable organization, on the date the charitable organization's qualification is being determined:

(1) Is a distributee or permissible distributee of trust income or principal;
(2) Would be a distributee or permissible distributee of trust income or principal upon the termination of the interest of other distributees or permissible distributees then receiving or eligible to receive distributions, but the termination of those interests would not cause the trust to terminate; or
(3) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(b) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in G.S. 36C-4-408 or G.S. 36C-4-409 has the rights of a qualified beneficiary under this Chapter.

"**§ 36C-1-111. Nonjudicial settlement agreements.**

(a) For purposes of this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(b) Interested persons may enter into a binding nonjudicial settlement agreement with respect to any of the following matters involving a trust:

(1) The approval of a trustee's report or accounting;

(2) Direction to a trustee to perform or refrain from performing a particular administrative act or the grant to a trustee of any necessary or desirable administrative power, including a power granted pursuant to G.S. 36C-8-816;

(3) The resignation or appointment of a trustee and the determination of a trustee's compensation;

(4) Transfer of a trust's principal place of administration; and

(5) Liability of a trustee for any action taken pursuant to subdivisions (1) through (4) of this subsection.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this Chapter or other applicable law.

(d) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in Article 3 of this Chapter was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

"**§ 36C-1-112. Rules of construction.**

The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.

"Article 2.

"Judicial Proceedings.

"**§ 36C-2-201. Role of court in administration of trust.**

(a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by a party or as provided by law.

(b) A trust is not subject to continuing judicial supervision, except as provided in G.S. 36C-2-208 and G.S. 36C-2-209, unless ordered by the court.

(c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

"**§ 36C-2-202. Jurisdiction over trustee and beneficiary.**

(a) By accepting the trusteeship of a trust having its principal place of administration in this State, or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution

from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

"**§ 36C-2-203. Subject matter jurisdiction.**

(a) The clerks of superior court of this State have original jurisdiction over all proceedings concerning the internal affairs of trusts. Except as provided in subdivision (9) of this subsection, the clerk of superior court's jurisdiction is exclusive. Proceedings concerning the internal affairs of the trust are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument. These include proceedings:

(1) To appoint or remove a trustee;

(2) To permit a trustee to resign or renounce; however, unless the trustee is required to account to the clerk of superior court, when the governing instrument names or provides a procedure to name a successor trustee, and the successor trustee is willing to serve, no trustee shall be required to initiate a proceeding to resign or renounce as trustee;

(3) To review trustees' fees pursuant to Article 5A of Chapter 32 of the General Statutes and review and settle interim or final accounts;

(4) To (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust as provided in G.S. 37A-1-104.3;

(5) To transfer a trust's principal place of administration;

(6) To require a trustee to provide bond and determine the amount of the bond, excuse a requirement of bond, reduce the amount of bond, release the surety, or permit the substitution of another bond with the same or different sureties;

(7) To make such orders with respect to a trust for the care of animals as provided in G.S. 36C-4-408;

(8) To make such orders with respect to a noncharitable trust without an ascertainable beneficiary as provided in G.S. 36C-4-409; and

(9) To ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments, and to determine the existence or nonexistence of trusts created other than by will and the existence or nonexistence of any immunity, power, privilege, duty, or right. Upon motion of a party, the clerk of superior court may determine that a proceeding to determine an issue listed in this subdivision shall be

originally heard by the superior court division of the General Court of Justice.

(b) Nothing in this section shall be construed (i) to confer upon the clerk of superior court any authority to regulate or supervise the actions of a trustee except to the extent that the trustee's actions are inconsistent with the provisions of the governing instrument or of State law; or (ii) to confer upon any party any additional right, remedy, or cause of action not otherwise conferred by law.

(c) Nothing in this section affects the right of a person to file an action for declaratory relief under the provisions of Article 26 of Chapter 1 of the General Statutes. In the event either the petitioner or respondent in a trust proceeding requests declaratory relief under the provisions of Article 26 of Chapter 1 of the General Statutes, either party may move for a transfer of the proceeding to the superior court division of the General Court of Justice as provided in Article 21 of Chapter 7A of the General Statutes. In absence of removal to superior court, the provisions of Article 26 of Chapter 1 of the General Statutes shall apply to a trust proceeding to the extent not inconsistent with this Article.

(d) The clerk of superior court shall not, over the objection of a party, entertain proceedings under this section involving a trust having its principal place of administration in another state, except:

(1) When all appropriate parties could not be bound by litigation in the courts of the state in which the trust had its principal place of administration; or

(2) When the interests of justice otherwise would be seriously impaired.

The clerk of superior court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust has its principal place of administration, or the clerk of superior court may grant a continuance or enter any other appropriate order.

(e) Any party to a proceeding before the clerk of superior court may appeal from the decision of the clerk to a superior court judge as provided for estate matters in G.S. 1-301.3.

(f) Without otherwise limiting the jurisdiction of the superior court division of the General Court of Justice, proceedings concerning the internal affairs of trusts shall not include, and, therefore, the clerk of superior court shall not have jurisdiction under subsection (a) of the following:

(1) Actions to reform, terminate, or modify a trust as provided by G.S. 36C-4-410 through G.S. 36C-4-416;

(2) Actions by or against creditors or debtors of a trust;

(3) Actions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud, and negligence;

(4) Actions to enforce a charitable trust under G.S. 36C-4-405A; and

(5) Actions to amend or reform a charitable trust under G.S. 36C-4A-1.

"**§ 36C-2-204. Venue.**

In any trust proceeding or action, whether brought before the clerk of superior court or the superior court division of the General Court of Justice, the following rules apply notwithstanding any other applicable Rule of Civil Procedure or provision of Chapter 1 of the General Statutes:

(1) If the trustee is required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is the place where the accountings are filed.

(2) If the trustee is not required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is:

a. In the case of an inter vivos trust, in any county of this State in which the trust has its principal place of administration or where any beneficiary resides; or

b. In the case of a testamentary trust, in any county of this State in which the trust has its principal place of administration, where any beneficiary resides, or in which the testator's estate was administered.

(3) Unless otherwise designated in the governing instrument, the principal place of administration of the trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if the trustee has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the governing instrument, is:

a. The usual place of business of the corporate trustee if there is but one corporate or co-trustee; or

b. The usual place of business or residence of any of the co-trustees.

(4) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in any county of this State in which a beneficiary resides, in any county in which trust property is located, in the county of this State specified in the trust instrument, if any county is so specified, or if the trust is created by will, in the county in which the decedent's estate was or is being administered.

"**§ 36C-2-205. Commencement of proceedings, pleadings, consolidation, and joinder.**

(a) Contested Proceedings. – Trust proceedings before the clerk of superior court brought against adverse parties shall be commenced as is prescribed for civil actions. Upon the filing of the petition or complaint, the clerk of superior court shall docket the cause as an estate matter. All parties not joined as petitioners shall be joined as respondents. The clerk of superior court shall issue the summons for the respondents.

The clerk of superior court may order that additional persons be joined as respondents and shall issue the summons for the additional persons. The summons shall notify the respondents to appear and answer the petition within 10 days after its service upon the respondents. The summons shall comply with the requirements set forth in G.S. 1-394 for a special proceeding summons except that the clerk of superior court shall indicate on the summons by appropriate words that the summons is issued in an estate matter and not in a special proceeding or in a civil action and shall be served upon the respondents in accordance with Rule 4 of the Rules of Civil Procedure. After the time for responding to the petition or complaint has expired, any party or the clerk of superior court may give notice to all parties of a hearing.

(b) Uncontested Proceedings. – Trust proceedings before the clerk of superior court in which all the parties join in the proceeding shall be commenced by the filing of a petition, setting forth the facts entitling the petitioners to relief and the nature of the relief demanded. In such proceedings, the clerk of superior court may hear and decide the petition summarily.

(c) Pleadings. – The petition or complaint filed in a trust proceeding before the clerk of superior court shall contain a short and plain statement of the claim which is sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions, intended to be proved showing that the pleaders entitled to relief, and a demand for judgment for the relief to which the pleader is entitled. Each averment of a pleading should be simple, concise, and direct. No technical forms of pleadings or motions are required. A party may set forth two or more statements of a claim or defense alternatively or hypothetically. The signature of an attorney or party constitutes a certificate by that attorney or party that (i) the attorney or party has read the pleading, motion, or other paper; (ii) that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (iii) that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. All pleadings shall be so construed as to do substantial justice.

(d) Extensions of Time. – The clerk of superior court, for cause shown at any time in the clerk's discretion, with or without motion or notice, may enter an order enlarging the period of time within which an act is required or permitted by this Article, by any applicable Rules of Civil Procedure or by order of the court, if the request is made before the expiration of the period originally prescribed, but not to exceed 10 days, nor more than once. Upon motion made after the expiration of the specified period, the clerk of superior court may permit the act where the failure to act was the result of excusable neglect. Notwithstanding any other provision of this subsection, the parties to a proceeding may enter into binding stipulations, without approval of the clerk of superior court, enlarging the time within which an act is required or permitted by this

Article, by any applicable Rules of Civil Procedure or by order of the court, not to exceed 30 days.

(e) Rules of Civil Procedure. – Unless the clerk of superior court otherwise directs, Rules 5, 6(a), 6(d), 6(e), 18, 19, 20, 21, 24, and 45 of the Rules of Civil Procedure shall apply to trust proceedings. Upon motion of a party or the clerk of superior court, the clerk may further direct that the following Rules of Civil Procedure shall apply: 15, 16, 17, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37; however, nothing in Rule 17 shall require the appointment of a guardian ad litem for a party represented except as provided under G.S. 36C-3-305. In applying these Rules to a trust proceeding pending before the clerk of superior court, the term "judge" shall be construed as "clerk of superior court."

(f) Consolidation. – When a trust proceeding pending before the clerk of superior court and a civil action pending before the superior court division of the General Court of Justice involve a common question of law or fact, upon the court's motion or motion of a party to either the trust proceeding or the civil action, a superior court judge may order a consolidation of the trust proceeding and civil action, and the judge may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. Upon the entry of an order consolidating a trust proceeding and civil action, the jurisdiction for all matters pending in both the trust proceeding and the civil action shall be vested in the superior court.

(g) Joinder. – In any civil action pending before a superior court division of the General Court of Justice, a party asserting a claim for relief as an original claim, counterclaim, cross claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party notwithstanding the fact that such claims may otherwise be within the exclusive jurisdiction of the clerk of superior court.

(h) Orders Upon Consolidation/Joinder. – Upon the consolidation of a trust proceeding and civil action or joinder of claims pursuant to subsection (f) or (g) of this section, the clerk of superior court or the judge may make such orders as appropriate to protect the interests of the parties and to avoid unnecessary costs or delay. Notwithstanding the consolidation or joinder of claims pursuant to subsection (f) or (g) of this section, the clerk of court's exclusive jurisdiction as set forth in G.S. 36C-2-203(a) shall not be stayed unless so ordered by the court.

"**§ 36C-2-206. Representation of parties.**

In any trust proceeding or action, whether brought before the clerk of superior court or in the superior court division of the General Court of Justice, the following rules apply notwithstanding any other applicable Rule of Civil Procedure or provision of Chapter 1 of the General Statutes:

(1) Parties shall be represented as provided in Article 3 of this Chapter.

(2) In the case of any party represented by another as provided in subdivision (1) of this section, service of process shall be made by serving such representative.

"**§ 36C-2-207. Waiver of notice.**

A party, or the representative of the party as provided in G.S. 36C-2-206, may waive notice by a writing signed by the party, the representative, or the attorney of the party or the representative, and filed in the proceeding.

"**§ 36C-2-208. Accounting to clerk.**

(a) No trustee, including a trustee appointed by the clerk of superior court, shall be required to account to the clerk of superior court unless the trust instrument directs that the trustee shall be required to account to the clerk of superior court or unless the trustee is otherwise required by law to account to the clerk of superior court.

(b) If the trustee is required to account to the clerk of superior court, the trustee shall not be permitted to resign as trustee until a final account of the trust estate is filed with the clerk of superior court and until the court shall be satisfied that the account is true and correct, unless the terms of the trust instrument provide otherwise.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, pursuant to a proceeding brought under G.S. 36C-4-405A, the clerk of superior court may require a trustee of a charitable trust to account to the clerk of superior court.

"**§ 36C-2-209. Qualification and accounting of trustee of a testamentary trust.**

(a) For any testamentary trust created under a will of a decedent executed before January 1, 2004, the trustee shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of superior court of the county where the will is probated inventories of the assets that come into the trustee's hands and annual and final accounts of the trust that are the same as required of executors and administrators. The power of the clerk of superior court to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts shall be the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. This subsection shall not apply to the extent that the will makes a different provision.

(b) For any testamentary trust created under a will of a decedent executed on or after January 1, 2004, the provisions of which direct the trustee to account to the clerk of superior court, the trustee shall first qualify under the laws applicable to executors and shall file in the office of the clerk of superior court of the county where the will is probated inventories of the assets that come into the trustee's hands and annual and final accounts of the trust that are the same as are required of executors and administrators. The power of the clerk of superior court to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts shall be the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. No trustee, including a trustee appointed by the clerk of superior court, shall be required to account to the clerk of superior court unless the will directs that the trustee shall be required to account to the clerk of superior court or unless otherwise required by law.

(c) The Administrative Office of the Courts may adopt rules regulating the registration or indexing of testamentary trusts.

"Article 3.

"Representation.

"**§ 36C-3-301. Representation: basic effect.**

(a) Notice to a person who may represent and bind another person under this Article has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this Article is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in G.S. 36C-4-411 and G.S. 36C-6-602, a person who under this Article may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this Article with respect to the termination or modification of trust under G.S. 36C-4-411(a).

"**§ 36C-3-302. Representation by holder of general testamentary power of appointment.**

The sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, shall represent other persons to the extent that their interests, as permissible appointees, takers in default, or otherwise, are subject to the power. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

"**§ 36C-3-303. Representation by fiduciaries, parents, and other persons.**

To the extent that there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) A general guardian or a guardian of the estate may represent and bind the estate that the guardian controls.

(2) A guardian of the person may represent and bind the ward if a general guardian or guardian of the estate of the ward's estate has not been appointed.

(3) An agent under a power of attorney having authority to act with respect to the particular question or dispute may represent and bind the principal.

(4) A trustee may represent and bind the beneficiaries of the trust.

(5) A personal representative of a decedent's estate may represent and bind persons interested in the estate.

(6) A parent may represent and bind the parent's minor child if a general guardian, guardian of the estate, or guardian of the person for the child

has not been appointed. If a disagreement arises between parents seeking to represent the same minor child, the parent who is a beneficiary of the trust which is the subject of the representation shall be entitled to represent the minor child or, if no parent is a beneficiary of the trust which is the subject of the representation, a parent who is a lineal descendant of the settlor shall be entitled to represent the minor child, or if no parent is a lineal descendant of the settlor, a guardian ad litem shall be appointed to represent the minor child.

(7) A person may represent and bind that person's unborn issue.

"**§ 36C-3-304. Representation by person having substantially identical interest.**

Unless otherwise represented under this Article, a minor, an incapacitated or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent that there is no conflict of interest between the representative and the person represented.

"**§ 36C-3-305. Appointment of representative; scope of representation.**

(a) If the court determines that an interest is not represented under this Article, or that the otherwise available representation might be inadequate, the court may appoint a guardian ad litem to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated or unborn individual, or a person whose identity or location is unknown. A guardian ad litem may be appointed to represent several persons or interests.

(b) Any representative under this Article may act on behalf of the individual represented with respect to any matter arising under this Chapter, whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a representative, including a guardian ad litem, may base a decision to consent to an action upon a finding that living members of the individual's family would generally benefit from that action.

"Article 4.

"Creation, Validity, Modification, and Termination of Trust.

"**§ 36C-4-401. Methods of creating trust.**

A trust may be created by:

(1) Transfer of property by a settlor to a person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

(2) Declaration by the owner of property that the owner holds identifiable property as trustee unless the transfer of title of that property is otherwise required by law; or

(3) Exercise of a power of appointment in favor of a trustee.

"**§ 36C-4-401A. 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 policy or elsewhere using the policy as collateral security;

(4) To assign the policy; or

(5) To exercise any other right in connection with the policy commonly known as an incident of ownership of that policy.

The term "life insurance policy" includes life, annuity, and endowment contracts, or any variation or combination of those contracts, and any agreement entered into by an insurance company in connection with life, annuity, or endowments contracts.

(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 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 group life, industrial life, accident, and health insurance policies having death benefits.

(c) A testator 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 that beneficiary a trustee named or to be named in the testator's 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 trustee makes claim to the proceeds within six months after the death of the testator, payments shall be made to the personal representative of the estate of the testator 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 testator to

estate or 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 that may properly become part of such trust, but the proceeds shall not become part of the testator's estate for purposes of trust administration unless the will expressly so provides.

"**§ 36C-4-402. Requirements for creation.**

(a) A trust is created only if:

(1) The settlor has capacity to create a trust;

(2) The settlor indicates an intention to create the trust;

(3) The trust has a definite beneficiary or is:

a. A charitable trust;

b. A trust for the care of an animal, as provided in G.S. 36C-4-408;

c. A trust for a noncharitable purpose, as provided in G.S. 36C-4-409;

(4) The trustee has duties to perform; and

(5) The same person is not the sole trustee and sole beneficiary.

(b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

"**§ 36C-4-403. Trusts created in other jurisdictions.**

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

(1) The settlor was domiciled, had a place of abode, or was a national;

(2) A trustee was domiciled or had a place of business; or

(3) Any trust property was located.

"**§ 36C-4-404. Trust purposes.**

A trust may be created only to the extent that its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.

"**§ 36C-4-405. Charitable purposes.**

(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, benevolent, literary, governmental, or municipal purposes, or other purposes the achievement of which is beneficial to the community.

(b) It is the policy of the State of North Carolina that gifts for charitable purposes, whether in trust or otherwise, are valid, notwithstanding the fact that the gift

is made in general terms, and this section shall be construed liberally to effect this policy.

(c) No gift for charitable purposes, whether in trust or otherwise, is void or invalid because:

(1) The gift is in general terms or is uncertain as to the specific charitable purposes;

(2) When the gift is made in trust, the trustee is granted discretionary powers in the selection and designation of the beneficiaries of that charitable trust or in carrying out the purpose of that trust;

(3) The trustee or other recipient of the gift is given no specific instructions, powers, or duties as to the manner or means of carrying out those charitable purposes; or

(4) The gift contravenes any statute or rule against perpetuities.

(d) When any gift is made in general terms, the trustee or other recipient of the gift shall have the right and power:

(1) To select from time to time one or more specific charitable beneficiaries or purposes for which any trust or property or income shall be held and administered; and

(2) To determine the means to accomplish those charitable purposes, unless otherwise provided, including the creation of corporations or other legal entities for those purposes.

(e) For purposes of this section, the reference to a "gift" or "gifts" includes both inter vivos and testamentary gifts, grants, and other transfers.

"**§ 36C-4-405A. Enforcement of charitable gift or trust.**

(a) The settlor of a charitable trust, the Attorney General, the district attorney, a beneficiary, or any other interested party may maintain a proceeding to enforce a charitable trust, including the following:

(1) A proceeding to require a trustee to make a selection as may be necessary to establish the charitable beneficiaries or purposes for which the trust was established, as provided in subsections (d)(1) and (d)(2) of G.S. 36C-4-405;

(2) A proceeding for breach of fiduciary duty if there is reason to believe that the trust property has been mismanaged through negligence or fraud; and

(3) A proceeding for an accounting of the trustee's administration of the trust.

(b) The donor of a charitable gift, the Attorney General, the district attorney, or any other interested party may maintain a proceeding to enforce the gift, including a proceeding to require the recipient of the gift to make a selection as may be necessary to establish the charitable beneficiaries or purposes for which the gift was intended, as provided in subsections (d)(1) and (d)(2) of G.S. 36C-4-405.

"**§ 36C-4-406. Creation of trust induced by fraud, duress, or undue influence.**

A trust is voidable to the extent that its creation was induced by fraud, duress, or undue influence.

"**§ 36C-4-407. Evidence of oral trust.**

Except as required by a statute other than this Chapter, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

"**§ 36C-4-408. Trust for care of animal.**

(a) Subject to the provisions of this section, a trust for the care of one or more designated domestic or pet animals alive at the time of creation of the trust is valid.

(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of the designated animal or animals.

(c) The trust terminates at the death of the animal or last surviving animal. Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(1) As directed in the trust instrument;

(2) If the trust was created in a preresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will;

(3) If no taker is produced by the application of subdivision (1) or (2) of this subsection, to the transferor or the transferor's heirs determined as of the date of the transferor's death under Chapter 29 of the General Statutes.

(d) The intended use of the principal or income can be enforced by a person designated for that purpose in the trust instrument or, if none, by a person appointed by the clerk of superior court having jurisdiction over the decedent's estate upon application to the clerk of superior court by a person.

(e) Except as ordered by the clerk of superior court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, bond, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(f) A governing instrument shall be liberally construed to bring the transfer within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.

(g) The clerk of superior court may reduce the amount of the property transferred, if the clerk of superior court determines that the amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c) of this section.

(h) If no trustee is designated or if no designated trustee agrees to serve or is able to serve, the clerk of superior court shall name a trustee. The clerk of superior court may

order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. The clerk of superior court may also make such other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of this section.

"**§ 36C-4-409. Noncharitable trust without ascertainable beneficiary.**

Except as otherwise provided in G.S. 36C-4-408 or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than 21 years.

(2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent that the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, or otherwise to the settlor's successors in interest.

(4) Notwithstanding subdivisions (1) through (3) of this section, a trust, contract, or other arrangement to provide for the care of a cemetery lot, grave, crypt, niche, mausoleum, columbarium, grave marker, or monument is valid without regard to remoteness of vesting, duration of the arrangement, or lack of definite beneficiaries to enforce the trust, provided that the trust, contract, or other arrangement meets the requirements of G.S. 28A-19-10, Article 4 of Chapter 65 of the General Statutes, Article 9 of Chapter 65 of the General Statutes, or other applicable law. This section does not repeal or supersede G.S. 36C-4-413.

"**§ 36C-4-410. Modification or termination of trust; proceedings for approval or disapproval.**

(a) In addition to the methods of termination prescribed by G.S. 36C-4-411 through G.S. 36C-4-414, a trust terminates to the extent that the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411 through G.S. 36C-4-416, or trust combination or division under G.S. 36C-4-417, may be commenced by a trustee or beneficiary, and a proceeding to approve or disapprove a proposed modification or termination under

G.S. 36C-4-411 may be commenced by the settlor. The settlor of a charitable trust may maintain a proceeding to modify the trust under G.S. 36C-4-413. A trustee shall be a necessary party to any proceeding under this section.

(c) Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-411. Modification or termination of noncharitable irrevocable trust by consent.**

(a) A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's general guardian or the guardian of the estate with the approval of the court supervising the guardianship if an agent is not so authorized; or by the settlor's guardian of the person with the approval of the court supervising the guardianship if an agent is not so authorized and a general guardian or guardian of the estate has not been appointed.

(b) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries, if the court concludes that modification is not inconsistent with a material purpose of the trust.

(c) Where the beneficiaries of an irrevocable trust seek to compel a termination of the trust and the continuance of the trust is necessary to carry out a material purpose of the trust, or where the beneficiaries seek to compel a modification of the trust in a manner that is inconsistent with its material purpose, the trust may be modified or terminated, in the discretion of the court, only if the court determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust.

(d) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a), (b) or (c) of this section, the modification or termination may be approved by the court if the court is satisfied that:

(1) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) The interests of a beneficiary who does not consent will be adequately protected.

(e) Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.**

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

(c) Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-413. Cy pres.**

(a) Except as otherwise provided in subsection (d) of this section, if a charitable trust becomes unlawful, impracticable, impossible to achieve, or wasteful:

(1) The trust does not fail, in whole or in part;

(2) The trust property does not revert to the settlor or the settlor's successors in interest; and

(3) The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(b) The settlor or a trustee of a charitable trust, the Attorney General, a beneficiary or any other interested party may maintain a cy pres proceeding under Article 2 of this Chapter.

(c) In every cy pres proceeding, the Attorney General shall be notified and given an opportunity to be heard.

(d) This section shall not be applicable if the settlor has provided, either directly or indirectly, for an alternative plan in the event that the charitable trust is or becomes unlawful, impracticable, impossible to achieve, or wasteful. However, if the alternative plan is also a charitable trust and that trust fails, the intention shown in the original plan shall prevail in the application of this section.

"**§ 36C-4-414. Modification or termination of uneconomic trust.**

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value of less than fifty thousand dollars ($50,000) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. The trustee may enter into an agreement or make other provisions that the trustee deems necessary or appropriate to protect the interests of the beneficiaries and to carry out the intent and purpose of the trust. The provisions of this subsection shall not apply where the instrument creating the trust, by specific reference to this section, or to former G.S. 36A-125.6, provides that it shall not apply. The trustee shall not be liable for that termination and distribution notwithstanding the existence or potential existence of other beneficiaries who are not sui juris. Any beneficiary receiving a distribution from a trust terminated under this

section shall incur no liability and shall not be required to account to anyone for such distribution.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(c) This section does not apply to an easement for conservation or preservation.

(d) Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-415. Reformation to correct mistakes.**

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-416. Modification to achieve settlor's tax objectives.**

To achieve a settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect. Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-417. Combination and division of trusts.**

(a) Unless otherwise provided in the trust instrument, after notice to the qualified beneficiaries, a trustee may:

(1) Consolidate the assets of more than one trust and administer the assets as one trust under the terms of one of the trusts if the terms of the trusts are substantially similar and the beneficiaries of the trusts are identical; or

(2) Divide one trust into two or more separate trusts if the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust.

(b) In dividing a trust into two or more separate trusts, a trustee shall accomplish the division by severing the trusts on a fractional basis and funding the separate trusts either (i) with a pro rata portion of each asset held by the undivided trust; or (ii) on a non-pro rata basis based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding.

(c) In any case where two separate identical trusts are created pursuant to this section, one of which is fully exempt from the federal generation-skipping transfer tax and one of which is fully subject to that tax, the trustee may thereafter, to the extent possible consistent with the terms of the trust, determine the value of any mandatory or discretionary distributions to trust beneficiaries on the basis of the combined value of both trusts, but may satisfy those distributions by a method other than pro rata from the

separate trusts in a manner designed to minimize the current and potential generation-skipping transfer tax.

"**§ 36C-4-418. Distribution upon termination of trust.**

Upon termination of a trust under G.S. 36C-4-411, the trustee shall distribute the trust property as agreed by the beneficiaries. Upon termination of a trust under G.S. 36C-4-412 or G.S. 36C-4-414, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. If any trust property becomes distributable to a minor or incompetent under this Article it may be distributed:

(1) To the guardian of the estate or general guardian of the beneficiary;

(2) In accordance with the North Carolina Uniform Transfer to Minors Act, Chapter 33A of the General Statutes; or

(3) In accordance with the North Carolina Custodial Trust Act, Chapter 33B of the General Statutes.

"**§ 36C-4-419. Effect of inalienable interest on modification or termination.**

The court, in exercising its discretion to modify or terminate an irrevocable trust pursuant to the provisions of G.S. 36C-4-411, 36C-4-412 or 36C-4-413 shall consider provisions making the interest of a beneficiary inalienable, including those described in Article 5, but the court is not precluded from the exercise of that discretion solely because of such provisions.

"Article 4A.

"Tax Status of Charitable Trusts.

"**§ 36C-4A-1. Prohibited transactions.**

(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 trust instrument of each trust which is a private foundation described in section 509 of the Internal Revenue Code (including each nonexempt charitable trust described in section 4947(a)(1) of the Internal Revenue Code which is treated as a private foundation) and the trust instrument of each nonexempt split-interest trust described in section 4947(a)(2) of the Internal Revenue Code (but only to the extent that section 508(e) of the Internal Revenue Code is applicable to such nonexempt split-interest trust under section 4947(a)(2) of the Internal Revenue 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 Internal Revenue Code; the trust shall not engage in any act of self-dealing which would subject it to tax under section 4941 of the Internal Revenue Code; the trust shall not retain any excess business holdings which would subject it to tax under section 4943 of the Internal Revenue Code; the trust shall not make any investments which would subject it to tax under section 4944 of the Internal Revenue Code; and the trust shall not make any taxable expenditures which would subject it to tax under section 4945 of the Internal Revenue Code." With respect to any such trust created prior to January 1, 1970, this section shall apply only for its taxable years beginning on or after January 1, 1972.

(b) 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 (a) of this section, the governing instrument of each trust that is a nonexempt charitable trust described in section 4947(a)(1) of the Internal Revenue Code shall be deemed to contain the following provisions:

(1) The trust shall be operated exclusively for charitable, educational, religious and scientific purposes within the meaning of section 501(c)(3) and section 170(c)(2) of the Internal Revenue Code.

(2) Upon any dissolution, winding up, or liquidation of the trust, its assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or shall be distributed to the federal government, or a state or local government for a public purpose.

(c) The trustee of any trust described in this section may either:

(1) Without judicial proceedings, amend the trust to expressly exclude the application of this section by executing a written amendment to the trust instrument and filing a duplicate original of the amendment with the Attorney General. Upon filing of the amendment, this section shall not apply to that trust.

(2) Institute a proceeding under Article 2 of this Chapter seeking reformation of the trust instrument.

"**§ 36C-4A-2. Reformation of charitable remainder trust.**

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 that passes from the decedent under a will or trust to a person, or for a use, described in section 2055(a) of the Internal Revenue Code, to meet the requirements of subsections 2055(e)(2)(A) or (B) of the Internal Revenue Code, then in order that the deduction shall nevertheless be allowable under section 2055(e)(3) of the Internal Revenue Code, the court may, on application of any trustee or interested party with either (i) the written consent of the qualified beneficiaries, or (ii) a finding that the interest of those beneficiaries is substantially preserved, order an amendment to the trust so that the remainder interest is in a trust that is a charitable remainder annuity trust, a charitable remainder unitrust (as those terms are described in section 664 of the Internal Revenue Code), or a pooled income fund (as that term is described in section 642(c)(5) of the Internal Revenue Code), or so that any other interest of a charitable beneficiary is in the form of a guaranteed annuity or is a fixed percentage distributed yearly of the fair market value of the property (to be determined yearly), in accordance with the provisions of section 2055(e)(2)(B) of the Internal Revenue Code. In every such proceeding, the Attorney General shall be notified, and given an opportunity to be heard.

"Article 4B.

"Charitable Remainder Trust Administration Act.

"**§ 36C-4B-1. Short title.**

This Article shall be known as the Charitable Remainder Administration Trust Act.

"**§ 36C-4B-2. General rule.**

Notwithstanding any provisions in the laws of this State or in the governing instruments to the contrary, any charitable remainder annuity trust and any charitable remainder unitrust that cannot qualify for a deduction for federal tax purposes under section 2055 or section 2522 of the Internal Revenue Code in the absence of this Article shall be administered in accordance with this Article.

"**§ 36C-4B-3. Definitions.**

The following definitions apply to this Article unless the context clearly requires otherwise:

(1) "Charitable remainder trust" means a trust that provides for a specified distribution at least annually for either life or a term of years to one or more beneficiaries, at least one of which is not a charity (hereinafter referred to as "beneficiaries"), with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity. For purposes of this Article, only a charitable remainder annuity trust or a charitable remainder unitrust is considered a charitable remainder trust.

(2) "Charitable remainder annuity trust" means a charitable remainder trust:

a. From which a sum certain (that is not less than five percent (5%) of the initial net fair market value of all property placed in trust) is to be paid at least annually to one or more persons (at least one of which is not an organization described in section 170(c) of the Internal Revenue Code and, in the case of individuals, only to an individual who was living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of that individual or those individuals; however, in the case of an individual, the amount to be paid to that individual may be subject to a qualified contingency according to the terms of the governing instrument;

b. From which no amount other than the payments described in sub-subdivision a. of this subdivision may be paid to and/or for the use of anyone other than an organization that is or was described in section 170(c) of the Internal Revenue Code; and

c. Following the termination of the payments described in sub-subdivision a. of this subdivision, the remainder interest in the trust is to be transferred to, or for the use of, an organization that is or was described in section 170(c) of the Internal Revenue Code or is to be retained by the trust for such a use.

(3) "Charitable remainder unitrust" means a charitable remainder trust:

a. From which a fixed percentage (that is not less than five percent (5%)) of the net fair market value of its assets, valued annually, is to be paid at least annually to one or more persons (at least one of which is not an organization described in section 170(c) of the Internal Revenue Code and, in the case of individuals, only to an individual who was living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of that individual or those individuals; however, in the case of an individual, the amount to be paid to that individual may be made subject to a qualified contingency according to the terms of the governing instrument;

b. From which no amount other than the payments described in sub-subdivision a. of this subdivision may be paid to or for the use of anyone other than an organization that is or was an organization described in section 170(c) of the Internal Revenue Code; and

c. Following the termination of the payments described in sub-subdivision a. of this subdivision, the remainder interest in the trust is to be transferred to, or for the use of, an organization that is or was described in section 170(c) of the Internal Revenue Code, or is to be retained by the trust for such a use.

Notwithstanding the provisions of sub-subdivisions a. and b. of this subdivision, the trust instrument may provide that the trustee shall pay to the income beneficiary for any year (i) the amount of the trust income if that amount is less than the amount required to be distributed under sub-subdivision a. of this subdivision, and (ii) any amount of the trust income that exceeds the amount required to be distributed under sub-subdivisions a of this subdivision to the extent that (by reason of sub-subdivision a.) the aggregate of the amounts paid in prior years is less than the aggregate of the required amounts.

(4) "Qualified contingency" means any provision of the governing instrument that provides that, upon the happening of a contingency, the payments made to an individual noncharitable beneficiary of a charitable remainder trust will terminate not later than those payments would otherwise terminate under the governing instrument.

"**§ 36C-4B-4. Administrative provisions applicable to both charitable remainder annuity trusts and charitable remainder unit trusts.**

(a) Creation of Remainder Interests in Charity. – Upon the termination of the noncharitable interests, the trustee shall distribute all of the then principal and income of the trust, other than any amount due the noncharitable beneficiary or beneficiaries, to

the designated charity or charities, or shall hold the property in trust for the designated charity or charities in accordance with the terms of the trust document.

(b) Selection of Alternate Charitable Beneficiary if Remaindermen Do Not Qualify Under Section 170(c) of the Internal Revenue Code at Time of Distribution. – If the designated charity is not an organization described in section 170(c) of the Internal Revenue Code at the time when any principal or income of the trust is to be distributed to it, the trustee shall distribute the principal or income to one or more organizations then described in section 170(c) of the Internal Revenue Code selected in accordance with the terms of the trust instrument. If the trust instrument does not provide for a method of selecting alternate charitable beneficiaries that are then qualified under section 170(c) of the Internal Revenue Code, the trustee shall, in the trustee's sole discretion, select alternate trust beneficiaries that are qualified under section 170(c) of the Internal Revenue Code.

(b1) Selection of Alternative Charitable Beneficiary if Remaindermen Do Not Qualify Under Section 170(b)(1)(A) of the Internal Revenue Code at Time of Distribution. – Notwithstanding the provisions of subsection (b) of this section, if the designated charity is, at the time of the creation of the trust, an organization described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code, and if the designated charity is not an organization described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code when any principal or income of the trust is to be distributed to it, the trustee shall distribute the principal or income to one or more organizations then described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code selected in accordance with the terms of the governing instrument; however, in the event that the governing instrument does not provide a method of selecting alternative charitable beneficiaries that are then described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code, the trustee shall, in his sole discretion, select one or more alternative charitable beneficiaries that are described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code and shall distribute the principal or income to the organization or organizations so selected in such shares as the trustee, in the trustee's sole discretion, shall determine.

(c) Prohibitions Governing Trustees. – Except for payment of the annuity amount or the unitrust amount to the beneficiaries, whichever is applicable, the trustee is prohibited from engaging in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code, retaining any excess business holdings as defined in section 4943(c) of the Internal Revenue Code that would subject the trust to tax under section 4943 of the Code, making any investments that would subject the trust to tax under section 4944 of the Internal Revenue Code, and making any taxable expenditures as defined in section 4945(d) of the Code. The trustee shall make distributions at a time and in a manner as not to subject the trust to tax under section 4942 of the Internal Revenue Code.

(d) Distribution to Charity During Term of Noncharitable Interests and Distributions in Kind. – If the governing instrument of the trust provides for distribution

to charity during the term of the noncharitable interests, the trustee may pay to the designated charity the amounts specified in the governing instrument that exceed the annuity amount or the unitrust amount payable to any of the beneficiaries for the taxable year of the trust in which the income is earned. If the governing instrument of the trust provides for distribution to charity in kind, the adjusted basis for federal income tax purposes of any trust property the trustee distributes in kind to charity during the term of the noncharitable interests must be fairly representative of the adjusted basis for those purposes of all trust property available for distribution on the date of distribution.

(e) Investment Restrictions on Trustee. – Nothing in the trust instrument shall be construed to restrict the trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

(f) Distribution From Trust Used to Administer an Estate to Charitable Remainder Trust. – If the governing instrument of a revocable inter vivos trust provides that the revocable inter vivos trust will be used partially to administer the estate of the settlor or for some other purpose, and further provides the assets will then be distributed to another trust that is a charitable remainder trust, upon the death of the settlor, or upon the occurrence of any event that causes the trust to become irrevocable, then the trust shall become irrevocable, and the trustee of this trust shall perform any remaining duties or obligations provided for in the trust instrument and then transfer the property specified in the governing instrument to the trustee of the charitable remainder trust to be held, administered, and distributed in the manner and according to the terms and conditions provided by the charitable remainder trust.

(g) Payment of Taxes by Noncharitable Beneficiary. – In the case of any inter vivos charitable remainder trust that is liable to pay, from trust property, any federal estate, state inheritance, or other similar death taxes by reason of the death of the settlor of the trust, the interest of any noncharitable beneficiary of the trust shall terminate upon the death of the settlor unless the noncharitable beneficiary furnishes to the trust sufficient funds for payment of all those taxes attributable to the interest of the noncharitable beneficiary in the trust property, and the termination shall be deemed as the occurrence of a qualified contingency.

"**§ 36C-4B-5. Administrative provisions applicable to charitable remainder trusts only.**

(a) Creation of Annuity Amount for Period of Years or Life. – The trustee shall pay the annuity amount designated in the trust instrument to the beneficiaries named in the trust instrument during their lives (or if the governing instrument so provides, for a period of 20 years or less) in each taxable year of the trust. The annuity amount shall be paid annually or in more frequent equal or unequal installments if the governing instrument so provides. The annuity amount shall be paid from income and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the annuity amount shall be added to principal.

The total amount payable at least annually to a person or persons named in the trust document, at least one of which is not an organization described in section 170(c) of the Internal Revenue Code, may not be less than five percent (5%) of the initial net fair market value of the property placed in trust as finally determined for federal tax purposes, except as provided in subsection (g) of this section.

(b) Computation of Annuity Amount in Short and Final Taxable Years. – For a short taxable year and for the taxable year in which the noncharitable beneficiary's interest terminates by death or otherwise, the trustee shall prorate the annuity amount on a daily basis.

(c) Prohibition of Additional Contributions. – No additional contributions shall be made to the trust after the initial contribution.

(d) Deferral of Annuity Amount During Period of Administration or Settlement. – When property passes to the trust at the death of the settlor, the obligation to pay the annuity amount commences with the date of death of the settlor, but payment of the annuity amount may be deferred from the date of the settlor's death to the end of the taxable year in which complete funding of the trust occurs. Within a reasonable time after the end of the taxable year in which the complete funding of the trust occurs, the trustee must pay to the beneficiary, in the case of an underpayment, or must receive from the beneficiary, in the case of an overpayment, the difference between:

(1) Any annuity amounts actually paid, plus interest on those amounts computed at ten percent (10%) a year, compounded annually; and

(2) The annuity amounts payable, determined under the method described in Section 1.664-1(a)(5) of the federal income tax regulations, plus interest on those amounts computed at ten percent (10%) a year, compounded annually.

Notwithstanding the foregoing sentence, in computing any underpayment or overpayment of the annuity amounts, if the governing instrument was executed or last amended prior to August 9, 1984, and if the governing instrument does not specify that a ten percent (10%) rate of interest shall be used, the underpayment or overpayment of the annuity amounts shall be computed using an interest rate at six percent (6%) a year, compounded annually.

(e) Dollar Amount Annuity May Be Stated as Fraction or Percentage. – If the governing instrument of the trust states the amount of the annuity as a fraction or a percentage, the trustee shall pay to the beneficiaries in each taxable year of the trust during their lives an annuity amount equal to a percentage (that percentage being stipulated in the governing instrument of the trust and, in any event, being five percent (5%) or greater) of the initial net fair market value of the assets constituting the trust. In determining this amount, assets shall be valued at their values as finally determined for federal tax purposes. If the fiduciary incorrectly determines the initial net fair market value of the assets constituting the trust, then, within a reasonable period after a final determination, the trustee shall pay to the beneficiaries, in the case of an undervaluation or shall receive from the beneficiaries, in the case of an overvaluation, an amount

equal to the difference between the annuity amount properly payable and the annuity amount actually paid.

(f) Annuity Amount May Be Allocated Among Class of Noncharitable Beneficiaries in Discretion of Trustee. – If the governing instrument of the trust provides that the annuity trust amount may be allocated among a class of noncharitable beneficiaries in the discretion of the trustee, then the trustee shall pay the annuity amount, which is defined in the governing instrument of the trust, in each taxable year of the trust, to the member or members of the class of noncharitable beneficiaries in an amount and proportions as the trustee in the trustee's absolute discretion shall from time to time determine until the last of the noncharitable beneficiaries dies. The trustee may pay the entire annuity amount to one member of this class or may apportion it among the various members in a manner as the trustee from time to time deems advisable as long as the power to allocate does not cause any person to be treated as the owner of any part of the trust under the rules of section 671 through section 678 of the Internal Revenue Code. If the class provided for in the governing instrument is open, then the distribution shall be for a period of years not to exceed 20 years, notwithstanding a provision to the contrary in the trust instrument. If the class provided for in the governing instrument is closed at the creation of the trust, and all members of the class are ascertainable, the distribution may be for the lives of the members of the class or for a period not exceeding 20 years. The trustee shall pay the entire annuity amount for each taxable year annually and may not delay payment of the annuity amount.

(g) Reduction of Annuity Amount If Part of Corpus Is Paid to Charity at Expiration of Term of Years or on Death of Recipient. – If the governing instrument of the trust provides for the reduction of the annuity amount if part of the corpus is paid to charity at the expiration of a term of years or upon the death of a recipient, then during the term of years or during the joint lives of the noncharitable beneficiaries, the trustee shall, in each taxable year of the trust, pay a total annuity amount of at least five percent (5%) of the initial net fair market value of the assets placed in trust. Upon the expiration of the term of years or the death of a beneficiary, the trustee shall distribute an amount or percentage of the trust assets, as provided in the governing instrument of the trust, to the charity named in the governing instrument, and thereafter the trustee shall pay, annually or in more frequent installments, to the survivors for their lives, an annuity amount that in each taxable year of the trust, bears the same ratio to five percent (5%) of the initial net fair market value of the trust assets as the net fair market value of the trust assets valued as of the date of distribution, less the amount or percentage of trust assets distributed to the charity, bears to the net fair market value of the trust assets as of the date of distribution.

(h) Termination of Annuity Amount on Payment Date Preceding Termination of Noncharitable Interest. – If the governing instrument of the trust provides that payment of the annuity amount may terminate with the regular payment preceding the

termination of all noncharitable interests, then the trustee shall pay to the noncharitable beneficiary during the term of the noncharitable interest the annuity amount, defined in the trust document, in each taxable year of the trust. The obligation of the trustee to pay the annuity amount shall terminate with the payment preceding the death of the noncharitable beneficiary or other event that terminates the noncharitable interest.

(i) Retention of Testamentary Power to Revoke Noncharitable Interest. – If the governing instrument of the trust provides that the settlor of the trust retains the power, exercisable only by will, to revoke or terminate the interest of any recipient other than an organization described in section 170(c) of the Internal Revenue Code, then the trustee shall pay to the settlor during his life the annuity amount, as defined in the governing instrument of the trust and, upon the death of the settlor, if the noncharitable beneficiary survives the settlor, the trustee shall pay to the noncharitable beneficiary during his life the annuity amount equal to the amount paid to the settlor. The settlor shall have the power, exercisable only by will, to revoke and terminate the interest of the noncharitable beneficiary under the trust. Upon the first to occur of (i) the death of the survivor of the settlor and noncharitable beneficiary; or (ii) the death of the settlor if he effectively exercised his testamentary power to revoke and terminate the interest of the noncharitable beneficiary; the trustee shall distribute all of the then principal and income of the trust, other than any amount due the settlor or noncharitable beneficiary, to the charity named in the trust document or, if the governing instrument so provides, the trustee shall continue to hold the principal and income in trust for the charity or for the charitable purposes specified in the trust. No other retained power to terminate an interest in the trust shall be effective.

"**§ 36C-4B-6. Administrative provisions applicable to charitable remainder unitrusts only.**

(a) Creation of Unitrust Amount for a Period of Years or Life. – The trustee shall pay to the beneficiaries named in the trust investment in each taxable year of the trust during their lives or, if the governing instrument so provides, for a period not exceeding 20 years, a unitrust amount equal to a fixed percentage, as stated in the governing instrument of the trust, of the net fair market value of the trust assets valued annually on the date or by the method designated in the governing instrument of the trust or, if no date or method is specified, on the date or by the method selected by the trustee in his discretion, so long as the same valuation date or dates or valuation methods are used each year. The unitrust amount shall be paid annually or in more frequent equal or unequal installments if the governing instrument so provides. The unitrust amount shall be paid from income and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal. The fixed percentage to be paid at least annually to all beneficiaries cannot be less than five percent (5%).

(b) Unitrust Amount Expressed as the Lesser of Income or a Fixed Percentage. – If the governing instrument of the trust provides that the trustee shall pay, instead of a regular unitrust amount (the fixed percentage of the net fair market value of the trust

assets, determined annually), the amount of trust income for the taxable year to the extent that this amount is not greater than the amount required to be distributed as a regular unitrust amount for that taxable year or the amount of the trust income for the taxable year that exceeds the regular unitrust amount for that taxable year to the extent that the aggregate of the amounts paid in prior years is less than the aggregate of the regular unitrust amount for those prior years, then the trustee shall pay to the beneficiaries in each taxable year of the trust during their lives, or for a period not exceeding 20 years if the trust agreement so provides, an amount equal to the lesser of (i) the trust income for the taxable year, as defined in section 643(b) of the Internal Revenue Code and the regulations thereunder, and (ii) the percentage, as stated in the governing instrument, of the net fair market value of the trust assets valued as of the taxable year decreased as elsewhere provided if the taxable year is a short taxable year or is the taxable year in which the noncharitable interest terminates by death or otherwise, and increased as elsewhere provided if additional contributions are made in the taxable year.

If the governing instrument of the trust so provides and if the trust income for any taxable year exceeds the amount determined under (ii) above, the payment to beneficiaries shall also include the excess income to the extent that the aggregate of the amounts paid to beneficiaries in prior years is less than the percentage of the aggregate net fair market value of the trust assets, which percentage is defined in the governing instrument of the trust, for these years. Payments to beneficiaries shall be made annually or in more frequent equal or unequal installments if the governing instrument so provides. Any income of the trust in excess of these payments shall be added to principal.

(c) Adjustment for Incorrect Valuation. – If the fiduciary incorrectly determines the net fair market value of the trust assets for any taxable year, the trustee shall, within a reasonable period after the final determination of the correct value, pay to the beneficiaries, in the case of an undervaluation, or receive from the beneficiaries, in the case of an overvaluation, an amount equal to the difference between the unitrust amount properly payable and the unitrust amount actually paid.

(d) Computation of Unitrust Amount in Short and Final Taxable Years. – For a short taxable year and for the taxable year in which the noncharitable beneficiary's interest terminates by death or otherwise, the trustee shall prorate the unitrust amount on a daily basis. If a trust provides for a valuation date other than the first day of the taxable year, and the valuation date does not occur in a taxable year of the trust because the taxable year is either a short taxable year or is the taxable year in which the noncharitable interests terminate, the trust assets shall be valued as of the last day of the short taxable year or the day on which the noncharitable interests terminate, as appropriate.

(e) Additional Contributions. – If the governing instrument does not prohibit additional contributions and additional contributions are made to the trust after the

initial contribution in the trust, the unitrust amount for the taxable year in which the additional contributions are made shall be a fixed percentage, as stated in the governing instrument of the trust, of the sum of (i) the net fair market value of trust assets, excluding the additional contributions and any income from or appreciation of these contributions and (ii) that proportion of the value of the additional contributions excluded under (i) which the number of days in the period beginning with the date of contribution and ending with the earlier of the last day of the taxable year or the day the noncharitable beneficiary's interest terminated bears to the number of days in the period beginning on the first day of the taxable year and ending with the earlier of the last day in the taxable year or the day the noncharitable beneficiary's interest terminated. If no valuation date occurs after the contributions are made, the assets so added shall be valued as of the time of contribution.

(f) Deferral of Unitrust Amount During Period of Administration or Settlement. – When property passes to the trust at the death of the settlor, the obligation to pay the unitrust amount commences with the date of the settlor's death, but payment of the unitrust amount may be deferred from the date of the settlor's death to the end of the taxable year of the trust in which complete funding of the trust occurs. Within a reasonable time after the end of the taxable year in which the complete funding of the trust occurs, the trustee must pay to the beneficiary, in the case of an underpayment, or must receive from the beneficiary, in the case of an overpayment, the difference between:

(1) Any unitrust amounts actually paid, plus interest on those amounts computed at ten percent (10%) a year, compounded annually; and

(2) The unitrust amounts payable, determined under the method described in section 1.664-1(a)(5) of the federal income tax regulations, plus interest on those amounts computed at ten percent (10%) a year, compounded annually.

Notwithstanding the foregoing sentence, in computing any underpayment or overpayment of the unitrust amounts, if the governing instrument was executed or last amended prior to August 9, 1984, and if the governing instrument does not specify that a ten percent (10%) rate of interest shall be used, the underpayment or overpayment of the unitrust amounts shall be computed using an interest rate of six percent (6%) a year, compounded annually.

(g) Unitrust Amount May Be Allocated Among Class of Noncharitable Beneficiaries in Discretion of Trustee. – If the governing instrument of the trust provides that the unitrust amount may be allocated to a class of noncharitable beneficiaries in the discretion of the trustee, then the trustee shall pay, in each taxable year of the trust, the unitrust amount to the member or members of the class of noncharitable beneficiaries in amounts and proportions as the trustee in the trustee's absolute discretion shall from time to time determine until the last of the noncharitable beneficiaries dies. The trustee may pay the unitrust amount to any one member of the class or may apportion it among the various members in a manner that the trustee shall

from time to time deem advisable as long as the power to allocate does not cause any person to be treated as the owner of any part of the trust under the rules of section 671 through section 678 of the Internal Revenue Code. If the class provided for in the governing instrument is open, the distribution shall be for a period not exceeding 20 years, notwithstanding a provision to the contrary in the trust instrument. If the class provided for in the governing instrument is closed at the creation of the trust, and all members of the class are ascertainable, the distribution may be for the lives of the members of the class or for a period not exceeding 20 years. The trustee shall pay the entire unitrust amount for each taxable year annually and may not delay payment of the unitrust amount.

(h) Reduction of Unitrust Amount if Part of Corpus Is Paid to Charity at Expiration of Term of Years or on Death of a Recipient. – If the governing instrument of the trust provides for the reduction of the unitrust amount if part of the corpus is paid to charity at the expiration of a term of years or upon the death of a recipient, then during the term of years or during the joint lives of the noncharitable beneficiaries the trustee shall, in each taxable year of the trust, pay the total unitrust amount equal to a percentage of the net fair market value of the trust assets valued annually, which shall not be less than five percent (5%). Upon expiration of the term of years or the death of a recipient, the trustee shall distribute an amount or percentage of the trust assets, as provided in the governing instrument of the trust, to the charity named in the governing instrument, and thereafter the trustee shall pay to the survivors for their lives a unitrust amount in each taxable year of the trust equal to at least five percent (5%) (the actual percentage being defined in the trust instrument) of the net fair market value of the remaining trust assets valued annually.

(i) Termination of Unitrust Amount on Payment Date Preceding Termination of Noncharitable Interests. – If the governing instrument of the trust provides that payment of the unitrust amount may terminate with the regular payment preceding the termination of all noncharitable interests, then the trustee shall pay the unitrust amount to the noncharitable beneficiary in each taxable year of the trust during the term of the noncharitable interest. The obligation of the trustee to pay the unitrust amount terminates with the payment preceding the termination of the noncharitable interest by death or otherwise. The five percent (5%) requirement provided in subsection (a) of this section shall be met until the termination of all payments of the unitrust amount.

(j) Retention of Testamentary Power to Revoke Noncharitable Interest. – If the governing instrument of the trust provides that the settlor of the trust shall retain the power, exercisable only by will, to revoke or terminate the interest of any recipient other than an organization described in section 170(c) of the Internal Revenue Code, then the trustee shall pay the unitrust amount to the settlor during his life and, upon the death of the settlor, shall pay the unitrust amount to the noncharitable beneficiary during his life, provided the noncharitable beneficiary survives the settlor. The settlor shall have the power, exercisable only by will, to revoke and terminate the interest of the

noncharitable beneficiary under the trust. Upon the first to occur of (i) the death of the survivor of the settlor and the noncharitable beneficiary; or (ii) the death of the settlor if the settlor effectively exercised the testamentary power to revoke and terminate the interest of the noncharitable beneficiary; the trustee shall distribute all of the then principal and income of the trust, other than any amount due the noncharitable beneficiaries, to the charity named in the trust document or, if the governing instrument so provides, the trustee shall continue to hold the principal and income in trust for the charity or for the charitable purposes specified in the trust. No other retained power to terminate an interest in the trust shall be effective.

"**§ 36C-4B-7. Interpretation.**

This Article shall be interpreted and construed to effectuate its general purpose to cause all charitable remainder annuity trusts and all charitable remainder unitrusts to be administered in accordance with the provisions of section 2055 and section 2522 of the Internal Revenue Code and the regulations under those sections.

"Article 5.

"Creditors' Claims; Spendthrift and Discretionary Trusts.

"**§ 36C-5-501. Rights of beneficiary's creditor or assignee.**

(a) Except as provided in subsection (b) of this section, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to that relief as is appropriate under the circumstances.

(b) This section shall not apply and a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary, to the extent that a beneficiary's interest:

(1) Is subject to a spendthrift provision;

(2) Is a discretionary trust interest as defined in G.S. 36C-5-504(a)(2); or

(3) Is a protective trust interest as described in G.S. 36C-5-508.

"**§ 36C-5-502. Spendthrift provision.**

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust", or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this Article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

"**§ 36C-5-503. Exceptions to spendthrift provision.**

(a) As used in this section, the term "child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(b) Even if a trust contains a spendthrift provision, or if the beneficiary's interest is a discretionary trust interest as defined in G.S. 36C-5-504(a)(2) or a protective trust

interest as defined in G.S. 36C-5-508, a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances.

"**§ 36C-5-504. Discretionary trusts; effect of standard.**

(a) In this section:

(1) "Child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(2) "Discretionary trust interest" means an interest in a trust that is subject to the trustee's discretion, whether or not the discretion is expressed in the form of a standard of distribution. A discretionary trust interest shall include an interest in any one or any combination of the following:

a. A trust in which the amount to be received by the beneficiary, including whether or not the beneficiary, or a class of beneficiaries, is to receive anything at all, is within the discretion of the trustee.

b. A trust in which the trustee has no duty to pay or distribute any particular amount to the beneficiary, but has only a duty to pay or distribute to the beneficiary, or apply on behalf of the beneficiary, those sums that the trustee, in the trustee's discretion, determines are appropriate for the support, education, or maintenance of the beneficiary.

(b) A discretionary trust interest may not be transferred by the beneficiary and, except as otherwise provided in this Article, a creditor or assignee of a beneficiary may not reach such an interest or a distribution by the trustee before its receipt by the beneficiary.

(c) Except as provided in subsection (d) of this section, a creditor of a beneficiary may not compel a distribution from a trust in which the beneficiary has a discretionary trust interest even if the trustee has abused the trustee's discretion.

(d) To the extent that a trustee has not complied with a standard of distribution or has abused a discretion:

(1) A distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child; and

(2) The court shall direct the trustee to pay to the child such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(e) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(f) A creditor may not reach the interest of a beneficiary who is also a trustee or co-trustee, or otherwise compel a distribution, if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard.

"**§ 36C-5-505. Creditor's claim against settlor.**

(a) Whether or not the terms of a trust contain a spendthrift provision or the interest in the trust is a discretionary trust interest as defined in G.S. 36C-504(a)(2) or a protective trust interest as defined in G.S. 36C-5-508, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent that the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances, unless barred by G.S. 28A-19-3.

(b) The lapse, release, or waiver of a power of withdrawal shall not cause the holder to be treated as a settlor of the trust.

"**§ 36C-5-506. Overdue distribution.**

(a) In this section, "mandatory distribution" means a distribution of income or principal that the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term excludes a distribution subject to the exercise of the trustee's discretion, regardless of whether the terms of the trust (i) include a support or other standard to guide the trustee in making distribution decisions; or (ii) provide that the trustee "may" or "shall" make discretionary distributions, including distributions pursuant to a support or other standard.

(b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

"**§ 36C-5-507. Personal obligations of trustee.**

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

"**§ 36C-5-508. Protective trusts.**

Except with respect to an interest retained by the settlor, a "protective trust interest" means an interest in a trust in which the terms of the trust provide that the interest shall terminate or become discretionary if:

(1) The beneficiary alienates or attempts to alienate that interest; or

(2) Any creditor attempts to reach the beneficiary's interest by attachment, levy, or otherwise; or

(3) The beneficiary becomes insolvent or bankrupt.

"Article 6.

"Revocable Trusts.

"**§ 36C-6-601. Capacity of settlor of revocable trust.**

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

"**§ 36C-6-602. Revocation or amendment of revocable trust.**

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust without regard to the actual capacity of the settlor. This subsection does not apply to a trust created under an instrument executed before the effective date of this Chapter.

(b) If a revocable trust is created or funded by more than one settlor:

(1) To the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

(2) To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard the portion of the trust property attributable to that settlor's contribution.

(c) The settlor may revoke or amend a revocable trust:

(1) By substantial compliance with a method provided in the terms of the trust; or

(2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

a. A later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

b. By oral statement to the trustee if the trust was created orally; or

c. Any other written method delivered to the trustee manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(e) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power of attorney provided the exercise of the power of revocation or amendment does not alter the designation of beneficiaries to receive property on the settlor's death under the settlor's existing estate plan.

(f) A general guardian or a guardian of the estate of the settlor or, if no general guardian or guardian of the estate has been appointed, a guardian of the person of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship.

(g) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

"**§ 36C-6-603. Settlor's powers; powers of withdrawal.**

(a) While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors.

"**§ 36C-6-604. Limitation on action contesting validity of revocable trust; distribution of trust property.**

(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

(1) Three years after the settlor's death; or

(2) 120 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

(1) The trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) A potential contestant has notified the trustee of a possible judicial proceeding to contest the trust, and a judicial proceeding is commenced within 60 days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

"Article 7.

"Office of Trustee.

"**§ 36 C-7-701. Accepting or declining trusteeship.**

(a) Except as otherwise provided in subsection (c) of this section, a person designated as trustee accepts the trusteeship:

(1) By substantially complying with a method of acceptance provided in the terms of the trust; or

(2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time, not to exceed 120 days, after receiving written notice of the trusteeship shall be deemed to have rejected the trusteeship.

(c) A person designated as trustee, without accepting the trusteeship, may:

(1) Act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

(2) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

"**§ 36C-7-702. Trustee's bond.**

(a) A trustee shall provide bond to secure the performance of the trustee's duties if:

(1) The trust instrument was executed before January 1, 2006, unless the terms of the trust instrument provide otherwise;

(2) The trust instrument was executed on or after January 1, 2006, but only if the terms of the trust instrument require the trustee to provide bond;

(3) A beneficiary requests the trustee to provide bond, and the court finds the request to be reasonable; or

(4) The court finds that it is necessary for the trustee to provide bond in order to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

However, in no event shall bond be required of a trustee if the governing instrument directs otherwise.

(b) If bond is required, it shall be in a sum of double the value of the personal property to come into the trustee's hands if 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 trust estate if 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 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%) of that value, conditioned upon the faithful performance of the trustee's duties and for the payment to the persons entitled to receive property that may come into the trustee's hands. All bonds executed under the provisions of this Article shall be filed with the clerk of superior court.

(c) On petition of the trustee or a qualified beneficiary, the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties.

(d) As provided in G.S. 53-159 and G.S. 53-366(a)(10), banks and trust companies licensed to do trust business in this State need not give bond, even if required by the terms of the trust.

"**§ 36C-7-703. Co-trustees.**

(a) Co-trustees who are unable to reach a unanimous decision may act by majority decision if more than two are serving. Unanimity is required when only two co-trustees are serving.

(b) If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust and exercise all trustee powers, except those powers that the remaining trustees are prohibited from exercising under the trust instrument or by law.

(c) A co-trustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity, or the co-trustee has properly delegated the performance of the function to another trustee.

(d) If a co-trustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust.

(e) A trustee may delegate to a co-trustee with the consent of the co-trustee the performance of any function other than those the settlor reasonably expected the trustees to perform jointly. The following functions shall not be deemed to be those that the settlor reasonably expected the trustees to perform jointly:

(1) Establish and maintain bank accounts for the trust and issue checks for the trust.

(2) Maintain inventories, accountings, and income and expense records of the trust.

(3) Enter any safety deposit box rented by the trust.

(4) Employ persons as advisors or assistants in the performance of administrative duties, including agents, attorneys, accountants, brokers, appraisers, and custodians.

(5) List trust property for taxes and prepare and file tax returns for the trust.

(6) Collect and give receipts for claims and debts of the trust.

(7) Pay debts, claims, costs of administration, and taxes of the trust.

(8) Compromise, adjust, or otherwise settle any claim by or against the trust and release, in whole or in part, a claim belonging to the trust.

(9) Have custody of the trust property.

The list of functions contained in this subsection is not intended to be exclusive of others that may be delegated to a co-trustee in accordance with this subsection.

(f) Except as otherwise provided in subsection (g) of this section, a trustee who does not join in an action of another trustee is not liable for the action.

(g) Each trustee shall exercise reasonable care to:

(1) Avoid enabling a co-trustee to commit a serious breach of trust; and

(2) Compel a co-trustee to redress a serious breach of trust.

(h) Notwithstanding subsection (f) or (g) of this section, a trustee who has not joined in an action approved by a majority of the other trustees shall not be liable for the action, nor shall a dissenting trustee who joins in an action at the direction of the majority of the trustees but who notified in writing any co-trustee of the dissent at or before the time of the action be liable for the action, unless that trustee had knowledge that the action taken involved intentional misconduct or was taken with an intention to directly or indirectly provide an improper personal benefit to one or more trustees approving the action.

(i) Notwithstanding any other provision of this section to the contrary, if two or more trustees own shares of corporate stock or other securities, their acts with respect to voting shall have the following effect:

(1) If only one votes, in person or by proxy, the act binds all;

(2) If more than one vote, in person or by proxy, the act binds all; and

(3) If more than one vote, in person or by proxy, but the vote is evenly split on any particular matter, each faction is entitled to vote the stock or other securities in question proportionately.

"**§ 36C-7-704. Vacancy in trusteeship; appointment of successor.**

(a) A vacancy in a trusteeship occurs if:

(1) A person designated as trustee rejects the trusteeship;

(2) A person designated as trustee cannot be identified or does not exist;

(3) A trustee resigns;

(4) A trustee is disqualified or removed;

(5) A trustee dies; or

(6) A general guardian, guardian of the estate, or guardian of the person is appointed for an individual serving as trustee.

(b) If one or more co-trustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

(c) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:

(1) By a person designated in the terms of the trust or appointed pursuant to the terms of the trust to act as successor trustee;
(2) By a person appointed by unanimous agreement of the qualified beneficiaries; or
(3) By a person appointed by the court.

(d) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:
(1) By a person designated in the terms of the trust or appointed pursuant to the terms of the trust to act as successor trustee;
(2) By a person selected by majority agreement of the charitable organizations expressly designated to receive distributions under the terms of the trust; or
(3) By a person appointed by the court.

(e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

(f) A 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 governing instrument or unless the order appointing the successor trustee provides otherwise.

"**§ 36C-7-705. Resignation of trustee.**

(a) A trustee may resign:
(1) Upon at least 30 days' notice in writing to the qualified beneficiaries, the settlor, if living, and all co-trustees; or
(2) With the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

"**§ 36C-7-706. Removal of trustee.**

(a) For the reasons set forth in subsection (b) of this section, the settlor, a co-trustee, or a beneficiary of an irrevocable trust may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:
(1) The trustee has committed a serious breach of trust;
(2) Lack of cooperation among co-trustees substantially impairs the administration of the trust;
(3) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
(4) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of all of the

beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order appropriate relief under G.S. 36C-10-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

"**§ 36C-7-707. Delivery of property by former trustee.**

(a) Unless a co-trustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the co-trustee, successor trustee, or other person entitled to it. A former trustee shall execute those documents transferring title to trust property as may be appropriate to facilitate administration of the trust, and in the event that the former trustee fails to do so, the clerk of superior court may order the former trustee to execute those documents, or the clerk of superior court may transfer title.

"**§ 36C-7-708. Compensation of trustee.**

(a) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation determined in accordance with the provisions of Article 5A of Chapter 32 of the General Statutes.

(b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified.

"**§ 36C-7-709. Reimbursement of expenses.**

A trustee is entitled to be reimbursed out of the trust property for expenses properly incurred in the administration of the trust as provided in G.S. 32-58.

"Article 8.

"Duties and Powers of Trustee.

"**§ 36C-8-801. Duty to administer trust.**

Upon acceptance of a trusteeship, a trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this Chapter.

"**§ 36C-8-802. Duty of loyalty.**

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in G.S. 36C-10-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests, is voidable by a beneficiary affected by the transaction, without regard to whether the transaction is fair to the beneficiary, unless:

(1) The transaction was authorized by the terms of the trust;
(2) The transaction was approved by the court;
(3) The beneficiary did not commence a judicial proceeding within the time allowed by G.S. 36C-10-1005;
(4) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with G.S. 36C-10-1009; or
(5) The transaction involves a contract entered into, or claim acquired by, the trustee before the person became or contemplated becoming trustee.

(c) In determining whether a sale, encumbrance, or other transaction involving the investment or management of trust property is affected by a conflict of interest between the trustee's fiduciary and personal interests, the transaction is rebuttably presumed to be affected by such a conflict if the trustee enters into the transaction with:
(1) The trustee's spouse or a parent of the trustee's spouse;
(2) The trustee's descendants, siblings, ancestors, or their spouses;
(3) An agent, attorney, employee, officer, director, member, manager, or partner of the trustee, or an entity that controls, is controlled by, or is under common control with the trustee; or
(4) Any other person or entity in which the trustee, or a person that owns a significant interest in the trust, has an interest or relationship that might affect the trustee's best judgment;

(d) A transaction between a trustee and a beneficiary that does not concern trust property, but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary, and from which the trustee obtains an advantage, is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f) Notwithstanding subsection (c) of this section:
(1) An investment by a trustee in securities of an investment company, investment trust, or pooled investment vehicle in which the trustee has an investment, or to which the trustee, or its affiliate, provides services is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of Article 9 of this Chapter. The trustee may be compensated by the investment company, investment trust, or pooled investment vehicle for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under G.S. 36C-8-813 to receive a copy of the trustee's annual report

of the rate and method by which the compensation was determined; and

(2) Payment made by a trustee to an attorney, broker, accountant, or agent for services performed on behalf of the trust in the ordinary course of business shall not be deemed to be affected by a conflict between the trustee's personal and fiduciary interests if the payment is consistent with payments generally made in the community for the same or similar services.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect to appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(h) This section does not preclude the following transactions, if fair to the beneficiaries:

(1) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(2) Payment of reasonable compensation to the trustee;

(3) A transaction between a trust and another trust, decedent's estate, or guardianship, or similar relationship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) A deposit of trust money in a regulated financial-service institution operated by the trustee or an affiliate of the trustee; or

(5) An advance by the trustee of money for the protection of the trust.

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

"**§ 36C-8-803. Impartiality.**

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

"**§ 36C-8-804. Prudent administration.**

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

"**§ 36C-8-805. Cost of administration.**

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

"**§ 36C-8-806. Trustee's skills.**

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

"**§ 36C-8-807. Delegation by trustee.**

(a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with subsection (a) of this section is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

"**§ 36C-8-808. Powers to direct.**

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust, or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

"**§ 36C-8-809. Control and protection of trust property.**

A trustee shall take reasonable steps to take control of and protect the trust property.

"**§ 36C-8-810. Record keeping and identification of trust property.**

(a) A trustee shall keep adequate records of the administration of the trust.

(b) A trustee shall keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in subsection (d) of this section, a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

"**§ 36C-8-811. Enforcement and defense of claims.**

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

"**§ 36C-8-812. Collecting trust property.**

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee.

"**§ 36C-8-813. Duty to inform and report.**

(a) The trustee is under a duty to a qualified beneficiary to give that beneficiary upon request and at reasonable times complete and accurate information as to the nature and amount of the trust property and to permit the beneficiary, or the beneficiary's representative, to inspect the subject matter of the trust and the accounts and other documents relating to the trust.

(b) Notwithstanding the provisions of subsection (a) of this section:

(1) The duty of the trustee under subsection (a) of this section shall not include informing any beneficiary in advance of transactions relating to the trust property.

(2) A trustee shall be deemed to have discharged the trustee's duty under subsection (a) of this section as to a qualified beneficiary for matters disclosed by a report sent at least annually and at termination of the trust to the beneficiary that describes the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, and lists the trust assets and their respective market values (including estimated values of assets with uncertain values). No presumption shall arise that a trustee who does not comply with the provisions of this subdivision failed to discharge the trustee's duty under subsection (a) of this section.

(c) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this subsection. With respect to future reports and other information, a beneficiary may withdraw a waiver previously given.

(d) Subsection (b) of this section applies only to a trust created pursuant to a trust instrument executed on or after the effective date of this Chapter.

"**§ 36C-8-814. Discretionary powers; tax savings.**

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of terms such as "absolute", "sole", or "uncontrolled", a trustee abuses the trustee's discretion in exercising or failing to exercise a discretionary power if the trustee acts with bad faith, acts dishonestly, acts with an improper motive, even though not a dishonest motive, or if the trustee fails to use the trustee's judgment in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) Subject to subsection (d) of this section, and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

(1) A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power that would, except for this subsection, constitute in whole or in part a general power of appointment may not exercise that power in favor of the trustee/beneficiary, the trustee/beneficiary's estate, the trustee/beneficiary's creditors, or the creditors of the trustee/beneficiary's estate.

(2) Notwithstanding the provisions of subdivision (1) of this subsection, if the trust confers on the trustee the power to make discretionary distributions to or for the trustee's personal benefit, the trustee may exercise the power in accordance with an ascertainable standard.

(3) The trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

For purposes of this subsection, a "general power of appointment" means any power that would cause the income to be taxed to the trustee in his individual capacity under section 678 of the Internal Revenue Code and any power that would be a general power of appointment, in whole or in part, under section 2041(b)(1) or section 2514(c) of the Internal Revenue Code.

(c) A power whose exercise is limited or prohibited by subsection (b) of this section may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) of this section does not apply to:

(1) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in section 2056(b)(5) or section 2523(e) of the Internal Revenue Code, was previously allowed;

(2) Any trust during any period that the trust may be revoked or amended by its settlor; or

(3) A trust, if contributions to the trust qualify for the annual exclusion under section 2503(c) of the Internal Revenue Code.

(e) If a trust created under a will or trust instrument for the benefit of the spouse of the settlor of the trust, other than a trust that provides that upon the termination of the income interest that the entire remaining trust estate be paid to the estate of the spouse, requires that all the income of the trust be paid not less frequently than annually to the spouse and a federal estate or gift tax marital deduction is claimed with respect to the trust, then, unless the trust instrument specifically provides otherwise by reference to this section, any investment in or retention of unproductive property as an asset of the trust is subject to the power of the spouse to require either that the asset be made

productive of income, or that it be converted to assets productive of income, within a reasonable period of time.

"**§ 36C-8-815. General powers of trustee.**

(a) A trustee, without authorization by the court, may exercise:

(1) Powers conferred by the terms of the trust; or

(2) Except as limited by the terms of the trust:

a. All powers over the trust property that an unmarried competent owner has over individually owned property;

b. Any other powers appropriate to achieve the proper investment, management, administration or distribution of the trust property; and

c. Any other powers conferred by this Chapter.

(b) The exercise of a power is subject to the fiduciary duties prescribed by this Article.

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

Without limiting the authority conferred by G.S. 36C-8-816, a trustee may:

(1) Collect and control trust property and accept or reject additions to the trust property from a settlor or any other person;

(2) Invest and reinvest trust property as the trustee deems advisable in accordance with the provisions of the trust, and to acquire or sell property, for cash or on credit, at public or private sale;

(3) Exchange, partition, or otherwise change the character of trust property;

(4) Deposit trust money in an account in a regulated financial services institution, including an institution operated by the trustee or an affiliate of the trustee upon compliance with any applicable requirements for the deposit;

(5) Borrow money, with or without security, including from a corporate trustee's lending department, renew or modify loans, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(6) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, venture, agricultural operation, or other form of business or enterprise, form and transfer, assign, and convey to that form of business or enterprise all or any part of the trust property in exchange for the stock, securities, or obligations of that form of business or enterprise, continue any business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization, or contributing additional capital;

(7) With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:

a. Vote, or give general or limited proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement, or execute waivers, consents, or objections with respect to those securities;

b. Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

c. Pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights;

d. Deposit the securities with a depositary or other regulated financial-service institution; and

e. Consent, directly or through a committee or other agent, to the merger, consolidation, reorganization, readjustment of capital or financial structure, lease, sale, dissolution, or liquidation of a business enterprise, and elect whether to participate as a member of a class in any litigation involving the securities;

(8) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing party walls or buildings or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries, make contracts, licenses, leases, conveyances, or grants of every nature and kind with respect to crops, gravel, sand, oil, gas, timber and forest products, other usufructs or natural resources, and other benefits or incidents of the real property;

(9) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust at the expense of the trust;

(12) Abandon, relinquish any or all rights to, or decline to administer property of no value or of insufficient benefit or value to the trust to justify its collection or continued administration;

(13) With respect to possible liability for violation of environmental law:
a. Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;
b. Take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;
c. Decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;
d. Compromise claims against the trust which may be asserted for an alleged violation of environmental law; and
e. Pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;
(14) Pay or contest any claim, compromise, adjust or otherwise settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;
(15) Pay from the trust property taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust and the protection of the trust property;
(16) Exercise elections with respect to federal, state, and local taxes;
(17) Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights under such a plan, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;
(18) Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and acquire a lien on future distributions for repayment of those loans;
(19) Pledge trust property to guarantee loans made by others to a beneficiary;
(20) Appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, limit those powers the appointed trustee may exercise and the duties for

which the appointed trustee is responsible, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

a. Paying it to the beneficiary's general guardian or the guardian of the beneficiary's estate or, if the beneficiary does not have a general guardian or guardian of the beneficiary's estate, the guardian of the beneficiary's person;

b. Paying it to a custodian under a uniform transfer to minors act or custodial trustee under a uniform custodial trust act and, for that purpose, creating a custodianship or custodial trust for the benefit of the beneficiary;

c. Paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

d. Managing it as a separate fund on the beneficiary's behalf.

A trustee making payments under this subdivision does not have any duty to see to the application of the payments so made, if the trustee exercised due care in the selection of the person, including the minor or incompetent, to whom the payments were made, and the receipt of that person shall be full acquittance to the trustee;

(22) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares without regard to the income tax basis or other special tax attributes of such assets, as the trustee finds to be most practicable and for the best interests of the distributees, value the trust property for those purposes, and adjust for resulting differences in valuation; and to distribute trust property in kind or in cash, or partially in kind and partially in cash, in divided or undivided interests;

(23) Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) Make, execute, and deliver contracts and other instruments, including instruments under seal, that are useful to achieve or facilitate the exercise of the trustee's powers;

(26) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it;

(27) Employ as advisors or assistants in the performance of administrative duties, or delegate administrative duties in the manner provided in G.S. 36C-8-807, to persons, firms, and corporations, including agents, auditors, accountants, brokers, attorneys-at-law, attorneys-in-fact, investment advisors, appraisers, custodians, rental agents, realtors, and tax specialists;

(28) Bid on property at a foreclosure sale, or acquire property from a mortgagor or obligor without foreclosure, and to retain the property so bid on or taken over without foreclosure;

(29) Divide one trust into several trusts and make distributions from those trusts in the manner provided in G.S. 36C-4-417;

(30) Request an order from the court for the sale of real or personal property under Article 29A of Chapter 1 of the General Statutes, or for the exchange, partition, or other disposition or change in the character of, or for the grant of options or other rights in or to, such property; and

(31) Distribute the assets of an inoperative trust consistent with the authority granted under the provisions of G.S. 28A-22-10.

"**§ 36C-8-817. Distribution upon termination.**

Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

"Article 9.

"Uniform Prudent Investor Act.

"**§ 36C-9-901. Prudent investor rule; applicability.**

(a) Except as otherwise provided in subsection (b) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this Article.

(b) The prudent investor rule is a default rule and may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust which govern or direct investments in a manner inconsistent with this Article. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the terms of the trust.

(c) The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorize any investment or strategy permitted under this Article: "Chapter 36A", "investments in accordance with Article 15 of Chapter 36A", "investments in accordance with Article 9 of Chapter 36C", "investments

permissible by law for investment of trust funds", "legal investments", "authorized investments", "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital", "prudent man rule", "prudent trustee rule", "prudent person rule", and "prudent investor rule". This Article also applies where a trust contains no investment standard.

(d) This Article does not apply to:

(1) Unless the provisions of the trust provide otherwise by specific reference to this Article:

a. Trusts under any federal employee retirement income security statute or other retirement or pension trusts;

b. Trusts that are created by legislative act;

c. Trusts that are created by or pursuant to premarital or postmarital agreements, divorce settlements, settlements of other proceedings or disputes;

d. Transfers under the Uniform Transfers to Minors Act;

e. Transfers under the Uniform Custodial Trust Act; or

f. Honorary trusts, trusts for pets, and trusts for cemetery lots.

(2) Trusts imposed or required under another chapter of the General Statutes or by rule in which the investment of the trust funds is regulated by the other chapter or by rule, unless a provision of the other chapter or the rule provides otherwise by a specific reference to this Article.

"**§ 36C-9-902. Standard of care; portfolio strategy; risk and return objectives.**

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are any of the following that are relevant to the trust or its beneficiaries:

(1) General economic conditions;

(2) The possible effect of inflation or deflation;

(3) The expected tax consequences of investment decisions or strategies;

(4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

(5) The expected total return from income and the appreciation of capital;
(6) Other resources of the beneficiaries known to the trustee;
(7) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and
(8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this Article.

"**§ 36C-9-903. Diversification.**

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

"**§ 36C-9-904. Duties at inception of trusteeship.**

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this Chapter.

"**§ 36C-9-905. Reviewing compliance.**

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

"**§ 36C-9-906. Effect on charitable remainder trusts.**

Nothing in this Article shall prevent the application of Article 4B of this Chapter to a "charitable remainder trust" as defined in G.S.36C-4B-3(1).

"**§ 36C-9-907. Short title.**

This Article may be cited as the "North Carolina Uniform Prudent Investor Act."

"Article 10.

"Liability of Trustees and Rights of Persons Dealing with Trustees.

"**§ 36C-10-1001. Remedies for breach of trust.**

(a) A violation by a trustee of a duty the trustee owes under a trust is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:
(1) Compel the trustee to perform the trustee's duties;
(2) Enjoin the trustee from committing a breach of trust;
(3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
(4) Order a trustee to account;
(5) Appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) Suspend the trustee;
(7) Remove the trustee as provided in G.S. 36C-7-706;
(8) Reduce or deny compensation to the trustee;
(9) Subject to G.S. 36C-10-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
(10) Order any other appropriate relief.

(c) The court may, for cause shown, relieve a trustee from liability for any breach of trust, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for a breach of trust.

"**§ 36C-10-1002. Damages for breach of trust.**

(a) A trustee who commits a breach of trust is liable for the greater of:
(1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
(2) The profit the trustee made by reason of the breach.

(b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

"**§ 36C-10-1003. Liability in absence of breach.**

(a) A trustee is accountable for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust. Nothing in this section limits a trustee's right to compensation under G.S. 36C-7-708 or payments allowed under G.S. 36C-8-802(f).

(b) Absent a breach of trust, a trustee is not liable for a loss or depreciation in the value of trust property or for not having made a profit.

"**§ 36C-10-1004. Attorney's fees and costs.**

In a judicial proceeding involving the administration of a trust, the court may award costs and expenses, including reasonable attorney fees, as provided in the General Statutes.

"**§ 36C-10-1005. Limitation of action against trustee.**

Limitation of actions on judicial proceedings involving trusts shall be governed by applicable provisions of Chapter 1 of the General Statutes, except that no proceeding against a trustee for breach of trust may be commenced more than five years after the first to occur of: (i) the removal, resignation, or death of the trustee; (ii) the termination of the beneficiary's interest in the trust; or (iii) the termination of the trust.

"**§ 36C-10-1006. Reliance on trust instrument.**

A trustee who acts in reasonable reliance on the terms of the trust as expressed in a trust instrument is not liable for a breach of trust to the extent that the breach resulted from the reliance.

"**§ 36C-10-1007. Event affecting administration or distribution.**

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

"**§ 36C-10-1008. Exculpation of trustee.**

A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.

"**§ 36C-10-1009. Beneficiary's consent, release, or ratification.**

(a) A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) At the time of the consent, release, or ratification, the beneficiary did not have knowledge of the beneficiary's rights or of the material facts relating to the breach.

(b) No consideration is required for the consent, release, or ratification to be valid.

"**§ 36C-10-1010. Limitation on personal liability of trustee.**

(a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in making the contract disclosed the fiduciary capacity. The addition of the phrases "trustee," or "as trustee," or similar designations to the signature of a trustee on a written contract shall be deemed prima facie evidence of a disclosure of fiduciary capacity.

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim. Any judgment rendered in favor of a claimant in such a judicial proceeding against a trust may be recovered from the trust property,

without proof that the trustee could have obtained reimbursement from the trust if the trustee had paid the claim.

(d) A trustee shall be entitled to indemnity from the trust for any claim, other than a breach of trust, for which the trustee is liable:

(1) If the claim arose from a common incident of activity in which the trustee was properly engaged for the trust;

(2) If the trustee was not personally at fault; or

(3) To the extent that the trustee's actions increased the value of trust property.

(e) A decision by a trustee not to inspect property, or to decline to accept property, shall not create any inference as to liability, under any environmental law, with respect to that property. A trustee shall have no liability for a decrease in value of property in a trust by reason of the trustee's compliance with any environmental law, including reporting requirements.

"**§ 36C-10-1011. Interest as general partner.**

(a) Except as otherwise provided in subsection (c) of this section or unless personal liability is imposed in the contract, a trustee who holds, in a fiduciary capacity, an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership if the fiduciary capacity was disclosed. The addition of the phrases "trustee", or "as trustee", or similar designations to the signature of a trustee on a written partnership document shall be deemed prima facie evidence of a disclosure of fiduciary capacity.

(b) A trustee who holds, in a fiduciary capacity, an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault. This subsection does not apply to additional ownership interests of the trustee held in a nonfiduciary capacity.

(c) If the settlor transfers an existing general partnership interest to a revocable trust, the settlor remains personally liable for partnership obligations as if the settlor were a general partner.

"**§ 36C-10-1012. Protection of person dealing with trustee.**

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that

the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

(f) A person is not required to obtain a certification under G.S. 36C-10-1013 in order to be entitled to the protections of this section.

"**§ 36C-10-1013. Certification of trust.**

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(1) The existence of the trust and the date the trust instrument was executed;

(2) The identity of the settlor, unless withheld pursuant to a provision in the trust instrument;

(3) The identity and address of the currently acting trustee;

(4) The powers of the trustee;

(5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) The authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;

(7) The trust's taxpayer identification number; and

(8) The manner of taking title to trust property.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that the person relying upon the certification holds a copy of all or part of the trust instrument.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

"Article 11.

"Miscellaneous Provisions.

"**§ 36C-11-1101. Uniformity of application and construction.**

In applying and construing this Chapter, consideration may be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 36C-11-1102. Electronic records and signatures.**

The provisions of this Chapter governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of those records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

"**§ 36C-11-1103. Severability clause.**

If any provision of this Chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Chapter that can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable."

SECTION 3. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 36D.**

"**North Carolina Community Trust for Persons with Severe Chronic Disabilities.**

"**§ 36D-1. Title; findings.**

(a) This Article shall be known and may be cited as the "North Carolina Community Trust for Persons with Severe Chronic Disabilities Act".

(b) The General Assembly finds that it is in the public interest to encourage activities by voluntary associations and private citizens that will supplement and augment those services provided by local, State, and federal government agencies in discharge of their responsibilities toward individuals with severe chronic disabilities. The General Assembly further finds that, as a result of changing social, economic, and demographic trends, families of persons with severe chronic disabilities are increasingly aware of the need for a vehicle by which they can assure ongoing individualized personal concern for a severely disabled family member who may survive his parents or other family members, and provide for the efficient management of small legacies or

trust funds to be used for the benefit of such a disabled person. In a number of other states voluntary associations have established foundations or trusts intended to be responsive to these concerns. Therefore, the General Assembly finds that North Carolina will benefit by the enactment of enabling legislation expressly authorizing the formation of community trusts in accordance with criteria set forth by statute and administered by the Secretary of State, pursuant to Chapter 55A of the General Statutes. These community trusts permit the pooling of resources contributed by families or persons with philanthropic intent, along with the reservation of portions of these funds for the use and benefit of designated beneficiaries.

(c) This Article shall be liberally construed and applied to promote its underlying purposes and policies, which are, among others, to:

(1) Encourage the orderly establishment of community trusts for the benefit of persons with severe chronic disabilities;

(2) Ensure that community trusts are administered properly and that the managing boards of the trusts are free from conflicts of interest;

(3) Facilitate sound administration of trust funds for persons with severe chronic disabilities by allowing family members and others to pool resources in order to make professional management investment more efficient;

(4) Provide parents of persons with severe chronic disabilities peace of mind in knowing that a means exists to ensure that the interests of their children who have severe chronic disabilities are properly looked after and managed after the parents die or become incapacitated;

(5) Help make guardians available for persons with severe chronic disabilities who are incompetent, when no other family member is available for this purpose;

(6) Encourage the availability of private resources to purchase for persons with severe chronic disabilities goods and services that are not available through any governmental or charitable program and to conserve these resources by limiting purchases to those that are not available from other sources;

(7) Encourage the inclusion, as beneficiaries of community trusts, of persons who lack resources and whose families are indigent, in a way that does not diminish the resources available to other beneficiaries whose families have contributed to the trust; and

(8) Remove the disincentives that discourage parents and others from setting aside funds for the future protection of persons with severe chronic disabilities by ensuring that the interest of beneficiaries in community trusts are not considered assets or income that would disqualify them from any governmental or charitable entitlement program with an economic means test.

"**§ 36D-2. Definitions.**

As used in this Article, unless the context clearly requires otherwise:

(1) "Beneficiary" means any person with a severe chronic disability who has qualified as a member of the community trust program and who has the right to receive those services and benefits vested with the management of the business and affairs of a corporation, formed for the purpose of managing a community trust, irrespective of the name by which the group is designated.

(2) "Community trust" means a nonprofit organization that offers the following services:

a. Administration of special trust funds for persons with severe chronic disabilities;

b. Follow along services;

c. Guardianship for persons with severe chronic disabilities who are incompetent, when no other family member or immediate friend is available for this purpose; and

d. Advice and counsel to persons who have been appointed as individual guardians of the persons or estates of persons with severe chronic disabilities.

(3) "Follow along services" means those services offered by community trusts that are designed to ensure that the needs of each beneficiary are being met for as long as may be required and may include periodic visits to the beneficiary and to the places where the beneficiary receives services, participation in the development of individualized plans being made by service providers for the beneficiary, and other similar services consistent with the purposes of this Article.

(4) "Severe chronic disability" means a physical or mental impairment that is expected to give rise to a long-term need for specialized health, social, and other services, and which makes the person with the disability dependent upon others for assistance to secure these services.

(5) "Trustee" means any member of the board of a corporation, formed for the purpose of managing a community trust, whether that member is designated as a trustee, director, manager, governor, or by any other title.

(6) "Surplus trust funds" means funds accumulated in the trust from contributions made on behalf of an individual beneficiary that, after the death of the beneficiary, are determined by the board to be in excess of the actual cost of providing services during the beneficiary's lifetime, including the beneficiary's share of administrative costs.

"**§ 36D-3. Scope.**

This Article applies to every community trust established in this State. In addition to meeting the other requirements of this Article, every board that administers a community trust shall incorporate as a nonprofit corporation pursuant to Chapter 55A of the General Statutes. Except as otherwise provided in this Chapter, the provisions of Chapter 55A of the General Statutes apply to the community trusts.

"**§ 36D-4. Administration; powers and duties.**

(a) Every community trust shall be administered by a board. The board shall be comprised of no less than nine and no more than 21 members, at least one-third of whom shall be parents or relatives of persons with severe chronic disabilities. No board member shall be a provider of habilitative, health, social, or educational services to persons with severe chronic disabilities or an employee of such a service provider. The board may, however, allow service providers to serve on the board in an advisory capacity. Board members shall be selected, to the maximum extent possible, from geographic areas throughout the area served by the trust.

The certificate of incorporation filed with the Secretary of State pursuant to Chapter 55A of the General Statutes shall, in addition to the requirements set forth in that Chapter, demonstrate that the requirements of this section have been met.

(b) Notwithstanding any other provision of law, no trustee may be compensated for services provided as a member of the board of a community trust. No fees or commissions shall be paid to these trustees; however, a trustee may be paid for necessary expenses incurred by the trustee and may receive indemnification as permitted under Chapter 55A of the General Statutes.

(bl) For every community trust incorporated under this Article, the corporation itself shall be considered the trustee of any funds administered by it. No individual board member shall be considered to be trustee of any fund deposited on behalf of any individual beneficiary with severe chronic disabilities.

(c) The board shall adopt bylaws that shall include a declaration delineating the primary geographic area serviced by the trust and the principal services to be provided and shall file the bylaws with the Secretary of State.

(d) The board may retain paid staff as it considers necessary to provide follow along services to the extent required by each beneficiary. The community trust may authorize the expenditure of funds for any goods or services that, in its sole discretion, it determines will promote the well-being of any beneficiary, including recreational services. The community trust may pay for the burial of any beneficiary. The community trust, however, may not expend funds for any goods or services of comparable quality to those available to any particular beneficiary through any governmental or charitable program, insurance, or other sources. The community trust may expend funds to meet the reasonable costs of administering the community trust.

(e) The community trust is not required to provide services to a beneficiary who is a competent adult and who has refused to accept the services. Further, the community trust shall not provide services of a nature or in a manner that would be contrary to the

public policy of this State at the time the services are to be provided. In either case, the community trust may offer alternate services that are consistent with the purposes of this Article and in keeping with the best interests of the beneficiary.

(f) The community trust may accept appointment as guardian of the person, guardian of the estate, or guardian of both on behalf of any beneficiary. If the community trust accepts appointment as guardian of the person of an individual, it shall assign a staff member to carry out its responsibilities as the guardian. The community trust may, upon request, offer consultative and professional assistance to an individual, private or public guardian of any of its beneficiaries.

(g) The community trust may accept contributions, bequests, and designations under life insurance policies to the community trust on behalf of individuals with severe chronic disabilities for the purpose of qualifying them as beneficiaries.

(h) At the time a contribution, bequest, or assignment of insurance proceeds is made, the trustor shall receive a written statement of the services to be provided to the beneficiary. The statement shall include a starting date for the delivery of services or the condition precedent, such as the death of the trustor, which shall determine the starting date. The statement shall describe the frequency with which services shall be provided and their duration, and the criteria or procedures for modifying the program of services from time to time in the best interests of the beneficiary.

"**§ 36D-5. Accountability.**

Along with the annual report filed with the Secretary of State pursuant to Chapter 55A of the General Statutes, the community trust shall file an itemized statement that shows the funds collected for the year, income earned, salaries, other expenses incurred, and the opening and final trust balances. A copy of this statement shall be made available, upon request, to any beneficiary, trustor, or designee of the trustor. In addition, once annually, each trustor or the trustor's designee shall receive a detailed individual statement of the services provided to the trustor's beneficiary during the previous 12 months and the services to be provided during the following 12 months. The community trust shall make a copy of the individual statement available to any beneficiary, upon request.

"**§ 36D-6. Gifts, surplus trust funds.**

The community trust may accept gifts and use surplus trust funds for the purpose of qualifying as beneficiary any indigent person whose family members lack the resources to make a full contribution on that person's behalf. The extent and character of the services and selection of beneficiaries are at the discretion of the community trust. The community trust may not use surplus trust funds to make any charitable contribution on behalf of any beneficiary or any group or class of beneficiaries. The community trust may accept gifts to meet start-up costs, reduce the charges to the trust for the cost of administration, and for any other purpose that is consistent with this Article. Gifts made to the trust for an unspecified purpose shall be used by the community trust either to qualify indigent persons whose families lack the means to qualify them as beneficiaries of the trust or to meet any start-up costs that the trust incurs.

"**§ 36D-7. Special requests on behalf of beneficiary.**

The community trust may agree to fulfill any special requests made on behalf of a beneficiary as long as the requests are consistent with this Article and provided that an adequate contribution has been made for this purpose on behalf of a beneficiary. The community trust may agree to serve as trustee for any individual trust created on behalf of a beneficiary, regardless of whether the trust is revocable or irrevocable, has one or more remaindermen or contingent beneficiaries, or any other condition, so long as the individual trust is consistent with the purposes of this Article.

"**§ 36D-8. Irrevocability; impossibility of fulfillment.**

A community trust for persons with severe chronic disabilities is irrevocable, but the trustees in their sole discretion may provide compensation for any contribution to the trust to any trustor who, upon good cause, withdraws a beneficiary designated by the trustor from the trust, or if it becomes impossible to fulfill the conditions of the trust with regard to an individual beneficiary for reasons other than the death of the beneficiary.

"**§ 36D-9. Beneficiary's interest in trust not asset for income eligibility determination.**

Notwithstanding any provisions of Chapter 108A of the General Statutes, the beneficiary's interest in any community trust shall not be deemed to be an asset for the purpose of determining income eligibility for any publicly operated program, nor shall that interest be reached in satisfaction of a claim for support and maintenance of the beneficiary. No agency shall reduce the benefits of services available to any individual because that person is the beneficiary of a community trust.

"**§ 36D-10. Trust not subject to law against perpetuities; restraints on alienation.**

A community trust shall not be subject to or held to be in violation of any principle of law against perpetuities or restraints on alienation or perpetual accumulations of trusts.

"**§ 36D-11. Settlement; trustee limitations.**

The community trust shall settle a community trust by filing a final accounting in the superior court. In addition, at anytime prior to the settlement of the final account, the community trust, the Secretary of State, or the Attorney General may bring an action for the dissolution of a nonprofit corporation in the superior court for the purpose of terminating the trust or merging it with another charitable trust.

No trustee or any private individual shall be entitled to share in the distribution of any of the trust assets upon dissolution, merger, or settlement of the community trust. Upon dissolution, merger, or settlement, the superior court shall distribute all of the remaining net assets of the community trust in a manner that is consistent with the purposes of this Article."

SECTION 4. G.S. 32-28 and G.S. 32-34 are repealed.

SECTION 5. G.S. 28A-13-6 reads as rewritten:

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

~~(a) As used in this section, the term "personal representatives" includes testamentary trustees.~~

(b) If a will expressly makes provision for the execution of any of the powers of personal representatives by all of them or by any one or more of them, the provisions of the will govern.

~~(c) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which such personal representatives qualified, provide that any one or more of the following powers of personal representatives 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 personal representative or representatives;~~

~~(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 estate and give receipts therefor;~~

~~(6) Pay claims against and debts of the estate;~~

~~(7) Compromise claims in favor of or against the estate;~~

~~(8) Have custody of property of the estate.~~

(c1) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which such personal representatives qualified, provide that any one or more of the following powers of personal representatives may be exercised by any designated one or more of them:

(1) Establish and maintain bank accounts for the trust and issue checks for the trust.

(2) Maintain inventories, accountings, and income and expense records of the trust.

(3) Enter any safety deposit box rented by the trust.

(4) Employ persons as advisors or assistants in the performance of administrative duties, including agents, attorneys, accountants, brokers, appraisers and custodians.

(5) List trust property for taxes and prepare and file tax returns for the trust.

(6) Collect and give receipts for claims and debts of the trust.

(7) Pay debts, claims, costs of administration, and taxes of the trust.

(8) Compromise, adjust or otherwise settle any claim by or against the trust and release, in whole or in part, a claim belonging to the trust.

(9) Have custody of the trust property.

(d) Subject to subsection (b) of this section, if two or more personal representatives own shares of corporate stock or other securities, their acts with respect to voting shall have the following effect:

(1) If only one votes, in person or by proxy, his act binds all;

(2) If more than one vote, in person or by proxy, the act of the majority so voting binds all;

(3) If more than one vote, in person or by proxy, but the vote is evenly split on any particular matter, each faction is entitled to vote the stock or other securities in question proportionately.

(e) Subject to the provisions of subsections (b), ~~(c)~~ (c1), 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.

(f) No personal representative shall be relieved of liability on his bond or otherwise by entering into any agreement under this section."

SECTION 6. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

SECTION 7.(a) Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C does not apply and the superseded law applies.

Except as otherwise provided in Chapter 36C, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2

of this act, that statute continues to apply to the right even if it has been repealed or superseded.

SECTION 7.(b) Sections 1 through 5 of this act become effective January 1, 2006. The remainder of this act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 679
PROPOSED COMMITTEE SUBSTITUTE S679-CSRH-10 [v.2]

4/18/2005 9:46:44 PM

Short Title: North Carolina Uniform Trust Code. (Public)

Sponsors:

Referred to:

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO ADOPT A REVISED VERSION OF THE UNIFORM TRUST CODE FOR NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 36A of the General Statutes is recodified as Article 7 of Chapter 32 of the General Statutes. G.S. 36A-63, G.S. 36A-66.1, and Article 6 of Chapter 36A are recodified in Article 15 of Chapter 53 of the General Statutes as G.S. 53-163.1 through G.S. 53-163.7. The remainder of Chapter 36A of the General Statutes is repealed.

SECTION 2. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 36C.**

"**North Carolina Uniform Trust Code.**

"Article 1.

"General Provisions and Definitions.

"**§ 36C-1-101. Short title.**

This Chapter may be cited as the North Carolina Uniform Trust Code.

"**§ 36C-1-102. Scope.**

This Chapter applies to any express trust, private or charitable, with additions to the trust, wherever and however created. The term "express trust" includes both testamentary and inter vivos trusts, regardless of whether the trustee is required to account to the clerk of superior court. This Chapter also applies to any trust created for or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. This Chapter does not apply to constructive trusts, resulting trusts, conservatorships, estates, trust accounts as defined in G.S. 53-146.2, 54-109.57, 54B-130, and 54C-166, trust funds subject to G.S. 90-210.61, custodial arrangements under G.S. 33A-1 through G.S. 33A-24 and G.S. 33B-1 through G.S. 33B-22, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting

trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or any arrangement under which a person is nominee or escrowee for another.

"**§ 36C-1-103. Definitions.**

In this Chapter:

(1) "Action", with respect to an act of a trustee, includes a failure to act.

(2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.

(3) "Beneficiary" means a person who:

a. Has a present or future beneficial interest in a trust, vested or contingent, including the owner of an interest by assignment or transfer; or

b. In a capacity other than that of trustee, holds a power of appointment over trust property.

(4) "Charitable trust" means a trust, including a split-interest trust as described in section 4947 of the Internal Revenue Code, created for a charitable purpose described in G.S. 36C-4-405(a).

(5) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

(6) "General guardian" means a general guardian as that term is defined in G.S. 35A-1202(7).

(7) "Guardian of the estate" means a guardian of the estate as that term is defined in G.S. 35A-1202(9).

(8) "Guardian of the person" means a guardian of the person as that term is defined in G.S. 35A-1202(10).

(9) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

(10) "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended from time to time. Each reference to a provision of the Internal Revenue Code shall include any successor to that provision.

(11) "Jurisdiction", with respect to a geographic area, includes a state or country.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(13) "Power of withdrawal" means a presently exercisable general power of appointment other than a power:

a. Exercisable by a trustee and limited by an ascertainable standard; or

b. Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

(14) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.

(15) "Qualified beneficiary" means a living beneficiary who, on the date the beneficiary's qualification is determined:

a. Is a distributee or permissible distributee of trust income or principal;

b. Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in sub-subdivision a. of this subdivision terminated on that date without causing the trust to terminate; or

c. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(16) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

(17) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

(18) "Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.

(19) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(20) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or established in a judicial proceeding.

(21) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments to the instrument, and any modifications permitted by court order.

(22) "Trustee" includes an original, additional, and successor trustee, and a co-trustee, whether or not appointed or confirmed by a court. The term does not include trustees in mortgages and deeds of trusts.

"**§ 36C-1-104. Knowledge.**

(a) Subject to subsection (b) of this section, a person has knowledge of a fact if the person:

(1) Has actual knowledge of it;

(2) Has received notice or notification of it; or

(3) From all the facts and circumstances known to the person at the time in question, has reason to know it.

(b) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the employee's regular duties or the employee knows a matter involving the trust would be materially affected by the information.

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

(a) Except as otherwise provided in the terms of the trust, this Chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

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

(1) The requirements for creating a trust;

(2) The duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

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

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

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

(6) The effect of an exculpatory term under G.S. 36C-10-1008;

(7) The rights under G.S. 36C-10-1010 through G.S. 36C-10-1013 of a person other than a trustee or beneficiary;

(8) Periods of limitation for commencing a judicial proceeding;

(9) The power of the court to take any action and exercise any jurisdiction as may be necessary in the interests of justice; and

(10) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in G.S. 36C-2-203 and G.S. 36C-2-204.

"**§ 36C-1-106. Common law of trusts; principles of equity.**

The common law of trusts and principles of equity supplement this Chapter, except to the extent modified by this Chapter or another statute of this State.

"**§ 36C-1-107. Governing law.**

The meaning and effect of the terms of a trust are determined by:

(1) The law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or

(2) In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

"**§ 36C-1-108. Principal place of administration.**

(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(1) A trustee's principal place of business is located in, or a trustee is a resident of, the designated jurisdiction; or

(2) All or part of the administration occurs in the designated jurisdiction.

(b) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee may transfer the trust's principal place of administration to another jurisdiction in accordance with this subsection:

(1) If the trustee is transferring the trust's principal place of administration to another state, the trustee must provide written notice of the proposed transfer to the qualified beneficiaries of the trust not less than 60 days before initiating the transfer. If no qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice, the trustee may make the transfer. If a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice, the authority of the trustee to transfer the trust's principal place of administration in accordance with this section terminates.

(2) If the trustee is transferring the trust's principal place of administration to a jurisdiction outside of the United States, the trustee must provide written notice of the proposed transfer to the qualified beneficiaries of the trust and the transfer cannot be made until the written consent of all the qualified beneficiaries is obtained.

(c) Any time a trustee is required to provide a qualified beneficiary with written notice of a proposed transfer of a trust's principal place of administration, the notice of proposed transfer must include:

(1) The name of the jurisdiction to which the principal place of administration is to be transferred;

(2) The address and telephone number at the new location at which the trustee can be contacted;

(3) An explanation of the reasons for the proposed transfer;

(4) The date on which the proposed transfer is anticipated to occur; and

(5) If the proposed transfer is to another state, the date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(d) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed under G.S. 36C-7-704.

"**§ 36C-1-109. Methods and waiver of notice.**

(a) Notice to a person under this Chapter or the sending of a document to a person under this Chapter must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed electronic message.

(b) Notice otherwise required under this Chapter, or a document otherwise required to be sent under this Chapter, need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(c) The person to be notified or to be sent a document may waive notice under this Chapter.

(d) Notice of a judicial proceeding must be given as provided in Article 2 of this Chapter.

"**§ 36C-1-110. Others treated as qualified beneficiaries.**

(a) A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under this Chapter if the charitable organization, on the date the charitable organization's qualification is being determined:

(1) Is a distributee or permissible distributee of trust income or principal;

(2) Would be a distributee or permissible distributee of trust income or principal upon the termination of the interest of other distributees or permissible distributees then receiving or eligible to receive distributions, but the termination of those interests would not cause the trust to terminate; or

(3) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(b) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in G.S. 36C-4-408 or G.S. 36C-4-409 has the rights of a qualified beneficiary under this Chapter.

"**§ 36C-1-111. Nonjudicial settlement agreements.**

(a) For purposes of this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(b) Interested persons may enter into a binding nonjudicial settlement agreement with respect to any of the following matters involving a trust:

(1) The approval of a trustee's report or accounting;

(2) Direction to a trustee to perform or refrain from performing a particular administrative act or the grant to a trustee of any necessary or desirable administrative power, including a power granted under G.S. 36C-8-816;

(3) The resignation or appointment of a trustee and the determination of a trustee's compensation;

(4) Transfer of a trust's principal place of administration; and

(5) Liability of a trustee for any action taken under subdivisions (1) through (4) of this subsection.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this Chapter or other applicable law.

(d) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in Article 3 of this Chapter was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

"**§ 36C-1-112. Rules of construction.**

The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.

"Article 2.

"Judicial Proceedings.

"**§ 36C-2-201. Role of court in administration of trust.**

(a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by a party or as provided by law.

(b) A trust is not subject to continuing judicial supervision, except as provided in G.S. 36C-2-208 and G.S. 36C-2-209, unless ordered by the court.

(c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

"**§ 36C-2-202. Jurisdiction over trustee and beneficiary.**

(a) By accepting the trusteeship of a trust having its principal place of administration in this State, or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

"**§ 36C-2-203. Subject matter jurisdiction.**

(a) The clerks of superior court of this State have original jurisdiction over all proceedings concerning the internal affairs of trusts. Except as provided in subdivision (9) of this subsection, the clerk of superior court's jurisdiction is exclusive. Proceedings concerning the internal affairs of the trust are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument. These include proceedings:

(1) To appoint or remove a trustee;

(2) To permit a trustee to resign or renounce; however, unless the trustee is required to account to the clerk of superior court, when the governing instrument names or provides a procedure to name a successor trustee, and the successor trustee is willing to serve, no trustee is required to initiate a proceeding to resign or renounce as trustee;

(3) To review trustees' fees under Article 5A of Chapter 32 of the General Statutes and review and settle interim or final accounts;

(4) To (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust as provided in G.S. 37A-1-104.3;

(5) To transfer a trust's principal place of administration;

(6) To require a trustee to provide bond and determine the amount of the bond, excuse a requirement of bond, reduce the amount of bond, release the surety, or permit the substitution of another bond with the same or different sureties;

(7) To make orders with respect to a trust for the care of animals as provided in G.S. 36C-4-408;

(8) To make orders with respect to a noncharitable trust without an ascertainable beneficiary as provided in G.S. 36C-4-409; and

(9) To ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments, and to determine the existence or nonexistence of trusts created other than by will and the existence or nonexistence of any immunity, power, privilege, duty, or right. Upon motion of a party, the clerk of superior court may determine that a proceeding to determine an issue listed in this subdivision shall be originally heard by the superior court division of the General Court of Justice.

(b) Nothing in this section shall be construed (i) to confer upon the clerk of superior court any authority to regulate or supervise the actions of a trustee except to the extent that the trustee's actions are inconsistent with the governing instrument or of State law; or (ii) to confer upon any party any additional right, remedy, or cause of action not otherwise conferred by law.

(c) Nothing in this section affects the right of a person to file an action for declaratory relief under Article 26 of Chapter 1 of the General Statutes. In the event either the petitioner or respondent in a trust proceeding requests declaratory relief under Article 26 of Chapter 1 of the General Statutes, either party may move for a transfer of the proceeding to the superior court division of the General Court of Justice as provided in Article 21 of Chapter 7A of the General Statutes. In absence of removal to superior court, Article 26 of Chapter 1 of the General Statutes shall apply to a trust proceeding to the extent consistent with this Article.

(d) The clerk of superior court shall not, over the objection of a party, entertain proceedings under this section involving a trust having its principal place of administration in another state, except:

(1) When all appropriate parties could not be bound by litigation in the courts of the state in which the trust had its principal place of administration; or

(2) When the interests of justice otherwise would be seriously impaired.

The clerk of superior court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust has its principal place of administration, or the clerk of superior court may grant a continuance or enter any other appropriate order.

(e) Any party to a proceeding before the clerk of superior court may appeal from the decision of the clerk to a superior court judge as provided for estate matters in G.S. 1-301.3.

(f) Without otherwise limiting the jurisdiction of the superior court division of the General Court of Justice, proceedings concerning the internal affairs of trusts shall not include, and, therefore, the clerk of superior court shall not have jurisdiction under subsection (a) of this section of the following:

(1) Actions to reform, terminate, or modify a trust as provided by G.S. 36C-4-410 through G.S. 36C-4-416;

(2) Actions by or against creditors or debtors of a trust;

(3) Actions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud, and negligence;

(4) Actions to enforce a charitable trust under G.S. 36C-4-405A; and

(5) Actions to amend or reform a charitable trust under G.S. 36C-4A-1.

"**§ 36C-2-204. Venue.**

In any trust proceeding or action, whether brought before the clerk of superior court or the superior court division of the General Court of Justice, the following rules apply notwithstanding any other applicable Rule of Civil Procedure or provision of Chapter 1 of the General Statutes:

(1) If the trustee is required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is the place where the accountings are filed.

(2) If the trustee is not required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is:

a. In the case of an inter vivos trust, in any county of this State in which the trust has its principal place of administration or where any beneficiary resides; or

b. In the case of a testamentary trust, in any county of this State in which the trust has its principal place of administration, where any beneficiary resides, or in which the testator's estate was administered.

(3) Unless otherwise designated in the governing instrument, the principal place of administration of the trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if the trustee has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the governing instrument, is:

a. The usual place of business of the corporate trustee if there is but one corporate or co-trustee; or

b. The usual place of business or residence of any of the co-trustees.

(4) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in any county of this State in which a beneficiary resides, in any county in which trust property is located, in the county of this State specified in the trust instrument, if any county is so specified, or if the trust is created by will, in the county in which the decedent's estate was or is being administered.

"**§ 36C-2-205. Commencement of proceedings, pleadings, consolidation, and joinder.**

(a) Contested Proceedings. – Trust proceedings before the clerk of superior court brought against adverse parties shall be commenced as is prescribed for civil actions. Upon the filing of the petition or complaint, the clerk of superior court shall docket the cause as an estate matter. All parties not joined as petitioners shall be joined as respondents. The clerk of superior court shall issue the summons for the respondents. The clerk of superior court may order that additional persons be joined as respondents and shall issue the summons for the additional persons. The summons shall notify the respondents to appear and answer the petition within 10 days after its service upon the respondents. The summons shall comply with the requirements set forth in G.S. 1-394 for a special proceeding summons except that the clerk of superior court shall indicate on the summons by appropriate words that the summons is issued in an estate matter and not in a special proceeding or in a civil action and shall be served upon the respondents in accordance with Rule 4 of the Rules of Civil Procedure. After the time for responding to the petition or complaint has expired, any party or the clerk of superior court may give notice to all parties of a hearing.

(b) Uncontested Proceedings. – Trust proceedings before the clerk of superior court in which all the parties join in the proceeding shall be commenced by the filing of a petition, setting forth the facts entitling the petitioners to relief and the nature of the relief demanded. In these proceedings, the clerk of superior court may hear and decide the petition summarily.

(c) Pleadings. – The petition or complaint filed in a trust proceeding before the clerk of superior court shall contain a short and plain statement of the claim which is sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions, intended to be proved showing that the pleaders entitled to relief, and a demand for judgment for the relief to which the pleader is entitled. Each averment of a pleading should be simple, concise, and direct. No

technical forms of pleadings or motions are required. A party may set forth two or more statements of a claim or defense alternatively or hypothetically. The signature of an attorney or party constitutes a certificate by that attorney or party that (i) the attorney or party has read the pleading, motion, or other paper; (ii) to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. All pleadings shall be so construed as to do substantial justice.

(d) Extensions of Time. – The clerk of superior court, for cause shown at any time in the clerk's discretion, with or without motion or notice, may enter an order enlarging the period of time within which an act is required or permitted by this Article, by any applicable Rules of Civil Procedure or by order of the court, if the request is made before the expiration of the period originally prescribed, but not to exceed 10 days, nor more than once. Upon motion made after the expiration of the specified period, the clerk of superior court may permit the act where the failure to act was the result of excusable neglect. Notwithstanding any other provision of this subsection, the parties to a proceeding may enter into binding stipulations, without approval of the clerk of superior court, enlarging the time within which an act is required or permitted by this Article, by any applicable Rules of Civil Procedure or by order of the court, not to exceed 30 days.

(e) Rules of Civil Procedure. – Unless the clerk of superior court otherwise directs, Rules 5, 6(a), 6(d), 6(e), 18, 19, 20, 21, 24, and 45 of the Rules of Civil Procedure shall apply to trust proceedings. Upon motion of a party or the clerk of superior court, the clerk may further direct that the following Rules of Civil Procedure shall apply: Rules 15, 16, 17, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37; however, nothing in Rule 17 requires the appointment of a guardian ad litem for a party represented except as provided under G.S. 36C-3-305. In applying these Rules to a trust proceeding pending before the clerk of superior court, the term "judge" shall be construed as "clerk of superior court."

(f) Consolidation. – When a trust proceeding pending before the clerk of superior court and a civil action pending before the superior court division of the General Court of Justice involve a common question of law or fact, upon the court's motion or motion of a party to either the trust proceeding or the civil action, a superior court judge may order a consolidation of the trust proceeding and civil action, and the judge may make orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. Upon the entry of an order consolidating a trust proceeding and civil action, the jurisdiction for all matters pending in both the trust proceeding and the civil action shall be vested in the superior court.

(g) Joinder. – In any civil action pending before a superior court division of the General Court of Justice, a party asserting a claim for relief as an original claim, counterclaim, cross claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as that party has against an

opposing party notwithstanding the fact that the claims may otherwise be within the exclusive jurisdiction of the clerk of superior court.

(h) Orders Upon Consolidation/Joinder. – Upon the consolidation of a trust proceeding and civil action or joinder of claims under subsection (f) or (g) of this section, the clerk of superior court or the judge may make such orders as appropriate to protect the interests of the parties and to avoid unnecessary costs or delay. Notwithstanding the consolidation or joinder of claims under subsection (f) or (g) of this section, the clerk of court's exclusive jurisdiction as set forth in G.S. 36C-2-203(a) shall not be stayed unless so ordered by the court.

"**§ 36C-2-206. Representation of parties.**

In any trust proceeding or action, whether brought before the clerk of superior court or in the superior court division of the General Court of Justice, the following rules apply notwithstanding any other applicable Rule of Civil Procedure or provision of Chapter 1 of the General Statutes:

(1) Parties shall be represented as provided in Article 3 of this Chapter.

(2) In the case of any party represented by another as provided in subdivision (1) of this section, service of process shall be made by serving such representative.

"**§ 36C-2-207. Waiver of notice.**

A party, or the representative of the party as provided in G.S. 36C-2-206, may waive notice by a writing signed by the party, the representative, or the attorney of the party or the representative, and filed in the proceeding.

"**§ 36C-2-208. Accounting to clerk.**

(a) No trustee, including a trustee appointed by the clerk of superior court, is required to account to the clerk of superior court unless the trust instrument directs that the trustee is required to account to the clerk of superior court or unless the trustee is otherwise required by law to account to the clerk of superior court.

(b) If the trustee is required to account to the clerk of superior court, the trustee shall not be permitted to resign as trustee until a final account of the trust estate is filed with the clerk of superior court and until the court is satisfied that the account is true and correct, unless the terms of the trust instrument provide otherwise.

(c) Notwithstanding subsections (a) and (b) of this section, under a proceeding brought under G.S. 36C-4-405A, the clerk of superior court may require a trustee of a charitable trust to account to the clerk of superior court.

"**§ 36C-2-209. Qualification and accounting of trustee of a testamentary trust.**

(a) For any testamentary trust created under a will of a decedent executed before January 1, 2004, the trustee shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of superior court of the county where the will is probated inventories of the assets that come into the trustee's hands and annual and final accounts of the trust that are the same as required of executors and administrators. The power of the clerk of superior court to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts is the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. This subsection shall not apply to the extent that the will makes a different provision.

(b) For any testamentary trust created under a will of a decedent executed on or after January 1, 2004, that directs the trustee to account to the clerk of superior court, the trustee shall first qualify under the laws applicable to executors and shall file in the office of the clerk of superior court of the county where the will is probated inventories of the assets that come into the trustee's hands and annual and final accounts of the trust that are the same as are required of executors and administrators. The power of the clerk of superior court to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts is the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. No trustee, including a trustee appointed by the clerk of superior court, is required to account to the clerk of superior court unless the will directs that the trustee is required to account to the clerk of superior court or unless otherwise required by law.

(c) The Administrative Office of the Courts may adopt rules regulating the registration or indexing of testamentary trusts.

"Article 3.

"Representation.

"**§ 36C-3-301. Representation: basic effect.**

(a) Notice to a person who may represent and bind another person under this Article has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this Article is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in G.S. 36C-4-411 and G.S. 36C-6-602, a person who under this Article may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this Article with respect to the termination or modification of trust under G.S. 36C-4-411(a).

"**§ 36C-3-302. Representation by holder of general testamentary power of appointment.**

The sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, shall represent other persons to the extent that their interests, as permissible appointees, takers in default, or otherwise, are subject to the power. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

"**§ 36C-3-303. Representation by fiduciaries, parents, and other persons.**

To the extent that there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) A general guardian or a guardian of the estate may represent and bind the estate that the guardian controls.

(2) A guardian of the person may represent and bind the ward if a general guardian or guardian of the estate of the ward's estate has not been appointed.

(3) An agent under a power of attorney having authority to act with respect to the particular question or dispute may represent and bind the principal.

(4) A trustee may represent and bind the beneficiaries of the trust.

(5) A personal representative of a decedent's estate may represent and bind persons interested in the estate.

(6) A parent may represent and bind the parent's minor child if a general guardian, guardian of the estate, or guardian of the person for the child has not been appointed. If a disagreement arises between parents seeking to represent the same minor child, the parent who is a beneficiary of the trust that is the subject of the representation is entitled to represent the minor child or, if no parent is a beneficiary of the trust that is the subject of the representation, a parent who is a lineal descendant of the settlor is entitled to represent the minor child, or if no parent is a lineal descendant of the settlor, a guardian ad litem shall be appointed to represent the minor child.

(7) A person may represent and bind that person's unborn issue.

"**§ 36C-3-304. Representation by person having substantially identical interest.**

Unless otherwise represented under this Article, a minor, an incapacitated or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent that there is no conflict of interest between the representative and the person represented.

"**§ 36C-3-305. Appointment of representative; scope of representation.**

(a) If the court determines that an interest is not represented under this Article, or that the otherwise available representation might be inadequate, the court may appoint a guardian ad litem to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated or unborn individual, or a person whose identity or location is unknown. A guardian ad litem may be appointed to represent several persons or interests.

(b) Any representative under this Article may act on behalf of the individual represented with respect to any matter arising under this Chapter, whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a representative, including a guardian ad litem, may base a decision to consent to an action upon a finding that living members of the individual's family would generally benefit from that action.

"Article 4.

"Creation, Validity, Modification, and Termination of Trust.

"**§ 36C-4-401. Methods of creating trust.**

A trust may be created by:

(1) Transfer of property by a settlor to a person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;
(2) Declaration by the owner of property that the owner holds identifiable property as trustee unless the transfer of title of that property is otherwise required by law; or
(3) Exercise of a power of appointment in favor of a trustee.

"**§ 36C-4-401A. 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 policy or elsewhere using the policy as collateral security;
(4) To assign the policy; or
(5) To exercise any other right in connection with the policy commonly known as an incident of ownership of that policy.

The term "life insurance policy" includes life, annuity, and endowment contracts, or any variation or combination of those contracts, and any agreement entered into by an insurance company in connection with life, annuity, or endowments contracts.

(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 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 under 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 group life, industrial life, accident, and health insurance policies having death benefits.

(c) A testator 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 that beneficiary a trustee named or to be named in the testator's 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 trustee

makes claim to the proceeds within six months after the death of the testator, payments shall be made to the personal representative of the estate of the testator unless it is otherwise provided by an alternative designation or by the policy or plan. The proceeds received by the trustee is not subject to claims against the estate of the testator to estate or 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 that may properly become part of the trust, but the proceeds shall not become part of the testator's estate for purposes of trust administration unless the will expressly so provides.

"**§ 36C-4-402. Requirements for creation.**

(a) A trust is created only if:

(1) The settlor has capacity to create a trust;

(2) The settlor indicates an intention to create the trust;

(3) The trust has a definite beneficiary or is:

a. A charitable trust;

b. A trust for the care of an animal, as provided in G.S. 36C-4-408;

c. A trust for a noncharitable purpose, as provided in G.S. 36C-4-409;

(4) The trustee has duties to perform; and

(5) The same person is not the sole trustee and sole beneficiary.

(b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

"**§ 36C-4-403. Trusts created in other jurisdictions.**

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

(1) The settlor was domiciled, had a place of abode, or was a national;

(2) A trustee was domiciled or had a place of business; or

(3) Any trust property was located.

"**§ 36C-4-404. Trust purposes.**

A trust may be created only to the extent that its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.

"**§ 36C-4-405. Charitable purposes.**

(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, benevolent, literary, governmental, or municipal purposes, or other purposes the achievement of which is beneficial to the community.

(b) It is the policy of the State that a gift for charitable purposes, whether in trust or otherwise, is valid, notwithstanding the fact that the gift is made in general terms, and this section shall be construed liberally to effect this policy.

(c) No gift for charitable purposes, whether in trust or otherwise, is void or invalid because:

(1) The gift is in general terms or is uncertain as to the specific charitable purposes;

(2) When the gift is made in trust, the trustee is granted discretionary powers in the selection and designation of the beneficiaries of that charitable trust or in carrying out the purpose of that trust;

(3) The trustee or other recipient of the gift is given no specific instructions, powers, or duties as to the manner or means of carrying out those charitable purposes; or

(4) The gift contravenes any statute or rule against perpetuities.

(d) When any gift is made in general terms, the trustee or other recipient of the gift may:

(1) Select from time to time one or more specific charitable beneficiaries or purposes for which any trust or property or income is held and administered; and

(2) Determine the means to accomplish those charitable purposes, unless otherwise provided, including the creation of corporations or other legal entities for those purposes.

(e) For purposes of this section, the reference to a "gift" includes both inter vivos and testamentary gifts, grants, and other transfers.

"**§ 36C-4-405A. Enforcement of charitable gift or trust.**

(a) The settlor of a charitable trust, the Attorney General, the district attorney, a beneficiary, or any other interested party may maintain a proceeding to enforce a charitable trust, including the following:

(1) A proceeding to require a trustee to make a selection as may be necessary to establish the charitable beneficiaries or purposes for which the trust was established, as provided in subsections (d)(1) and (d)(2) of G.S. 36C-4-405;

(2) A proceeding for breach of fiduciary duty if there is reason to believe that the trust property has been mismanaged through negligence or fraud; and

(3) A proceeding for an accounting of the trustee's administration of the trust.

(b) The donor of a charitable gift, the Attorney General, the district attorney, or any other interested party may maintain a proceeding to enforce the gift, including a proceeding to require the recipient of the gift to make a selection as may be necessary to establish the charitable beneficiaries or purposes for which the gift was intended, as provided in subsections (d)(1) and (d)(2) of G.S. 36C-4-405.

"**§ 36C-4-406. Creation of trust induced by fraud, duress, or undue influence.**

A trust is voidable to the extent that its creation was induced by fraud, duress, or undue influence.

"**§ 36C-4-407. Evidence of oral trust.**

Except as required by a State statute other than this Chapter, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

"**§ 36C-4-408. Trust for care of animal.**

(a) Subject to this section, a trust for the care of one or more designated domestic or pet animals alive at the time of creation of the trust is valid.

(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of the designated animal or animals.

(c) The trust terminates at the death of the animal or last surviving animal. Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(1) As directed in the trust instrument;

(2) If the trust was created in a preresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will;

(3) If no taker is produced by the application of subdivision (1) or (2) of this subsection, to the transferor or the transferor's heirs determined as of the date of the transferor's death under Chapter 29 of the General Statutes.

(d) The intended use of the principal or income can be enforced by a person designated for that purpose in the trust instrument or, if none, by a person appointed by the clerk of superior court having jurisdiction over the decedent's estate upon application to the clerk of superior court by a person.

(e) Except as ordered by the clerk of superior court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, bond, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(f) A governing instrument shall be liberally construed to bring the transfer within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.

(g) The clerk of superior court may reduce the amount of the property transferred, if the clerk of superior court determines that the amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c) of this section.

(h) If no trustee is designated or if no designated trustee agrees to serve or is able to serve, the clerk of superior court must name a trustee. The clerk of superior court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. The

clerk of superior court may also make other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of this section.

"**§ 36C-4-409. Noncharitable trust without ascertainable beneficiary.**

Except as otherwise provided in G.S. 36C-4-408 or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than 21 years.

(2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent that the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, or otherwise to the settlor's successors in interest.

(4) Notwithstanding subdivisions (1) through (3) of this section, a trust, contract, or other arrangement to provide for the care of a cemetery lot, grave, crypt, niche, mausoleum, columbarium, grave marker, or monument is valid without regard to remoteness of vesting, duration of the arrangement, or lack of definite beneficiaries to enforce the trust, provided that the trust, contract, or other arrangement meets the requirements of G.S. 28A-19-10, Article 4 of Chapter 65 of the General Statutes, Article 9 of Chapter 65 of the General Statutes, or other applicable law. This section does not repeal or supersede G.S. 36C-4-413.

"**§ 36C-4-410. Modification or termination of trust; proceedings for approval or disapproval.**

(a) In addition to the methods of termination prescribed by G.S. 36C-4-411 through G.S. 36C-4-414, a trust terminates to the extent that the trust is revoked or expires under its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411 through G.S. 36C-4-416, or trust combination or division under G.S. 36C-4-417. A settler may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411. The settlor of a charitable trust may maintain a proceeding to modify the trust under G.S. 36C-4-413. A trustee is a necessary party to any proceeding under this section.

(c) Jurisdiction of a proceeding brought under this section is as provided in G.S. 36C-2-203.

"**§ 36C-4-411. Modification or termination of noncharitable irrevocable trust by consent.**

(a) A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's general guardian or the guardian of the estate with the approval of the court supervising the guardianship if an agent is not so authorized; or by the settlor's guardian of the person with the approval of the court supervising the guardianship if an agent is not so authorized and a general guardian or guardian of the estate has not been appointed.

(b) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries, if the court concludes that modification is consistent with a material purpose of the trust.

(c) Where the beneficiaries of an irrevocable trust seek to compel a termination of the trust and the continuance of the trust is necessary to carry out a material purpose of the trust, or where the beneficiaries seek to compel a modification of the trust in a manner that is inconsistent with its material purpose, the trust may be modified or terminated, in the discretion of the court, only if the court determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust.

(d) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a), (b) or (c) of this section, the modification or termination may be approved by the court if the court is satisfied that:

(1) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) The interests of a beneficiary who does not consent will be adequately protected.

(e) Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.**

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

(c) Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-413. Cy pres.**

(a) Except as otherwise provided in subsection (d) of this section, if a charitable trust becomes unlawful, impracticable, impossible to achieve, or wasteful:

(1) The trust does not fail, in whole or in part;

(2) The trust property does not revert to the settlor or the settlor's successors in interest; and

(3) The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(b) The settlor or a trustee of a charitable trust, the Attorney General, a beneficiary or any other interested party may maintain a cy pres proceeding under Article 2 of this Chapter.

(c) In every cy pres proceeding, the Attorney General shall be notified and given an opportunity to be heard.

(d) This section is not applicable if the settlor has provided, either directly or indirectly, for an alternative plan in the event that the charitable trust is or becomes unlawful, impracticable, impossible to achieve, or wasteful. However, if the alternative plan is also a charitable trust and that trust fails, the intention shown in the original plan shall prevail in the application of this section.

"**§ 36C-4-414. Modification or termination of uneconomic trust.**

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value of less than fifty thousand dollars ($50,000) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. The trustee may enter into an agreement or make other provisions that the trustee deems necessary or appropriate to protect the interests of the beneficiaries and to carry out the intent and purpose of the trust. This subsection shall not apply where the instrument creating the trust, by specific reference to this section, or to former G.S. 36A-125.6, provides that it shall not apply. The trustee shall not be liable for that termination and distribution notwithstanding the existence or potential existence of other beneficiaries who are not sui juris. Any beneficiary receiving a distribution from a trust terminated under this section shall incur no liability and shall not be required to account to anyone for such distribution.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration.

(c) This section does not apply to an easement for conservation or preservation.

(d) Jurisdiction of a proceeding brought under this section is as provided in G.S. 36C-2-203.

"**§ 36C-4-415. Reformation to correct mistakes.**

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law,

whether in expression or inducement. Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-416. Modification to achieve settlor's tax objectives.**

To achieve a settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect. Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

"**§ 36C-4-417. Combination and division of trusts.**

(a) Unless otherwise provided in the trust instrument, after notice to the qualified beneficiaries, a trustee may:

(1) Consolidate the assets of more than one trust and administer the assets as one trust under the terms of one of the trusts if the terms of the trusts are substantially similar and the beneficiaries of the trusts are identical; or

(2) Divide one trust into two or more separate trusts if the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust.

(b) In dividing a trust into two or more separate trusts, a trustee shall accomplish the division by severing the trusts on a fractional basis and funding the separate trusts either (i) with a pro rata portion of each asset held by the undivided trust; or (ii) on a non-pro rata basis based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding.

(c) In any case where two separate identical trusts are created under this section, one of which is fully exempt from the federal generation-skipping transfer tax and one of which is fully subject to that tax, the trustee may thereafter, to the extent possible consistent with the terms of the trust, determine the value of any mandatory or discretionary distributions to trust beneficiaries on the basis of the combined value of both trusts, but may satisfy those distributions by a method other than pro rata from the separate trusts in a manner designed to minimize the current and potential generation-skipping transfer tax.

"**§ 36C-4-418. Distribution upon termination of trust.**

Upon termination of a trust under G.S. 36C-4-411, the trustee shall distribute the trust property as agreed by the beneficiaries. Upon termination of a trust under G.S. 36C-4-412 or G.S. 36C-4-414, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. If any trust property becomes distributable to a minor or incompetent under this Article it may be distributed:

(1) To the guardian of the estate or general guardian of the beneficiary;

(2) In accordance with the North Carolina Uniform Transfer to Minors Act, Chapter 33A of the General Statutes; or

(3) In accordance with the North Carolina Custodial Trust Act, Chapter 33B of the General Statutes.

"**§ 36C-4-419. Effect of inalienable interest on modification or termination.**

The court, in exercising its discretion to modify or terminate an irrevocable trust under G.S. 36C-4-411, 36C-4-412 or 36C-4-413 shall consider provisions making the interest of a beneficiary inalienable, including those described in Article 5, but the court is not precluded from the exercise of that discretion solely because of such provisions.

"Article 4A.

"Tax Status of Charitable Trusts.

"**§ 36C-4A-1. Prohibited transactions.**

(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) of this section, the trust instrument of each trust that is a private foundation described in section 509 of the Internal Revenue Code (including each nonexempt charitable trust described in section 4947(a)(1) of the Internal Revenue Code that is treated as a private foundation) and the trust instrument of each nonexempt split-interest trust described in section 4947(a)(2) of the Internal Revenue Code (but only to the extent that section 508(e) of the Internal Revenue Code is applicable to the nonexempt split-interest trust under section 4947(a)(2) of the Internal Revenue Code) is considered to contain the following provisions: "The trust shall make distributions at any time and in any manner as not to subject it to tax under section 4942 of the Internal Revenue Code; the trust shall not engage in any act of self-dealing which would subject it to tax under section 4941 of the Internal Revenue Code; the trust shall not retain any excess business holdings that would subject it to tax under section 4943 of the Internal Revenue Code; the trust shall not make any investments that would subject it to tax under section 4944 of the Internal Revenue Code; and the trust shall not make any taxable expenditures that would subject it to tax under section 4945 of the Internal Revenue Code." With respect to any trust created before January 1, 1970, this section shall apply only for its taxable years beginning on or after January 1, 1972.

(b) 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 (a) of this section, the governing instrument of each trust that is a nonexempt charitable trust described in section 4947(a)(1) of the Internal Revenue Code is considered to contain the following provisions:

(1) The trust shall be operated exclusively for charitable, educational, religious and scientific purposes within the meaning of section 501(c)(3) and section 170(c)(2) of the Internal Revenue Code.

(2) Upon any dissolution, winding up, or liquidation of the trust, its assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or shall be distributed to the federal government, or a state or local government for a public purpose.

(c) The trustee of any trust described in this section may do one of the following:

(1) Without judicial proceedings, amend the trust to expressly exclude the application of this section by executing a written amendment to the

trust instrument and filing a duplicate original of the amendment with the Attorney General. Upon filing of the amendment, this section shall not apply to that trust.

(2) Institute a proceeding under Article 2 of this Chapter seeking reformation of the trust instrument.

"**§ 36C-4A-2. Reformation of charitable remainder trust.**

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 that passes from the decedent under a will or trust to a person, or for a use, described in section 2055(a) of the Internal Revenue Code, to meet the requirements of subsections 2055(e)(2)(A) or (B) of the Internal Revenue Code, then in order that the deduction shall nevertheless be allowable under section 2055(e)(3) of the Internal Revenue Code, the court may, on application of any trustee or interested party with either (i) the written consent of the qualified beneficiaries, or (ii) a finding that the interest of those beneficiaries is substantially preserved, order an amendment to the trust so that the remainder interest is in a trust that is a charitable remainder annuity trust, a charitable remainder unitrust (as those terms are described in section 664 of the Internal Revenue Code), or a pooled income fund (as that term is described in section 642(c)(5) of the Internal Revenue Code), or so that any other interest of a charitable beneficiary is in the form of a guaranteed annuity or is a fixed percentage distributed yearly of the fair market value of the property (to be determined yearly), in accordance with section 2055(e)(2)(B) of the Internal Revenue Code. In every proceeding under this section, the Attorney General shall be notified, and given an opportunity to be heard.

"Article 4B.

"Charitable Remainder Trust Administration Act.

"**§ 36C-4B-1. Short title.**

This Article shall be known as the Charitable Remainder Administration Trust Act.

"**§ 36C-4B-2. General rule.**

Notwithstanding any provisions in the laws of this State or in the governing instruments to the contrary, any charitable remainder annuity trust and any charitable remainder unitrust that cannot qualify for a deduction for federal tax purposes under section 2055 or section 2522 of the Internal Revenue Code in the absence of this Article shall be administered in accordance with this Article.

"**§ 36C-4B-3. Definitions.**

The following definitions apply to this Article unless the context clearly requires otherwise:

(1) "Charitable remainder trust" means a trust that provides for a specified distribution at least annually for either life or a term of years to one or more beneficiaries, at least one of which is not a charity (hereinafter referred to as "beneficiaries"), with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity. For purposes of this Article, only a charitable remainder annuity trust or a charitable remainder unitrust is considered a charitable remainder trust.

(2) "Charitable remainder annuity trust" means a charitable remainder trust:

a. From which a sum certain (that is not less than five percent (5%) of the initial net fair market value of all property placed in trust) is to be paid at least annually to one or more persons (at least one of which is not an organization described in section 170(c) of the Internal Revenue Code and, in the case of individuals, only to an individual who was living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of that individual or those individuals; however, in the case of an individual, the amount to be paid to that individual may be subject to a qualified contingency according to the terms of the governing instrument;

b. From which no amount other than the payments described in sub-subdivision a. of this subdivision may be paid to or for or both to and for the use of anyone other than an organization that is or was described in section 170(c) of the Internal Revenue Code; and

c. Following the termination of the payments described in sub-subdivision a. of this subdivision, the remainder interest in the trust is to be transferred to, or for the use of, an organization that is or was described in section 170(c) of the Internal Revenue Code or is to be retained by the trust for that use.

(3) "Charitable remainder unitrust" means a charitable remainder trust:

a. From which a fixed percentage (that is not less than five percent (5%)) of the net fair market value of its assets, valued annually, is to be paid at least annually to one or more persons (at least one of which is not an organization described in section 170(c) of the Internal Revenue Code and, in the case of individuals, only to an individual who was living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of that individual or those individuals; however, in the case of an individual, the amount to be paid to that individual may be made subject to a qualified contingency according to the terms of the governing instrument;

b. From which no amount other than the payments described in sub-subdivision a. of this subdivision may be paid to or for the use of anyone other than an organization that is or was an organization described in section 170(c) of the Internal Revenue Code; and

c. Following the termination of the payments described in sub-subdivision a. of this subdivision, the remainder interest in the trust is to be transferred to, or for the use of, an organization

that is or was described in section 170(c) of the Internal Revenue Code, or is to be retained by the trust for such a use.

Notwithstanding sub-subdivisions a. and b. of this subdivision, the trust instrument may provide that the trustee shall pay to the income beneficiary for any year (i) the amount of the trust income if that amount is less than the amount required to be distributed under sub-subdivision a. of this subdivision, and (ii) any amount of the trust income that exceeds the amount required to be distributed under sub-subdivision a of this subdivision to the extent that (by reason of sub-subdivision a.) the aggregate of the amounts paid in prior years is less than the aggregate of the required amounts.

(4) "Qualified contingency" means any provision of the governing instrument that provides that, upon the happening of a contingency, the payments made to an individual noncharitable beneficiary of a charitable remainder trust will terminate not later than those payments would otherwise terminate under the governing instrument.

"**§ 36C-4B-4. Administrative provisions applicable to both charitable remainder annuity trusts and charitable remainder unit trusts.**

(a) Creation of Remainder Interests in Charity. – Upon the termination of the noncharitable interests, the trustee shall distribute all of the then principal and income of the trust, other than any amount due the noncharitable beneficiary or beneficiaries, to the designated charity or charities, or shall hold the property in trust for the designated charity or charities in accordance with the terms of the trust document.

(b) Selection of Alternate Charitable Beneficiary if Remaindermen Do Not Qualify Under Section 170(c) of the Internal Revenue Code at Time of Distribution. – If the designated charity is not an organization described in section 170(c) of the Internal Revenue Code at the time when any principal or income of the trust is to be distributed to it, the trustee must distribute the principal or income to one or more organizations then described in section 170(c) of the Internal Revenue Code selected in accordance with the terms of the trust instrument. If the trust instrument does not provide for a method of selecting alternate charitable beneficiaries that are then qualified under section 170(c) of the Internal Revenue Code, the trustee must, in the trustee's sole discretion, select alternate trust beneficiaries that are qualified under section 170(c) of the Internal Revenue Code.

(bl) Selection of Alternative Charitable Beneficiary if Remaindermen Do Not Qualify Under Section 170(b)(1)(A) of the Internal Revenue Code at Time of Distribution. – Notwithstanding subsection (b) of this section, if the designated charity is, at the time of the creation of the trust, an organization described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code, and if the designated charity is not an organization described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code when any principal or income of the trust is to be distributed to it, the trustee must distribute the principal or income to one or more organizations then described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code selected in accordance with the terms of the governing instrument; however, in the

event that the governing instrument does not provide a method of selecting alternative charitable beneficiaries that are then described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code, the trustee shall, in his sole discretion, select one or more alternative charitable beneficiaries that are described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code and must distribute the principal or income to the organization or organizations so selected in shares as the trustee, in the trustee's sole discretion, shall determine.

(c) Prohibitions Governing Trustees. – Except for payment of the annuity amount or the unitrust amount to the beneficiaries, whichever is applicable, the trustee is prohibited from engaging in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code, retaining any excess business holdings as defined in section 4943(c) of the Internal Revenue Code that would subject the trust to tax under section 4943 of the Code, making any investments that would subject the trust to tax under section 4944 of the Internal Revenue Code, and making any taxable expenditures as defined in section 4945(d) of the Code. The trustee shall make distributions at a time and in a manner as not to subject the trust to tax under section 4942 of the Internal Revenue Code.

(d) Distribution to Charity During Term of Noncharitable Interests and Distributions in Kind. – If the governing instrument of the trust provides for distribution to charity during the term of the noncharitable interests, the trustee may pay to the designated charity the amounts specified in the governing instrument that exceed the annuity amount or the unitrust amount payable to any of the beneficiaries for the taxable year of the trust in which the income is earned. If the governing instrument of the trust provides for distribution to charity in kind, the adjusted basis for federal income tax purposes of any trust property the trustee distributes in kind to charity during the term of the noncharitable interests must be fairly representative of the adjusted basis for those purposes of all trust property available for distribution on the date of distribution.

(e) Investment Restrictions on Trustee. – Nothing in the trust instrument shall be construed to restrict the trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

(f) Distribution From Trust Used to Administer an Estate to Charitable Remainder Trust. – If the governing instrument of a revocable inter vivos trust provides that the revocable inter vivos trust will be used partially to administer the estate of the settlor or for some other purpose, and further provides the assets will then be distributed to another trust that is a charitable remainder trust, upon the death of the settlor, or upon the occurrence of any event that causes the trust to become irrevocable, then the trust shall become irrevocable, and the trustee of this trust shall perform any remaining duties or obligations provided for in the trust instrument and then transfer the property specified in the governing instrument to the trustee of the charitable remainder trust to be held, administered, and distributed in the manner and according to the terms and conditions provided by the charitable remainder trust.

(g) Payment of Taxes by Noncharitable Beneficiary. – In the case of any inter vivos charitable remainder trust that is liable to pay, from trust property, any federal

estate, state inheritance, or other similar death taxes by reason of the death of the settlor of the trust, the interest of any noncharitable beneficiary of the trust shall terminate upon the death of the settlor unless the noncharitable beneficiary furnishes to the trust sufficient funds for payment of all those taxes attributable to the interest of the noncharitable beneficiary in the trust property, and the termination shall be deemed as the occurrence of a qualified contingency.

"**§ 36C-4B-5. Administrative provisions applicable to charitable remainder trusts only.**

(a) Creation of Annuity Amount for Period of Years or Life. – In each taxable year of the trust, the trustee shall pay the annuity amount designated in the trust instrument to the beneficiaries named in the trust instrument during their lives or, if the governing instrument so provides, for a period of 20 years or less. The annuity amount shall be paid annually or in more frequent equal or unequal installments if the governing instrument so provides. The annuity amount shall be paid from income and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the annuity amount shall be added to principal.

The total amount payable at least annually to a person or persons named in the trust document, at least one of which is not an organization described in section 170(c) of the Internal Revenue Code, may not be less than five percent (5%) of the initial net fair market value of the property placed in trust as finally determined for federal tax purposes, except as provided in subsection (g) of this section.

(b) Computation of Annuity Amount in Short and Final Taxable Years. – For a short taxable year and for the taxable year in which the noncharitable beneficiary's interest terminates by death or otherwise, the trustee shall prorate the annuity amount on a daily basis.

(c) Prohibition of Additional Contributions. – No additional contributions shall be made to the trust after the initial contribution.

(d) Deferral of Annuity Amount During Period of Administration or Settlement. – When property passes to the trust at the death of the settlor, the obligation to pay the annuity amount commences with the date of death of the settlor, but payment of the annuity amount may be deferred from the date of the settlor's death to the end of the taxable year in which complete funding of the trust occurs. Within a reasonable time after the end of the taxable year in which the complete funding of the trust occurs, the trustee must pay to the beneficiary, in the case of an underpayment, or must receive from the beneficiary, in the case of an overpayment, the difference between:

(1) Any annuity amounts actually paid, plus interest on those amounts computed at ten percent (10%) a year, compounded annually; and

(2) The annuity amounts payable, determined under the method described in Section 1.664-1(a)(5) of the federal income tax regulations, plus interest on those amounts computed at ten percent (10%) a year, compounded annually.

Notwithstanding the foregoing sentence, in computing any underpayment or overpayment of the annuity amounts, if the governing instrument was executed or last amended before August 9, 1984, and if the governing instrument does not specify that

a ten percent (10%) rate of interest shall be used, the underpayment or overpayment of the annuity amounts must be computed using an interest rate at six percent (6%) a year, compounded annually.

(e) Dollar Amount Annuity May Be Stated as Fraction or Percentage. – If the governing instrument of the trust states the amount of the annuity as a fraction or a percentage, the trustee must pay to the beneficiaries in each taxable year of the trust during their lives an annuity amount equal to a percentage (that percentage being stipulated in the governing instrument of the trust and, in any event, being five percent (5%) or greater) of the initial net fair market value of the assets constituting the trust. In determining this amount, assets shall be valued at their values as finally determined for federal tax purposes. If the fiduciary incorrectly determines the initial net fair market value of the assets constituting the trust, then, within a reasonable period after a final determination, the trustee shall pay to the beneficiaries, in the case of an undervaluation or shall receive from the beneficiaries, in the case of an overvaluation, an amount equal to the difference between the annuity amount properly payable and the annuity amount actually paid.

(f) Annuity Amount May Be Allocated Among Class of Noncharitable Beneficiaries in Discretion of Trustee. – If the governing instrument of the trust provides that the annuity trust amount may be allocated among a class of noncharitable beneficiaries in the discretion of the trustee, then the trustee must pay the annuity amount, which is defined in the governing instrument of the trust, in each taxable year of the trust, to the member or members of the class of noncharitable beneficiaries in an amount and proportions as the trustee in the trustee's absolute discretion shall from time to time determine until the last of the noncharitable beneficiaries dies. The trustee may pay the entire annuity amount to one member of this class or may apportion it among the various members in a manner as the trustee from time to time considers advisable as long as the power to allocate does not cause any person to be treated as the owner of any part of the trust under the rules of section 671 through section 678 of the Internal Revenue Code. If the class provided for in the governing instrument is open, then the distribution must be for a period of years not to exceed 20 years, notwithstanding a provision to the contrary in the trust instrument. If the class provided for in the governing instrument is closed at the creation of the trust, and all members of the class are ascertainable, the distribution may be for the lives of the members of the class or for a period not exceeding 20 years. The trustee shall pay the entire annuity amount for each taxable year annually and may not delay payment of the annuity amount.

(g) Reduction of Annuity Amount If Part of Corpus Is Paid to Charity at Expiration of Term of Years or on Death of Recipient. – If the governing instrument of the trust provides for the reduction of the annuity amount if part of the corpus is paid to charity at the expiration of a term of years or upon the death of a recipient, then during the term of years or during the joint lives of the noncharitable beneficiaries, the trustee shall, in each taxable year of the trust, pay a total annuity amount of at least five percent (5%) of the initial net fair market value of the assets placed in trust. Upon the expiration of the term of years or the death of a beneficiary, the trustee shall

distribute an amount or percentage of the trust assets, as provided in the governing instrument of the trust, to the charity named in the governing instrument, and thereafter the trustee shall pay, annually or in more frequent installments, to the survivors for their lives, an annuity amount that in each taxable year of the trust, bears the same ratio to five percent (5%) of the initial net fair market value of the trust assets as the net fair market value of the trust assets valued as of the date of distribution, less the amount or percentage of trust assets distributed to the charity, bears to the net fair market value of the trust assets as of the date of distribution.

(h) Termination of Annuity Amount on Payment Date Preceding Termination of Noncharitable Interest. – If the governing instrument of the trust provides that payment of the annuity amount may terminate with the regular payment preceding the termination of all noncharitable interests, then the trustee must pay to the noncharitable beneficiary during the term of the noncharitable interest the annuity amount, defined in the trust document, in each taxable year of the trust. The obligation of the trustee to pay the annuity amount shall terminate with the payment preceding the death of the noncharitable beneficiary or other event that terminates the noncharitable interest.

(i) Retention of Testamentary Power to Revoke Noncharitable Interest. – If the governing instrument of the trust provides that the settlor of the trust retains the power, exercisable only by will, to revoke or terminate the interest of any recipient other than an organization described in section 170(c) of the Internal Revenue Code, then the trustee shall pay to the settlor during the settlor's life the annuity amount, as defined in the governing instrument of the trust and, upon the death of the settlor, if the noncharitable beneficiary survives the settlor, the trustee must pay to the noncharitable beneficiary during that beneficiary's life the annuity amount equal to the amount paid to the settlor. The settlor shall have the power, exercisable only by will, to revoke and terminate the interest of the noncharitable beneficiary under the trust. Upon the first to occur of (i) the death of the survivor of the settlor and noncharitable beneficiary; or (ii) the death of the settlor if the settler effectively exercised the settlor's testamentary power to revoke and terminate the interest of the noncharitable beneficiary; the trustee must distribute all of the then principal and income of the trust, other than any amount due the settlor or noncharitable beneficiary, to the charity named in the trust document or, if the governing instrument so provides, the trustee must continue to hold the principal and income in trust for the charity or for the charitable purposes specified in the trust. No other retained power to terminate an interest in the trust is effective.

"**§ 36C-4B-6. Administrative provisions applicable to charitable remainder unitrusts only.**

(a) Creation of Unitrust Amount for a Period of Years or Life. – The trustee shall pay to the beneficiaries named in the trust investment in each taxable year of the trust during their lives or, if the governing instrument so provides, for a period not exceeding 20 years, a unitrust amount equal to a fixed percentage, as stated in the governing instrument of the trust, of the net fair market value of the trust assets valued annually on the date or by the method designated in the governing instrument of the trust or, if no date or method is specified, on the date or by the method selected by the trustee in

the trustee's discretion, so long as the same valuation date or dates or valuation methods are used each year. The unitrust amount is paid annually or in more frequent equal or unequal installments if the governing instrument so provides. The unitrust amount is paid from income and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount is added to principal. The fixed percentage to be paid at least annually to all beneficiaries cannot be less than five percent (5%).

(b) Unitrust Amount Expressed as the Lesser of Income or a Fixed Percentage. – If the governing instrument of the trust provides that the trustee shall pay, instead of a regular unitrust amount (the fixed percentage of the net fair market value of the trust assets, determined annually), the amount of trust income for the taxable year to the extent that this amount is not greater than the amount required to be distributed as a regular unitrust amount for that taxable year or the amount of the trust income for the taxable year that exceeds the regular unitrust amount for that taxable year to the extent that the aggregate of the amounts paid in prior years is less than the aggregate of the regular unitrust amount for those prior years, then the trustee must pay to the beneficiaries in each taxable year of the trust during their lives, or for a period not exceeding 20 years if the trust agreement so provides, an amount equal to the lesser of (i) the trust income for the taxable year, as defined in section 643(b) of the Internal Revenue Code and the regulations under that section, and (ii) the percentage, as stated in the governing instrument, of the net fair market value of the trust assets valued as of the taxable year decreased as elsewhere provided if the taxable year is a short taxable year or is the taxable year in which the noncharitable interest terminates by death or otherwise, and increased as elsewhere provided if additional contributions are made in the taxable year.

If the governing instrument of the trust so provides and if the trust income for any taxable year exceeds the amount determined under (ii) above, the payment to beneficiaries also must include the excess income to the extent that the aggregate of the amounts paid to beneficiaries in prior years is less than the percentage of the aggregate net fair market value of the trust assets, which percentage is defined in the governing instrument of the trust, for these years. Payments to beneficiaries must be made annually or in more frequent equal or unequal installments if the governing instrument so provides. Any income of the trust in excess of these payments must be added to principal.

(c) Adjustment for Incorrect Valuation. – If the fiduciary incorrectly determines the net fair market value of the trust assets for any taxable year, the trustee must, within a reasonable period after the final determination of the correct value, pay to the beneficiaries, in the case of an undervaluation, or receive from the beneficiaries, in the case of an overvaluation, an amount equal to the difference between the unitrust amount properly payable and the unitrust amount actually paid.

(d) Computation of Unitrust Amount in Short and Final Taxable Years. – For a short taxable year and for the taxable year in which the noncharitable beneficiary's interest terminates by death or otherwise, the trustee shall prorate the unitrust amount on a daily basis. If a trust provides for a valuation date other than the first day of the

taxable year, and the valuation date does not occur in a taxable year of the trust because the taxable year is either a short taxable year or is the taxable year in which the noncharitable interests terminate, the trust assets must be valued as of the last day of the short taxable year or the day on which the noncharitable interests terminate, as appropriate.

(e) Additional Contributions. – If the governing instrument does not prohibit additional contributions and additional contributions are made to the trust after the initial contribution in the trust, the unitrust amount for the taxable year in which the additional contributions are made must be a fixed percentage, as stated in the governing instrument of the trust, of the sum of (i) the net fair market value of trust assets, excluding the additional contributions and any income from or appreciation of these contributions and (ii) that proportion of the value of the additional contributions excluded under (i) which the number of days in the period beginning with the date of contribution and ending with the earlier of the last day of the taxable year or the day the noncharitable beneficiary's interest terminated bears to the number of days in the period beginning on the first day of the taxable year and ending with the earlier of the last day in the taxable year or the day the noncharitable beneficiary's interest terminated. If no valuation date occurs after the contributions are made, the assets so added are valued as of the time of contribution.

(f) Deferral of Unitrust Amount During Period of Administration or Settlement. – When property passes to the trust at the death of the settlor, the obligation to pay the unitrust amount commences with the date of the settlor's death, but payment of the unitrust amount may be deferred from the date of the settlor's death to the end of the taxable year of the trust in which complete funding of the trust occurs. Within a reasonable time after the end of the taxable year in which the complete funding of the trust occurs, the trustee must pay to the beneficiary, in the case of an underpayment, or must receive from the beneficiary, in the case of an overpayment, the difference between:

(1) Any unitrust amounts actually paid, plus interest on those amounts computed at ten percent (10%) a year, compounded annually; and

(2) The unitrust amounts payable, determined under the method described in section 1.664-1(a)(5) of the federal income tax regulations, plus interest on those amounts computed at ten percent (10%) a year, compounded annually.

Notwithstanding the foregoing sentence, in computing any underpayment or overpayment of the unitrust amounts, if the governing instrument was executed or last amended before August 9, 1984, and if the governing instrument does not specify that a ten percent (10%) rate of interest shall be used, the underpayment or overpayment of the unitrust amounts shall be computed using an interest rate of six percent (6%) a year, compounded annually.

(g) Unitrust Amount May Be Allocated Among Class of Noncharitable Beneficiaries in Discretion of Trustee. – If the governing instrument of the trust provides that the unitrust amount may be allocated to a class of noncharitable beneficiaries in the discretion of the trustee, then the trustee must pay, in each taxable

year of the trust, the unitrust amount to the member or members of the class of noncharitable beneficiaries in amounts and proportions as the trustee in the trustee's absolute discretion shall from time to time determine until the last of the noncharitable beneficiaries dies. The trustee may pay the unitrust amount to any one member of the class or may apportion it among the various members in a manner that the trustee shall from time to time consider advisable as long as the power to allocate does not cause any person to be treated as the owner of any part of the trust under the rules of section 671 through section 678 of the Internal Revenue Code. If the class provided for in the governing instrument is open, the distribution must be for a period not exceeding 20 years, notwithstanding a provision to the contrary in the trust instrument. If the class provided for in the governing instrument is closed at the creation of the trust, and all members of the class are ascertainable, the distribution may be for the lives of the members of the class or for a period not exceeding 20 years. The trustee shall pay the entire unitrust amount for each taxable year annually and may not delay payment of the unitrust amount.

(h) Reduction of Unitrust Amount if Part of Corpus Is Paid to Charity at Expiration of Term of Years or on Death of a Recipient. – If the governing instrument of the trust provides for the reduction of the unitrust amount if part of the corpus is paid to charity at the expiration of a term of years or upon the death of a recipient, then during the term of years or during the joint lives of the noncharitable beneficiaries the trustee shall, in each taxable year of the trust, pay the total unitrust amount equal to a percentage of the net fair market value of the trust assets valued annually, which shall not be less than five percent (5%). Upon expiration of the term of years or the death of a recipient, the trustee shall distribute an amount or percentage of the trust assets, as provided in the governing instrument of the trust, to the charity named in the governing instrument, and thereafter the trustee shall pay to the survivors for their lives a unitrust amount in each taxable year of the trust equal to at least five percent (5%) (the actual percentage being defined in the trust instrument) of the net fair market value of the remaining trust assets valued annually.

(i) Termination of Unitrust Amount on Payment Date Preceding Termination of Noncharitable Interests. – If the governing instrument of the trust provides that payment of the unitrust amount may terminate with the regular payment preceding the termination of all noncharitable interests, then the trustee must pay the unitrust amount to the noncharitable beneficiary in each taxable year of the trust during the term of the noncharitable interest. The obligation of the trustee to pay the unitrust amount terminates with the payment preceding the termination of the noncharitable interest by death or otherwise. The five percent (5%) requirement provided in subsection (a) of this section shall be met until the termination of all payments of the unitrust amount.

(j) Retention of Testamentary Power to Revoke Noncharitable Interest. – If the governing instrument of the trust provides that the settlor of the trust shall retain the power, exercisable only by will, to revoke or terminate the interest of any recipient other than an organization described in section 170(c) of the Internal Revenue Code, then the trustee must pay the unitrust amount to the settlor during the settlor's life and, upon the death of the settlor, shall pay the unitrust amount to the noncharitable

beneficiary during the charitable beneficiary's life, provided the noncharitable beneficiary survives the settlor. The settlor shall have the power, exercisable only by will, to revoke and terminate the interest of the noncharitable beneficiary under the trust. Upon the first to occur of (i) the death of the survivor of the settlor and the noncharitable beneficiary; or (ii) the death of the settlor if the settlor effectively exercised the testamentary power to revoke and terminate the interest of the noncharitable beneficiary; the trustee shall distribute all of the then principal and income of the trust, other than any amount due the noncharitable beneficiaries, to the charity named in the trust document or, if the governing instrument so provides, the trustee shall continue to hold the principal and income in trust for the charity or for the charitable purposes specified in the trust. No other retained power to terminate an interest in the trust is effective.

"**§ 36C-4B-7. Interpretation.**

This Article shall be interpreted and construed to effectuate its general purpose to cause all charitable remainder annuity trusts and all charitable remainder unitrusts to be administered in accordance with section 2055 and section 2522 of the Internal Revenue Code and the regulations under those sections.

"Article 5.

"Creditors' Claims; Spendthrift and Discretionary Trusts.

"**§ 36C-5-501. Rights of beneficiary's creditor or assignee.**

(a) Except as provided in subsection (b) of this section, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to that relief as is appropriate under the circumstances.

(b) This section shall not apply and a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary, to the extent that a beneficiary's interest:

(1) Is subject to a spendthrift provision;

(2) Is a discretionary trust interest as defined in G.S. 36C-5-504(a)(2); or

(3) Is a protective trust interest as described in G.S. 36C-5-508.

"**§ 36C-5-502. Spendthrift provision.**

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust", or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this Article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

"**§ 36C-5-503. Exceptions to spendthrift provision.**

(a) As used in this section, the term "child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(b) Even if a trust contains a spendthrift provision, or if the beneficiary's interest is a discretionary trust interest as defined in G.S. 36C-5-504(a)(2) or a protective trust interest as defined in G.S. 36C-5-508, a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to relief that is appropriate under the circumstances.

"**§ 36C-5-504. Discretionary trusts; effect of standard.**

(a) In this section:

(1) "Child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(2) "Discretionary trust interest" means an interest in a trust that is subject to the trustee's discretion, whether or not the discretion is expressed in the form of a standard of distribution. A discretionary trust interest shall include an interest in any one or any combination of the following:

a. A trust in which the amount to be received by the beneficiary, including whether or not the beneficiary, or a class of beneficiaries, is to receive anything at all, is within the discretion of the trustee.

b. A trust in which the trustee has no duty to pay or distribute any particular amount to the beneficiary, but has only a duty to pay or distribute to the beneficiary, or apply on behalf of the beneficiary, those sums that the trustee, in the trustee's discretion, determines are appropriate for the support, education, or maintenance of the beneficiary.

(b) The beneficiary may not transfer a discretionary trust interest. Except as otherwise provided in this Article, a creditor or assignee of a beneficiary may not reach a discretionary trust interest or a distribution by the trustee before its receipt by the beneficiary.

(c) Except as provided in subsection (d) of this section, a creditor of a beneficiary may not compel a distribution from a trust in which the beneficiary has a discretionary trust interest even if the trustee has abused the trustee's discretion.

(d) To the extent that a trustee has not complied with a standard of distribution or has abused a discretion:

(1) A distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child; and

(2) The court shall direct the trustee to pay to the child an amount that is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(e) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(f) A creditor may not reach the interest of a beneficiary who is also a trustee or co-trustee, or otherwise compel a distribution, if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard.

"**§ 36C-5-505. Creditor's claim against settlor.**

(a) Whether or not the terms of a trust contain a spendthrift provision or the interest in the trust is a discretionary trust interest as defined in G.S. 36C-504(a)(2) or a protective trust interest as defined in G.S. 36C-5-508, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent that the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances, unless barred by G.S. 28A-19-3.

(b) The lapse, release, or waiver of a power of withdrawal shall not cause the holder to be treated as a settlor of the trust.

"**§ 36C-5-506. Overdue distribution.**

(a) In this section, "mandatory distribution" means a distribution of income or principal that the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term excludes a distribution subject to the exercise of the trustee's discretion, regardless of whether the terms of the trust (i) include a support or other standard to guide the trustee in making distribution decisions; or (ii) provide that the trustee "may" or "shall" make discretionary distributions, including distributions under a support or other standard.

(b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

"**§ 36C-5-507. Personal obligations of trustee.**

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

"**§ 36C-5-508. Protective trusts.**

Except with respect to an interest retained by the settlor, a "protective trust interest" means an interest in a trust in which the terms of the trust provide that the interest terminates or becomes discretionary if:

(1) The beneficiary alienates or attempts to alienate that interest; or

(2) Any creditor attempts to reach the beneficiary's interest by attachment, levy, or otherwise; or

(3) The beneficiary becomes insolvent or bankrupt.

"Article 6.

"Revocable Trusts.

"§ 36C-6-601. Capacity of settlor of revocable trust.

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

"§ 36C-6-602. Revocation or amendment of revocable trust.

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust without regard to the actual capacity of the settlor. This subsection does not apply to a trust created under an instrument executed before the effective date of this Chapter.

(b) If a revocable trust is created or funded by more than one settlor:

(1) To the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

(2) To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard the portion of the trust property attributable to that settlor's contribution.

(c) The settlor may revoke or amend a revocable trust:

(1) By substantial compliance with a method provided in the terms of the trust; or

(2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

a. A later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

b. By oral statement to the trustee if the trust was created orally; or

c. Any other written method delivered to the trustee manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(e) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power of attorney provided the exercise of the power of revocation or amendment does not alter the designation of beneficiaries to receive property on the settlor's death under the settlor's existing estate plan.

(f) A general guardian or a guardian of the estate of the settlor or, if no general guardian or guardian of the estate has been appointed, a guardian of the person of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship.

(g) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

"**§ 36C-6-603. Settlor's powers; powers of withdrawal.**

(a) While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors.

"**§ 36C-6-604. Limitation on action contesting validity of revocable trust; distribution of trust property.**

(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

(1) Three years after the settlor's death; or

(2) 120 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

(1) The trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) A potential contestant has notified the trustee of a possible judicial proceeding to contest the trust, and a judicial proceeding is commenced within 60 days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

"Article 7.

"Office of Trustee.

"**§ 36 C-7-701. Accepting or declining trusteeship.**

(a) Except as otherwise provided in subsection (c) of this section, a person designated as trustee accepts the trusteeship:

(1) By substantially complying with a method of acceptance provided in the terms of the trust; or

(2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time, not to exceed 120 days, after receiving written notice of the trusteeship is considered to have rejected the trusteeship.

(c) A person designated as trustee, without accepting the trusteeship, may:

(1) Act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

(2) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

"**§ 36C-7-702. Trustee's bond.**

(a) A trustee shall provide bond to secure the performance of the trustee's duties if:

(1) The trust instrument was executed before January 1, 2006, unless the terms of the trust instrument provide otherwise;

(2) The trust instrument was executed on or after January 1, 2006, but only if the terms of the trust instrument require the trustee to provide bond;

(3) A beneficiary requests the trustee to provide bond, and the court finds the request to be reasonable; or

(4) The court finds that it is necessary for the trustee to provide bond in order to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

However, in no event shall bond be required of a trustee if the governing instrument directs otherwise.

(b) If bond is required, it shall be in a sum of double the value of the personal property to come into the trustee's hands if 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 trust estate if 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 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%) of that value, conditioned upon the faithful performance of the trustee's duties and for the payment to the persons entitled to receive property that may come into the trustee's hands. All bonds executed under this Article shall be filed with the clerk of superior court.

(c) On petition of the trustee or a qualified beneficiary, the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties.

(d) As provided in G.S. 53-159 and G.S. 53-366(a)(10), banks and trust companies licensed to do trust business in this State need not give bond, even if required by the terms of the trust.

"**§ 36C-7-703. Co-trustees.**

(a) Co-trustees who are unable to reach a unanimous decision may act by majority decision if more than two are serving. Unanimity is required when only two co-trustees are serving.

(b) If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust and exercise all trustee powers, except those powers that the remaining trustees are prohibited from exercising under the trust instrument or by law.

(c) A co-trustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity, or the co-trustee has properly delegated the performance of the function to another trustee.

(d) If a co-trustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust.

(e) A trustee may delegate to a co-trustee with the consent of the co-trustee the performance of any function other than those the settlor reasonably expected the trustees to perform jointly. The following functions are not considered to be those that the settlor reasonably expected the trustees to perform jointly:

(1) Establish and maintain bank accounts for the trust and issue checks for the trust.

(2) Maintain inventories, accountings, and income and expense records of the trust.

(3) Enter any safety deposit box rented by the trust.

(4) Employ persons as advisors or assistants in the performance of administrative duties, including agents, attorneys, accountants, brokers, appraisers, and custodians.

(5) List trust property for taxes and prepare and file tax returns for the trust.

(6) Collect and give receipts for claims and debts of the trust.

(7) Pay debts, claims, costs of administration, and taxes of the trust.

(8) Compromise, adjust, or otherwise settle any claim by or against the trust and release, in whole or in part, a claim belonging to the trust.

(9) Have custody of the trust property.

The list of functions contained in this subsection is not intended to be exclusive of others that may be delegated to a co-trustee in accordance with this subsection.

(f) Except as otherwise provided in subsection (g) of this section, a trustee who does not join in an action of another trustee is not liable for the action.

(g) Each trustee shall exercise reasonable care to:

(1) Avoid enabling a co-trustee to commit a serious breach of trust; and

(2) Compel a co-trustee to redress a serious breach of trust.

(h) Notwithstanding subsection (f) or (g) of this section, a trustee who has not joined in an action approved by a majority of the other trustees is not liable for the action. Notwithstanding subsection (f) or (g) of this section, a dissenting trustee who joins in an action at the direction of the majority of the trustees but who notified in

writing any co-trustee of the dissent at or before the time of the action is not liable for the action, unless that trustee had knowledge that the action taken involved intentional misconduct or was taken with an intention to directly or indirectly provide an improper personal benefit to one or more trustees approving the action.

(i) Notwithstanding any other provision of this section to the contrary, if two or more trustees own shares of corporate stock or other securities, their acts with respect to voting shall have the following effect:

(1) If only one votes, in person or by proxy, the act binds all;

(2) If more than one vote, in person or by proxy, the act binds all; and

(3) If more than one vote, in person or by proxy, but the vote is evenly split on any particular matter, each faction is entitled to vote the stock or other securities in question proportionately.

"**§ 36C-7-704. Vacancy in trusteeship; appointment of successor.**

(a) A vacancy in a trusteeship occurs if:

(1) A person designated as trustee rejects the trusteeship;

(2) A person designated as trustee cannot be identified or does not exist;

(3) A trustee resigns;

(4) A trustee is disqualified or removed;

(5) A trustee dies; or

(6) A general guardian, guardian of the estate, or guardian of the person is appointed for an individual serving as trustee.

(b) If one or more co-trustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

(c) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:

(1) By a person designated in the terms of the trust or appointed under the terms of the trust to act as successor trustee;

(2) By a person appointed by unanimous agreement of the qualified beneficiaries; or

(3) By a person appointed by the court.

(d) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:

(1) By a person designated in the terms of the trust or appointed under the terms of the trust to act as successor trustee;

(2) By a person selected by majority agreement of the charitable organizations expressly designated to receive distributions under the terms of the trust; or

(3) By a person appointed by the court.

(e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

(f) A successor trustee shall succeed to all the rights, powers, and privileges, and is subject to all the duties, liabilities, and responsibilities that were imposed upon the

original trustee, unless a contrary intent appears from the governing instrument or unless the order appointing the successor trustee provides otherwise.

"**§ 36C-7-705. Resignation of trustee.**

(a) A trustee may resign:

(1) Upon at least 30 days' notice in writing to the qualified beneficiaries, the settlor, if living, and all co-trustees; or

(2) With the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

"**§ 36C-7-706. Removal of trustee.**

(a) For the reasons set forth in subsection (b) of this section, the ~~settlor~~settler of an irrevocable trust, a co-trustee of an irrevocable trust, or a beneficiary of an irrevocable trust may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

(1) The trustee has committed a serious breach of trust;

(2) Lack of cooperation among co-trustees substantially impairs the administration of the trust;

(3) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(4) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is consistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order appropriate relief under G.S. 36C-10-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

"**§ 36C-7-707. Delivery of property by former trustee.**

(a) Unless a co-trustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the co-trustee, successor trustee, or other person entitled to it. A former trustee shall execute those documents transferring title to trust property as may be appropriate to facilitate administration of the trust, and in the event that the former trustee fails to do so, the clerk of superior court may order the former trustee to execute those documents, or the clerk of superior court may transfer title.

"**§ 36C-7-708. Compensation of trustee.**

(a) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation determined in accordance with Article 5A of Chapter 32 of the General Statutes.

(b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified.

"**§ 36C-7-709. Reimbursement of expenses.**

A trustee is entitled to be reimbursed out of the trust property for expenses properly incurred in the administration of the trust as provided in G.S. 32-58.

"Article 8.

"Duties and Powers of Trustee.

"**§ 36C-8-801. Duty to administer trust.**

Upon acceptance of a trusteeship, a trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this Chapter.

"**§ 36C-8-802. Duty of loyalty.**

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in G.S. 36C-10-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests, is voidable by a beneficiary affected by the transaction, without regard to whether the transaction is fair to the beneficiary, unless:

(1) The terms of the trust authorized the transaction;

(2) The court approved the transaction;

(3) The beneficiary did not commence a judicial proceeding within the time allowed by G.S. 36C-10-1005;

(4) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with G.S. 36C-10-1009; or

(5) The transaction involves a contract entered into, or claim acquired by, the trustee before the person became or contemplated becoming trustee.

(c) In determining whether a sale, encumbrance, or other transaction involving the investment or management of trust property is affected by a conflict of interest between the trustee's fiduciary and personal interests, the transaction is rebuttably presumed to be affected by a conflict of interest if the trustee enters into the transaction with:

(1) The trustee's spouse or a parent of the trustee's spouse;

(2) The trustee's descendants, siblings, ancestors, or their spouses;

(3) An agent, attorney, employee, officer, director, member, manager, or partner of the trustee, or an entity that controls, is controlled by, or is under common control with the trustee; or

(4) Any other person or entity in which the trustee, or a person that owns a significant interest in the trust, has an interest or relationship that might affect the trustee's best judgment;

(d) A transaction between a trustee and a beneficiary that does not concern trust property, but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary, and from which the trustee obtains an advantage, is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f) Notwithstanding subsection (c) of this section:

(1) An investment by a trustee in securities of an investment company, investment trust, or pooled investment vehicle in which the trustee has an investment, or to which the trustee, or its affiliate, provides services is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of Article 9 of this Chapter. The investment company, investment trust, or pooled investment vehicle may compensate the trustee for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under G.S. 36C-8-813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined; and

(2) Payment made by a trustee to an attorney, broker, accountant, or agent for services performed on behalf of the trust in the ordinary course of business is not considered to be affected by a conflict between the trustee's personal and fiduciary interests if the payment is consistent with payments generally made in the community for the same or similar services.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect to appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(h) This section does not preclude the following transactions, if fair to the beneficiaries:

(1) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(2) Payment of reasonable compensation to the trustee;

(3) A transaction between a trust and another trust, decedent's estate, or guardianship, or similar relationship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) A deposit of trust money in a regulated financial-service institution operated by the trustee or an affiliate of the trustee; or

(5) An advance by the trustee of money for the protection of the trust.

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

"**§ 36C-8-803. Impartiality.**

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

"**§ 36C-8-804. Prudent administration.**

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

"**§ 36C-8-805. Cost of administration.**

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

"**§ 36C-8-806. Trustee's skills.**

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

"**§ 36C-8-807. Delegation by trustee.**

(a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with subsection (a) of this section is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

"**§ 36C-8-808. Powers to direct.**

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee must act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust, or the trustee knows the attempted exercise would

constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

"**§ 36C-8-809. Control and protection of trust property.**

A trustee shall take reasonable steps to take control of and protect the trust property.

"**§ 36C-8-810. Record keeping and identification of trust property.**

(a) A trustee shall keep adequate records of the administration of the trust.

(b) A trustee shall keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in subsection (d) of this section, a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

"**§ 36C-8-811. Enforcement and defense of claims.**

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

"**§ 36C-8-812. Collecting trust property.**

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee.

"**§ 36C-8-813. Duty to inform and report.**

(a) The trustee is under a duty to a qualified beneficiary to give that beneficiary upon request and at reasonable times complete and accurate information as to the nature and amount of the trust property and to permit the beneficiary, or the beneficiary's representative, to inspect the subject matter of the trust and the accounts and other documents relating to the trust.

(b) Notwithstanding subsection (a) of this section:

(1) The duty of the trustee under subsection (a) of this section shall not include informing any beneficiary in advance of transactions relating to the trust property.

(2) A trustee is considered to have discharged the trustee's duty under subsection (a) of this section as to a qualified beneficiary for matters disclosed by a report sent at least annually and at termination of the trust to the beneficiary that describes the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, and lists the trust assets and their respective market values, including estimated values of assets with uncertain values. No presumption shall arise that a trustee who does not comply

with this subdivision failed to discharge the trustee's duty under subsection (a) of this section.

(c) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. With respect to future reports and other information, a beneficiary may withdraw a waiver previously given.

(d) Subsection (b) of this section applies only to a trust created under a trust instrument executed on or after the effective date of this Chapter.

"**§ 36C-8-814. Discretionary powers; tax savings.**

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of terms such as "absolute", "sole", or "uncontrolled", a trustee abuses the trustee's discretion in exercising or failing to exercise a discretionary power if the trustee acts with bad faith, acts dishonestly, acts with an improper motive, even though not a dishonest motive, or if the trustee fails to use the trustee's judgment in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) Subject to subsection (d) of this section, and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

(1) A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power that would, except for this subsection, constitute in whole or in part a general power of appointment may not exercise that power in favor of the trustee/beneficiary, the trustee/beneficiary's estate, the trustee/beneficiary's creditors, or the creditors of the trustee/beneficiary's estate.

(2) Notwithstanding subdivision (1) of this subsection, if the trust confers on the trustee the power to make discretionary distributions to or for the trustee's personal benefit, the trustee may exercise the power in accordance with an ascertainable standard.

(3) The trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

For purposes of this subsection, a "general power of appointment" means any power that would cause the income to be taxed to the trustee in his individual capacity under section 678 of the Internal Revenue Code and any power that would be a general power of appointment, in whole or in part, under section 2041(b)(1) or section 2514(c) of the Internal Revenue Code.

(c) A power whose exercise is limited or prohibited by subsection (b) of this section may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) of this section does not apply to:

(1) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in section 2056(b)(5) or section 2523(e) of the Internal Revenue Code, was previously allowed;
(2) Any trust during any period that the trust may be revoked or amended by its settlor; or
(3) A trust, if contributions to the trust qualify for the annual exclusion under section 2503(c) of the Internal Revenue Code.

(e) If a trust created under a will or trust instrument for the benefit of the spouse of the settlor of the trust, other than a trust that provides that upon the termination of the income interest that the entire remaining trust estate be paid to the estate of the spouse, requires that all the income of the trust be paid not less frequently than annually to the spouse and a federal estate or gift tax marital deduction is claimed with respect to the trust, then, unless the trust instrument specifically provides otherwise by reference to this section, any investment in or retention of unproductive property as an asset of the trust is subject to the power of the spouse to require either that the asset be made productive of income, or that it be converted to assets productive of income, within a reasonable period of time.

"**§ 36C-8-815. General powers of trustee.**

(a) A trustee, without authorization by the court, may exercise:
(1) Powers conferred by the terms of the trust; or
(2) Except as limited by the terms of the trust:
a. All powers over the trust property that an unmarried competent owner has over individually owned property;
b. Any other powers appropriate to achieve the proper investment, management, administration or distribution of the trust property; and
c. Any other powers conferred by this Chapter.

(b) The exercise of a power is subject to the fiduciary duties prescribed by this Article.

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

Without limiting the authority conferred by G.S. 36C-8-815, a trustee may:
(1) Collect and control trust property and accept or reject additions to the trust property from a settlor or any other person;
(2) Invest and reinvest trust property as the trustee considers advisable in accordance with the trust, and to acquire or sell property, for cash or on credit, at public or private sale;
(3) Exchange, partition, or otherwise change the character of trust property;
(4) Deposit trust money in an account in a regulated financial services institution, including an institution operated by the trustee or an affiliate of the trustee upon compliance with any applicable requirements for the deposit;
(5) Borrow money, with or without security, including from a corporate trustee's lending department, renew or modify loans, and mortgage or

pledge trust property for a period within or extending beyond the duration of the trust;

(6) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, venture, agricultural operation, or other form of business or enterprise, form and transfer, assign, and convey to that form of business or enterprise all or any part of the trust property in exchange for the stock, securities, or obligations of that form of business or enterprise, continue any business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization, or contributing additional capital;

(7) With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:

a. Vote, or give general or limited proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement, or execute waivers, consents, or objections with respect to those securities;

b. Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

c. Pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights;

d. Deposit the securities with a depositary or other regulated financial service institution; and

e. Consent, directly or through a committee or other agent, to the merger, consolidation, reorganization, readjustment of capital or financial structure, lease, sale, dissolution, or liquidation of a business enterprise, and elect whether to participate as a member of a class in any litigation involving the securities;

(8) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing party walls or buildings or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries, make contracts, licenses, leases, conveyances, or grants of every nature and kind with respect to crops, gravel, sand, oil, gas, timber and forest products, other usufructs or natural resources, and other benefits or incidents of the real property;

(9) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust at the expense of the trust;

(12) Abandon, relinquish any or all rights to, or decline to administer property of no value or of insufficient benefit or value to the trust to justify its collection or continued administration;

(13) With respect to possible liability for violation of environmental law:

a. Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

b. Take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

c. Decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

d. Compromise claims against the trust that may be asserted for an alleged violation of environmental law; and

e. Pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

(14) Pay or contest any claim, compromise, adjust or otherwise settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

(15) Pay from the trust property taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust and the protection of the trust property;

(16) Exercise elections with respect to federal, state, and local taxes;

(17) Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights under that plan, annuity, or life insurance, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

(18) Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable

under the circumstances, and acquire a lien on future distributions for repayment of those loans;

(19) Pledge trust property to guarantee loans made by others to a beneficiary;

(20) Appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, limit those powers the appointed trustee may exercise and the duties for which the appointed trustee is responsible, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

a. Paying it to the beneficiary's general guardian or the guardian of the beneficiary's estate or, if the beneficiary does not have a general guardian or guardian of the beneficiary's estate, the guardian of the beneficiary's person;

b. Paying it to a custodian under a uniform transfer to minors act or custodial trustee under a uniform custodial trust act and, for that purpose, creating a custodianship or custodial trust for the benefit of the beneficiary;

c. Paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

d. Managing it as a separate fund on the beneficiary's behalf.

A trustee making payments under this subdivision does not have any duty to see to the application of the payments so made, if the trustee exercised due care in the selection of the person, including the minor or incompetent, to whom the payments were made, and the receipt of that person shall be full acquittance to the trustee;

(22) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares without regard to the income tax basis or other special tax attributes of the assets, as the trustee finds to be most practicable and for the best interests of the distributees, value the trust property for those purposes, and adjust for resulting differences in valuation; and to distribute trust property in kind or in cash, or partially in kind and partially in cash, in divided or undivided interests;

(23) Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) Make, execute, and deliver contracts and other instruments, including instruments under seal, that are useful to achieve or facilitate the exercise of the trustee's powers;

(26) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it;

(27) Employ as advisors or assistants in the performance of administrative duties, or delegate administrative duties in the manner provided in G.S. 36C-8-807, to persons, firms, and corporations, including agents, auditors, accountants, brokers, attorneys-at-law, attorneys-in-fact, investment advisors, appraisers, custodians, rental agents, realtors, and tax specialists;

(28) Bid on property at a foreclosure sale, or acquire property from a mortgagor or obligor without foreclosure, and retain the property so bid on or taken over without foreclosure;

(29) Divide one trust into several trusts and make distributions from those trusts in the manner provided in G.S. 36C-4-417;

(30) Request an order from the court for the sale of real or personal property under Article 29A of Chapter 1 of the General Statutes, or for the exchange, partition, or other disposition or change in the character of, or for the grant of options or other rights in or to, such property; and

(31) Distribute the assets of an inoperative trust consistent with the authority granted under G.S. 28A-22-10.

"**§ 36C-8-817. Distribution upon termination.**

Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

"Article 9.

"Uniform Prudent Investor Act.

"**§ 36C-9-901. Prudent investor rule; applicability.**

(a) Except as otherwise provided in subsection (b) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this Article.

(b) The prudent investor rule is a default rule and may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust that govern or direct investments in a manner inconsistent with this Article. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the terms of the trust.

(c) The following terms or comparable language in a trust, unless otherwise limited or modified, authorize any investment or strategy permitted under this Article: "Chapter 36A", "investments in accordance with Article 15 of Chapter 36A", "investments in accordance with Article 9 of Chapter 36C", "investments permissible by law for investment of trust funds", "legal investments", "authorized investments", "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital", "prudent man rule", "prudent trustee rule", "prudent person rule", and "prudent investor rule". This Article also applies where a trust contains no investment standard.

(d) This Article does not apply to:

(1) Unless the trust provides otherwise by specific reference to this Article:

a. Trusts under any federal employee retirement income security statute or other retirement or pension trusts;

b. Trusts that are created by legislative act;

c. Trusts that are created by or under premarital or postmarital agreements, divorce settlements, settlements of other proceedings or disputes;

d. Transfers under the Uniform Transfers to Minors Act;

e. Transfers under the Uniform Custodial Trust Act; or

f. Honorary trusts, trusts for pets, and trusts for cemetery lots.

(2) Trusts imposed or required under another chapter of the General Statutes or by rule in which the investment of the trust funds is regulated by the other chapter or by rule, unless a provision of the other chapter or the rule provides otherwise by a specific reference to this Article.

"**§ 36C-9-902. Standard of care; portfolio strategy; risk and return objectives.**

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are any of the following that are relevant to the trust or its beneficiaries:

(1) General economic conditions;

(2) The possible effect of inflation or deflation;

(3) The expected tax consequences of investment decisions or strategies;

(4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in

closely held enterprises, tangible and intangible personal property, and real property;

(5) The expected total return from income and the appreciation of capital;

(6) Other resources of the beneficiaries known to the trustee;

(7) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this Article.

"**§ 36C-9-903. Diversification.**

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

"**§ 36C-9-904. Duties at inception of trusteeship.**

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this Chapter.

"**§ 36C-9-905. Reviewing compliance.**

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

"**§ 36C-9-906. Effect on charitable remainder trusts.**

Nothing in this Article shall prevent the application of Article 4B of this Chapter to a "charitable remainder trust" as defined in G.S.36C-4B-3(1).

"**§ 36C-9-907. Short title.**

This Article may be cited as the "North Carolina Uniform Prudent Investor Act."

"Article 10.

"Liability of Trustees and Rights of Persons Dealing with Trustees.

"**§ 36C-10-1001. Remedies for breach of trust.**

(a) A violation by a trustee of a duty the trustee owes under a trust is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

(1) Compel the trustee to perform the trustee's duties;

(2) Enjoin the trustee from committing a breach of trust;

(3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;

(4) Order a trustee to account;

(5) Appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) Suspend the trustee;

(7) Remove the trustee as provided in G.S. 36C-7-706;
(8) Reduce or deny compensation to the trustee;
(9) Subject to G.S. 36C-10-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
(10) Order any other appropriate relief.

(c) The court may, for cause shown, relieve a trustee from liability for any breach of trust, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for a breach of trust.

"**§ 36C-10-1002. Damages for breach of trust.**

(a) A trustee who commits a breach of trust is liable for the greater of:
(1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
(2) The profit the trustee made by reason of the breach.

(b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

"**§ 36C-10-1003. Liability in absence of breach.**

(a) A trustee is accountable for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust. Nothing in this section limits a trustee's right to compensation under G.S. 36C-7-708 or payments allowed under G.S. 36-8-802(f).

(b) Absent a breach of trust, a trustee is not liable for a loss or depreciation in the value of trust property or for not having made a profit.

"**§ 36C-10-1004. Attorney's fees and costs.**

In a judicial proceeding involving the administration of a trust, the court may award costs and expenses, including reasonable attorney fees, as provided in the General Statutes.

"**§ 36C-10-1005. Limitation of action against trustee.**

Applicable provisions of Chapter 1 of the General Statutes govern the limitation of actions on judicial proceedings involving trusts, except that no proceeding against a trustee for breach of trust may be commenced more than five years after the first to occur of: (i) the removal, resignation, or death of the trustee; (ii) the termination of the beneficiary's interest in the trust; or (iii) the termination of the trust.

"**§ 36C-10-1006. Reliance on trust instrument.**

A trustee who acts in reasonable reliance on the terms of the trust as expressed in a trust instrument is not liable for a breach of trust to the extent that the breach resulted from the reliance.

"**§ 36C-10-1007. Event affecting administration or distribution.**

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

"**§ 36C-10-1008. Exculpation of trustee.**

A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.

"**§ 36C-10-1009. Beneficiary's consent, release, or ratification.**

(a) A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) At the time of the consent, release, or ratification, the beneficiary did not have knowledge of the beneficiary's rights or of the material facts relating to the breach.

(b) No consideration is required for the consent, release, or ratification to be valid.

"**§ 36C-10-1010. Limitation on personal liability of trustee.**

(a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in making the contract disclosed the fiduciary capacity. The addition of the phrase "trustee," or "as trustee," or a similar designation to the signature of a trustee on a written contract is considered prima facie evidence of a disclosure of fiduciary capacity.

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim. Any judgment rendered in favor of a claimant in such a judicial proceeding against a trust may be recovered from the trust property, without proof that the trustee could have obtained reimbursement from the trust if the trustee had paid the claim.

(d) A trustee is entitled to indemnity from the trust for any claim, other than a breach of trust, for which the trustee is liable:

(1) If the claim arose from a common incident of activity in which the trustee was properly engaged for the trust;

(2) If the trustee was not personally at fault; or

(3) To the extent that the trustee's actions increased the value of trust property.

(e) A decision by a trustee not to inspect property, or to decline to accept property, shall not create any inference as to liability, under any environmental law, with respect to that property. A trustee shall have no liability for a decrease in value of property in a trust by reason of the trustee's compliance with any environmental law, including reporting requirements.

"**§ 36C-10-1011. Interest as general partner.**

(a) Except as otherwise provided in subsection (c) of this section or unless personal liability is imposed in the contract, a trustee who holds, in a fiduciary capacity, an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership if the fiduciary capacity was disclosed. The addition of the phrase "trustee" or "as trustee" or a similar designation to the signature of a trustee on a written partnership document is considered prima facie evidence of a disclosure of fiduciary capacity.

(b) A trustee who holds, in a fiduciary capacity, an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault. This subsection does not apply to additional ownership interests of the trustee held in a nonfiduciary capacity.

(c) If the settlor transfers an existing general partnership interest to a revocable trust, the settlor remains personally liable for partnership obligations as if the settlor were a general partner.

"**§ 36C-10-1012. Protection of person dealing with trustee.**

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

(f) A person is not required to obtain a certification under G.S. 36C-10-1013 in order to be entitled to the protections of this section.

"**§ 36C-10-1013. Certification of trust.**

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(1) The existence of the trust and the date the trust instrument was executed;

(2) The identity of the settlor, unless withheld under a provision in the trust instrument;

(3) The identity and address of the currently acting trustee;

(4) The powers of the trustee;

(5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) The authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;

(7) The trust's taxpayer identification number; and

(8) The manner of taking title to trust property.

(b) Any trustee may sign or otherwise authenticate a certification of trust.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that the person relying upon the certification holds a copy of all or part of the trust instrument.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

"Article 11.

"Miscellaneous Provisions.

"**§ 36C-11-1101. Uniformity of application and construction.**

In applying and construing this Chapter, consideration may be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 36C-11-1102. Electronic records and signatures.**

The provisions of this Chapter governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of those records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

"**§ 36C-11-1103. Severability clause.**

If any provision of this Chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Chapter that can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable."

SECTION 3. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 36D.**

"**North Carolina Community Trust for Persons with Severe Chronic Disabilities.**

"**§ 36D-1. Title; findings.**

(a) This Article shall be known and may be cited as the "North Carolina Community Trust for Persons with Severe Chronic Disabilities Act".

(b) The General Assembly finds that it is in the public interest to encourage activities by voluntary associations and private citizens that will supplement and augment those services provided by local, State, and federal government agencies in discharge of their responsibilities toward individuals with severe chronic disabilities. The General Assembly further finds that, as a result of changing social, economic, and demographic trends, families of persons with severe chronic disabilities are increasingly aware of the need for a vehicle by which they can assure ongoing individualized personal concern for a severely disabled family member who may survive that disabled person's parents or other family members, and provide for the efficient management of small legacies or trust funds to be used for the benefit of that disabled person. In a number of other states, voluntary associations have established foundations or trusts intended to be responsive to these concerns. Therefore, the General Assembly finds that North Carolina will benefit by the enactment of enabling legislation expressly authorizing the formation of community trusts in accordance with criteria set forth by statute and administered by the Secretary of State, under Chapter 55A of the General Statutes. These community trusts permit the pooling of resources contributed by families or persons with philanthropic intent, along with the reservation of portions of these funds for the use and benefit of designated beneficiaries.

(c) This Article shall be liberally construed and applied to promote its underlying purposes and policies, which are, among others, to:

(1) Encourage the orderly establishment of community trusts for the benefit of persons with severe chronic disabilities;

(2) Ensure that community trusts are administered properly and that the managing boards of the trusts are free from conflicts of interest;

(3) Facilitate sound administration of trust funds for persons with severe chronic disabilities by allowing family members and others to pool resources in order to make professional management investment more efficient;

(4) Provide parents of persons with severe chronic disabilities peace of mind in knowing that a means exists to ensure that the interests of their children who have severe chronic disabilities are properly looked after and managed after the parents die or become incapacitated;

(5) Help make guardians available for persons with severe chronic disabilities who are incompetent, when no other family member is available for this purpose;

(6) Encourage the availability of private resources to purchase for persons with severe chronic disabilities goods and services that are not available through any governmental or charitable program and to conserve these resources by limiting purchases to those that are not available from other sources;

(7) Encourage the inclusion, as beneficiaries of community trusts, of persons who lack resources and whose families are indigent, in a way that does not diminish the resources available to other beneficiaries whose families have contributed to the trust; and

(8) Remove the disincentives that discourage parents and others from setting aside funds for the future protection of persons with severe chronic disabilities by ensuring that the interest of beneficiaries in community trusts are not considered assets or income that would disqualify them from any governmental or charitable entitlement program with an economic means test.

"**§ 36D-2. Definitions.**

As used in this Article, unless the context clearly requires otherwise:

(1) "Beneficiary" means any person with a severe chronic disability who has qualified as a member of the community trust program and who has the right to receive those services and benefits vested with the management of the business and affairs of a corporation, formed for the purpose of managing a community trust, irrespective of the name by which the group is designated.

(2) "Community trust" means a nonprofit organization that offers the following services:

a. Administration of special trust funds for persons with severe chronic disabilities;

b. Follow along services;

c. Guardianship for persons with severe chronic disabilities who are incompetent, when no other family member or immediate friend is available for this purpose; and

d. Advice and counsel to persons who have been appointed as individual guardians of the persons or estates of persons with severe chronic disabilities.

(3) "Follow along services" means (i) those services offered by community trusts that are designed to ensure that the needs of each beneficiary are being met for as long as may be required and may include periodic visits to the beneficiary and to the places where the beneficiary receives services, (ii) participation in the development of individualized plans being made by service providers for the beneficiary, and (iii) other similar services consistent with the purposes of this Article.

(4) "Severe chronic disability" means a physical or mental impairment that is expected to give rise to a long-term need for specialized health, social, and other services, and that makes the person with the disability dependent upon others for assistance to secure these services.

(5) "Trustee" means any member of the board of a corporation, formed for the purpose of managing a community trust, whether that member is designated as a trustee, director, manager, governor, or by any other title.

(6) "Surplus trust funds" means funds accumulated in the trust from contributions made on behalf of an individual beneficiary that, after the death of the beneficiary, are determined by the board to be in excess of the actual cost of providing services during the beneficiary's lifetime, including the beneficiary's share of administrative costs.

"**§ 36D-3. Scope.**

This Article applies to every community trust established in this State. In addition to meeting the other requirements of this Article, every board that administers a community trust shall incorporate as a nonprofit corporation under Chapter 55A of the General Statutes. Except as otherwise provided in this Chapter, Chapter 55A of the General Statutes applies to community trusts.

"**§ 36D-4. Administration; powers and duties.**

(a) Every community trust shall be administered by a board. The board shall be comprised of no less than nine and no more than 21 members, at least one-third of whom are parents or relatives of persons with severe chronic disabilities. No board member shall be a provider of habilitative, health, social, or educational services to persons with severe chronic disabilities or an employee of such a service provider. The board may, however, allow service providers to serve on the board in an advisory capacity. Board members shall be selected, to the maximum extent possible, from geographic areas throughout the area served by the trust.

The certificate of incorporation filed with the Secretary of State under Chapter 55A of the General Statutes shall, in addition to the requirements set forth in that Chapter, demonstrate that the requirements of this section have been met.

(b) Notwithstanding any other law, no trustee may be compensated for services provided as a member of the board of a community trust. No fees or commissions shall

be paid to these trustees; however, a trustee may be paid for necessary expenses incurred by the trustee and may receive indemnification as permitted under Chapter 55A of the General Statutes.

(b1) For every community trust incorporated under this Article, the corporation itself is considered the trustee of any funds administered by it. No individual board member is considered to be trustee of any fund deposited on behalf of any individual beneficiary with severe chronic disabilities.

(c) The board shall adopt bylaws that include a declaration delineating the primary geographic area serviced by the trust and the principal services to be provided. The board shall file the bylaws with the Secretary of State.

(d) The board may retain paid staff as it considers necessary to provide follow along services to the extent required by each beneficiary. The community trust may authorize the expenditure of funds for any goods or services, including recreational services, which the board, in its sole discretion, determines will promote the well-being of any beneficiary. The community trust may pay for the burial of any beneficiary. The community trust, however, may not expend funds for any goods or services of comparable quality to those available to any particular beneficiary through any governmental or charitable program, insurance, or other sources. The community trust may expend funds to meet the reasonable costs of administering the community trust.

(e) The community trust is not required to provide services to a beneficiary who is a competent adult and who has refused to accept the services. Further, the community trust shall not provide services of a nature or in a manner that would be contrary to the public policy of this State at the time the services are to be provided. In either case, the community trust may offer alternate services that are consistent with the purposes of this Article and in keeping with the best interests of the beneficiary.

(f) The community trust may accept appointment as guardian of the person, guardian of the estate, or guardian of both on behalf of any beneficiary. If the community trust accepts appointment as guardian of the person of an individual, it shall assign a staff member to carry out its responsibilities as the guardian. The community trust may, upon request, offer consultative and professional assistance to an individual, private or public guardian of any of its beneficiaries.

(g) The community trust may accept contributions, bequests, and designations under life insurance policies to the community trust on behalf of individuals with severe chronic disabilities for the purpose of qualifying them as beneficiaries.

(h) At the time a contribution, bequest, or assignment of insurance proceeds is made, the trustor shall receive a written statement of the services to be provided to the beneficiary. The statement shall include a starting date for the delivery of services or the condition precedent, such as the death of the trustor, which shall determine the starting date. The statement shall describe the frequency with which services shall be provided and their duration, and the criteria or procedures for modifying the program of services from time to time in the best interests of the beneficiary.

"**§ 36D-5. Accountability.**

Along with the annual report filed with the Secretary of State under Chapter 55A of the General Statutes, the community trust shall file an itemized statement that shows the

funds collected for the year, income earned, salaries, other expenses incurred, and the opening and final trust balances. A copy of this statement shall be made available, upon request, to any beneficiary, trustor, or designee of the trustor. In addition, once annually, each trustor or the trustor's designee shall receive a detailed individual statement of the services provided to the trustor's beneficiary during the previous 12 months and the services to be provided during the following 12 months. The community trust shall make a copy of the individual statement available to any beneficiary, upon request.

"**§ 36D-6. Gifts, surplus trust funds.**

The community trust may accept gifts and use surplus trust funds for the purpose of qualifying as beneficiary any indigent person whose family members lack the resources to make a full contribution on that person's behalf. The extent and character of the services and selection of beneficiaries are at the discretion of the community trust. The community trust may not use surplus trust funds to make any charitable contribution on behalf of any beneficiary or any group or class of beneficiaries. The community trust may accept gifts to meet start-up costs, reduce the charges to the trust for the cost of administration, and for any other purpose that is consistent with this Article. Gifts made to the trust for an unspecified purpose shall be used by the community trust either to qualify indigent persons whose families lack the means to qualify them as beneficiaries of the trust or to meet any start-up costs that the trust incurs.

"**§ 36D-7. Special requests on behalf of beneficiary.**

The community trust may agree to fulfill any special requests made on behalf of a beneficiary as long as the requests are consistent with this Article and provided that an adequate contribution has been made for this purpose on behalf of a beneficiary. The community trust may agree to serve as trustee for any individual trust created on behalf of a beneficiary, regardless of whether the trust is revocable or irrevocable, has one or more remaindermen or contingent beneficiaries, or any other condition, so long as the individual trust is consistent with the purposes of this Article.

"**§ 36D-8. Irrevocability; impossibility of fulfillment.**

A community trust for persons with severe chronic disabilities is irrevocable, but the trustees in their sole discretion may provide compensation for any contribution to the trust to any trustor who, upon good cause, withdraws a beneficiary designated by the trustor from the trust, or if it becomes impossible to fulfill the conditions of the trust with regard to an individual beneficiary for reasons other than the death of the beneficiary.

"**§ 36D-9. Beneficiary's interest in trust not asset for income eligibility determination.**

Notwithstanding any provisions of Chapter 108A of the General Statutes, the beneficiary's interest in any community trust is not considered to be an asset for the purpose of determining income eligibility for any publicly operated program, nor shall that interest be reached in satisfaction of a claim for support and maintenance of the beneficiary. No agency shall reduce the benefits of services available to any individual because that person is the beneficiary of a community trust.

"**§ 36D-10. Trust not subject to law against perpetuities; restraints on alienation.**

A community trust shall not be subject to or held to be in violation of any principle of law against perpetuities or restraints on alienation or perpetual accumulations of trusts.

"**§ 36D-11. Settlement; trustee limitations.**

The community trust shall settle a community trust by filing a final accounting in the superior court. In addition, at any time before the settlement of the final account, the community trust, the Secretary of State, or the Attorney General may bring an action for the dissolution of a nonprofit corporation in the superior court for the purpose of terminating the trust or merging it with another charitable trust.

No trustee or any private individual is entitled to share in the distribution of any of the trust assets upon dissolution, merger, or settlement of the community trust. Upon dissolution, merger, or settlement, the superior court shall distribute all of the remaining net assets of the community trust in a manner that is consistent with the purposes of this Article."

SECTION 4. G.S. 32-28 and G.S. 32-34 are repealed.

SECTION 5. G.S. 28A-13-6 reads as rewritten:

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

~~(a) As used in this section, the term "personal representatives" includes testamentary trustees.~~

(b) If a will expressly makes provision for the execution of any of the powers of personal representatives by all of them or by any one or more of them, the provisions of the will govern.

~~(c) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which such personal representatives qualified, provide that any one or more of the following powers of personal representatives 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 personal representative or representatives;~~

~~(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 estate and give receipts therefor;~~

~~(6) Pay claims against and debts of the estate;~~

~~(7) Compromise claims in favor of or against the estate;~~

~~(8) Have custody of property of the estate.~~

(c1) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which the personal representatives qualified, provide that any designated one or more of the personal representatives may exercise one or more of the following powers:

(1) Establish and maintain bank accounts for the trust and issue checks for the trust.
(2) Maintain inventories, accountings, and income and expense records of the trust.
(3) Enter any safety deposit box rented by the trust.
(4) Employ persons as advisors or assistants in the performance of administrative duties, including agents, attorneys, accountants, brokers, appraisers and custodians.
(5) List trust property for taxes and prepare and file tax returns for the trust.
(6) Collect and give receipts for claims and debts of the trust.
(7) Pay debts, claims, costs of administration, and taxes of the trust.
(8) Compromise, adjust or otherwise settle any claim by or against the trust and release, in whole or in part, a claim belonging to the trust.
(9) Have custody of the trust property.

(d) Subject to subsection (b) of this section, if two or more personal representatives own shares of corporate stock or other securities, their acts with respect to voting shall have the following effect:
(1) If only one votes, in person or by proxy, ~~his~~ that personal representative's act binds all;
(2) If more than one vote, in person or by proxy, the act of the majority so voting binds all;
(3) If more than one vote, in person or by proxy, but the vote is evenly split on any particular matter, each faction is entitled to vote the stock or other securities in question proportionately.

(e) Subject to ~~the provisions of~~ subsections (b), ~~(c)~~ (c1), 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~~ the personal representative joins at the direction of the majority of the personal representatives, if ~~he~~ that personal representative expressed his or her dissent in writing to any other personal representative at or before the time of such joinder.

(f) No personal representative shall be relieved of liability on his or her bond or otherwise by entering into any agreement under this section."

SECTION 6. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

SECTION 7.(a) Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial

proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded.

SECTION 7.(b) Sections 1 through 5 of this act become effective January 1, 2006. The remainder of this act is effective when it becomes law.

Summary of North Carolina Uniform Trust Code

Introduction

The Uniform Trust Code ("UTC") was promulgated by the Uniform Law Commissioners in 2000 as the first truly national codification of the law of trusts. The UTC draws from existing statutory and common law sources, including the Restatements of the Law of Trusts 2nd and 3rd. It also contains elements of reform to reflect modern needs. As of October 2004 at least ten states have enacted the UTC, and numerous groups in other states have the UTC under study.

Unlike some states, North Carolina does not have a substantial body of statutory trust law, and some of what we do have is in need of amendment. The Uniform Trust Act, enacted in 1939 as Article 6 of Chapter 36A and adopted by only a few states, was not a complete codification of trust law, and several of its provisions are outmoded in light of modern practices. The more recent Trust Administration Act, enacted in 2002 as Article 3 of Chapter 36A, was helpful in granting the clerks of superior court jurisdiction to deal with trust matters, but it has raised questions concerning the extent of that jurisdiction and the application of the rules of civil procedure.

The promulgation of the UTC presented an opportunity to codify, clarify and improve the North Carolina trust law. With this objective in mind, the Legislative Committee of the Estate Planning and Fiduciary Law Section of the North Carolina Bar Association began its study of the UTC in 2001. The proposed North Carolina Uniform Trust Code ("NCUTC"), a modified version of the UTC, is the product of the Legislative Committee's three-year study.

The NCUTC, which replaces Chapter 36A with a new Chapter 36C, should be very beneficial to lawyers and judges alike by filling any gaps that exist in our trust law, while at the same time providing a modern practice approach in dealing with trust issues. It makes a number of beneficial changes and additions in our existing law. For example,

- Jurisdictional and procedural issues in the Trust Administration Act have been clarified. The Trust Administration Act gave the clerk of superior court original jurisdiction over "internal affairs" of the trust. The NCUTC clarifies that certain actions, including actions for damages, do not constitute such "internal affairs." The NCUTC also clarifies the application of rules of civil procedure in proceedings before the clerk.

- The representation provisions that now exist in the Trust Administration Act for trust proceedings before the clerk are applicable to trust proceedings before a superior court judge.

- Article 11 of Chapter 36A contains provisions for the modification and termination of a trust which are similar to those in the NCUTC. However, the NCUTC adds rules to reform a trust because of mistakes of law or fact and to achieve tax objectives.

- The NCUTC contains special rules pertaining to revocable trusts which are added to our trust law. Where an instrument is silent, the instrument is deemed to be revocable. This reverses the presumption under our existing common law.

- The current provisions in Chapter 36A require court approval for the transfer of administration to another jurisdiction and for the resignation and appointment of a trustee where the governing instrument is silent. The NCUTC allows for the transfer, resignation and appointment of a trustee by consent of the beneficiaries.

- The provisions in Chapter 36A contain inflexible provisions in dealing with conflict of law issues. For example, trustees cannot sell or make loans to a related party without a court order. The NCUTC allows such transfers to occur with the consent of the beneficiaries.

Summary of Articles

In General

The NCUTC, like the UTC, is divided into 11 articles. The first and eleventh articles do not address substantive topics, but deal with general provisions like definitions and rules of statutory interpretation. The nine substantive articles are Article 2, Judicial Proceedings; Article 3, Representation; Article 4, Creation, Validity, Modification, and Termination of Trusts; Article 5, Creditor's Claims, Spendthrift and Discretionary Trusts; Article 6, Revocable Trusts; Article 7, Office of Trustee; Article 8, Duties and Powers of Trustee; Article 9, The Uniform Prudent Investor Act (which recodifies provisions of Article 15 of Chapter 36A); and Article 10, Liability of Trustees and Rights of Persons Dealing with Trustee. It is not possible to provide a complete summary of the entire NCUTC, but what follows highlights central characteristics of this important code.

Article 1
General Provisions and Definitions

Article 1 sets forth the definitions and rules that govern application of the NCUTC.

G.S. 36C-1-101 states that Chapter 36C of the North Carolina General Statutes shall be known as the "North Carolina Uniform Trust Code."

G.S. 36C-1-102 specifies the scope of the NCUTC by describing the types of trusts to which it applies. The description of these trusts was based on the provisions of G.S. 36A-22.1 of the Trust Administration Act.

G.S. 36C-1-103 is one of the NCUTC's most important sections because it contains the definitions that apply throughout the entire NCUTC. Of specific importance are the following definitions:

- "Qualified beneficiary" – not all beneficiaries of a trust are qualified beneficiaries. Under the NCUTC, qualified beneficiaries receive more

rights than normal beneficiaries. A qualified beneficiary is one of the following three types of beneficiaries: (i) a permissible distributee of income or principal, (ii) a beneficiary who would be a permissible distributee of income or principal if the current present interest in the trust terminated, or (iii) a beneficiary who would receive a distribution of trust assets if the trust terminated.

- "Settlor" – is not just the person who creates the trust. A settlor is any person who contributes assets to a trust unless another person has the power to revoke the trust or withdraw the assets contributed.

- "Terms of a trust" mean the actual provisions of the trust instrument and any provisions established through a judicial proceeding.

G.S. 36C-1-104 specifies when persons, particularly persons who work in organizations (e.g., corporate trustees), are deemed to have acquired knowledge of a fact.

G.S. 36C-1-105 states that the NCUTC is primarily a default statute the provisions of which can be overridden in the terms of a trust. The UTC contained fourteen items that could not be overridden. The NCUTC deletes the following four of these leaving the settlor free to provide what he wishes with respect to such matters:

- the power of the court under UTC Section 706 to require or dispense with a bond.

- the power of the court under UTC Section 708 to adjust a trustee's compensation specified in the instrument.

- the duty of the trustee under UTC Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports. Note: G.S. 36C-8-813 has been re-written to delete this duty. Under G.S. 36C-8-813, a trustee's only duty is to give a qualified beneficiary "upon request and at reasonable times complete and accurate information as to the nature and amount of the trust property and to permit such beneficiary, or such beneficiary's representative, to inspect the subject matter of the trust and the accounts and other documents relating to the trust." This language is derived from the Restatement of the Law of Trust (2nd) which has been quoted with approval by our courts.

- the duty of the trustee under UTC Section 813(a) to respond to the request of a qualified beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust.

G.S. 36C-1-106 clarifies that the NCUTC is supplemented by the common law of trusts and principles of equity.

G.S. 36C-1-107 provides that the terms of a trust may set forth the jurisdiction or jurisdictions whose laws will govern the trust. The designation of jurisdiction in the terms of a trust will be binding unless designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. If a trust is silent as to which jurisdiction's laws will apply, the laws of the jurisdiction having the most significant relationship to the matter at issue will control.

G.S. 36C-1-108 allows a trustee to change a trust's principal place of administration without going to court if certain conditions are met. If the trustee seeks to change the trust's principal place of administration to a jurisdiction within the United States, the trustee must provide all qualified beneficiaries with sixty days advance notice. If no qualified beneficiary objects to the proposed transfer, the trustee may proceed with changing the principal place of administration of the trust. If a qualified beneficiary does object, the trustee would not be able to make the change without going to court and obtaining an order permitting the transfer. If the trustee seeks to change the trust's principal place of administration to a jurisdiction outside of the United States, the trustee cannot make the change without first securing the written consent of all qualified beneficiaries.

G.S. 36C-1-109 specifies the methods for giving notice and excludes from the NCUTC's notice requirements persons whose identity or location is unknown and not reasonably ascertainable. This section does not apply to judicial proceedings. Notice of a judicial proceeding must be given as provided in Article 2.

G.S. 36C-1-110 states when a charitable organization or person entitled to enforce a trust for animals or a noncharitable purpose may be treated as a qualified beneficiary.

G.S. 36C-1-111 allows "interested persons" (as that term is defined in this section) to enter into nonjudicial settlement agreements only in five instances dealing primarily with administrative matters. The virtual representation provisions of Article 3 apply in determining who are interested persons. A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court.

G.S. 36C-1-112 provides that North Carolina's specific rules on construction of wills also apply to the construction of trusts.

Article 2
Judicial Proceedings

Article 2 deals with judicial proceedings concerning trusts. The Trust Administration Act provided the clerk of superior court with jurisdiction in certain trust proceedings. As discussed below, this Article clarifies the jurisdiction of the clerk of superior court and the superior court trial division.

G.S. 36C-2-201 states that a court may intervene in the administration of a trust to the extent that jurisdiction is properly invoked by a party or is provided by law. This section does

not change existing law. It also reiterates existing law that a trust is not subject to judicial supervision, except as expressly provided in G.S. 36C-2-208 (relating to accountings to the clerk) and G.S. 36C-2-209 (relating to qualifications and accountings of trustees of testamentary trusts). As described below G.S. 36C-2-208 and G.S. 36C-2-209 are recodifications of existing law.

G.S. 36C-2-202 specifies that by accepting a trusteeship of a trust having its principal place of administration in this State or by moving the principal place of administration of a trust to this State, a trustee submits personally to the jurisdiction of this State in any matter involving the trust. Additionally, a beneficiary of a trust, by accepting a distribution from a trust, submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust. This section does not preclude other means of obtaining jurisdiction over a trust, beneficiary or other person receiving property from the trust. This section is consistent with existing law.

G.S. 36C-2-203 incorporates the former provisions of G.S.36A-23.1, 36A-25.1 and 36A-27 of the Trust Administration Act. The section has been revised to clarify the jurisdiction between the clerk of superior court and superior court trial division. Subsection (f) is new and provides a nonexclusive list of jurisdiction which, pursuant to existing case law, lies exclusively with the superior court division of the general court of justice, not the clerk of court. This section retains the provisions of the Trust Administration Act providing that nothing in the section affects the right of a person to file for declaratory relief under the provisions of Article 26 of Chapter. To prevent forum shopping between the clerk and superior court trial division, subsection (c) gives a party the right to remove a trust proceeding to superior court if relief under the declaratory judgment act is requested. Subsection (d) incorporates former G.S. 36A-25.1 (dealing with jurisdiction over foreign trusts). Subsection (e) incorporates former G.S. 36A-27 (appeal).

G.S. 36C-2-204 incorporates the venue provisions under the Trust Administration Act contained in G.S. 36A-24.1. Subsection (d) adds a provision of the UTC which provides that if a trust has no trustee, venue for a trust proceeding involving the appointment of a trustee is any county in this State in which a beneficiary resides, the trust is located, in the county as specified in the trust instrument or if the trust is created by will, in a county in which the decedent's estate was or is being administered.

G.S. 36C-2-205 is a revision of G.S. 36A-26.1 setting forth the manner in which a trust proceeding is commenced and other procedural requirements. As with G.S. 36A-26.1, this section incorporates the procedures for the pleading requirements that exist for special proceedings, but specifies that trust proceedings are to be docketed as an estate matter. Additionally, the rules of pleading have been clarified. This section does not allow a clerk to enter a default judgment in a trust proceeding. This section does allow for the consolidation of trust proceedings which are pending both before the clerk of superior court and a civil action pending before the superior court division of the general court of justice if they involve a common question of law or fact. To consolidate a matter, a motion must be made to the judge of the superior court trial division. Similarly, parties can join claims for relief in a civil action pending before a superior court division notwithstanding such joined claims may otherwise be within the exclusive jurisdiction of the clerk. Subsection (h) allows the clerk and superior court

judge to make such orders as appropriate to protect the interest of the parties to avoid unnecessary cost or delay in connection with any motion for consolidation or joinder of claims. Until otherwise ordered by superior court judge, the clerk of superior court's exclusive jurisdiction as set forth in subsection (a) is not stayed notwithstanding a motion to consolidate or joinder of claims.

G.S. G.S. 36C-2-206 is consistent with G.S. 36A-26.3 dealing with representation of parties. However, this section does clarify that representation provisions apply to both trust proceedings before the clerk of superior court and in the trial division of the superior court. Under current law, apparently the representation provisions of G.S. 36A-26.3 applied only to trust proceedings before the clerk.

G.S. 36C-2-207 incorporates former G.S. 36A-26.2 by providing that any interested party or person representing an interested party may waive notice by writing signed by the person or the person's attorney and filed in the proceeding.

G.S. 36C-2-208 sets forth when accountings must be filed with the clerk of superior court. It incorporates current law contained in G.S. 36A-29.

G.S. 36C-2-209 incorporates the provisions of G.S. 36A-107 and 108 regarding the qualification and accounting requirements for trustees of testamentary trusts and rules relating to the registration or indexing of testamentary trusts.

Article 3
Representation

Article 3 deals with the rather complex issues of who may represent whom in transactions or proceedings relating to a trust. The representation provisions are similar to those existing in G.S. 36A-26.3 of the Trust Administration Act relating to proceedings before the clerk of superior court.

G.S. 36C-3-301 is the introductory section, laying out the scope of the article. The representation principles of this article have numerous applications under the NCUTC. They apply for purposes of settlement of disputes, whether by a court or nonjudicially. As noted above, the provisions change existing North Carolina law in that representation applies not only to proceedings before the clerk of the superior court but also to proceedings before the superior court division of the general court of justice. They apply for the giving of required notices and for the giving of consents to certain actions.

G.S. 36C-3-302 deals with representation by the holder of a general power of appointment (both presently exercisable and testamentary general powers of appointment).

G.S. 36C-3-303 deals with representation by a fiduciary, whether of an estate, trust, conservatorship, or guardianship. The section also allows a parent without a conflict of interest to represent and bind a minor or unborn child. If a disagreement arises between parents seeking to represent the same minor child, the parent who is either a beneficiary of or a lineal descendant

of the settlor of the trust shall be entitled to represent the minor child. A person may also represent and bind such person's unborn issue.

G.S. 36C-3-304 is the virtual representation provision. It provides for representation of and the giving of a binding consent by another person having a substantially identical interest with respect to the particular issue. G.S. 36C-3-304 is broader than existing North Carolina law in that it permits a person with a substantially identical interest to represent not only minor and unborn or unascertained persons, but also incapacitated persons and persons whose identity or location is unknown.

G.S. 36C-3-305 authorizes the court to appoint a representative to represent the interests of unrepresented persons or persons for whom the court concludes the other available representation might be inadequate. This section is broader than existing North Carolina law in that a representative may be appointed to represent someone whose identity is known but cannot be located. In addition, this section authorizes the representative to act on behalf of a party without regard to whether or not a judicial proceeding is pending and to take into consideration benefits accruing generally to the party's family.

The provisions of Article 3 are subject to modification in the terms of the trust. Settlors are free to specify their own methods for providing substituted notice and obtaining substituted consent.

Article 4
Creation, Validity, Modification and Termination of a Trust

G.S. 36C-4-401 specifies the methods by which trusts are created, that is, by transfer of property, self-declaration, or exercise of a power of appointment. This section modifies the UTC and common law rule that transfer of title to property is not required where the owner of the property declares himself as trustee of the property. As modified, a valid declaration of trust may only be created by complying with state law provisions governing delivery of property by transfer of title.

G.S. 36C-4-401A recodifies G.S. 36A-100 expressly confirming that an unfunded trust is valid where the trust is the designated beneficiary of a life insurance policy, retirement benefits or a pourover provision in a will. This matter is dealt with by implication in G.S. 36C-401(1), which validates a trust by transfer of property through a disposition taking effect upon the settlor's death.

G.S. 36C-4-402 lists the requirements for creation of a trust. Whatever method to create the trust may have been employed, the settlor must have the capacity and indicate an intention to create a trust. In addition, there must be a definite beneficiary or the trust must be a charitable trust, a trust for animals (specially provided for as a kind of honorary trust), or a trust for a noncharitable purpose (also a kind of honorary trust).

G.S. 36C-4-403 addresses the validity in the enacting jurisdiction of trusts created in other jurisdictions. A trust not created by will is validly created if its creation complied with the law of specified jurisdictions in which the settlor or trustee had a significant contact.

G.S. 36C-4-404 forbids trusts for illegal or impossible purposes, and requires that a trust and its terms must be for the benefit of its beneficiaries. This section recites the permitted purposes of a charitable trust. Subsections (b) through (e) of this section incorporate existing provisions in G.S. 36A-49 and G.S. 36A-52 validating gifts for charitable purposes even though expressed in general terms.

G.S. 36C-4-405A incorporates existing North Carolina statutory provisions for enforcement of charitable gifts and charitable trusts. This section provides that a trust induced by fraud, duress or undue influence may be invalidated. North Carolina courts have consistently recognized fraud, duress and undue influence as reasons to invalidate a will; but there are no cases extending the concept to the creation of a trust. This section makes a trust induced by fraud, duress or undue influence voidable rather than void so that either a trustee or a third party dealing with the trustee would not be at risk if the trust is later determined to have been invalid unless that trustee or third party had knowledge of the grounds for the invalidity.

G.S. 36C-4-407 codifies existing North Carolina common law validating oral trusts. North Carolina courts have repeatedly recognized oral trusts, including oral trusts for realty, where the "clear and convincing evidence" standard is met. The remaining sections address what are often referred to as "honorary" trusts, although such trusts are valid and enforceable under the NCUTC.

G.S. 36C-4-408 covers a trust for the care of a domestic or pet animal. This section is based on existing provisions in G.S. 36A-147, which is more limited than the UTC, which covers any animal living during the settlor's lifetime.

G.S. 36C-4-409 allows creation of a trust for another noncharitable purpose such as maintenance of a cemetery lot.

G.S. 36C-4-410 is substantially similar to existing North Carolina law in that it establishes a non-exclusive procedure for modification and termination of an irrevocable trust.

G.S. 36C-4-411(a) is similar to G.S. 36A-123.3 in providing for termination or modification upon beneficiary consent if the settlor concurs, but is broader than existing North Carolina law in that it permits the consent of a settlor to be given by an attorney-in-fact, a guardian of the estate or a guardian of the person of the settlor. Subsections (b) and (c) are consistent with G.S. 36A-125.4 in permitting the court to modify or terminate the trust if all beneficiaries consent where the circumstances outweigh the interests in accomplishing a material purpose of the trust.

G.S. 36C-4-412 authorizes the court to modify or terminate a trust in response to unanticipated circumstances or due to ineffective administrative terms.

G.S. 36C-4-413 codifies and at the same time modifies the doctrine of cy pres, at least as applied in most states. This section authorizes the court to apply cy pres not only if the original means becomes impossible or unlawful but also if the means become impracticable or wasteful. This section also creates a presumption of general charitable intent. Upon failure of the settlor's original plan, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide. Subsection (b) is based on existing North Carolina law authorizing

the Attorney General to maintain a proceeding to enforce a charitable trust, but this subsection expands existing law in that it also authorizes a settlor, trustee, qualified beneficiary or other interested party to maintain such a proceeding.

G.S. 36C-4-414 authorizes the court to modify or terminate a trust if continued administration under the trust's existing terms would be uneconomical. This section also authorizes a trustee to terminate a trust valued at less than $50,000. These provisions are consistent with G.S. 36A-125.6.

G.S. 36C-4-415 authorizes the court to reform a trust to correct a mistake of law or fact. Reformation of inter vivos instruments as a remedy to correct a mistake of law or fact is well established. However, there is no comparable North Carolina statutory provision authorizing a court to reform an unambiguous trust to conform to the settlor's intent. G.S. 36C-4-415 would permit the introduction of parol evidence, even where contradicted by the plain meaning of the words in the instrument, to show the settlor's intent and the existence of a mistake of fact or law. However, the evidence must be clear and convincing to protect against the possibility of unreliable or fraudulent evidence.

G.S. 36A-4-416 authorizes the court to modify a trust to achieve the settlor's tax objectives.

G.S. 36A-4-417 authorizes a trustee to combine or divide a trust.

G.S. 36C-4-418 is based on G.S. 36A-125.10 which provides for trust property distributable to a minor upon termination of a trust to be distributed to the minor's guardian of the estate or general guardian, to a custodian for the benefit of the minor under the North Carolina Uniform Transfer to Minors Act, or to a trustee for the benefit of the minor under the North Carolina Custodial Trust Act.

G.S. 36C-4-419 requires the court in exercising its discretion to modify or terminate an irrevocable trust under G.S. 36C-4-411, G.S. 36C-4-412, and G.S. 36C-4-413 to consider provisions making the interest of a beneficiary inalienable, but the court is not precluded from the exercise of that discretion solely because of such provisions. This is consistent with G.S. 36A-125.8.

The requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. Nor may the settlor negate the court's ability to modify or terminate a trust as provided in G.S. 36C-4-410 through 416. However, a settlor is free to restrict or modify the trustee's power to terminate an uneconomic trust as provided in G.S. 36C-4-414, and the trustee's power to combine and divide trusts as provided in G.S. 36C-4-417.

Articles 4A
Tax Status of Charitable Trusts

Articles 4A recodifies G.S. 36A-54 and G.S. 36A-53(b) dealing with the tax status of charitable trusts that are intended to preserve the favorable tax treatment of gifts to such trusts.

Article 4B
Charitable Trust Administration Act

Article 4B recodifies the existing Charitable Trust Administration Act in Article 4A of Chapter 36A.

Article 5
Creditor's Claims, Spendthrift and Discretionary Trusts

Article 5 deals with creditor claims against the interests of a beneficiary or a settlor. The NCUTC's version of Article 5 includes certain provisions to preserve current North Carolina law with regard to discretionary trusts.

G.S. 36C-5-501 provides that a spendthrift provision in a trust restricts a beneficiary's creditor from attaching the beneficiary's interest in the trust until there is a distribution to the beneficiary. The NCUTC adds additional protection for not only spendthrift trusts, but discretionary and protective trusts as well (as they are defined in later sections of Article 5). If there is no spendthrift, discretionary, or protective trust provision, a creditor of a beneficiary may attach a distribution interest before it is distributed. G.S. 36C-5-501(b) seeks to protect a trustee who makes distributions from a spendthrift, discretionary or protective trust to or for the benefit of a beneficiary from liability for the distribution.

G.S. 36C-5-502 states that a spendthrift provision is created simply by general reference to "spendthrift trust" in the trust instrument.

G.S. 36C-5-503 differs from the UTC which provides for three "exception" creditors – creditors who could attach a beneficiary's interest in a trust even if protected by a spendthrift provision. These exception creditors were: (1) child support orders; (2) spousal maintenance orders; and (3) a creditor for services provided to protect the beneficiary's interest in the trust. However, the only exception creditor to a spendthrift trust allowed in this section is for a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance.

G.S. 36C-5-504 seeks to preserve much of G.S. 36A-115 because of the concern of some practitioners that the UTC might eliminate the availability of discretionary trusts for asset protection and Medicaid planning. The definition of a "discretionary trust interest" in G.S. 36C-5-504(a) includes both the definition of a "discretionary" trust interest from G.S. 36A-115(b)(1), and the definition of a "support" trust from G.S. 36A-115(b)(2).

G.S. 36C-5-504(c) states clearly that a creditor of a beneficiary cannot compel a distribution from a discretionary trust even if the trustee has abused its discretion. As with spendthrift trusts, the only exception creditor will be a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance. However, a child's claim against a discretionary trust interest will be limited to those cases where a trustee has not complied with a standard of distribution or has abused its discretion. Under 36C-8-814(a), a trustee will abuse its discretion if the trustee acts with bad faith, acts dishonestly, acts with an improper even

though not a dishonest motive, or if the trustee fails to use the trustee's judgment in accordance with the terms and purposes of the trust and the interests of the beneficiaries. This language, which differs significantly from the UTC, was taken from the opinion in *Lineback v. Stout*, 79 N.C. App. 292, 339 S.E. 2d 103 (1986).

G.S. 36C-5-505 provides that creditors of the settlor of a revocable trust may attach the corpus of the trust. In addition, a creditor may reach the maximum amount that may be distributed to the settlor in an irrevocable trust.

G.S. 36C-5-506 adds a definition of "mandatory distribution" to prevent this section from being interpreted to require distributions from discretionary trusts as defined in G.S. § 36C-5-504(a)(2).

G.S. 36C-5-507 provides that trust property is exempt from the personal obligations of the trustee.

G.S. 36C-5-508 adds to the UTC provisions regarding a protective trust, similar to G.S. 36A-115(b)(3), as an additional way to preserve assets from creditors.

Article 6
Revocable Trusts

G.S. 36C-6-601 provides that the capacity of a person to establish and fund a revocable trust is the same as that applicable to a will. North Carolina law has no present standard of capacity for trusts.

G.S. 36C-6-602 provides that all trusts are presumed revocable unless the instrument creating the trust expressly provides to the contrary. This reverses the present North Carolina common law rule. This section also states that the settlor's suitably authorized attorney-in-fact or guardian may amend the revocable trust but not in such a fashion as to change the settlor's existing estate plan.

G.S. 36C-6-603 provides that while the settlor of a revocable trust is living, the beneficiaries' rights are subject to the control of the settlor or the settlor's agents. With certain exceptions, however, persons with powers of withdrawal from a trust are deemed to have the authority of the settlor to the extent of that portion of the trust subject to the power.

G.S. 36C-6-604 states that the validity of the formerly revocable trust that becomes irrevocable when the settlor dies cannot be challenged upon the elapsing of three years after the decedent's death. This is similar to the present statute of limitations governing caveats to wills.

Article 7
Office of Trustee

Article 7 deals with acceptance of the trust by the trustee, bond for the trustee, decision-making by co-trustees, and like matters.

G.S. 36C-7-701 contains provisions regarding accepting or declining the trusteeship that are substantially the same as existing North Carolina law.

G.S. 36C-7-702 retains North Carolina's existing law regarding circumstances where a trustee shall be required to give bond. This differs from the UTC, which would allow the court to require a bond even where the governing instrument directs otherwise. In addition, North Carolina law, as incorporated in this section, gives more guidance regarding the amount of the bond, where one is required.

G.S. 36C-7-703 provides for general rules applicable to co-trustees that are similar to existing North Carolina law. However, this section goes further to protect a co-trustee who does not join in an action so long as there is no intentional misconduct or improper personal benefit to one or more of the trustees approving the action.

G.S. 36C-7-704 contains provisions regarding a vacancy in the trusteeship and appointment of a successor which are similar to existing North Carolina law. This section adds a provision that is consistent with existing North Carolina law clarifying the powers and duties of a successor trustee.

G.S. 36C-7-705, unlike existing North Carolina law, permits a trustee to resign without court approval by giving notice to qualified beneficiaries, even where the governing instrument does not address trustee resignation.

G.S. 36C-7-706 provides for removal of a trustee on several grounds based on malfeasance or on a change of circumstances if not inconsistent with a material purpose. This section did not adopt a UTC provision allowing removal at the request of beneficiaries.

G.S. 36C-7-707 offers an additional remedy not in the UTC in cases where the former trustee does not execute the proper documentation to transfer title to the trust property to the successor in that it gives the clerk of superior court authority to order the former trustee to execute such documents or to transfer title.

G.S. 36C-7-708 dealing with trustee's fees refers to the provisions of Article 5A of Chapter 32 for determination of fees of trustees where the fees are not specified in the instrument.

G.S. 36C-7-709 dealing with trustee expenses refers to Article 5A of Chapter 32 regarding reimbursement of a trustee's expenses out of trust property.

Article 8
Duties and Powers of Trustee

Article 8 articulates the basic fiduciary obligations of a trustee, except for those articulated in the Uniform Prudent Investor Act.

Many of the sections in Article 8 reflect duties that are not seen as an extension of current North Carolina law because the duties are ones that have been applicable under common law,

current statutes or the prudent person rule. In some cases, the North Carolina Uniform Prudent Investor Act made these duties specifically applicable to a trustee's investment and management duties and Article 8 clarifies that these duties apply to all activities of the trustee.

The sections referred to by the foregoing are: G.S. 36C-8-801 regarding the duty to administer the trust, G.S. 36C-8-803 regarding impartiality, G.S. 36C-8- 804 regarding prudent administration, G.S. 36C-8-805 regarding costs of administration, G.S. 36C-8- 806 regarding the trustee's skills, G.S. 36C-8-807 regarding delegation by trustee, G.S. 36C-8-809 regarding control and protection of trust property, G.S. 36C-8-810 regarding recordkeeping and identification of trust property, G.S. 36C-8-811 regarding enforcement and defense of claims, G.S. 36C-8- 812 regarding collecting trust property and G.S. 36C-8-817 regarding distribution upon termination.

G.S. 36C-8-802 speaks to the basic duty of loyalty that requires the trustee to manage the trust solely for the beneficiaries and to avoid conflicts of interest between trustee's interests and beneficiaries' interests. This section represents a modernization of the current North Carolina statutes dealing with the duty of loyalty and conflicts of interest. Under G.S. 36C-8-802, any conflict of interest is waivable by a beneficiary. This section also allows the application of virtual representation in obtaining consent from beneficiaries for a conflict of interest transaction.

G.S. 36C-8-808 introduces the concept of a trust protector or advisor being named with the power to direct the trustee in certain respects and naming a person who would have the power to modify or terminate the trust.

G.S. 36C-8-813 restates the common law duty to provide the beneficiaries with information regarding the trust and its property. Consistent with existing North Carolina law, a settlor may specifically limit what information is given to the beneficiaries.

G.S. 36C-8-814, as discussed in the summary of Article 5, sets out the standard for determining when a trustee has abused its discretion. This section also updates tax savings provisions of existing law precluding a trustee from exercising discretion to make distributions from a trust for his or her own benefit that are not limited to an ascertainable standard.

G.S. 36C-8-815 broadens the automatic powers that apply by default to every trustee when the instrument does not contain powers.

G.S. 36C-8-816 grants to all trustees specific powers similar to the powers listed in G.S. 36A-136 and that can currently be incorporated in an instrument under G.S. 32-27. The powers are broader than those listed in G.S. 36A-136 in that a trustee may sell real property without court order even though the power is not expressed in the trust instrument. In addition, the trustee can borrow funds for any purpose and not just to pay taxes and expenses.

Article 9
Uniform Prudent Investor Act

Article 9 reenacts the North Carolina Prudent Investor Act, Article 15 of Chapter 36A, as a part of the UTC.

G.S. 36C-9-901 recodifies former section 36A-161 regarding the applicability of the prudent investor rule recodifies.

G.S. 36C-9-902 recodifies former 36A-162 regarding the standard of care, portfolio strategy and risk and return objectives.

G.S. 36C-9-903 recodifies former section 36A-163 regarding diversification.

G.S. 36C-9-904 recodifies former section 36A-164 regarding duties at the inception of the trusteeship.

G.S. 36C-9-905 recodifies former section 36A-168 regarding compliance with the prudent investor rule.

G.S. 36C-9-906 recodifies former section 36A-170 regarding the effect on charitable remainder trusts.

G.S. 36C-9-907 recodifies former section 36A-172 referring to the short title

Other sections of the North Carolina Prudent Investor Act were repealed because, as noted in the summary of Article 8, Article 8 contains substantially similar provisions applicable to the administration of trusts in general and not just to investment duties. These provisions include G.S. 36C-8-802(a) regarding the duty of loyalty, G.S. 36C-8-803 regarding impartiality, G.S. 36C-8-805 regarding investment costs, and G.S. 36C-8-807 regarding delegation of management functions. Similarly G.S. 36C-11-1103 makes the language of former 36A-173 regarding severability applicable to any provision of the NCUTC, and G.S. 36C-11-1106 covers the effective date provisions formerly provided by 36A-171.

Article 10
Liability of Trustees and Rights of Persons Dealing with Trustee

Article 10 provides for remedies when there is breach of an obligation by the trustee, who and under what circumstances there is a right of action by anybody, and a trustee's immunity from personal liability when doing business with others on behalf of the trust.

G.S. 36C-10-1001 provides that a breach of duty to a beneficiary invokes a court's equity powers to compel performance, suspend the trustee, remove the trustee, and enter other orders to remedy a breach of trust. As provided under existing North Carolina law, the court also may relieve from liability, either prospectively or retrospectively, a trustee who acts honestly and reasonably.

G.S. 36C-10-1002 requires damages for breach of trust to restore the trust's position as if breach had not occurred, or to provide the trust with profits made from the breach if that amount is greater.

G.S. 36C-10-1003 provides that the trustee's is responsible to account for all profits, but does not insure that the trust will be profitable.

G.S. 36C-10-1004 dealing with attorneys' fees refers to existing North Carolina statutes governing the award of attorneys' fees.

G.S. 36C-10-1005 providing for limitations of actions against the trustee refers to existing North Carolina statutes governing limitation of actions, except that no action may be brought more than five years after (a) the removal, resignation, or death of trustee, (b) termination of the beneficiary's interest in the trust, or (c) termination of the trust.

G.S. 36C-10-1006 provides that a trustee is not liable for good faith reliance on a trust instrument.

G.S. 36C-10-1007 provides that a trustee is not liable for lack of knowledge of an event affecting trust administration if the trustee exercises reasonable care to learn of such events.

G.S. 36C-10-1008 precludes a trust instrument from exculpating the trustee for bad faith or reckless indifference.

G.S. 36C-10-1009 allows a beneficiary to consent or ratify a breach, or release trustee from liability for a breach, provided the trustee did not obtain the consent, ratification or release by improper conduct and the beneficiary is aware of the material facts.

G.S. 36C-10-1010 absolves a trustee from personal liability to third parties for contracts on behalf of the trust so long as the fiduciary status of the trustee is disclosed. A trustee is not liable for a tort action against the trust unless the trustee also has personal liability. A trustee is entitled to indemnity from the trust on an equitable basis.

G.S. 36C-10-1011 allows a trustee to hold an interest in a general partnership as trustee without personal liability.

G.S. 36C-10-1012 provides that a third party dealing with a trust is not liable for any breach of the trustee's obligations to the beneficiaries resulting from the transaction, unless the third party has knowledge of the actual breach by the trustee.

G.S. 36C-10-1013 permits a trustee to furnish a third party dealing with the trust a certification of its important provisions in lieu of the actual trust document.

Article 11
Miscellaneous Provisions

G.S. 36C-11-1101 states that in construing the provisions of the NCUTC consideration may be given to the need to promote uniformity of the law with respect to its subject matter among states that enact the UTC.

G.S. 36C-11-1102 provides for electronic records and signatures.

G.S. 36C-11-1103 contains a severability provision if any portion of the Code is held to be invalid.

G.S. 36C-11-1104 states that the NCUTC is to take effect on January 1, 2006.

G.S. 36C-11-1105 states existing relationships to which the NCUTC applies when it takes effect.

NORTH CAROLINA UNIFORM TRUST CODE
DISPOSITION OF PROVISIONS OF CHAPTER 32

CHAPTER 32	DESCRIPTION	DISPOSITION	COMMENTS
Article 1 §§32-1 through 13	**Uniform Fiduciaries Act**	No change	
Article 3 §§32-25 through 27	**Powers of Fiduciaries**	No change	
§32-28	Appointment of Ancillary Trustee	Repealed	§36-8-816(20) adopts §816(20) of the UTC relating to appointment of ancillary trustee with modifications.
Article 4 §32-34	**Restrictions on Exercise of Power for Fiduciary's Benefit**	Repealed	§§36-8-814(b) and (c) adopt §§814(b) and (c) of the UTC relating to restrictions on exercise of powers for trustee-beneficiary's benefit.
Article 5A §§32-53 through 62	**Compensation of Trustees and Other Fiduciaries**	No change	
Article 6	Investment and Deposit of Trust Funds	New Article	Article 1 of Chapter 36A is recodified as Article 6 of Chapter 32.

NORTH CAROLINA UNIFORM TRUST CODE
DISPOSITION OF PROVISIONS OF CHAPTER 36A

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
Article 1 §§36A-1 through 12	**Investment and Deposit of Trust Funds**	Recodified as Article 6 of Chapter 32	
Article 2 §§36A-13 through 21	**Removal of Fiduciary Funds**	Repealed	§§36C-1-108(b) through (e) adopt §§108(b) through (e) of the UTC which provides for transfer of a trust's principal place of administration without court order. §36C-2-203(a)(7) gives the clerk exclusive jurisdiction with respect to transfer of a trust's principal place of administration. §35A-1281 provides for the transfer of a ward's funds.
Article 3 §36A-22.1	**Trust Administration** Definitions	Repealed	§§36C-1-102 and 103 adopt §§102 and 103 of the UTC which have substantially similar provisions.
§36A-23.1	Court: jurisdiction of trusts	Repealed	§36C-2-203 has substantially the same provisions with modifications adding (i) proceedings in which the clerk's jurisdiction is exclusive and (ii) exceptions to the exclusive jurisdiction of the clerk.
§36A-24.1	Trust proceedings; venue	Recodified as §§36C-2-204 (a), (b) and (c)	
§36A-25.1	Trust proceedings; dismissal of matters relating to foreign trusts	Recodified as §36C-2-203(d)	
§36A-26.1	Trust proceedings; necessary parties	Repealed	§36C-2-205 has similar provisions but with substantial additions relating to procedure, including commencement of contested and uncontested proceedings, pleadings, extensions of time, application of Rules of Civil Procedure and consolidation.
§36A-26.2	Waiver of notice	Recodified as §36C-2-207	
§36A-26.3	When parties represented by others	Repealed	§§36C-3-301 through 305 adopt §§301 through 305 of the UTC which have similar rules relating to representation of the parties and which are applicable to trust proceedings before a judge as well as those before the clerk.
§36A-27	Appeal	Recodified as §36C-2-203(e)	

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
§36A-29	Accounting to the clerk	Recodified as §§36C-2-208(a) and (b)	
§36A-31	When bond required	Recodified as §36C-7-702	
§36A-32	Rights and duties devolve on successor	Recodified as §36C-7-704(f)	
§36A-33	Appointment of successor trustee on clerk's own motion	Repealed	§§36C-7-704(c) and (e) adopt §§704(c) and (e) of the UTC which have provisions relating to the appointment of a successor trustee by the court.
§36A-36	Appointment of special trustee	Repealed	§36C-7-704(e) adopts §704(e) of the UTC which has substantially similar provisions.
§36A-37	Consolidation, merger, reorganization, reincorporation, or transfer of assets and liabilities by a corporate trustee	Repealed	§53-17 has substantially similar provisions.
§36A-39	Powers of co-trustees	Repealed	§36A-7-703(b) adopts §703(b) of the UTC which was modified to include language in 36A-39.
§36A-40	Vesting of title	Repealed	§36C-7-707(b) adopts §707(b) of the UTC which has provisions relating to delivery of property to the successor trustee. It was modified to include language in 36A-40 requiring the former trustee to transfer title to assets.
Article 4	**Charitable Trusts**		
§§36A-47	Trustees to file accounts; Exceptions	Repealed	§36C-2-208 has provisions relating to trust accounts, including charitable trust accounts.
§36A-48	Actions for account; court to enforce trust	Repealed	§36C-2-208(c) has similar provisions relating to accounts of charitable trusts.
§36A-49	Not void for indefiniteness; title in trustees; vacancies	Repealed	§36C-4-405 contains similar provisions to the effect that a charitable trust is not invalid because the charitable purposes are in general terms. §36C-7-704(d) contains provisions relating to trustee vacancies in charitable trusts.
§36A-50	Trusts created in other states valid	Repealed	§36C-4-403 adopts §403 of the UTC containing similar provisions relating to trusts created in other jurisdictions.

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
§36A-51	Application of 36A-50	Repealed	Not necessary to bring forward.
§36A-52	Gifts, etc. for religious, educational, charitable or benevolent uses or purposes	Repealed	§§36C-4-405(b), (c) and (d) contain similar provisions to the effect that charitable gifts are not invalid because the charitable purposes are in general terms. §36C-4-405(e) contains provisions relating to enforcement of charitable trusts which are similar to those in 36A-52(c)..
§36A-53	Charitable Trust Administration Act	Repealed	§36C-413 contains similar provisions as those in 36A-53(a) relating to the cy pres doctrine. §36C-4A-2 recodifies §36A-53(b) relating to reformation of a charitable remainder trust.
§36A-54	Charitable trusts tax exempt status	Recodified as Article 4A of 36C	
Article 4A §§36A-59.1 through 59.7	**Charitable Remainder Trusts Administration Act**	Recodified as §§36C-4B-1 through 6 of Article 4B of Chapter 36C	
Article 4B §§36A-59.10 through 59.20	**North Carolina Community Trust Act**	Recodified as Chapter 36D	
Article 5 §36A-60	**Uniform Trusts Act** Definitions	Repealed	Definitions no longer necessary in light of repeal of entire Uniform Trust Act.
§36A-61	Bank account to pay special debts	Repealed	Not necessary to bring forward.
§36A-62	Loan of trust funds	Repealed	§§36C-8-802(b) and (c) adopt §§802(b) and (c) of the UTC relating to transactions involving a conflict of interest which may be valid if, among other things, they are consented to by the beneficiaries. This is a change in N.C. law which allowed loans to a trustee only if approved by the court. See §§36A-79 and 80.
§36A-63	Funds held by a corporation exercising fiduciary powers awaiting investment or distribution	Recodified in Article 14 of Chapter 53	

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
§36A-64	Loan to trust	Repealed	§36C-8-802(i)(5) adopts §802(h)(5) of the UTC which is a provision similar to §36A-64 authorizing a trustee to make a loan to the trust if fair to the beneficiaries.
§36A-65	Trustee loaning from one trust to another trust	Repealed	§36C-8-802(i)(3) adopts §802(h)(3) of the UTC relating to transactions between trusts.
§36A-66	Trustee buying from or selling to self	Repealed	§§36C-8-802(b) and (c) adopt §§802(b) and (c) of the UTC relating to sales involving a conflict of interest which may be valid if, among other things, they are consented to by the beneficiaries. This is a change from N.C. law which allowed sales to the trustee only if approved by the court. See §§36A-79 and 36A-80.
§36A-66.1	Investments in securities by banks or trust companies	Recodified in Article 14 of Chapter 53	
§36A-66.2	Trustee investment in mutual funds advised by trustee	Repealed	§36C-8-802(f) adopts §802(f) of the UTC which has substantially similar provisions.
§36A-67	Corporate trustee buying its own stock	Repealed	§36C-8-802(b) adopts §802(b) of the Code relating to trustee conflict of interest which should apply to trustee buying its own stock.
§36A-68	Trustee selling assets from one trust to another trust	Repealed	§36C-8-802(i)(3) adopts §802(h)(3) of the UTC relating to transactions between trusts.
§36A-69	Voting stock	Repealed	§36C-8-802(h) adopts §802(g) of the UTC relating to voting of stock.
§36A-70	Trustees holding stock or other securities in name of nominee	Repealed	§36C-8-816(7)(b) authorizes a trustee generally to hold a security in the name of a nominee without disclosure of the trust. Remaining provisions of §36A-70 not necessary to bring forward.
§36A-71	Bank and trust company assets kept separate, records of securities	Repealed	§36C-8-810(b) adopts §810(b) of the UTC requiring a trustee to keep assets separate.
§36A-72	Powers attached to office	Repealed	Not necessary to bring forward.
§36A-73	Powers exercisable by one of more trustees	Repealed	§36C-7-703 adopts §703 of the UTC concerning actions by co-trustees. It has provisions similar to 36A-73(d) requiring majority rule. §36C-7-703(i) recodifies 36A-73(c) relating to voting of stock by co-trustee.

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
§36A-74	Contracts of trustee	Repealed	§§36C-10-1010(a) and (c) adopt §§1010(a) and (c) of the UTC concerning personal liability of the trustee in making contracts and the right to sue the trustee in the trustee's representative capacity.
§36A-75	Exoneration or reimbursement for torts	Repealed	§36C-10-1010(d) contains similar provisions relating to indemnity of the trustee.
§36A-76	Tort liability of trust estate	Repealed	§§36C-10-1010(b) and (c) adopt §§1010(b) and (c) of the UTC relating to personal liability of the trustee for torts and the right to sue the trustee in the trustee's representative capacity.
§37A-77	Withdrawals from mingled trust funds	Repealed	Not necessary to bring forward.
§36A-78	Power of settlor	Repealed	§36C-8-802(b)(1) adopts §802(b)(1) of the UTC permitting transactions involving a conflict of interest if authorized by the terms of the trust.
§36A-79	Power of beneficiary	Repealed	§36C-8-802(b)(4) adopts §802(b)(4) of the UTC relating to the power of the beneficiary to consent to transactions involving a conflict of interest. See also §36C-10-1009 which adopts §1009 of the UTC relating to powers of beneficiary to release the trustee from a breach of trust.
§36A-80	Power of the court	Repealed	§36C-10-1001(c) contains substantially similar provisions. In addition, §36C-8-802(b)(2) permits transactions involving a conflict of interest if authorized by the court.
§36A-81	Liabilities for violation of Article	Repealed	§36C-10-1001 adopts §1001 of the UTC relating to remedies for breach of trust which include the remedies provided in §36A-81.
§36A-82	Uniformity of interpretation	Repealed	
§36A-83	Short title	Repealed	
§36A-84	Time of taking effect	Repealed	
Article 6 §36A-90 through 94	**Uniform Common Trust Fund Act**	Recodified in Article 14 of Chapter 53	

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
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	Recodified as 36C-4-401A	The comments to §36C-4-401 (§401 of the UTC) state that the designation of a trustee as beneficiary of a life insurance policy or employee benefit plan "has long been understood to be a property interest sufficient to create a trust." The recodification of §36A-100 as 36C-4-401A makes this clear.
§36A-101	Applicability and construction of Article	Repealed	Not necessary to bring forward.
Article 8	**Testamentary Trustees**		
§36A-107	Trustees in wills to qualify and file inventories and accounts	Recodified as 36C-2-209(a) and (b)	
§36A-108	Registration and indexing	Recodified as 36C-2-209(c)	
Article 9	**Alienability of Beneficial Interest; Spendthrift trust**		
§36A-115	Alienability of beneficiary's interest; spendthrift trusts	Repealed	§§36C-5-501 through 507 adopt §§501 through 507 of the UTC relating to spendthrift trusts with modifications which keep intact the inalienability of interests in discretionary, support and protective trusts as provided in §36A-115.
Article 10	**Trust Accounts in Financial Institutions**		
§36A-120	Payable on Death accounts in financial institution	Repealed	Not necessary to bring forward.
Article 11A	**Modification and Termination of Irrevocable Trusts**		
§36A-125.1	Definitions	Repealed	§36C-1-103 adopts §103 of the UTC which has substantially similar definitions.
§36A-125.2	Modification or termination where settlor is sole beneficiary	Repealed	§36C-4-411(a) adopts §411(a) of the UTC which covers modification and termination when the settlor is sole beneficiary.

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
§36A-125.3	Modification or termination by consent of settlor and beneficiaries	Repealed	§§36C-4-411(a) and (e) adopt §§411(a) and (e) of the UTC which have substantially similar provisions.
§36A-125.4	Modification or termination by consent of beneficiaries	Repealed	§36C-4-411(b) adopts §411(b) of the UTC which has substantially similar provisions as modified in 36C-4-411(c) to add existing language in §36A-125.4 granting court power to modify or terminate a trust even if inconsistent with a material purpose of the trust.
§36A-125.5	Provisions relating to consent of beneficiaries	Repealed	§36C-3-305(c) adopts §305(c) of the UTC which has substantially the same provisions as the second sentence of 36A-125.5(1) although the former has broader application. The first sentence of 36A-125.5(1) and 36A-125.5(2) and (3) were not necessary to bring forward.
§36A-125.6	Modification or termination of a small trust	Repealed	§36C-4-414 adopts §414 of the UTC which has substantially similar provisions as modified to add existing language in 36A-125.6.
§36A-125.7	Modification or termination because of changed circumstances	Repealed	§36C-4-412 adopts §412 of the UTC which has substantially similar provisions.
§36A-125.8	Inalienability of the beneficiary's interest	Repealed	§36C-4-411(d) contains substantially similar provisions concerning the effect of provisions making the beneficiary's interest in a trust inalienable.
§36A-125.9	Tax consequences	Repealed	Not necessary to bring forward.
§36A-125.10	Distribution to minors or incompetents	Recodified as the second sentence of §36C-4-418	
§36A-125.11	Procedure	Repealed	§36C-4-410(b) adopts §410(b) of the UTC which has provisions substantially similar to §36A-125.11(b) but omits reference in §36A-125.11(a) to actions under the Declaratory Judgment Act.
§36A-125.12	Exclusiveness of remedy	Repealed	Not necessary to bring forward.

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
Article 12	**Marital Deduction Trusts**		
§36A-130	Marital deduction trusts	§36A-130(a) is recodified as §36A-8-814(e). §36A-130(b) is repealed.	 §36A-130(b) is no longer necessary in light of current IRS regulations.
Article 13	**Powers of Trustees**		
§36A-135	Applicability	Repealed	§36C-1-101 adopts §101 of the UTC which has similar rules regarding applicability.
§36A-136	Powers of a trustee	Repealed	§36C-8-816 adopts §816 of the UTC which contains similar powers of the trustee but with some modifications and additions. The most significant change grants the trustee the power to sell or dispose of real property without a judicial sale even in the absence of specific authority to sell or dispose of the real property granted in the trust agreement. Compare §36A-8-816(2) and (3) with §36A-136(8).
§36A-137	Disposition of personal property without court order	Repealed	Not necessary since 36C-8-816 (2) and (3) grants the power to dispose of personal property without court order.
§36A-138	Disposition of personal property by court order	Repealed	§36C-8-816(30) contains substantially similar provisions.
§36A-139	Disposition of real property without court order	Repealed	Not necessary since 36C-8-816 (2) and (3) grants the power to dispose of real property without court order.
§36A-140	Disposition of real property by court order	Repealed	§36C-8-816(30) contains substantially similar provisions.
§36A-141	Distribution of assets of inoperative trust	Repealed	§36C-8-816(31) contains substantially similar provisions.
Article 14	**Honorary Trusts; Trusts for Pets; Trusts for Cemetery Lots**		
§36A-145	Honorary trusts	Repealed	§36C-4-409(a) adopts §409(1) of the UTC which has substantially similar provisions.
§36A-146	Trusts for cemetery lots	Recodified as §36C-4-409(d)	

CHAPTER 36A	DESCRIPTION	DISPOSITION	COMMENTS
§36A-147	Trusts for pets	Recodified as §36C-4-408	
§36A-148	Termination of small trusts	Repealed	Not necessary to bring forward.
Article 15	North Carolina Uniform Prudent Investor Act		
§36A-161	Prudent investor rule; applicability	Recodified as §36C-9-901	
§36A-162	Standard of care; portfolio strategy; risk and return objectives	Recodified as §36C-9-902	
§36A-163	Diversification	Recodified as §36C-9-903	
§36A-164	Duties at inception of trusteeship	Recodified as §36C-9-904	
§36A-165	Loyalty	Repealed	§36C-8-802(a) adopts §802(a) of the UTC containing substantially similar provisions applicable to the administration of trusts in general, including investment of trust assets.
§36A-166	Impartiality	Repealed	§36C-8-803 adopts §803 of the UTC containing substantially similar provisions applicable to the administration of trusts in general, including investment of trust assets.
§36A-167	Investment costs	Repealed	§36C-8-804 adopts §804 of the UTC containing substantially similar provisions applicable to the costs of administration of trusts in general, including investment costs.
§36A-168	Reviewing compliance	Recodified as §36C-9-905	
§36A-169	Delegation of investment and management functions	Repealed	§36C-8-804 adopts §804 of the UTC containing substantially similar provisions applicable to the administration of trusts in general, including delegation of investment functions.
§36A-170	Effect on charitable remainder trusts	Recodified as 36C-9-906	
§36A-171	Application to existing trusts	Repealed	§36C-11-1105 adopts §1105 of the Code containing substantially similar provisions applicable to the UTC in general, including the Prudent Investor Act.
§36A-172	Short title	Recodified as §36C-9-907	
§36A-173	Severability	Repealed	§36C-11-1103 adopts§1103 of the UTC which has identical language applicable to any provision of the UTC, including the Prudent Investor Act.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 671*

Short Title:	Real Property Electronic Recording.	(Public)
Sponsors:	Senators Hartsell; and Berger of Rockingham.	
Referred to:	Judiciary II.	

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO ENACT THE UNIFORM REAL PROPERTY ELECTRONIC RECORDING ACT, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 47 of the General Statutes is amended by adding a new Article to read:

"Article 1A.

"Uniform Real Property Electronic Recording Act.

"**§ 47-16.1. Short title.**

This Article may be cited as the Uniform Real Property Electronic Recording Act.

"**§ 47-16.2. Definitions.**

In this Article:

(1) "Document" means information that is:

a. Inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

b. Eligible to be recorded in the land records maintained by the register of deeds.

(2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) "Electronic document" means a document that is received by the register of deeds in an electronic form.

(4) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

"**§ 47-16.3. Validity of electronic documents.**

(a) If a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying this Article.

(b) If a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature.

(c) A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to notarize, acknowledge, verify, witness, or administer the oath, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.

"**§ 47-16.4. Recording of documents.**

(a) In this section, "paper document" means a document that is received by the register of deeds in a form that is not electronic.

(b) A register of deeds:

(1) Who implements any of the functions listed in this section shall do so in compliance with standards adopted by the Secretary of State.

(2) May receive, index, store, archive, and transmit electronic documents.

(3) May provide for access to, and for search and retrieval of, documents and information by electronic means.

(4) Who accepts electronic documents for recording shall continue to accept paper documents as authorized by law and shall place entries for both types of documents in the same index.

(5) May convert paper documents accepted for recording into electronic form.

(6) May convert into electronic form information recorded before the register of deeds began to record electronic documents.

(7) May accept electronically any fee or tax that the register of deeds is authorized to collect.

(8) May agree with other officials of this State or a political subdivision thereof on procedures or processes to facilitate the electronic satisfaction of conditions to recording and the electronic payment of fees and taxes.

"**§ 47-16.5. Administration and standards.**

(a) Standard-Setting Agency. – The Secretary of State shall adopt standards to implement this Article upon recommendation of the Electronic Recording Council. The Secretary of State may direct the Council to revise any portion of the recommended standards the Secretary deems inadequate or inappropriate. Technological standards and specifications adopted by the Secretary of State to implement this Article are engineering standards for the purposes of G.S. 150B-2(8a)h.

(b) Electronic Recording Council Created. – The Electronic Recording Council is created in the Department of the Secretary of State to advise and assist the Secretary of State in the adoption of standards to implement this Article. The Council shall review

the functions listed in G.S. 47-16.4 and shall formulate and recommend to the Secretary standards for recording electronic documents and implementing the other functions listed in G.S. 47-16.4. The Council shall report its findings and recommendations to the Secretary of State at least once each calendar year. The Council shall advise the Secretary of State on a continuing basis of the need to adopt, amend, revise, or repeal standards. The Council may advise the Secretary of State on any other matter the Secretary refers to the Council.

(c) Council Membership, Terms, and Vacancies. – The Council shall consist of 13 members as follows:

(1) Seven members appointed by the North Carolina Association of Registers of Deeds. It is the intent of the General Assembly that the North Carolina Association of Registers of Deeds shall appoint as members a representative selection of registers of deeds from large, medium, and small counties, urban and rural counties, and the different geographic areas of this State.

(2) One member appointed by the North Carolina Bar Association.

(3) One member appointed by the North Carolina Society of Land Surveyors.

(4) One member appointed by the North Carolina Bankers Association.

(5) One member appointed by the North Carolina Land Title Association.

(6) One member appointed by the North Carolina Association of Assessing Officers.

(7) The Secretary of Cultural Resources or the Secretary's designee.

In making appointments to the Council, each appointing authority shall select appointees with the ability and commitment to fulfill the purposes of the Council.

Appointed members shall serve four-year terms, except that the initial appointments by the North Carolina Bar Association, the North Carolina Bankers Association, the North Carolina Association of Assessing Officers, and three of the initial appointments by the North Carolina Association of Registers of Deeds shall be for two years. All initial terms shall commence on the effective date of this Article. Members shall serve until their successors are appointed. An appointing authority may reappoint a member for successive terms. A vacancy on the Council shall be filled in the same manner in which the original appointment was made, and the term shall be for the balance of the unexpired term.

(d) Council Meetings and Officers. – The Secretary of State shall call the first meeting of the Council. At the first meeting and biennially thereafter, the Council shall elect from its membership a chair and a vice-chair to serve two-year terms. Meetings may be called by the chair, the vice-chair, or the Secretary of State. Meetings shall be held as often as necessary, but at least once a year.

(e) Council Compensation. – None of the members of the Council shall receive compensation for serving on the Council, but Council members shall receive per diem, subsistence, and travel expenses in accordance with G.S. 138-5 and G.S. 138-6, as applicable.

(f) Staff and Other Assistance. – As soon as practicable and as needed thereafter, the Council shall identify the information technology expertise it needs and report its needs to the Secretary of State. The Council shall also report any other expertise needed to fulfill its responsibilities. The Secretary of State shall provide professional and clerical staff and other services and supplies, including meeting space, as needed for the Council to carry out its duties in an effective manner. The Secretary of State may appoint additional committees to advise and assist the Council in its work.

The Council shall consult with the North Carolina Local Government Information Systems Association, and may consult with any other person the Council deems appropriate, to advise and assist the Council in its work.

(g) Uniformity of Standards. – To keep the standards and practices of registers of deeds in this State in harmony with the standards and practices of recording offices in other jurisdictions that enact substantially this Article and to keep the technology used by registers of deeds in this State compatible with technology used by recording offices in other jurisdictions that enact substantially this Article, the Secretary of State and the Council shall consider all of the following in carrying out their responsibilities under this Article, so far as is consistent with its purposes, policies, and provisions:

(1) Standards and practices of other jurisdictions.

(2) The most recent standards promulgated by national standard-setting bodies, such as the Property Records Industry Association.

(3) The views of interested persons and other governmental officials and entities.

(4) The needs of counties of varying size, population, and resources.

"**§ 47-16.6. Uniformity of application and construction.**

In applying and construing this Article, consideration must be given to promoting uniformity of interpretation of the Uniform Real Property Electronic Recording Act among states that enact it.

"**§ 47-16.7. Relation to Electronic Signatures in Global and National Commerce Act.**

This Article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001, et seq.) but does not modify, limit, or supersede section 101(c) of that act (15 U.S.C. § 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. § 7003(b))."

SECTION 2. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Real Property Electronic Recording Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 671*
PROPOSED COMMITTEE SUBSTITUTE S671-CSRC-21 [v.1]

4/24/2005 11:17:37 AM

Short Title: Real Property Electronic Recording. (Public)

Sponsors:

Referred to:

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO ENACT THE UNIFORM REAL PROPERTY ELECTRONIC RECORDING ACT, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 47 of the General Statutes is amended by adding a new Article to read:

"Article 1A.

"Uniform Real Property Electronic Recording Act.

"**§ 47-16.1. Short title.**

This Article may be cited as the Uniform Real Property Electronic Recording Act.

"**§ 47-16.2. Definitions.**

In this Article:

(1) "Document" means information that is:

a. Inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

b. Eligible to be recorded in the land records maintained by the register of deeds.

(2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

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(4) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture,

public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

"**§ 47-16.3. Validity of electronic documents.**

(a) If a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying this Article.

(b) If a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature.

(c) A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to notarize, acknowledge, verify, witness, or administer the oath, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.

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(b) A register of deeds:

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(a) Standard-Setting Agency. – The Secretary of State shall adopt standards to implement this Article upon recommendation of the Electronic Recording Council. The Secretary of State may direct the Council to revise any portion of the recommended standards the Secretary deems inadequate or inappropriate. Technological standards and specifications adopted by the Secretary of State to implement this Article are engineering standards for the purposes of G.S. 150B-2(8a)h.

(b) Electronic Recording Council Created. – The Electronic Recording Council is created in the Department of the Secretary of State to advise and assist the Secretary of State in the adoption of standards to implement this Article. The Council shall review the functions listed in G.S. 47-16.4 and shall formulate and recommend to the Secretary standards for recording electronic documents and implementing the other functions listed in G.S. 47-16.4. The Council shall report its findings and recommendations to the Secretary of State at least once each calendar year. The Council shall advise the Secretary of State on a continuing basis of the need to adopt, amend, revise, or repeal standards. The Council may advise the Secretary of State on any other matter the Secretary refers to the Council.

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(g) Uniformity of Standards. – To keep the standards and practices of registers of deeds in this State in harmony with the standards and practices of recording offices in other jurisdictions that enact substantially this Article and to keep the technology used by registers of deeds in this State compatible with technology used by recording offices in other jurisdictions that enact substantially this Article, the Secretary of State and the Council shall consider all of the following in carrying out their responsibilities under this Article, so far as is consistent with its purposes, policies, and provisions:

(1) Standards and practices of other jurisdictions.

(2) The most recent standards adopted by national standard-setting bodies, such as the Property Records Industry Association.

(3) The views of interested persons and other governmental officials and entities.

(4) The needs of counties of varying size, population, and resources.

"**§ 47-16.6. Uniformity of application and construction.**

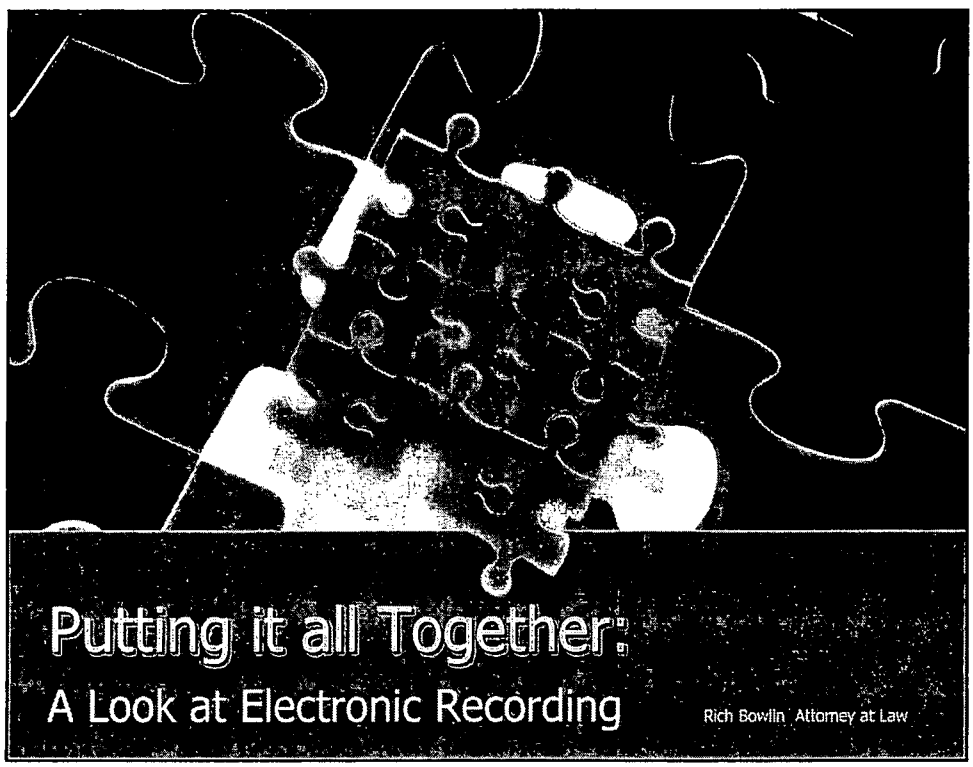
In applying and construing this Article, consideration shall be given to promoting uniformity of interpretation of the Uniform Real Property Electronic Recording Act among states that enact it.

"**§ 47-16.7. Relation to Electronic Signatures in Global and National Commerce Act.**

This Article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001, et seq.) but does not modify, limit, or supersede section 101(c) of that act (15 U.S.C. § 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. § 7003(b))."

SECTION 2. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Real Property Electronic Recording Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.

SECTION 3. This act is effective when it becomes law.



Putting it all Together:

A Look at Electronic Recording

Rich Bowlin Attorney at Law

An Overview of e-Recording

Statutes that will make real property electronic recording possible:

- URPERA: Senate Bill 671
- Electronic Notary: Senate Bill 934

Is e-Recording Mandatory?

- No!
- Local Registers of Deeds may offer e-recording - but not required
- Lending Institutions are not required to provide e-Closings
- Attorneys are not required to record any documents electronically

How will it Work?

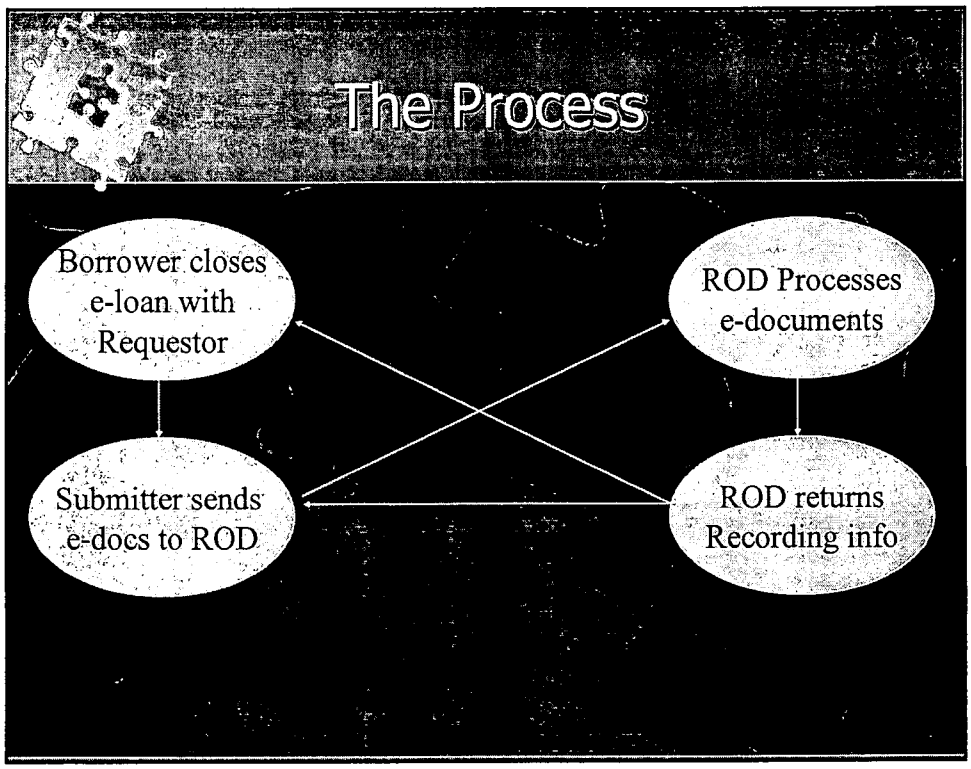
- Who are the Parties to an e-closing?
  - Borrower
  - Requestor (bank)
  - Submitter (attorney)
  - Register of Deeds

How do you sign an e-document?

- URPERA defines signature as:
  - An electronic symbol or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.
- Examples:
  - Holographic (signature pad)
  - Digital Signature

Digital Signature Defined

A digital code that can be attached to an electronically transmitted message that uniquely identifies the sender. Like a written signature, the purpose of a digital signature is to guarantee that the individual sending the message really is who he or she claims to be.



Is the Public Safe?

- YES!
- What about "hackers"?
  - Process protected by encryption
  - Process protected by Hashing

Will URPERA Promote e-Business in NC?

- YES!
- Currently Wachovia sends e-cancellations from Virginia
- Wells Fargo sends e-cancellations from South Carolina

Considerations

- Making NC a leading state in e-commerce
- Keeping e-transactions secure and reliable
- Keeping major lenders within NC
- Fostering emerging business entities

Joe Moore (Research)

From: Sally Gillis (Rep. Tucker)
Sent: Monday, April 25, 2005 3:44 PM
To: Rep. Tom Wright; Rep. Paul Miller
Cc: Clarestene Stewart (Rep. Wright); Eryn Gee (Rep. Miller)
Subject: CORRECTED Committee Meeting & Sponsor Notice, Local Government I, April 27, 2005

CORRECTED NOTICE

NORTH CAROLINA HOUSE OF REPRESENTATIVES
COMMITTEE MEETING NOTICE
AND
BILL SPONSOR NOTIFICATION
2005-2006 SESSION

You are hereby notified that the Committee on LOCAL GOVERNMENT I will meet as follows:

DAY & DATE: **WEDNESDAY, APRIL 27, 2005**

TIME: **11:00 A.M.**

LOCATION: **ROOM 415, LEGISLATIVE OFFICE BUILDING**

The following bills will be considered (Bill # & Short Title & Bill Sponsor):

HB 1034 **STUDY SUCCESS CENTERS/NEW HANOVER.**
Rep. Wright

HB 1075 **WHEEL LOCKS FOR SCOFFLAWS IN DURHAM.**
Rep. Miller

Respectfully,
Representative Russell Tucker
Chair

I hereby certify this notice was filed by the committee assistant at the following offices at **4:00 p.m.** on **April 25 2005.**

___Principal Clerk
___Reading Clerk - House Chamber

Sally Gillis (Committee Assistant)

4/26/2005

State of North Carolina
General Statutes Commission
9001 Mail Service Center
RALEIGH, NORTH CAROLINA
27699-9001

MEMORANDUM

TO: Senate Judiciary II Committee

FROM: General Statutes Commission

DATE: April 1, 2005

RE: **Senate Bill 671 (Real Property Electronic Recording)**

General Comments

This bill enacts a North Carolina version of the Uniform Electronic Recording Act (URPERA), which was adopted in 2004 by the National Conference of Commissioners on Uniform State Laws (NCCUSL). URPERA expressly authorizes registers of deeds to receive, record, and retrieve real property documents and information in electronic form and provides that a document in electronic form and an electronic signature satisfy, respectively, State law requirements that a real property document be an original, on paper, or in writing and that the document contain a signature. It also requires a register of deeds who implements electronic recording to comply with uniform statewide standards, and it establishes a method for adopting these standards.

Limited experiments with recording electronic documents have already been initiated in this State under S.L. 2002-115, as amended by S.L. 2003-326, a local act authorizing the electronic recording of documents in Mecklenburg, Cabarrus, Durham, Harnett, Moore, New Hanover, and Randolph Counties. The Register of Deeds of Mecklenburg County has implemented an electronic recordation system and has been accepting deed of trust cancellations electronically. Other registers of deeds are interested in following her example. Section 6.1 of Part VI of Session Law 2004-161 (Studies Act of 2004) required the General Statutes Commission (Commission) to study methods for establishing uniform legal standards for electronic recording (specifically, receipt, recordation, authentication, preservation, and retrieval of electronic documents). The study charge included a review of URPERA, the main goal of which is to provide for the acceptance and processing of electronic land records in accordance with uniform standards.

The Commission conducted its review and concluded that, based on the information before it, URPERA was an effective means of establishing electronic recordation of land records

in this State. The Commission's review and conclusions are set out in its report to the 2005 General Assembly and its supplement to that report.

Specific Comments

Section 1 enacts a version of URPERA as Article 1A of Chapter 47 of the General Statutes.

Proposed § 47-16.1 ("Short title") contains the article title (the "Uniform Real Property Electronic Recording Act").

Proposed § 47-16.2 ("Definitions") contains key definitions that were taken from the Uniform Electronic Transactions Act (UETA), which this State adopted as Article 40 of Chapter 66 of the General Statutes. The definitions of "electronic" and "electronic signature" are the same as UETA's, and the definitions of "document" and "electronic document" are based on UETA's definitions of "record" and "electronic record."

Proposed § 47-16.3 ("Validity of electronic documents") overlaps UETA. Although nothing in UETA prevents it from applying to electronic real property documents, which are apparently valid and enforceable as between the parties under UETA, there is no broad agreement nationwide that these documents can be recorded. Proposed § 47-16.3 eliminates such doubts by providing in essence that electronic documents and electronic signatures are acceptable. The section also eliminates any requirement that a notary's electronic stamp or seal be an actual image.

Proposed § 47-16.4 ("Recording of documents") expressly authorizes registers of deeds to accept electronic documents for recordation but requires conformity with standards adopted by the Secretary of State to implement URPERA. It does not compel a register of deeds to implement electronic recording. The section contains a list of specifically authorized functions that are related to electronic filing. It does not itself, however, contain any requirements related to security or authentication.

Proposed § 47-16.5 ("Administration and standards") adopts a standard-setting approach that is different from the Uniform Act. URPERA contains two alternatives for a standard-setting entity: a new independent commission with a majority of registers of deeds or an existing State agency. The approach taken in this bill blends URPERA's alternatives, due to various factors described in the supplement to the Commission's report.

Proposed § 47-16.5 authorizes the Secretary of State to adopt standards to implement URPERA on the recommendation of a new advisory body, the Electronic Recording Council (Council). The Council is responsible for developing and recommending to the Secretary of State initial standards to implement URPERA and, on an ongoing basis, any changes to the standards that may be needed. The Council is required to meet at least once a year and to make an annual report to the Secretary. If the Secretary deems any portion of the Council's recommended standards inadequate or inappropriate, the Secretary may direct the Council to revise that portion.

The Council has 13 members and is located within the Department of Secretary of State for organizational, budgetary, and administrative purposes. Of its members, 12 are appointed as follows: seven by the North Carolina Association of Registers of Deeds, one by the North Carolina Bar Association, one by the North Carolina Society of Land Surveyors, one by the North Carolina Bankers Association, one by the North Carolina Land Title Association, and one by the North Carolina Association of Assessing Officers. These members serve staggered four-year terms. The remaining member is the Secretary of Cultural Resources or the Secretary's designee. The fact that a majority of the members are registers of deeds is consistent with URPERA's first alternative.

Because the Council must be a working body, a group small in size is important. In discussing the Council's composition, the Commission recognized that all groups that could be affected or might make a contribution could not be directly represented on the Council without creating a body of 25 to 30 members, which would be unworkable. The Commission attempted to include the groups most affected on the Council and provide a vehicle for contribution from others through consultation requirements and the option for additional committees to advise the Council.

The Commission recommends direct appointments to the Council, rather than nominations with appointments by some other authority, to reduce the time required for the Council to begin operating, being of the opinion that direct appointments can be appropriate for an advisory body. Speed in implementing URPERA was a concern expressed by different groups who spoke to the Commission.

In the interest of national uniformity, proposed § 47-16.5 also requires both the Council and the Secretary of State to consider a list of factors in adopting standards for this State, including standards set by national bodies and by other jurisdictions.

Proposed § 47-16.6 ("Uniformity of application and construction") establishes uniformity of interpretation as a goal among states enacting URPERA.

Proposed § 47-16.7 ("Relation to Electronic Signatures in Global and National Commerce Act") covers the relationship between URPERA and the federal Electronic Signatures in Global and National Commerce Act (E-Sign).

Section 2 authorizes the Revisor of Statutes to print official and drafters' comments.

Section 3 provides that the act is effective when it becomes law.

RECORDING REQUESTED BY:
Wachovia Bank, N.A.

AND WHEN RECORDED MAIL TO
Wachovia Bank, N.A.
RCS
7711 Plantation Rd, VA0343
P O BOX 50010
Roanoke VA 24016

For Registration Judith A. Gibson
Register of Deeds
Mecklenburg County, NC
Record of Cancellation
2004 Nov 04 10:16 AM
Book 1417 Page 157 Fee: $ 0.00
Instrument # 2004234389

The foregoing certificate of COLLEEN F HORNE Notary is certified to be correct. This 4TH day of November, 2004
Judith A. Gibson, Register of Deeds

Loan Number: 4386540111469202

NCGS 47-46.2 CERTIFICATE OF SATISFACTION of deed of trust, mortgage, or other instrument.
State of North Carolina
County of Mecklenburg

SUSAN H FORD, personally appeared before me in Roanoke County, State of VA and being duly sworn (or affirmed made the following affidavit:

2004234389

1. The affiant is the owner of the note or other indebtedness secured by the deed of trust, mortgage or other obligation in the amount of $240,000.00 secured by deed of trust/mortgage executed by BERTINA H HOLLOMAN AKA TINA HOLLOMAN AND DONALD P HOLLOMAN (grantors), and TRSTE INC (trustee) and WACHOVIA BANK, NATIONAL ASSOCIATION (beneficiary) recorded in Mecklenburg County at Instrument number N/A, Book number 16687 Page number 662. I request that this certificate of satisfaction be recorded and the above-referenced instrument be canceled of record.
2. The note or other indebtedness cannot be produced or has been lost and after the exercise of due diligence cannot be located.
3. The affiant certifies that all indebtedness secured by the deed of trust, mortgage, or other instrument was satisfied on 10/19/2004, and the affiant is responsible for cancellation of the same.

WACHOVIA BANK, NATIONAL ASSOCIATION

== Susan H Ford ==
SUSAN H FORD, Vice President
Affiant/Owner

STATE OF VA
COUNTY OF Roanoke } s.s.

I, COLLEEN F HORNE , notary public, certify that SUSAN H FORD personally came before me, acknowledged and being duly sworn this day that he/she is Vice President (officer title) of WACHOVIA BANK, NATIONAL ASSOCIATION, a corporation, and that he/she, as Vice President, being authorized to do so, executed the foregoing on behalf of the corporation. Witness my hand and official seal, this day 11/04/2004.

== Colleen F Horne ==
COLLEEN F HORNE
My commission expires: 03/31/2008

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Principal Clerk ____
Reading Clerk ____

CORRECTED NOTICE

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	April 28, 2005	9:00 to 11:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 671	Real Property Electronic Recording.	Senator Hartsell
SB 934	Notary Public Act.-AB	Senator Hartsell
SB 774	Seat Belt Use Enhancements.	Senator Purcell
SB 669	State Land Not Subject to Municipal Control.	Senator Hartsell
SB 574	Amend Post-Release Supervision Laws.	Senator Hartsell
HB 508	Allow Name Change Where Divorce Granted.	Representative Haire

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk _____
Reading Clerk _____

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SB 797	Bail Bonds/Forfeitures & Remittances.	Senator Thomas
SB 846	Modernize Bail Bondsman Registration.	Senator Swindell IV

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, April 28, 2005, 9:00 to 11:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

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Presentations

Mr. Darrell Jernigan, Governor's Highway Safety Program

Other Business

Adjournment

Senate Judiciary II Committee
Thursday, April 28, 2005, 9:00 to 11:00 AM
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Mr. Darrell Jernigan, Governor's Highway Safety Program

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

April 28, 2005

Senator Fletcher L. Hartsell, Chairman, called the Senate Judiciary II Committee to order on April 28, 2005, with fourteen members present. Senator Hartsell introduced pages Peter Coogan, Justin Siler, Sara Sumner and Stephen Kooba and thanked them for serving.

HB 508 (Allow Name Change Where Divorce Granted.) Representative Haire was recognized to explain the bill. Senator Allran's question was answered by Representative Haire. Senator Apodaca moved for a favorable report. All voted and the motion carried.

SB 774 (Seat Belt Use Enhancements.) Senator Forrester moved to consider the Proposed Committee Substitute for the purpose of discussion. Senator Hartsell invited Senator Purcell to explain the bill. Mr. Darrell Jernigan, in charge of the Governor's Highway Safety Program gave a presentation on highway safety to the committee members. Questions by Senators Apodaca, Bingham, Dorsett, Thomas, and Webster were answered by Mr. Jernigan, Senator Purcell, Senator Hartsell and Major Charlie Carden of the North Carolina Highway Patrol. The bill will be heard again at the May 3rd. meeting.

SB 671 (Real Property Electronic Recording.) Senator Allran chaired and called for Senator Hartsell to explain the bill. After his explanation, he moved that the bill be adopted. Senator Snow sent forth an amendment. Senator Hartsell accepted the amendment and Senator Bingham moved that the amendment be adopted. All voted and the motion carried. Senator Apodaca moved for a favorable report as amended, rolled into a new committee substitute. All voted and the motion carried.

SB 934 (Notary Public Act.-AB) Senator Thomas chaired the meeting and called for Senator Hartsell to explain the bill. Senator Bingham moved to adopt the proposed committee substitute for purposes of discussion. The motion carried. Senator Hartsell introduced Ms. Hailey Montgomery, Deputy Secretary of State, who spoke on the bill and noted changes to the present law. The bill will be heard again on Tuesday, May 3rd.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, April 28, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B. **508** Allow Name Change Where Divorce Granted.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, May 04, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **671** Real Property Electronic Recording.

Draft Number:	PCS55221
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

HOUSE BILL 508

Short Title:	Allow Name Change Where Divorce Granted.	(Public)
Sponsors:	Representative Haire.	
Referred to:	Judiciary III.	

March 7, 2005

A BILL TO BE ENTITLED

AN ACT ALLOWING A PERSON WHO HAS RECEIVED AN ABSOLUTE DIVORCE TO CHANGE HIS OR HER NAME IN THE COUNTY WHERE THE DIVORCE WAS GRANTED.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 50-12 reads as rewritten:

"**§ 50-12. Resumption of maiden or premarriage surname.**

(a) Any woman whose marriage is dissolved by a decree of absolute divorce may, upon application to the clerk of court of the county in which she resides or where the divorce was granted setting forth her intention to do so, change her name to any of the following:

(1) Her maiden name; or

(2) The surname of a prior deceased husband; or

(3) The surname of a prior living husband if she has children who have that husband's surname.

(a1) A man whose marriage is dissolved by decree of absolute divorce may, upon application to the clerk of court of the county in which he resides or where the divorce was granted setting forth his intention to do so, change the surname he took upon marriage to his premarriage surname.

(b) The application shall be addressed to the clerk of the court of the county in which such divorced person ~~resides,~~resides or where the divorce was granted, and shall set forth the full name of the former spouse of the applicant, the name of the county and state in which the divorce was granted, and the term or session of court at which such divorce was granted, and shall be signed by the woman in her full maiden name, or by the man in his full premarriage surname. The clerks of court of the several counties of the State shall record and index such applications in such manner as shall be required by the Administrative Office of the Courts.

(c) If an applicant, since the divorce, has adopted one of the surnames listed in subsection (a) or (a1) of this section, the applicant's use and adoption of that name is validated.

(d) In the complaint, or counterclaim for divorce filed by any person in this State, the person may petition the court to adopt any surname as provided by this section, and the court is authorized to incorporate in the divorce decree an order authorizing the person to adopt that surname."

SECTION 2. This act is effective when it becomes law and applies to petitions filed 90 days after the effective date of this act.

HOUSE BILL 508:
Allow Name Change Where Divorce Granted

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	April 27, 2005
Introduced by:	Rep. Haire	**Summary by:**	Ben Popkin
Version:	First Edition		Committee Counsel

SUMMARY: House Bill 508 would allow a person who has gotten a divorce to apply for a name change from the clerk of court in the county where the divorce was granted.

CURRENT LAW: There are several ways to effect a name change in North Carolina.

Resumption of premarriage name. G.S. 50-12 allows a woman who has received an absolute divorce to apply to the clerk of court in the county where she resides to change her name to:

- Her maiden name;
- The surname of a prior deceased husband; or
- The surname of a prior living husband if she has children with that name.

G.S. 50-12 also allows a man who has received a divorce to apply to the clerk of court where he resides to change his name to his premarriage surname.

Requests for these name changes may also be included as part of a complaint or counterclaim for divorce, and the court may include the name change in the divorce decree.

For good cause shown. Chapter 101 of the General Statutes provides a process by which a person can apply for a name change for good cause. Applications must be filed with the clerk of court in the county in which the person lives, along with proof of good character. A person may only change his or her name once through this procedure.

Use. According to common law, a person may assume and use any name he or she chooses, without resorting to any sort of legal procedure, as long as it is not done for fraudulent or illegal purposes.

BILL ANALYSIS: House Bill 508 would amend G.S. 50-12, which provides for name changes following a divorce. The bill would allow a person to apply for a name change in the county in which the divorce was granted, in addition to the county in which the person resides.

EFFECTIVE DATE: The bill would be effective when it becomes law and would apply to petitions filed 90 days after that date.

Wendy Graf Ray, House Judiciary III Committee Counsel, contributed substantially to this summary.

H0508e1-SMSS

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

S 1

SENATE BILL 774

Short Title:	Seat Belt Use Enhancements.	(Public)
Sponsors:	Senators Purcell; Dannelly, Kinnaird, Lucas, and Malone.	
Referred to:	Judiciary II.	

March 22, 2005

A BILL TO BE ENTITLED

AN ACT TO MODIFY THE SEAT BELT USE STATUTES TO ENHANCE THE USE OF SEAT BELTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-135.2A(a) reads as rewritten:

"(a) Each ~~front seat~~ occupant ~~who is 16 years of age or older and each driver~~ of a passenger motor vehicle manufactured with seat belts shall have a seat belt properly fastened about his or her body at all times when the vehicle is in forward motion on a street or highway in this State."

SECTION 2. G.S. 20-135.2A(e) reads as rewritten:

"(e) Any driver or passenger who fails to wear a seat belt as required by this section shall have committed an infraction and shall pay a penalty of ~~twenty-five dollars ($25.00)~~ fifty dollars ($50.00) plus court costs in the sum of fifty dollars ($50.00). The driver shall be assessed the penalty and costs for any unbelted passenger under the age of 16 years. In the case of multiple violations arising out of the same incident, the driver shall be subject to a maximum of one penalty. Court costs assessed under this section are for the support of the General Court of Justice and shall be remitted to the State Treasurer. Conviction of an infraction under this section has no other consequence."

SECTION 3. G.S. 20-135.2A(f) reads as rewritten:

"(f) ~~No~~ One drivers license ~~points or insurance surcharge~~ point shall be assessed on account of a violation of this ~~section.~~section involving the driver or a passenger under the age of 16 years. In the case of multiple violations arising out of the same incident, the driver shall only be assessed one drivers license point. Only the driver of the vehicle may be assessed drivers license points for a violation."

SECTION 4. G.S. 20-16(c) reads as rewritten:

"(c) The Division shall maintain a record of convictions of every person licensed or required to be licensed under the provisions of this Article as an operator and shall enter therein records of all convictions of such persons for any violation of the motor vehicle laws of this State and shall assign to the record of such person, as of the date of

commission of the offense, a number of points for every such conviction in accordance with the following schedule of convictions and points, except that points shall not be assessed for convictions resulting in suspensions or revocations under other provisions of laws: Further, any points heretofore charged for violation of the motor vehicle inspection laws shall not be considered by the Division of Motor Vehicles as a basis for suspension or revocation of driver's license:

Schedule of Point Values

Passing stopped school bus	5
Aggressive driving	5
Reckless driving	4
Hit and run, property damage only	4
Following too close	4
Driving on wrong side of road	4
Illegal passing	4
Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2)b.	4
Failure to yield right-of-way to bicycle, motor scooter, or motorcycle	4
Running through stop sign	3
Speeding in excess of 55 miles per hour	3
Failing to yield right-of-way	3
Running through red light	3
No driver's license or license expired more than one year	3
Failure to stop for siren	3
Driving through safety zone	3
No liability insurance	3
Failure to report accident where such report is required	3
Speeding in a school zone in excess of the posted school zone speed limit	3
Failure to properly restrain a child in a restraint or seat belt	2
All other moving violations	2
Failure to use a seat belt as required by G.S. 20-135.2A, a moving violation	1
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle	1

Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle

Passing stopped school bus	8
Rail-highway crossing violation	6
Careless and reckless driving in violation of G.S. 20-140(f)	6

Speeding in violation of G.S. 20-141(j3) 6
Aggressive driving 6
Reckless driving 5
Hit and run, property damage only 5
Following too close 5
Driving on wrong side of road 5
Illegal passing 5
Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2)b. 5
Failure to yield right-of-way to bicycle, motor scooter, or motorcycle 5
Running through stop sign 4
Speeding in excess of 55 miles per hour 4
Failing to yield right-of-way 4
Running through red light 4
No driver's license or license expired more than one year 4
Failure to stop for siren 4
Driving through safety zone 4
No liability insurance 4
Failure to report accident where such report is required 4
Speeding in a school zone in excess of the posted school zone speed limit 4
Possessing alcoholic beverages in the passenger area of a commercial motor vehicle 4
All other moving violations 3
Failure to use a seat belt as required by G.S. 20-135.2A, a moving violation 1
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle 1

The above provisions of this subsection shall only apply to violations and convictions which take place within the State of North Carolina. The Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle shall not apply to any commercial motor vehicle known as an "aerial lift truck" having a hydraulic arm and bucket station, and to any commercial motor vehicle known as a "line truck" having a hydraulic lift for cable, if the vehicle is owned, operated by or under contract to a public utility, electric or telephone membership corporation or municipality and used in connection with installation, restoration or maintenance of utility services.

No points shall be assessed for conviction of the following offenses:

Overloads
Over length
Over width
Over height

Illegal parking
Carrying concealed weapon
Improper plates
Improper registration
Improper muffler
Improper display of license plates or dealers' tags
Unlawful display of emblems and insignia
Failure to display current inspection certificate.

In case of the conviction of a licensee of two or more traffic offenses committed on a single occasion, such licensee shall be assessed points for one offense only and if the offenses involved have a different point value, such licensee shall be assessed for the offense having the greater point value.

Upon the restoration of the license or driving privilege of such person whose license or driving privilege has been suspended or revoked because of conviction for a traffic offense, any points that might previously have been accumulated in the driver's record shall be cancelled.

Whenever any licensee accumulates as many as seven points or accumulates as many as four points during a three-year period immediately following reinstatement of his license after a period of suspension or revocation, the Division may request the licensee to attend a conference regarding such licensee's driving record. The Division may also afford any licensee who has accumulated as many as seven points or any licensee who has accumulated as many as four points within a three-year period immediately following reinstatement of his license after a period of suspension or revocation an opportunity to attend a driver improvement clinic operated by the Division and, upon the successful completion of the course taken at the clinic, three points shall be deducted from the licensee's conviction record; provided, that only one deduction of points shall be made on behalf of any licensee within any five-year period.

When a license is suspended under the point system provided for herein, the first such suspension shall be for not more than 60 days; the second such suspension shall not exceed six months and any subsequent suspension shall not exceed one year.

Whenever the driver's license of any person is subject to suspension under this subsection and at the same time also subject to suspension or revocation under other provisions of laws, such suspensions or revocations shall run concurrently.

In the discretion of the Division, a period of probation not to exceed one year may be substituted for suspension or for any unexpired period of suspension under subsections (a)(1) through (a)(10a) of this section. Any violation of probation during the probation period shall result in a suspension for the unexpired remainder of the suspension period. Any accumulation of three or more points under this subsection during a period of probation shall constitute a violation of the condition of probation."

SECTION 5. G.S. 20-183.3(a) reads as rewritten:

"(a) Safety. – A safety inspection of a motor vehicle consists of an inspection of the following equipment to determine if the vehicle has the equipment required by Part 9 of Article 3 of this Chapter and if the equipment is in a safe operating condition:

(1) Brakes, as required by G.S. 20-124.
(2) Lights, as required by G.S. 20-129 or G.S. 20-129.1.
(3) Horn, as required by G.S. 20-125(a).
(4) Steering mechanism, as required by G.S. 20-123.1.
(5) Windows and windshield wipers, as required by G.S. 20-127. To determine if a vehicle window meets the window tinting restrictions, a safety inspection mechanic must first determine, based on use of an automotive film check card or knowledge of window tinting techniques, if after-factory tint has been applied to the window. If after-factory tint has been applied, the mechanic must use a light meter approved by the Commissioner to determine if the window meets the window tinting restrictions.
(6) Directional signals, as required by G.S. 20-125.1.
(7) Tires, as required by G.S. 20-122.1.
(8) Mirrors, as required by G.S. 20-126.
(9) Exhaust system and emissions control devices, as required by G.S. 20-128. For a vehicle that is subject to an emissions inspection in addition to a safety inspection, a visual inspection of the vehicle's emissions control devices is included in the emissions inspection rather than the safety inspection.
(10) Seat belts, as required by G.S. 20-135.2A."

SECTION 6. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

SENATE BILL 774:
Seat Belt Use Enhancements

BILL ANALYSIS

Committee:	Senate Ref to Judiciary II. If fav, re-ref to Finance	**Date:**	April 27, 2005
Introduced by:	Sen. Purcell	**Summary by:**	Robin Johnson
Version:	First Edition		Committee Counsel

SUMMARY: ***Senate Bill 774, a recommendation of the Executive Committee for Highway Safety, would require all vehicle occupants to wear a seatbelt while the vehicle is in forward motion and increase the penalty and points related to a violation. The bill also would require vehicle safety inspections to include the inspection of seat belts.***

CURRENT LAW: G.S. 20-135.2A (attached) requires front seat passengers who are under 18 and drivers of passenger motor vehicles to wear a seat belt when the vehicle is moving forward on a street or highway. Violation is an infraction, punishable by a penalty of $25.00 plus court costs of $50.00. No insurance surcharges or drivers license points may be assessed.

The Division of Motor Vehicles may suspend a drivers license when a person accumulates 12 or more drivers license points within a three-year period or 8 or more of these points during a three-year period immediately following the reinstatement of a license that had been suspended or revoked.

Motor vehicles are subject to annual safety inspections of specified equipment. The equipment does not include seat belts. G.S. 20-183.8 (attached) provides that operating a motor vehicle that has not been inspected, as evidenced by a vehicle's lack of a current sticker, is an infraction with a penalty of up to $50.00.

BILL ANALYSIS: Senate Bill 774 would require all occupants of a passenger motor vehicle to wear a seat belt when the vehicle is in forward motion.

The penalty for a violation would be increased from $25.00 to $50.00 plus court costs of $50.00. The driver would be subject to this penalty when the unbelted passenger is under 16. However, if there are multiple violations arising out of one incident, the driver would be subject to only one penalty. (In the case of a person operating a commercial motor vehicle, the penalty may be doubled.[1])

Senate Bill 774 also would require one drivers license point to be assessed for a violation involving the driver or a passenger under 16, or both. Only the driver may be assessed this point.

Section 5 of the bill would add seat belts to the list of equipment that must be inspected during an annual safety inspection.

EFFECTIVE DATE: This act would become effective December 1, 2005, and would apply to offenses occurring on or after that date.

S0774e1-SMRH

[1] G.S. 20-16.01

§ 20-135.2A. Seat belt use mandatory.

(a) Each front seat occupant who is 16 years of age or older and each driver of a passenger motor vehicle manufactured with seat belts shall have a seat belt properly fastened about his or her body at all times when the vehicle is in forward motion on a street or highway in this State.

(b) "Passenger Motor Vehicle," as used in this section, means a motor vehicle with motive power designed for carrying 10 passengers or fewer, but does not include a motorcycle, a motorized pedacycle or a trailer.

(c) This section shall not apply to any of the following:

(1) A driver or occupant with a medical or physical condition that prevents appropriate restraint by a safety belt or with a professionally certified mental phobia against the wearing of vehicle restraints;

(2) A motor vehicle operated by a rural letter carrier of the United States Postal Service while performing duties as a rural letter carrier and a motor vehicle operated by a newspaper delivery person while actually engaged in delivery of newspapers along the person's specified route;

(3) A driver or passenger frequently stopping and leaving the vehicle or delivering property from the vehicle if the speed of the vehicle between stops does not exceed 20 miles per hour;

(4) Any vehicle registered and licensed as a property-carrying vehicle in accordance with G.S. 20-88, while being used for agricultural or commercial purposes; or

(5) A motor vehicle not required to be equipped with seat safety belts under federal law.

(d) Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section or as justification for the stop of a vehicle or detention of a vehicle operator and passengers.

(e) Any driver or passenger who fails to wear a seat belt as required by this section shall have committed an infraction and shall pay a penalty of twenty-five dollars ($25.00) plus court costs in the sum of fifty dollars ($50.00). Court costs assessed under this section are for the support of the General Court of Justice and shall be remitted to the State Treasurer. Conviction of an infraction under this section has no other consequence.

(f) No drivers license points or insurance surcharge shall be assessed on account of violation of this section.

(g) The Commissioner of the Division of Motor Vehicles and the Department of Public Instruction shall incorporate in driver education programs and driver licensing programs instructions designed to encourage compliance with this section as an important means of reducing the severity of injury to the users of restraint devices and on the requirements and penalties specified in this law.

(h) Repealed by Session Laws 1999-183, s. 3, effective October 1, 1999.

§ 20-183.8. Infractions and criminal offenses for violations of inspection requirements.

(a) Infractions. – A person who does any of the following commits an infraction and, if found responsible, is liable for a penalty of up to fifty dollars ($50.00):

(1) Operates a motor vehicle that is subject to inspection under this Part on a highway or public vehicular area in the State when the vehicle has not been inspected in accordance with this Part, as evidenced by the vehicle's lack of a current inspection sticker or otherwise.

(2) Allows an inspection sticker to be put on a vehicle owned or operated by that person, knowing that the vehicle was not inspected before the sticker was attached or was not inspected properly.

(3) Puts an inspection sticker on a vehicle, knowing or having reasonable grounds to know that an inspection of the vehicle was not performed or was performed improperly. A person who is cited for a civil penalty under G.S. 20-183.8B for an emissions violation involving the inspection of a vehicle may not be charged with an infraction under this subdivision based on that same vehicle.

(4) Alters the original certified configuration or data link connectors of a vehicle in such a way as to make an emissions inspection by analysis of data provided by on-board diagnostic (OBD) equipment inaccurate or impossible.

(b) Defenses to Infractions. – Any of the following is a defense to a violation under subsection (a) of this section:

(1) The vehicle was continuously out of State for at least the 30 days preceding the date the inspection sticker expired and a current inspection sticker was obtained within 10 days after the vehicle came back to the State.

(2) The vehicle displays a dealer license plate or a transporter plate, the dealer repossessed the vehicle or otherwise acquired the vehicle within the last 10 days, and the vehicle is being driven from its place of acquisition to the dealer's place of business or to an inspection station.

(3) Repealed by Session Laws 1997-29, s. 5.

(4) The charged infraction is described in subdivision (a)(1) of this section, the vehicle is subject to a safety inspection or an emissions inspection and the vehicle owner establishes in court that the vehicle was inspected after the citation was issued and within 30 days of the expiration date of the inspection sticker that was on the vehicle when the citation was issued.

(c) Felony. – A person who does any of the following commits a Class I felony:

(1) Forges an inspection sticker.

(2) Buys, sells, or possesses a forged inspection sticker.

(3) Buys, sells, or possesses an inspection sticker other than as the result of either of the following:

a. Having a license as an inspection station, a self-inspector, or an inspection mechanic and obtaining the inspection sticker from the Division in the course of business.

b. A vehicle inspection in which the vehicle passed the inspection or for which the vehicle received a waiver.

(4) Solicits or accepts anything of value in order to pass a vehicle that fails a safety or emissions inspection.

(5) Fails a vehicle for any reason not authorized by law.

§ 20-16.01. Double penalties for offenses committed while operating a commercial motor vehicle.

Any person who commits an offense for which points may be assessed pursuant to the Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle as provided in G.S. 20-16(c) may be assessed double the amount of any fine or penalty authorized by statute.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 774
PROPOSED COMMITTEE SUBSTITUTE S774-CSLK-7 [v.1]

3/31/2005 11:46:04 AM

Short Title: Seat Belt Use Enhancements. (Public)

Sponsors:

Referred to:

March 22, 2005

A BILL TO BE ENTITLED

AN ACT TO MODIFY THE SEAT BELT USE STATUTES TO ENHANCE THE USE OF SEAT BELTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-135.2A(a) reads as rewritten:

"(a) Each ~~front seat~~ occupant ~~who is 16 years of age or older and each driver~~ of a passenger motor vehicle manufactured with seat belts shall have a seat belt properly fastened about his or her body at all times when the vehicle is in forward motion on a street or highway in this State."

SECTION 2. G.S. 20-135.2A(c) reads as rewritten:

"(c) This section shall not apply to any of the following:

(1) A driver or occupant with a medical or physical condition that prevents appropriate restraint by a safety belt or with a professionally certified mental phobia against the wearing of vehicle restraints;

(2) A motor vehicle operated by a rural letter carrier of the United States Postal Service while performing duties as a rural letter carrier and a motor vehicle operated by a newspaper delivery person while actually engaged in delivery of newspapers along the person's specified route;

(3) A driver or passenger frequently stopping and leaving the vehicle or delivering property from the vehicle if the speed of the vehicle between stops does not exceed 20 miles per hour; or

~~(4) Any vehicle registered and licensed as a property-carrying vehicle in accordance with G.S. 20-88, while being used for agricultural or commercial purposes; or~~

~~(5)~~(4) A motor vehicle not required to be equipped with seat safety belts under federal law."

SECTION 3. G.S. 20-135.2A(e) reads as rewritten:

"(e) Any driver or passenger who fails to wear a seat belt as required by this section shall have committed an infraction and shall pay a penalty of ~~twenty-five dollars ($25.00)~~ fifty dollars ($50.00) plus court costs in the sum of fifty dollars ($50.00). Court costs assessed under this section are for the support of the General Court of Justice and shall be remitted to the State Treasurer. Conviction of an infraction under this section has no other consequence."

SECTION 4. G.S. 20-135.2A(f) reads as rewritten:

"(f) ~~No~~ One drivers license ~~points or insurance surcharge point~~ shall be assessed on account of a violation of this ~~section.~~section involving the driver. Only the driver of the vehicle may be assessed drivers license points for a violation."

SECTION 5. G.S. 20-16(c) reads as rewritten:

"(c) The Division shall maintain a record of convictions of every person licensed or required to be licensed under the provisions of this Article as an operator and shall enter therein records of all convictions of such persons for any violation of the motor vehicle laws of this State and shall assign to the record of such person, as of the date of commission of the offense, a number of points for every such conviction in accordance with the following schedule of convictions and points, except that points shall not be assessed for convictions resulting in suspensions or revocations under other provisions of laws: Further, any points heretofore charged for violation of the motor vehicle inspection laws shall not be considered by the Division of Motor Vehicles as a basis for suspension or revocation of driver's license:

Schedule of Point Values

Passing stopped school bus	5
Aggressive driving	5
Reckless driving	4
Hit and run, property damage only	4
Following too close	4
Driving on wrong side of road	4
Illegal passing	4
Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2)b.	4
Failure to yield right-of-way to bicycle, motor scooter, or motorcycle	4
Running through stop sign	3
Speeding in excess of 55 miles per hour	3
Failing to yield right-of-way	3
Running through red light	3
No driver's license or license expired more than one year	3
Failure to stop for siren	3
Driving through safety zone	3
No liability insurance	3
Failure to report accident where such report is required	3
Speeding in a school zone in excess of the posted school	

zone speed limit 3
Failure to properly restrain a child in a restraint or seat belt 2
All other moving violations 2
Failure to use a seat belt as required by G S. 20-135.2A, a moving violation 1
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle 1

Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle

Passing stopped school bus 8
Rail-highway crossing violation 6
Careless and reckless driving in violation of G.S. 20-140(f) 6
Speeding in violation of G.S. 20-141(j3) 6
Aggressive driving 6
Reckless driving 5
Hit and run, property damage only 5
Following too close 5
Driving on wrong side of road 5
Illegal passing 5
Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2)b. 5
Failure to yield right-of-way to bicycle, motor scooter, or motorcycle 5
Running through stop sign 4
Speeding in excess of 55 miles per hour 4
Failing to yield right-of-way 4
Running through red light 4
No driver's license or license expired more than one year 4
Failure to stop for siren 4
Driving through safety zone 4
No liability insurance 4
Failure to report accident where such report is required 4
Speeding in a school zone in excess of the posted school zone speed limit 4
Possessing alcoholic beverages in the passenger area of a commercial motor vehicle 4
All other moving violations 3
Failure to use a seat belt as required by G.S. 20-135.2A, a moving violation 1
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle 1

The above provisions of this subsection shall only apply to violations and convictions which take place within the State of North Carolina. The Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle shall not apply to any commercial motor vehicle known as an "aerial lift truck" having a hydraulic arm and bucket station, and to any commercial motor vehicle known as a "line truck" having a hydraulic lift for cable, if the vehicle is owned, operated by or under contract to a public utility, electric or telephone membership corporation or municipality and used in connection with installation, restoration or maintenance of utility services.

No points shall be assessed for conviction of the following offenses:

Overloads
Over length
Over width
Over height
Illegal parking
Carrying concealed weapon
Improper plates
Improper registration
Improper muffler
Improper display of license plates or dealers' tags
Unlawful display of emblems and insignia
Failure to display current inspection certificate.

In case of the conviction of a licensee of two or more traffic offenses committed on a single occasion, such licensee shall be assessed points for one offense only and if the offenses involved have a different point value, such licensee shall be assessed for the offense having the greater point value.

Upon the restoration of the license or driving privilege of such person whose license or driving privilege has been suspended or revoked because of conviction for a traffic offense, any points that might previously have been accumulated in the driver's record shall be cancelled.

Whenever any licensee accumulates as many as seven points or accumulates as many as four points during a three-year period immediately following reinstatement of his license after a period of suspension or revocation, the Division may request the licensee to attend a conference regarding such licensee's driving record. The Division may also afford any licensee who has accumulated as many as seven points or any licensee who has accumulated as many as four points within a three-year period immediately following reinstatement of his license after a period of suspension or revocation an opportunity to attend a driver improvement clinic operated by the Division and, upon the successful completion of the course taken at the clinic, three points shall be deducted from the licensee's conviction record; provided, that only one deduction of points shall be made on behalf of any licensee within any five-year period.

When a license is suspended under the point system provided for herein, the first such suspension shall be for not more than 60 days; the second such suspension shall not exceed six months and any subsequent suspension shall not exceed one year.

Whenever the driver's license of any person is subject to suspension under this subsection and at the same time also subject to suspension or revocation under other provisions of laws, such suspensions or revocations shall run concurrently.

In the discretion of the Division, a period of probation not to exceed one year may be substituted for suspension or for any unexpired period of suspension under subsections (a)(1) through (a)(10a) of this section. Any violation of probation during the probation period shall result in a suspension for the unexpired remainder of the suspension period. Any accumulation of three or more points under this subsection during a period of probation shall constitute a violation of the condition of probation."

SECTION 6. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

Safety Belt Data

THE PROBLEM

- Safety belt use rate in N.C. remains steady at 86.1 percent, however, it needs to be understood that this compliance rate is obtained from observational studies monitoring ***only*** front seat occupants of vehicles.
- Unbelted motorists continue to account for a large percentage of our highway fatalities each year.
- Seat Belt Usage is not mandatory for all seating positions in a vehicle.
- Current exemptions for farm and commercial motor vehicles create lower usage rates among these two categories of vehicles.
- Present fines of $25 for non-compliance with the existing safety belt laws have been instrumental in getting N.C. to the 86.1% compliance. However, the remaining 13.9% who still do not utilize their safety belts account for 43% of motor vehicle fatalities. Due to inflation and other factors, the economic impact of a $25 fine has diminished.

THE SPECIFICS

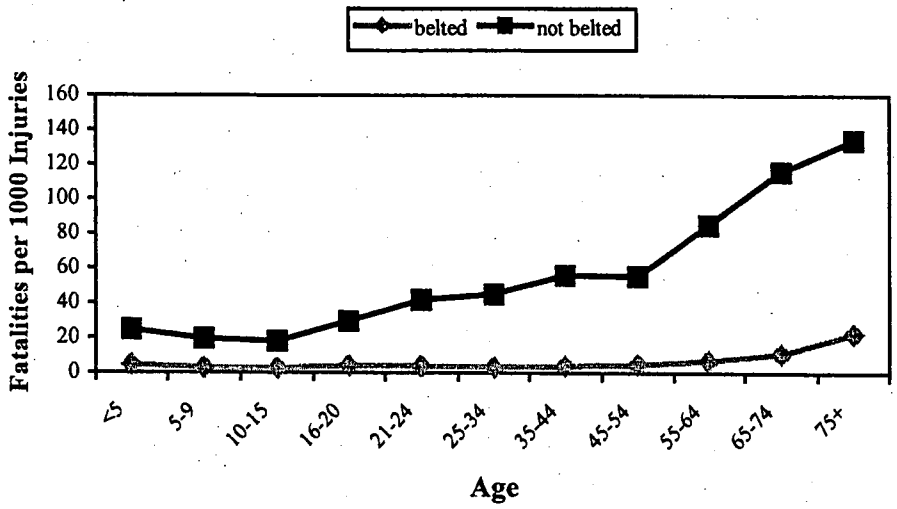
- North Carolina's fatality rate is at 1.66 fatalities/100 million vehicle miles traveled (MVMT)
- 1,552 fatalities on our highways in 2003, broken down by:

	Total	Unbelted	
Driver Fatalities:	913	380	(42%)
Passenger Fatalities (front seat):	224	102	(46%)
Passenger Fatalities (back seat):	164	72	(44%)
Total Vehicle Occupants:	**1,301**	**554**	**(43%)**
Pedestrians	140	N/A	
Motorcyclist	97	N/A	
Bicyclist	14	N/A	
Total Fatalities:	**1,552**		

- 43% (554) of vehicle occupant fatalities were ***unbelted.***
- Unbelted motorists are 10 times more likely to suffer a severe injury in a crash.
- Unbelted motorists are 20 times more likely to be fatally injured in a crash.
- Belt usage tends to be lower among younger drivers/occupants.
- Unbelted occupants account for 68% of all lane departure related fatalities.
- Unbelted occupants account for 70% of all speed related fatalities.

- A recent 2004 survey found that North Carolina's pickup truck and van safety belt usage rates lag far behind. These two vehicle types include many vehicles that are licensed as either Farm or Commercial vehicles (***which presently are exempt from current safety belt laws.***) Statewide safety belt surveys reveal that usage by drivers and occupants of pickup trucks is only 78.5% and that of full size vans is only 68.0 %. These rates compare to cars, minivans and sport utility vehicles, which are all above 90%.

- Although older drivers typically tend to have higher belt usage rates, they tend to suffer more fatalities per 1,000 injuries when unbelted (see graph; Source: Wagner and Gotschall, 2002).



AIR BAGS AS AN ALTERNATIVE

- Many people tend to think they do not need to wear safety belts since their vehicle is equipped with an air bag. However, **driver air bags offer relatively little benefit** in vehicle crashes when used without a safety belt. Researchers have only found an 8% reduction in the risk of death, when air bags were the only form of occupant protection. Using a seat belt, reduces the risk of death by 65%, according to a study of over 50,000 driver-passenger car crashes and seat belts in combination with an air bag give a 68% reduction in the risk of death. *(British Medical Journal May 11, 2002;324:1119-1122)*

REAR SEAT OCCUPANTS

- A study by the Insurance Institute for Highway Safety found that only 38% of respondents said they always use seatbelts when riding in the rear seat of a car.

- A study conducted at the University of Tokyo examined 100,000 collisions involving front and rear passengers. The study found that **drivers who are buckled up have five times the risk of dying in a collision if their rear seat passengers are not buckled up.** The injuries to the driver and front seat passenger are caused when the people in the back who are not buckled up catapult to the front. **The force of this human body flying into the front seat is calculated to be 3.5 tons for a 30-mile per hour crash.** The study found that 80% of the deaths from the crashes could have been eliminated if the rear seat occupants had been buckled up. The study results were recently published in The Lancet.

IN GENERAL

- Wearing a seat belt reduces the risk of death in a head-on crash by an average of more than 50%, and the risk of death in a roll-over crash by 74-80%. *(National Highway Traffic Safety Administration)*

- Crash victims who don't wear seat belts have medical bills that are 50% higher than those who buckle up. Society bears 74% of those costs through increased insurance premiums, taxes and health care costs. *(National Highway Traffic Safety Administration)*

- Traffic crashes are the leading cause of traumatic brain injury. *(Brain Injury Association of America)*

- When drivers buckle up, children in their vehicles are buckled up 87% of the time. But when drivers don't wear their seat belts, kids in the vehicle are restrained only 25% of the time. In focus group studies, teens said the one of the most important factors in whether or not they buckle up is whether or not their parents buckle up. *(American Academy of Pediatrics)*

- Traffic crashes are the number one cause of worker deaths and a significant cause of work-related disabilities. *(Bureau of Labor Statistics)*

- On and off the job, traffic crashes resulted in 3 million lost work days in 2000. *(Network of Employers for Traffic Safety)*

- A single traffic crash with an unbelted driver, can cost a company $29,000 in insurance costs, lost production and workers compensation costs. *(Network of Employers for Traffic Safety)*

- Seat belt use reduces the risk of serious injury and death by 40-60% *(National Highway Traffic Safety Administration)*

EXPELLING THE MYTHS

- **IT'S MY RIGHT**
  The fact is, injuries are a burden on your family and all of society who end up paying in terms of increased health care, insurance and social costs. *No individual has the right to make others pay.*

- **IT'S SAFER TO BE THROWN CLEAR**
  The fact is, you are ***three times more likely to die*** if ejected out of the vehicle than if you remain inside.

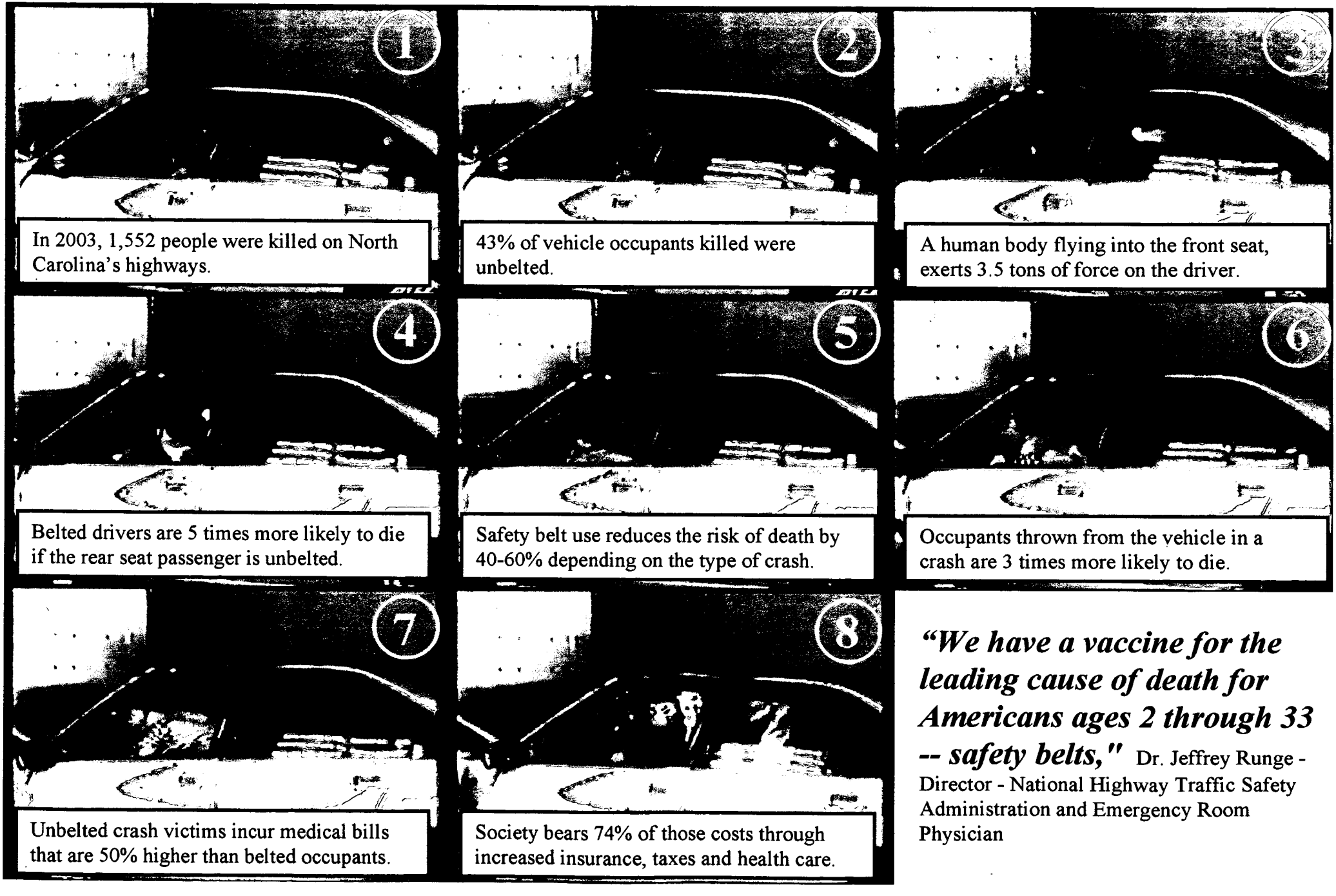
- **I'VE GOT AN AIRBAG**
  The fact is, seat belts increase your chances of surviving a collision by up to 65 per cent (depending on the crash type), while airbags only give you an extra five per cent survivability in frontal collisions. Airbags are not effective in side, rear or rollover situations, however and they are designed to work with your seat belt.

- **THE KIDS AND I ARE JUST POPPING INTO TOWN, NOTHING WILL HAPPEN**
  The fact is, ***most collisions occur on short trips within 15 miles of home.*** You can't predict when it will happen so be prepared. Make sure everyone is buckled up, every time.

- **I'M THE ONLY ONE THAT GETS HURT**
  The fact is, you may the one injured or killed, but think of what you are leaving behind. Think how hurt your mother, father, siblings, children, spouse or friends will be. If you think you are the only one getting hurt, think again.

"We have a vaccine for the leading cause of death for Americans ages 2 through 33 – safety belts," said Dr. Jeffrey Runge, the head of the National Highway Traffic Safety Administration and an emergency room physician.

Unbelted Rear Seat Passenger



"We have a vaccine for the leading cause of death for Americans ages 2 through 33 -- safety belts," Dr. Jeffrey Runge - Director - National Highway Traffic Safety Administration and Emergency Room Physician

Resolution for Strengthening North Carolina's Safety Belt Law

WHEREAS, in 2003, there were 231,247 reported motor vehicle collisions on North Carolina's highways that resulted in 1,552 fatalities and 134,472 persons injured;

WHEREAS, North Carolina's safety belt use rate is currently at 86.1%;

WHEREAS, unbelted occupants still accounted for 554 or 43% of all motor vehicle related fatalities (380 drivers and 174 passengers) in 2003;

WHEREAS, studies indicate that a person who is unrestrained is ten (10) times more likely to suffer a Class A or severe injury and twenty (20) times more likely to suffer a fatal injury when compared with people who are belted;

WHEREAS, North Carolina motorists who refuse to fasten their safety belts, have continued to drive up the cost of the crash tax (crash cost per person) to over $1,100 per person in North Carolina;

WHEREAS, recent increases in fines for front seat occupants not using their safety belts has had little to no effect on the compliance rates;

WHEREAS, a 2004 survey found that North Carolina's pickup truck and van safety belt usage rates lag far behind the overall compliance rates in large because these two vehicle types include vehicles that are licensed as either Farm or Commercial vehicles and are presently are exempt from current safety belt laws; and

WHEREAS, strengthening current North Carolina safety belt laws is consistent with the mission of the Executive Committee for Highway Safety; now, therefore, be it

RESOLVED, that the Executive Committee for Highway Safety unanimously and strongly supports revising North Carolina General Statute §20-135.2A to include: 1) Mandating safety belt usage for **all** vehicles except those exempted by Federal Standards, 2) Mandating safety belt usage for **all** seating positions in a vehicle, 3) Increasing fines for non-compliance from $25 per violation to $50 per violation and 4) Assessing one driver's license point to the operator's license for non-compliance of the driver.

David D. King

David D. King, Chairman
Executive Committee for Highway Safety
April 11, 2005

Executive Committee for Highway Safety Members

David King
Committee Chair
Deputy Secretary – Transit
North Carolina Department of Transportation

Susan Coward
Committee Vice Chair
Deputy Secretary – Intergovernmental Affairs
North Carolina Department of Transportation

Robert Andrews, Jr., CSP
Director – Safety & Loss Control
North Carolina Department of Transportation

Debbie Barbour, P.E.
Director - Preconstruction
North Carolina Department of Transportation

Ken Bumgarner
Retired Chief of Police
Jacksonville Police Department

Fletcher Clay
Colonel
North Carolina State Highway Patrol

Peg Dorer
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North Carolina Conference of District Attorneys

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Herb Garrison III, MD
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Eastern Carolina Injury Prevention Program

Terry Hopkins, P.E.
State Traffic Safety Engineer
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Director – Public Information Office
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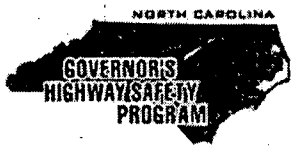
NCDOT – Division of Motor Vehicles

Steve Varnedoe, P.E.
Chief Engineer – Operations
North Carolina Department of Transportation

Jim Westmoreland, P.E.
Director of Transportation
City of Greensboro

Michael Yaniero
Chief of Police
Jacksonville Police Department



On April 1, 2005, the U.S. Department of Transportation Secretary Norman Y. Mineta announced a new national education safety belt campaign message aimed at truck drivers, BE READY. BE BUCKLED.

The Commercial Motor Vehicle Safety Belt Partnership was created by Secretary Mineta to combat low safety belt use among the nation's commercial motor vehicle drivers. Over the past year, the Partnership has increased to include additional representatives from the motor carrier safety community. The announcement was prompted by a new national study released by the Secretary that found only 48 percent of all commercial vehicle drivers wear safety belts.

Nationally, 80 percent of passenger vehicle drivers wear safety belts. In comparison, the low number of truck drivers buckling up has taken a severe toll. In 2003, of the 620 commercial drivers killed in crashes, almost half (309) were not wearing safety belts. Of the 171 drivers who were ejected from their trucks, almost 80 percent of them were not wearing safety belts.

Facts

The overall safety belt usage rate for commercial vehicle drivers is 48%. (Source: 2003 FMCSA Safety Belt Usage by Commercial Motor Vehicle Drivers Study)

620 drivers of large trucks died in truck related crashes in 2003. (Source: 2003 FARS)

309 drivers of large trucks died and were not using their safety belts in 2003. (Source: 2003 FARS)

135 drivers of large trucks were ejected and were not using their safety belts in 2003. (Source: 2003 FARS)

Truck drivers have more work-related fatalities than any other occupation, accounting for approximately 14% of all job-related fatalities. (Source: U.S. Dept. of Labor Statistics, Census of Fatal Occupational Injuries)

60% of truck occupant fatalities in large trucks involve a rollover. (Source: NHTSA - National Highway Traffic Safety Administration)

Rollover in a large truck increases the likelihood of fatality 30 times. (Source: Univ. of Michigan Transportation Research Institute, Center for National Truck Statistics)

32% of the truck drivers surveyed report that they had been involved in an accident in their truck at some point in their career. (Source: 2002 Mid - America Truck Show Survey)

65% of truck drivers think that safety belt usage in large trucks should be required by law. (Source: 2002 Mid America Truck Show Survey)

In 2003:

457,000 large trucks were involved in crashes in the United States, 4,986 people died and 122,000 were injured in those crashes at an estimated cost to the nation of $26 billion.

- More than 80% of all fatal truck crashes involved at least one other vehicle, usually a passenger car, pick-up, sport utility vehicle or van.

In fatalities resulting from crashes involving large trucks, 78% were occupants of another vehicle, 8% were non-occupants, and 15% were occupants of a large truck.

- In injuries resulting from crashes involving large trucks, 75% were occupants of another vehicle, 3% were non-occupants, and 22% were occupants of a large truck.

- In 2003, the majority of large truck crashes occurred in good weather (85%), on dry roads (81%), during the daytime (66%), and on weekdays (84%).

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 671*

Short Title:	Real Property Electronic Recording.	(Public)
Sponsors:	Senators Hartsell; and Berger of Rockingham.	
Referred to:	Judiciary II.	

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO ENACT THE UNIFORM REAL PROPERTY ELECTRONIC RECORDING ACT, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 47 of the General Statutes is amended by adding a new Article to read:

"Article 1A.

"Uniform Real Property Electronic Recording Act.

"**§ 47-16.1. Short title.**

This Article may be cited as the Uniform Real Property Electronic Recording Act.

"**§ 47-16.2. Definitions.**

In this Article:

(1) "Document" means information that is:

a. Inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

b. Eligible to be recorded in the land records maintained by the register of deeds.

(2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) "Electronic document" means a document that is received by the register of deeds in an electronic form.

(4) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

"**§ 47-16.3. Validity of electronic documents.**

(a) If a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying this Article.

(b) If a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature.

(c) A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to notarize, acknowledge, verify, witness, or administer the oath, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.

"**§ 47-16.4. Recording of documents.**

(a) In this section, "paper document" means a document that is received by the register of deeds in a form that is not electronic.

(b) A register of deeds:

(1) Who implements any of the functions listed in this section shall do so in compliance with standards adopted by the Secretary of State.

(2) May receive, index, store, archive, and transmit electronic documents.

(3) May provide for access to, and for search and retrieval of, documents and information by electronic means.

(4) Who accepts electronic documents for recording shall continue to accept paper documents as authorized by law and shall place entries for both types of documents in the same index.

(5) May convert paper documents accepted for recording into electronic form.

(6) May convert into electronic form information recorded before the register of deeds began to record electronic documents.

(7) May accept electronically any fee or tax that the register of deeds is authorized to collect.

(8) May agree with other officials of this State or a political subdivision thereof on procedures or processes to facilitate the electronic satisfaction of conditions to recording and the electronic payment of fees and taxes.

"**§ 47-16.5. Administration and standards.**

(a) Standard-Setting Agency. – The Secretary of State shall adopt standards to implement this Article upon recommendation of the Electronic Recording Council. The Secretary of State may direct the Council to revise any portion of the recommended standards the Secretary deems inadequate or inappropriate. Technological standards and specifications adopted by the Secretary of State to implement this Article are engineering standards for the purposes of G.S. 150B-2(8a)h.

(b) Electronic Recording Council Created. – The Electronic Recording Council is created in the Department of the Secretary of State to advise and assist the Secretary of State in the adoption of standards to implement this Article. The Council shall review

the functions listed in G.S. 47-16.4 and shall formulate and recommend to the Secretary standards for recording electronic documents and implementing the other functions listed in G.S. 47-16.4. The Council shall report its findings and recommendations to the Secretary of State at least once each calendar year. The Council shall advise the Secretary of State on a continuing basis of the need to adopt, amend, revise, or repeal standards. The Council may advise the Secretary of State on any other matter the Secretary refers to the Council.

(c) Council Membership, Terms, and Vacancies. – The Council shall consist of 13 members as follows:

(1) Seven members appointed by the North Carolina Association of Registers of Deeds. It is the intent of the General Assembly that the North Carolina Association of Registers of Deeds shall appoint as members a representative selection of registers of deeds from large, medium, and small counties, urban and rural counties, and the different geographic areas of this State.

(2) One member appointed by the North Carolina Bar Association.

(3) One member appointed by the North Carolina Society of Land Surveyors.

(4) One member appointed by the North Carolina Bankers Association.

(5) One member appointed by the North Carolina Land Title Association.

(6) One member appointed by the North Carolina Association of Assessing Officers.

(7) The Secretary of Cultural Resources or the Secretary's designee.

In making appointments to the Council, each appointing authority shall select appointees with the ability and commitment to fulfill the purposes of the Council.

Appointed members shall serve four-year terms, except that the initial appointments by the North Carolina Bar Association, the North Carolina Bankers Association, the North Carolina Association of Assessing Officers, and three of the initial appointments by the North Carolina Association of Registers of Deeds shall be for two years. All initial terms shall commence on the effective date of this Article. Members shall serve until their successors are appointed. An appointing authority may reappoint a member for successive terms. A vacancy on the Council shall be filled in the same manner in which the original appointment was made, and the term shall be for the balance of the unexpired term.

(d) Council Meetings and Officers. – The Secretary of State shall call the first meeting of the Council. At the first meeting and biennially thereafter, the Council shall elect from its membership a chair and a vice-chair to serve two-year terms. Meetings may be called by the chair, the vice-chair, or the Secretary of State. Meetings shall be held as often as necessary, but at least once a year.

(e) Council Compensation. – None of the members of the Council shall receive compensation for serving on the Council, but Council members shall receive per diem, subsistence, and travel expenses in accordance with G.S. 138-5 and G.S. 138-6, as applicable.

(f) Staff and Other Assistance. – As soon as practicable and as needed thereafter, the Council shall identify the information technology expertise it needs and report its needs to the Secretary of State. The Council shall also report any other expertise needed to fulfill its responsibilities. The Secretary of State shall provide professional and clerical staff and other services and supplies, including meeting space, as needed for the Council to carry out its duties in an effective manner. The Secretary of State may appoint additional committees to advise and assist the Council in its work.

The Council shall consult with the North Carolina Local Government Information Systems Association, and may consult with any other person the Council deems appropriate, to advise and assist the Council in its work.

(g) Uniformity of Standards. – To keep the standards and practices of registers of deeds in this State in harmony with the standards and practices of recording offices in other jurisdictions that enact substantially this Article and to keep the technology used by registers of deeds in this State compatible with technology used by recording offices in other jurisdictions that enact substantially this Article, the Secretary of State and the Council shall consider all of the following in carrying out their responsibilities under this Article, so far as is consistent with its purposes, policies, and provisions:

(1) Standards and practices of other jurisdictions.

(2) The most recent standards promulgated by national standard-setting bodies, such as the Property Records Industry Association.

(3) The views of interested persons and other governmental officials and entities.

(4) The needs of counties of varying size, population, and resources.

"**§ 47-16.6. Uniformity of application and construction.**

In applying and construing this Article, consideration must be given to promoting uniformity of interpretation of the Uniform Real Property Electronic Recording Act among states that enact it.

"**§ 47-16.7. Relation to Electronic Signatures in Global and National Commerce Act.**

This Article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001, et seq.) but does not modify, limit, or supersede section 101(c) of that act (15 U.S.C. § 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. § 7003(b))."

SECTION 2. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Real Property Electronic Recording Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 671*
PROPOSED COMMITTEE SUBSTITUTE S671-CSRC-21 [v.1]

4/24/2005 11:17:37 AM

Short Title: Real Property Electronic Recording. (Public)

Sponsors:

Referred to:

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO ENACT THE UNIFORM REAL PROPERTY ELECTRONIC RECORDING ACT, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 47 of the General Statutes is amended by adding a new Article to read:

"Article 1A.

"Uniform Real Property Electronic Recording Act.

"**§ 47-16.1. Short title.**

This Article may be cited as the Uniform Real Property Electronic Recording Act.

"**§ 47-16.2. Definitions.**

In this Article:

(1) "Document" means information that is:

a. Inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

b. Eligible to be recorded in the land records maintained by the register of deeds.

(2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) "Electronic document" means a document that is received by the register of deeds in an electronic form.

(4) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture,

public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

"**§ 47-16.3. Validity of electronic documents.**

(a) If a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying this Article.

(b) If a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature.

(c) A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to notarize, acknowledge, verify, witness, or administer the oath, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.

"**§ 47-16.4. Recording of documents.**

(a) In this section, "paper document" means a document that is received by the register of deeds in a form that is not electronic.

(b) A register of deeds:

(1) Who implements any of the functions listed in this section shall do so in compliance with standards adopted by the Secretary of State.

(2) May receive, index, store, archive, and transmit electronic documents.

(3) May provide for access to, and for search and retrieval of, documents and information by electronic means.

(4) Who accepts electronic documents for recording shall continue to accept paper documents as authorized by law and shall place entries for both types of documents in the same index.

(5) May convert paper documents accepted for recording into electronic form.

(6) May convert into electronic form information recorded before the register of deeds began to record electronic documents.

(7) May accept electronically any fee or tax that the register of deeds is authorized to collect.

(8) May agree with other officials of this State or a political subdivision thereof on procedures or processes to facilitate the electronic satisfaction of conditions to recording and the electronic payment of fees and taxes.

"**§ 47-16.5. Administration and standards.**

(a) Standard-Setting Agency. – The Secretary of State shall adopt standards to implement this Article upon recommendation of the Electronic Recording Council. The Secretary of State may direct the Council to revise any portion of the recommended standards the Secretary deems inadequate or inappropriate. Technological standards and specifications adopted by the Secretary of State to implement this Article are engineering standards for the purposes of G.S. 150B-2(8a)h.

(b) Electronic Recording Council Created. – The Electronic Recording Council is created in the Department of the Secretary of State to advise and assist the Secretary of State in the adoption of standards to implement this Article. The Council shall review the functions listed in G.S. 47-16.4 and shall formulate and recommend to the Secretary standards for recording electronic documents and implementing the other functions listed in G.S. 47-16.4. The Council shall report its findings and recommendations to the Secretary of State at least once each calendar year. The Council shall advise the Secretary of State on a continuing basis of the need to adopt, amend, revise, or repeal standards. The Council may advise the Secretary of State on any other matter the Secretary refers to the Council.

(c) Council Membership, Terms, and Vacancies. – The Council shall consist of 13 members as follows:

(1) Seven members appointed by the North Carolina Association of Registers of Deeds. It is the intent of the General Assembly that the North Carolina Association of Registers of Deeds shall appoint as members a representative selection of registers of deeds from large, medium, and small counties, urban and rural counties, and the different geographic areas of this State.

(2) One member appointed by the North Carolina Bar Association.

(3) One member appointed by the North Carolina Society of Land Surveyors.

(4) One member appointed by the North Carolina Bankers Association.

(5) One member appointed by the North Carolina Land Title Association.

(6) One member appointed by the North Carolina Association of Assessing Officers.

(7) The Secretary of Cultural Resources or the Secretary's designee.

In making appointments to the Council, each appointing authority shall select appointees with the ability and commitment to fulfill the purposes of the Council.

Appointed members shall serve four-year terms, except that the initial appointments by the North Carolina Bar Association, the North Carolina Bankers Association, the North Carolina Association of Assessing Officers, and three of the initial appointments by the North Carolina Association of Registers of Deeds shall be for two years. All initial terms shall commence on the effective date of this Article. Members shall serve until their successors are appointed. An appointing authority may reappoint a member for successive terms. A vacancy on the Council shall be filled in the same manner in which the original appointment was made, and the term shall be for the balance of the unexpired term.

(d) Council Meetings and Officers. – The Secretary of State shall call the first meeting of the Council. At the first meeting and biennially thereafter, the Council shall elect from its membership a chair and a vice-chair to serve two-year terms. Meetings may be called by the chair, the vice-chair, or the Secretary of State. Meetings shall be held as often as necessary, but at least once a year.

(e) Council Compensation. – None of the members of the Council shall receive compensation for serving on the Council, but Council members shall receive per diem,

subsistence, and travel expenses in accordance with G.S. 138-5 and G.S. 138-6, as applicable.

(f) Staff and Other Assistance. – As soon as practicable and as needed thereafter, the Council shall identify the information technology expertise it needs and report its needs to the Secretary of State. The Council shall also report any other expertise needed to fulfill its responsibilities. The Secretary of State shall provide professional and clerical staff and other services and supplies, including meeting space, as needed for the Council to carry out its duties in an effective manner. The Secretary of State may appoint additional committees to advise and assist the Council in its work.

The Council shall consult with the North Carolina Local Government Information Systems Association, and may consult with any other person the Council deems appropriate, to advise and assist the Council in its work.

(g) Uniformity of Standards. – To keep the standards and practices of registers of deeds in this State in harmony with the standards and practices of recording offices in other jurisdictions that enact substantially this Article and to keep the technology used by registers of deeds in this State compatible with technology used by recording offices in other jurisdictions that enact substantially this Article, the Secretary of State and the Council shall consider all of the following in carrying out their responsibilities under this Article, so far as is consistent with its purposes, policies, and provisions:

(1) Standards and practices of other jurisdictions.

(2) The most recent standards adopted by national standard-setting bodies, such as the Property Records Industry Association.

(3) The views of interested persons and other governmental officials and entities.

(4) The needs of counties of varying size, population, and resources.

"**§ 47-16.6. Uniformity of application and construction.**

In applying and construing this Article, consideration shall be given to promoting uniformity of interpretation of the Uniform Real Property Electronic Recording Act among states that enact it.

"**§ 47-16.7. Relation to Electronic Signatures in Global and National Commerce Act.**

This Article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001, et seq.) but does not modify, limit, or supersede section 101(c) of that act (15 U.S.C. § 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. § 7003(b))."

SECTION 2. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Real Property Electronic Recording Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.

SECTION 3. This act is effective when it becomes law.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 671*

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S671-ARC-7 [v.1]

Date _____,2005

Comm. Sub. [YES]
Amends Title [NO]
S671-CSRC-21[v.1]

Senator Snow

moves to amend the bill on page 2, line 41, by deleting the phrase "deems inadequate or inappropriate.", and substituting the following:

"determines to be out of compliance with existing law or not consistent with accepted industry technical standards and specifications necessary to maintain consistency and uniformity for nation-wide electronic commerce.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 671*

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S671-ARC-6 [v.1]

Date _____,2005

Comm. Sub. [YES]
Amends Title [NO]
S671-CSRC-21

Senator Hartsell

moves to amend the bill on page 2, line 14, by adding the following after the period: "Nothing in this act shall prohibit the North Carolina Board of Examinors for Engineers and Surveyors from requiring that the image of a seal accompany any plat or map that is presented electronically for recording.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

State of North Carolina
General Statutes Commission
9001 Mail Service Center
RALEIGH, NORTH CAROLINA
27699-9001

MEMORANDUM

TO: Senate Judiciary II Committee

FROM: General Statutes Commission

DATE: April 1, 2005

RE: **Senate Bill 671 (Real Property Electronic Recording)**

General Comments

This bill enacts a North Carolina version of the Uniform Electronic Recording Act (URPERA), which was adopted in 2004 by the National Conference of Commissioners on Uniform State Laws (NCCUSL). URPERA expressly authorizes registers of deeds to receive, record, and retrieve real property documents and information in electronic form and provides that a document in electronic form and an electronic signature satisfy, respectively, State law requirements that a real property document be an original, on paper, or in writing and that the document contain a signature. It also requires a register of deeds who implements electronic recording to comply with uniform statewide standards, and it establishes a method for adopting these standards.

Limited experiments with recording electronic documents have already been initiated in this State under S.L. 2002-115, as amended by S.L. 2003-326, a local act authorizing the electronic recording of documents in Mecklenburg, Cabarrus, Durham, Harnett, Moore, New Hanover, and Randolph Counties. The Register of Deeds of Mecklenburg County has implemented an electronic recordation system and has been accepting deed of trust cancellations electronically. Other registers of deeds are interested in following her example. Section 6.1 of Part VI of Session Law 2004-161 (Studies Act of 2004) required the General Statutes Commission (Commission) to study methods for establishing uniform legal standards for electronic recording (specifically, receipt, recordation, authentication, preservation, and retrieval of electronic documents). The study charge included a review of URPERA, the main goal of which is to provide for the acceptance and processing of electronic land records in accordance with uniform standards.

The Commission conducted its review and concluded that, based on the information before it, URPERA was an effective means of establishing electronic recordation of land records

in this State. The Commission's review and conclusions are set out in its report to the 2005 General Assembly and its supplement to that report.

Specific Comments

Section 1 enacts a version of URPERA as Article 1A of Chapter 47 of the General Statutes.

Proposed § 47-16.1 ("Short title") contains the article title (the "Uniform Real Property Electronic Recording Act").

Proposed § 47-16.2 ("Definitions") contains key definitions that were taken from the Uniform Electronic Transactions Act (UETA), which this State adopted as Article 40 of Chapter 66 of the General Statutes. The definitions of "electronic" and "electronic signature" are the same as UETA's, and the definitions of "document" and "electronic document" are based on UETA's definitions of "record" and "electronic record."

Proposed § 47-16.3 ("Validity of electronic documents") overlaps UETA. Although nothing in UETA prevents it from applying to electronic real property documents, which are apparently valid and enforceable as between the parties under UETA, there is no broad agreement nationwide that these documents can be recorded. Proposed § 47-16.3 eliminates such doubts by providing in essence that electronic documents and electronic signatures are acceptable. The section also eliminates any requirement that a notary's electronic stamp or seal be an actual image.

Proposed § 47-16.4 ("Recording of documents") expressly authorizes registers of deeds to accept electronic documents for recordation but requires conformity with standards adopted by the Secretary of State to implement URPERA. It does not compel a register of deeds to implement electronic recording. The section contains a list of specifically authorized functions that are related to electronic filing. It does not itself, however, contain any requirements related to security or authentication.

Proposed § 47-16.5 ("Administration and standards") adopts a standard-setting approach that is different from the Uniform Act. URPERA contains two alternatives for a standard-setting entity: a new independent commission with a majority of registers of deeds or an existing State agency. The approach taken in this bill blends URPERA's alternatives, due to various factors described in the supplement to the Commission's report.

Proposed § 47-16.5 authorizes the Secretary of State to adopt standards to implement URPERA on the recommendation of a new advisory body, the Electronic Recording Council (Council). The Council is responsible for developing and recommending to the Secretary of State initial standards to implement URPERA and, on an ongoing basis, any changes to the standards that may be needed. The Council is required to meet at least once a year and to make an annual report to the Secretary. If the Secretary deems any portion of the Council's recommended standards inadequate or inappropriate, the Secretary may direct the Council to revise that portion.

The Council has 13 members and is located within the Department of Secretary of State for organizational, budgetary, and administrative purposes. Of its members, 12 are appointed as follows: seven by the North Carolina Association of Registers of Deeds, one by the North Carolina Bar Association, one by the North Carolina Society of Land Surveyors, one by the North Carolina Bankers Association, one by the North Carolina Land Title Association, and one by the North Carolina Association of Assessing Officers. These members serve staggered four-year terms. The remaining member is the Secretary of Cultural Resources or the Secretary's designee. The fact that a majority of the members are registers of deeds is consistent with URPERA's first alternative.

Because the Council must be a working body, a group small in size is important. In discussing the Council's composition, the Commission recognized that all groups that could be affected or might make a contribution could not be directly represented on the Council without creating a body of 25 to 30 members, which would be unworkable. The Commission attempted to include the groups most affected on the Council and provide a vehicle for contribution from others through consultation requirements and the option for additional committees to advise the Council.

The Commission recommends direct appointments to the Council, rather than nominations with appointments by some other authority, to reduce the time required for the Council to begin operating, being of the opinion that direct appointments can be appropriate for an advisory body. Speed in implementing URPERA was a concern expressed by different groups who spoke to the Commission.

In the interest of national uniformity, proposed § 47-16.5 also requires both the Council and the Secretary of State to consider a list of factors in adopting standards for this State, including standards set by national bodies and by other jurisdictions.

Proposed § 47-16.6 ("Uniformity of application and construction") establishes uniformity of interpretation as a goal among states enacting URPERA.

Proposed § 47-16.7 ("Relation to Electronic Signatures in Global and National Commerce Act") covers the relationship between URPERA and the federal Electronic Signatures in Global and National Commerce Act (E-Sign).

Section 2 authorizes the Revisor of Statutes to print official and drafters' comments.

Section 3 provides that the act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 934

Short Title:	Notary Public Act.-AB	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO ADD CHAPTER 10B TO THE GENERAL STATUTES RELATING TO NOTARIES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 10A of the General Statutes is repealed.

SECTION 2. The General Statutes of North Carolina are amended by adding a new Chapter to read:

"**Chapter 10B.**

"**Notaries.**

"Article 1.

"Notary Public Act.

"Part 1. General Provisions.

"**§ 10B-1. Short title.**

This act is the Notary Public Act and may be cited by that name.

"**§ 10B-2. Purposes.**

This Chapter shall be construed and applied to advance its underlying purposes, which are the following:

(1) To promote, serve, and protect the public interests.

(2) To simplify, clarify, and modernize the law governing notaries.

(3) To prevent fraud and forgery.

(4) To foster ethical conduct among notaries.

(5) To enhance cross-border recognition of notarial acts.

(6) To integrate procedures for traditional paper and electronic notarial acts.

"**§ 10B-3. Definitions.**

The following definitions apply in this Chapter:

(1) Acknowledgment. –"Acknowledgment" means a notarial act in which an individual, at a single time and place:

a. Appears in person before the notary and presents a record;

b. Is personally known to the notary or identified by the notary through satisfactory evidence and indicates to the notary that the signature on the record was voluntarily affixed by the individual for the purposes stated within the record and, if applicable, that the individual had due authority to sign in a particular representative capacity.

(2) Affirmation. –"Affirmation" means a notarial act, or part thereof, which is legally equivalent to an oath and in which an individual at a single time and place:

a. Appears in person before the notary;

b. Is personally known to the notary or identified by the notary through satisfactory evidence; and

c. Makes a vow of truthfulness on penalty of perjury, based on personal honor and without invoking a deity or using any form of the word "swear".

(3) Commission. –"Commission" means the empowerment to perform notarial acts and the written evidence of authority to perform those acts.

(4) Credible Witness. –"Credible Witness" means an honest, reliable, and impartial person who is personally known to the notary and takes an oath or affirmation from the notary to confirm a signer's identity.

(5) Director. –"Director" means the Division Director for the North Carolina Department of the Secretary of State Notary Public Section.

(6) Jurat. –"Jurat" means an act in which the notary certifies the date, place, and person before whom an affidavit is sworn or affirmed.

(7) Moral Turpitude. –"Moral Turpitude" means conduct contrary to expected standards of honesty, morality, or integrity.

(8) Nickname. –"Nickname" means a descriptive, familiar, or shortened form of a proper name.

(9) Notarial Act; Notary Act; Notarization. –"Notarial Act," "Notary Act," and "Notarization" mean any act that a notary is empowered to perform under this Chapter.

(10) Notarial Certificate; Certificate. –"Notarial Certificate" and "Certificate" mean the portion of a notarized record that is completed by the notary, bears the notary's signature and seal, and states the facts attested by the notary in a particular notarization.

(11) Notary Public; Notary. –"Notary Public" and "Notary" mean a person commissioned to perform notarial acts under this Chapter. A notary is a public officer of the State of North Carolina and shall act in full and strict compliance with this act.

(12) Oath. –"Oath" means a notarial act, or part thereof, which is legally equivalent to an affirmation and in which an individual at a single time and place:

a. Appears in person before a notary;

b. Is personally known to the notary or identified by the notary through satisfactory evidence; and

c. Makes a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear".

(13) Official Misconduct. –"Official Misconduct" means either of the following:

a. A notary's performance of a prohibited act or failure to perform a mandated act set forth in this Chapter or any other law in connection with notarization.

b. A notary's performance of a notarial act in a manner found by the Secretary to be negligent or against the public interest.

(14) Personal Appearance; Appear in Person Before a Notary. –"Personal Appearance" and "Appear in Person Before a Notary" mean an individual and a notary are physically before each other, e.g., in the same room, such that they may freely see and communicate with one another and exchange records back and forth during the notarization process.

(15) Personal Knowledge of Identity. –"Personal Knowledge of Identity" means familiarity with an individual resulting from interactions with that individual over a period of time sufficient to eliminate every reasonable doubt that the individual has the identity claimed.

(16) Principal. –"Principal" means a person whose signature is notarized; or a person, other than a credible witness, taking an oath or affirmation from the notary.

(17) Record. –"Record" means information that is inscribed on a tangible medium and called a traditional or paper record.

(18) Regular Place of Work or Business. –"Regular Place of Work or Business" means a location (office or other workspace) where an individual regularly spends all or part of his or her work time.

(19) Satisfactory Evidence of a Signer's Identity. –"Satisfactory Evidence of a Signer's Identity" means identification of an individual based on either of the following:

a. At least one current document issued by a federal, state, or federal- or state-recognized tribal government agency bearing the photographic image of the individual's face and either the signature or a physical description of the individual.

b. The oath or affirmation of one credible witness unaffected by the record or transaction who is personally known to the notary and who personally knows the individual seeking to be identified.

(20) Seal; Stamp. –"Seal" and "Stamp" mean a device for affixing on a paper record an image containing a notary's name, the words "Notary Public," and other information as required in G.S. 10B-24 of this Chapter.

(21) Secretary. –"Secretary" means the North Carolina Secretary of State or the Secretary's designee.

(22) Signature. –"Signature" means a traditional original signature ink on paper transactions of the notary's name under which the notary is commissioned. A facsimile signature is not acceptable for notary purposes unless otherwise permitted by law.

(23) Subscribing Witness. –"Subscribing Witness" means a person who either watches another individual sign a record or takes that individual's acknowledgment of an already-signed record and appears before the notary on behalf of the principal. The subscribing witness must sign the document in addition to the principal, must be personally known by the notary or prove identity to the notary by satisfactory evidence, and must take an oath or affirmation stating that he or she witnessed the principal sign.

(24) Verification; Proof. –"Verification" or "Proof" means a notarial act where a person certifies under oath or affirmation that he or she witnessed the principal either execute, record, or acknowledge his or her signature on an already-executed record.

"Part 2. Commissioning.

"**§ 10B-4. Qualifications.**

(a) Except as provided in subsection (d) of this section, the Secretary shall commission as a notary any qualified person who submits an application in accordance with this Chapter.

(b) A person qualified for a notarial commission shall meet all of the following requirements:

(1) Be at least 18 years of age or legally emancipated.

(2) Reside or have a regular place of work or business in this State.

(3) Reside legally in the United States.

(4) Speak, read, and write the English language.

(5) Possess a high school diploma or equivalent.

(6) Pass the course of instruction described in this Article, unless the person is a licensed member of the North Carolina State Bar.

(7) Purchase and keep as a reference the most recent manual approved by the Secretary that describes the duties and authority of notaries public.

(8) Submit an application containing no significant misstatement or omission of fact. The application form shall be provided by the Secretary and be available at the register of deeds office in each county. Every application shall bear the signature of the applicant written with pen and ink, and the signature shall be acknowledged by the applicant before a person authorized to administer oaths. The applicant shall also obtain the recommendation of one publicly elected official in North Carolina whose recommendation shall be contained on the application.

(9) Pay a nonrefundable application fee of fifty dollars ($50.00).

(c) The notary shall be commissioned in his or her county of residence, unless the notary is not a North Carolina resident, in which case he or she shall be commissioned in the county of his or her employment or business.

(d) The Secretary may deny an application for commission or recommission based upon:

(1) Submission of an incomplete application or an application containing material misstatement or omission of fact;

(2) The applicant's conviction or plea of admission or nolo contendere to a felony or any crime involving dishonesty or moral turpitude. In no case may a commission be issued to an applicant within 10 years after release from prison, probation, or parole, whichever is later;

(3) A finding or admission of liability against the applicant in a civil lawsuit based on the applicant's deceit;

(4) The revocation, suspension, restriction, or denial of a notarial commission or professional license by this or any other state or nation. In no case may a commission be issued to an applicant within five years after the completion of all conditions of any disciplinary order;

(5) A finding that the applicant has engaged in official misconduct, whether or not disciplinary action resulted;

(6) An applicant knowingly using false or misleading advertising in which the applicant as a notary represents that the applicant has powers, duties, rights, or privileges that the applicant does not possess by law;

(7) A finding by a state bar or court that the applicant has engaged in the unauthorized practice of law.

"**§ 10B-5. Application for commission.**

Every application for a notary commission shall be made on paper with original signatures, or in another form determined by the Secretary, and shall include:

(1) A statement of the applicant's personal qualifications as required by this Chapter;

(2) A certificate or signed statement by the instructor evidencing successful completion of the course of instruction as required by this Chapter;

(3) A notarized declaration of the applicant, as required by this Chapter;

(4) Any other information that the Secretary deems appropriate; and

(5) The application fee required by this Chapter.

"**§ 10B-6. Statement of personal qualification.**

(a) The application for a notary commission shall state or include at least:

(1) The applicant's full legal name and the name to be used for commissioning, excluding nicknames;

(2) The applicant's date of birth;

(3) The applicant's residence mailing and street address(es) and telephone number(s);

(4) The applicant's county of residence;

(5) The applicant's employer's name, business street and mailing address(es) and telephone number(s);
(6) The applicant's last four digits of his or her social security number;
(7) The applicant's personal and business e-mail addresses;
(8) A declaration that the applicant is a citizen of the United States or proof of the applicant's legal residency in this country;
(9) A declaration that the applicant can speak, read, and write in the English language;
(10) A complete listing of any issuances, denials, revocations, suspensions, restrictions, and resignations of a notarial commission, professional license, or public office involving the applicant in this or any other state or nation;
(11) A complete listing of any criminal convictions of the applicant, including any pleas of admission or nolo contendere, in this or any other state or nation;
(12) A complete listing of any civil findings or admissions of fault or liability regarding the applicant's activities as a notary, in this or any other state or nation.

(b) Except as provided herein, the information contained on an application shall be a public record. The applicant's date of birth, social security number, personal e-mail address(es), residence street address and residence telephone number(s) shall be considered confidential information.

"**§ 10B-7. Course of study and examination.**

(a) Every applicant for an initial notary commission shall, within the three months preceding application, take a course of classroom instruction of not less than six hours approved by the Secretary of State and pass an examination approved by the Secretary. Each examination approved by the Director has a minimum passing grade of eighty percent (80%).

(b) Every applicant for recommissioning shall pass a written examination approved by and administered by or under the direction of the Secretary, unless the person is a licensed member of the North Carolina State Bar.

(c) The content of the course of instruction and the basis for the written examinations shall be notarial laws, procedures, and ethics.

(d) The Secretary may charge such fees as are reasonably necessary to pay the cost associated with developing and administering examinations permitted by this Chapter and for conducting the training of notaries and notary instructors. All funds received by the Secretary under this section shall be deposited into a Notary Public Special Fund, which shall be subject to audit pursuant to the Executive Budget Act and shall not revert to the General Fund. The Special Fund shall be used for the administration of this Chapter.

"**§ 10B-8. Length of term and jurisdiction.**

A person commissioned under this Chapter may perform notarial acts in any part of this State for a term of five years, unless the commission is earlier revoked or resigned.

"**§ 10B-9. Commission; oath of office.**

(a) If granted, the Secretary shall notify the appointee and shall instruct the appointee regarding the proper procedure for taking the oath at the register of deeds office in the county of his or her commissioning.

(b) The appointee shall appear before the register of deeds no later than 45 days after commissioning and shall be duly qualified by taking the general oath of office prescribed in G.S. 11-11 and the oath prescribed for officers in G.S. 11-7.

(c) The register of deeds shall then place the notary record in a book designated for that purpose, or the notary record may be recorded in the Consolidated Document Book and indexed in the Consolidated Real Property Index under the notary's name in the grantor index. The notary record may be kept in electronic format so long as the signature of the notary public may be viewed and printed. The notary record shall contain the name and the signature of the notary as commissioned, the effective date and expiration date of the commission, the date the oath was administered, and the date of any restriction, suspension, revocation, or resignation. The record shall constitute the official record of the qualification of notaries public.

(d) The register of deeds shall deliver the commission to the notary following completion of the requirements of this section and shall notify the Secretary of State of the delivery.

(e) If the appointee does not appear before the register of deeds within 45 days of commissioning, the register of deeds must return the commission to the Secretary and the appointee must reapply for commissioning. If the appointee reapplies within one year of the granting of the commission, the Secretary may waive the educational requirements of this Chapter.

(f) As soon as practicable, or within six months of the effective date of this act, North Carolina registers of deeds and clerks of superior court shall send the pages and documents contained in their "Records of Notaries Public" created prior to 1991 to the Department for permanent storage.

"**§ 10B-10. Recommissioning.**

(a) A commissioned notary may apply for recommissioning no earlier than 10 weeks prior to the commission expiration date.

(b) A previously commissioned individual may apply for recommissioning as a notary within one year after the expiration of a previous commission; the Secretary may waive the educational requirements of this Chapter.

(c) Except as hereinafter set forth, an applicant for recommissioning as a notary shall submit a new application and comply anew with the provisions of this Chapter, except that an applicant for recommissioning shall not be required to complete the classroom course of study required by this Chapter if he or she complies with subsection (d) of this section and shall not be required to obtain the recommendation of a publicly elected official.

(d) An applicant for recommissioning shall be required to pass a written examination required by this Chapter, unless the person is a licensed member of the North Carolina State Bar.

"**§ 10B-11. Notarized declaration.**

The application for a notary public commission shall contain the following declaration to be executed by each applicant under oath:

Declaration of Applicant

I, _____ (name of applicant), solemnly swear or affirm under penalty of perjury that the information in this application is true, complete, and correct; that I understand the official duties and responsibilities of a notary public in this State, as described in the statutes; and that I will perform to the best of my ability all notarial acts in accordance with the law.

_____
(signature of applicant)

"**§ 10B-12. Application fee.**

Every applicant for a notary commission shall pay to the Secretary of State a nonrefundable application fee of fifty dollars ($50.00).

"**§ 10B-13. Instructor's certification.**

(a) The course of study required by G.S. 10B-4(b) shall be taught by an instructor certified in accordance with rules adopted by the Secretary. An instructor must meet the following requirements to be certified to teach a course of study for notaries public:

(1) Complete and pass an instructor certification course of not less than six hours taught by the Director or other person approved by the Secretary.
(2) Have at least one year of active experience as a notary public.
(3) Maintain a current commission as a notary public.
(4) Possess the current notary public guidebook.
(5) Pay a nonrefundable fee of fifty dollars ($50.00).

(b) Certification to teach a course of study for notaries effective for two years. A certification may be renewed by passing a recertification course taught by the Director or other person approved by the Secretary and by paying a nonrefundable fee of fifty dollars ($50.00).

(c) The following individuals may be certified to teach a course of study for notaries public without paying the fee required by this section, and they may renew their certification without paying the renewal fee, so long as they remain actively employed in the capacities named:

(1) Registers of deeds.
(2) Clerks of court.
(3) The Director and other duly authorized employees of the Secretary.

(d) Former registers of deeds and clerks of court who have been certified as notary public instructors must apply for commissioning as a notary public but are exempt from the education requirements of G.S. 10B-7 after successful completion of an examination administered by the Secretary.

(e) Assistant and deputy registers of deeds and assistant and deputy clerks of court must have a regular notary commission prior to receiving a certification or recertification as a notary public instructor.

(f) The Secretary may suspend or revoke the certification of a notary instructor for violating the provisions of this Chapter or any of the administrative rules promulgated hereunder.

"Part 3. Notarial Acts, Powers, and Limitations.

"**§ 10B-14. Powers and limitations.**

(a) A notary may perform any of the following notarial acts:

(1) Acknowledgments.

(2) Oaths and affirmations.

(3) Execute jurats.

(4) Verifications or proofs.

(b) A notarial act shall be attested by all of the following:

(1) The signature of the notary, exactly as shown on the notary's commission.

(2) The readable appearance of the notary's name, either from the notary's signature or from the notary's typed or printed name near the signature.

(3) The clear and legible appearance of the notary's stamp or seal.

(4) A statement of the date the notary's commission expires.

(c) A notary is disqualified from performing a notarial act if any of the following apply:

(1) The principal is not in the notary's presence at the time the notarial act is to be performed.

(2) The principal is not personally known to the notary or identified by the notary through satisfactory evidence.

(3) The principal shows a demeanor that causes the notary to have a compelling doubt about whether the principal knows the consequences of the transaction requiring a notarial act.

(4) The principal, in the notary's judgment, is not acting of his or her own free will.

(5) The notary is a signer of or is named, other than as a trustee in a deed of trust, in the document that is to be notarized.

(6) The notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in G.S. 10B-20, other than fees or other consideration paid for services rendered by a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker.

(7) The notary is a spouse, domestic partner, or relative by blood or marriage within two degrees of the principal, including in-law, step, and half relatives, unless the notary is an employee or a partner of an attorney licensed to practice law in North Carolina.

(d) A notary may certify the affixation of a signature by mark on a record presented for notarization if:

(1) The mark is affixed in the presence of the notary;

(2) The notary writes below the mark: "Mark affixed by (name of signer by mark) in presence of undersigned notary"; and

(3) The notary notarizes the signature by performing an acknowledgment, oath or affirmation, jurat, or verification or proof.

(e) If a principal is physically unable to sign or make a mark on a record presented for notarization, that principal may designate another person as his or her designee, who shall be a disinterested party, to sign on the principal's behalf pursuant to the following procedure:

(1) The principal directs the designee to sign the record in the presence of the notary and two witnesses unaffected by the record;

(2) The designee signs the principal's name in the presence of the principal, the notary, and the two witnesses;

(3) Both witnesses sign their own names to the record near the principal's signature;

(4) The notary writes below the principal's signature: "Signature affixed by designee in the presence of (names and addresses of principal and witnesses)"; and

(5) The notary notarizes the signature through an acknowledgment, oath or affirmation, jurat, or verification or proof.

(f) A notarial act performed in another jurisdiction by a notary public of that jurisdiction is valid to the same extent as if it had been performed by a notary commissioned under this Chapter.

(g) Commissioned officers on active duty in the United States armed forces who are authorized to perform notarial acts may perform the acts for persons serving in or with the United States armed forces, their spouses, and their dependents.

(h) The Secretary of State and register of deeds in the county in which a notary qualified may certify to the commission of the notary.

(i) A notary public who is not an attorney licensed to practice law in this State who advertises the person's services as a notary public in a language other than English, by radio, television, signs, pamphlets, newspapers, other written communication, or in any other manner, shall post or otherwise include with the advertisement the notice set forth in this subsection in English and in the language used for the advertisement. The notice shall be of conspicuous size, if in writing, and shall state: "I AM NOT AN ATTORNEY LICENSED TO PRACTICE LAW IN THE STATE OF NORTH CAROLINA, AND I MAY NOT GIVE LEGAL ADVICE OR ACCEPT FEES FOR LEGAL ADVICE." If the advertisement is by radio or television, the statement may be modified but must include substantially the same message.

(j) A notary public who is not an attorney licensed to practice law in this State is prohibited from representing or advertising that the notary public is an "immigration consultant" or expert on immigration matters unless the notary public is an accredited representative of an organization recognized by the Board of Immigration Appeals

pursuant to Title 8, Part 292, Section 2(a-e) of the Code of Federal Regulations (8 CFR § 292.2(a-e)).

(k) A notary public who is not an attorney licensed to practice law in this State is prohibited from rendering any service that constitutes the unauthorized practice of law.

(l) A notary public required to comply with the provisions of subsection (g) of this section shall prominently post at the notary public's place of business a schedule of fees established by law, which a notary public may charge. The fee schedule shall be written in English and in the non-English language in which the notary services were solicited and shall contain the notice required in subsection (i) of this section, unless the notice is otherwise prominently posted at the notary public's place of business.

(m) If notarial certificate wording is not provided or indicated for a record, a nonattorney notary shall not determine the type of notarial act or certificate to be used. This does not prohibit a notary from offering the selection of certificate forms recognized in this Chapter or promulgated by the Department of the Secretary of State.

(n) A nonattorney notary shall not assist another person in drafting, completing, selecting, or understanding a record or transaction requiring a notarial act.

(o) A notary shall not claim to have powers, qualifications, rights, or privileges that the office of notary does not provide, including the power to counsel on immigration matters.

"**§ 10B-15. Notaries ex officio.**

(a) The clerks of the superior court may act as notaries public in their several counties by virtue of their offices as clerks and may certify their notarial acts only under the seals of their respective courts. Assistant and deputy clerks of superior court, by virtue of their offices, may perform the following notarial acts and may certify these notarial acts only under the seals of their respective courts:

(1) Oaths and affirmations.

(2) Verifications or proofs.

Upon completion of the course of study provided for in G.S. 10B-4(b), assistant and deputy clerks of superior court may, by virtue of their offices, perform all other notarial acts and may certify these notarial acts only under the seals of their respective courts. A course of study attended only by assistant and deputy clerks of superior court may be taught at any mutually convenient location agreed to by the Secretary and the Administrative Officer of the Courts.

(b) Registers of deeds may act as notaries public in their several counties by virtue of their offices as registers of deeds and may certify their notarial acts only under the seals of their respective offices. Assistant and deputy registers of deeds, by virtue of their offices, may perform the following notarial acts and may certify these notarial acts only under the seals of their respective offices:

(1) Oaths and affirmations.

(2) Verifications or proofs.

Upon completion of the course of study provided for in G.S. 10B-4(b), assistant and deputy registers of deeds may, by virtue of their offices, perform all other notarial acts and may certify these notarial acts only under the seals of their respective offices. A course of study attended only by assistant and deputy registers of deeds may be taught

at any mutually convenient location agreed to by the Secretary and the North Carolina Association of Registers of Deeds.

(c) The Director may act as a notary public by virtue of the Director's employment in the Department of the Secretary of State and may certify a notarial act performed in that capacity under the seal of the Secretary of State.

(d) Unless otherwise provided by law, a person designated a notary public by this section may charge a fee for a notarial act performed in accordance with G.S. 10A-20. The fee authorized by this section is payable to the governmental unit or agency by whom the person is employed.

(e) Nothing in this section shall authorize a person to act as a notary public other than in the performance of the official duties of the person's office unless the person complies fully with the requirements of G.S. 10B-4.

"**§ 10B-16. False certificate.**

(a) A notary shall not execute a certificate containing information known or believed by the notary to be false.

(b) A notary shall not provide or send a signed or sealed notarial certificate to another person with the understanding that it will be completed or attached to a record outside of the notary's presence.

(c) A notary shall not affix an official signature or seal on a notarial certificate that is incomplete. Prior to performing a notarial act, the notary shall cross out blank lines and spaces in the certificate.

(d) A notary shall not execute a certificate that is not written in the English language. A notary may execute a certificate written in the English language that accompanies a record written in another language, which record may include a translation of the notarial certificate into the other language. In such cases, the notary shall execute only the English language certificate.

"**§ 10B-17. Improper records.**

(a) A notary shall not notarize a signature:

(1) On a blank or incomplete record; or

(2) On a record without a notarial certificate indicating what type of notarial act was performed.

(b) A notary shall neither certify, notarize, nor authenticate a photograph. A notary may notarize an affidavit regarding and attached to a photograph.

"**§ 10B-18. Testimonials.**

A notary shall not use the official notary title or seal in a manner intended to endorse, promote, denounce, or oppose any product, service, contest, candidate, or other offering. This section does not prohibit a notary public from performing a notarial act upon a record executed by another individual.

"Part 4. Fees.

"**§ 10B-19. Imposition and waiver of fees.**

(a) For performing a notarial act, a notary may charge up to the maximum fee specified in this Chapter.

(b) A notary shall not discriminatorily condition the fee for a notarial act on any attribute of the principal that would constitute unlawful discrimination.

(c) Nothing in this Chapter shall compel a notary to charge a fee.

"**§ 10B-20. Fees for notarial acts.**

The maximum fees that may be charged by a notary for notarial acts are as follows:

(1) For acknowledgments, jurats, verifications or proofs, five dollars ($5.00) per principal signature.

(2) For oaths or affirmations without a signature, five dollars ($5.00) per person, except for an oath or affirmation administered to a credible witness to vouch for a principal's identity.

"**§ 10B-21. Notice of fees.**

Notaries who charge for their notarial services shall conspicuously display in their places of business, or present to each principal outside their places of business, an English-language schedule of fees for notarial acts. No part of any notarial fee schedule shall be printed in smaller than 10-point type.

"Part 5. Signature and Seal.

"**§ 10B-22. Official signature.**

When notarizing a paper record, a notary shall sign by hand in ink on the notarial certificate exactly and only the name indicated on the notary's commission. The notary shall print or type his or her name directly below the official signature. The notary shall affix the official signature only at the time the notarial act is performed. The notary shall not sign a paper record using a facsimile stamp or an electronic or other printing method.

"**§ 10B-23. Official seal.**

(a) A notary shall keep an official seal or stamp (herein "seal") that is the exclusive property of the notary. The seal shall not be possessed or used by any other person, nor surrendered to an employer upon termination of employment.

(b) The seal shall be placed by the notary near the notary's signature and on the same page on every paper record notarized.

(c) The seal shall be impressed only at the time the notarial act is performed.

(d) When not in use, the seal shall be kept secure and accessible only to the notary.

(e) If a seal is stolen, lost, damaged or otherwise rendered incapable of affixing a legible image, within 10 days of such discovery the notary shall do the following:

(1) Inform the appropriate law enforcement agency in the case of theft or vandalism.

(2) Notify the appropriate register of deeds and the Secretary of State in writing and signed in the official name in which he or she was commissioned.

As soon as is reasonably practicable after resignation, revocation, or expiration of a notary commission, or death of the notary, the seal shall be delivered to the Secretary of State for disposal.

"**§ 10B-24. Seal image.**

(a) Near the notary's official signature on the notarial certificate of a paper record, the notary shall place a sharp, legible, permanent, and photographically reproducible image of the official seal.

(b) A notary's official seal shall include the following elements:

(1) The notary's name exactly as commissioned;

(2) The words "Notary Public";

(3) The County of commissioning, including the word "County" or the abbreviation "Co."; and

(4) The words "North Carolina" or the abbreviation "NC".

(c) The notary seal may be either circular or rectangular in shape. The circular seal may not be over 2 inches in diameter; the rectangular seal may not be over 1 inch wide and 2-1/2 inches long. The perimeter of the seal shall contain a border that is visible when impressed.

(d) After December 31, 2009, notary seals shall not contain a commission expiration date.

"Part 6. Certificate Forms.

"**§ 10B-25. Notarial certificates in general.**

(a) In addition to the notarial certificates contained in this section, a notary public shall also use certificates that are in substantially the same form as those contained in G.S. 47. All statutory forms for the certification of acknowledgment or proof of written instruments shall include:

(1) The name of the state and county in which the certification occurs;

(2) The body of the certificate, stating before whom, by whom, and in what manner the signature was acknowledged or proved;

(3) The date of the acknowledgment or proof;

(4) The signature and seal or stamp of the officer who took the acknowledgment or proof; and

(5) The notary's commission expiration date.

(b) Any certificate of acknowledgment taken in another jurisdiction shall be sufficient in this State if it is taken in accordance with the laws of the jurisdiction where the acknowledgment is made.

"**§ 10B-26. General acknowledgment.**

A notary public shall use a certificate in substantially the following form in notarizing the signature or mark of persons acknowledging for themselves or as partners, corporate officers, attorneys-in-fact, or in other representative capacities:

State of North Carolina
_____ County

I, [name of notary], a notary public of _____ County, North Carolina, do certify that on this _____ day of _____, 20____, before me personally appeared [name], [and title, if applicable], (personally known to me) (proved to me by satisfactory evidence) (proved to me on the oath or affirmation of _____, who is personally known to me,) to be the person(s) whose name(s) (is) (are) signed on the preceding or attached record, and acknowledged to me that (he) (she) (they) signed it voluntarily for its stated purpose.

(Official Seal) Official Signature of Notary
My Commission Expires the day of , 20 .

"**§ 10B-27. Verification or proof of acknowledgment.**

A notary shall use a certificate in substantially the following form in notarizing a signature or mark on an affidavit or other sworn or affirmed written declaration:

State of North Carolina
County

I, [name of notary], a notary public of County, North Carolina, do certify that on this day of , 20 , before me personally appeared , (personally known to me) (proved to me by satisfactory evidence) (proved to me on the oath or affirmation of , who is personally known to me,) to be the person(s) who signed the preceding or attached record in my presence and who swore or affirmed to me that the signature(s) (is) (are) voluntary and the record truthful.

(Official Seal) Official Signature of Notary
My Commission Expires the day of , 20 .

"**§ 10B-28. Subscribing witness of absent signer.**

A notary shall use a certificate in substantially the following form to take an oath or affirmation from a subscribing witness that a signer, not appearing before the notary, did in fact execute or sign the record:

State of North Carolina
County

I, [name of notary], a notary public of County, North Carolina, do certify that on this day of , 20 , before me personally appeared , (personally known to me) (proved to me by satisfactory evidence) (proved to me on the oath or affirmation of , who is personally known to me,) or (proved to me by satisfactory evidence) to be the person whose name is signed on the preceding or attached record as subscribing witness and who declared to me under oath that (he) (she) personally knows (name of signer not appearing before notary), that they are not a named party to this and have no interest in this transaction, and that (he) (she) witnessed that individual sign or acknowledge the record having signed the same as witness.

Signature of Subscribing Witness

(Official Seal) Official Signature of Notary

My Commission Expires the day of , 20 .

"**§ 10B-29. Signer by mark; person unable to sign.**

As modified by the following provisions, the certificates in this chapter may be used for signers by mark or persons physically unable to sign or make a mark.

(a) A notary may certify the affixation of a signature by mark on a record presented for notarization if:

(1) The mark is affixed in the presence of the notary;

(2) The notary writes below the mark: "Mark affixed by (name of signer by mark) in presence of undersigned notary"; and

(3) The notary notarizes the signature by performing an acknowledgment or jurat.

(b) If a principal is physically unable to sign or make a mark on a record presented for notarization, that principal may designate another person as his or her designee, who shall be a disinterested party, to sign on the principal's behalf pursuant to the following procedure:

(1) The principal directs the designee to sign the record in the presence of the notary and two witnesses unaffected by the record;

(2) The designee signs the principal's name in the presence of the principal, the notary and the two witnesses;

(3) Both witnesses sign their own names to the record near the principal's signature;

(4) The notary writes below the principal's signature: "Signature affixed by designee in the presence of (names and addresses of principal and witnesses)"; and

(5) The notary notarizes the signature through an acknowledgment or jurat.

"**§ 10B-30. Other certificates allowed.**

In addition to the notarial certificates contained in this section, a notary public may also use other certificates provided by North Carolina law.

"Part 7. Changes in Status.

"**§ 10B-31. Change of address.**

Within 45 days after the change of a notary's residence, business, or any mailing address or telephone number, the notary shall send to the Secretary of State by fax, e-mail, or certified mail, return receipt requested, a signed notice of the change, giving both old and new addresses or telephone numbers.

"**§ 10B-32. Change of name.**

(a) Within 45 days after the change of a notary's name, the notary shall send to the Secretary of State by fax, e-mail, or certified mail, return receipt requested, a signed notice of the change, giving both former and new names.

(b) A notary with a new name may continue to use the former name in performing notarial acts until all of the following steps have been completed, after which point the notary shall use the new name:

(1) The notary has received a confirmation of Notary's Name Change from the Secretary of State;

(2) A new seal bearing the new name exactly as in the confirmation has been obtained; and

(3) The notary shall appear before the register of deeds to which the commission was delivered within 45 days of the effective date of the change to be duly qualified by taking the general oath of office prescribed in G.S. 11-11 and the oath prescribed for officers in G.S. 11-7 under the new name and to have the notary public record changed to reflect the new commissioned name.

"**§ 10B-33. Change of county.**

(a) A notary who has moved to another county in North Carolina remains commissioned until the current commission expires and may continue to notarize without changing his or her seal.

(b) When a notary who has moved applies to be recommissioned, if the commission is granted the Secretary of State shall issue a notice of recommissioning. The commission applicant shall then:

(1) Obtain a new seal bearing the new county exactly as in the notice of recommissioning; and

(2) Appear before the register of deeds to which the commission was delivered within 45 days of recommissioning, to be duly qualified by taking the general oath of office prescribed in G.S.11-11 and the oath prescribed for officers in G.S.11-7 under the new county and to have the notary public record changed to reflect the new county name.

"**10B-34. Change of both name and county.**

(a) Within 45 days after the legal change of a notary's name, and if the notary has also moved to a different county than as last commissioned, the notary shall submit to the Secretary of State a recommissioning application and fee pursuant to this Chapter.

(b) A notary with a new name and county may continue to perform notarial acts under his or her previous name and seal until the following steps have been completed:

(1) A transmittal receipt of reappointment due to name and county change has been received from the Secretary of State;

(2) A new seal bearing the new name and county exactly as in the transmittal receipt has been obtained; and

(3) The notary has appeared before the register of deeds to which the commission was delivered within 45 days of recommissioning to be duly qualified by taking the general oath of office prescribed in G.S.11-11 and the oath prescribed for officers in G.S.11-7 under the new name and county and to have the notary public record changed to reflect the new name and county.

"**§ 10B-35. Resignation.**

(a) A notary who resigns his or her commission shall send to the Secretary of State by fax, e-mail, or certified mail, return receipt requested, a signed notice indicating the effective date of resignation.

(b) Notaries who cease to reside in or to maintain a regular place of work or business in this State, or who become permanently unable to perform their notarial duties, shall resign their commissions and shall deliver their seals to the Secretary of State by certified mail, return receipt requested.

"**§ 10B-36. Disposition of seal; death of notary.**

(a) Except as provided below, when a notary commission expires, is resigned or revoked, within 45 days the notary shall deliver his or her seal to the Secretary of State for destruction. Delivery shall be accomplished by certified mail, return receipt requested.

(b) A former notary who intends to apply for a new commission and whose previous commission or application was not revoked or denied by this State, need not deliver the seal within 45 days after commission expiration, but must do so within three months after expiration unless recommissioned within that period.

(c) If a notary dies while commissioned or before fulfilling the disposition of seal requirements in this section, the notary's estate shall, as soon as is reasonably practicable and no later than the closing of the estate, notify the Secretary of State in writing of the notary's death and deliver the notary's seal to the Secretary for destruction.

"Part 8. Enforcement, Sanctions, and Remedies.

"**§ 10B-37. Enforcement and penalties.**

(a) The Secretary of State may warn, restrict, suspend, or revoke a notarial commission for a violation of this Chapter and on any ground for which an application for a commission may be denied under this Chapter.

(b) Except as otherwise permitted by law, any person without a commission who holds himself or herself out to the public as a notary, or who performs notarial acts in this State after his or her commission has expired, or during a period of commission suspension or before a commission oath has been administered, is guilty of a Class 1 misdemeanor.

(c) Any notary who performs a notarial act without personal knowledge or without satisfactory evidence of the signer's identity is guilty of a Class 1 misdemeanor.

(d) Any notary who:

(1) Takes an acknowledgment, performs an oath, affirmation, verification or proof, or jurat knowing it is false or fraudulent; or

(2) Takes an acknowledgment or verification or proof or jurat without the principal appearing before the notary is guilty of a Class I felony.

(e) Any person who holds himself or herself out to the public as a notary or who performs notarial acts in this State and is knowingly not commissioned under this Chapter is guilty of a Class I felony.

(f) Any person who without authority obtains, uses, conceals, defaces, or destroys the seal or notarial records of a notary is guilty of a Class I felony.

(g) For purposes of enforcing this Chapter and Article 34 of Chapter 66, the law enforcement agents of the Department of the Secretary of State have statewide jurisdiction and have all of the powers and authority of law enforcement officers. The agents have the authority to assist local law enforcement agencies in their investigations and to initiate and carry out, on their own or in coordination with local law enforcement agencies, investigations of violations.

(h) Resignation or expiration of a notarial commission does not terminate or preclude an investigation into a notary's conduct by the Secretary, who may pursue the investigation to a conclusion, whereupon it may be a matter of public record whether or not the finding would have been grounds for disciplinary action.

(i) The Secretary of State may seek injunctive relief against any person who violates the provisions of this Chapter. Nothing in this Chapter diminishes the authority of the North Carolina State Bar.

(j) Any person who knowingly solicits, coerces, or in any material way influences a notary to commit official misconduct is guilty as an aider and abettor and subject to the same level of punishment as the notary.

(k) The sanctions and remedies of this Chapter supplement other sanctions and remedies provided by law, including but not limited to, forgery and aiding and abetting.

"Part 9. Validation of Notarial Acts.

"**§ 10B-38. Acts of notaries public in certain instances validated.**

(a) Any acknowledgment taken and any instrument notarized by a person prior to qualification as a notary public but after commissioning or recommissioning as a notary public, or by a person whose notary commission has expired, is hereby validated. The acknowledgment and instrument shall have the same legal effect as if the person qualified as a notary public at the time the person performed the act.

(b) All documents bearing a notarial seal and which contain any of the following errors are validated and given the same legal effect as if the errors had not occurred:

(1) The date of the expiration of the notary's commission is stated, whether correctly or erroneously.

(2) The notarial seal does not contain a readable impression of the notary's name, contains an incorrect spelling of the notary's name.

(3) The notary's signature does not comport exactly with the name on the notary commission or on the notary seal, as required by G.S. 10A-14.

(4) The notarial seal contains typed, printed, drawn, or handwritten material added to the seal, fails to contain the words "North Carolina" or the abbreviation "NC", or contains correct information except that instead of the abbreviation for North Carolina contains the abbreviation for another state.

(c) All deeds of trust in which the notary was named in the document as a trustee only are validated.

(d) All notary acknowledgments performed before January 1, 1953, bearing a notarial seal are hereby validated.

(e) This section applies to notarial acts performed on or before July 1, 2002.

"**§ 10B-39. Certain notarial acts validated.**

(a) Any acknowledgment taken and any instrument notarized by a person whose notarial commission was revoked on or before January 30, 1997, is hereby validated.

(b) This section applies to notarial acts performed on or before August 1, 1998.

"Article 2.

"Electronic Notary Act.

"Part 1. General Provisions.

"**§ 10B-40. Short title.**

This act is the Electronic Notary Public Act and may be cited by that name.

"**§ 10B-41. Definitions.**

The following definitions apply in this Article:

(a) Electronic: "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(b) Electronic Notary Public and Electronic Notary: "Electronic Notary Public" and "Electronic Notary" mean a notary public who has registered with the Secretary of State the capability of performing electronic notarial acts in conformance with this Article.

(c) Electronic Document: "Electronic Document" means information that is created, generated, sent, communicated, received, or stored by electronic means.

(d) Electronic Notarial Act and Electronic Notarization: "Electronic Notarial Act" and "Electronic Notarization" mean an official act by an electronic notary public that involves electronic documents.

(e) Electronic Notary Seal: "Electronic Notary Seal" and "Electronic Seal" mean information within a notarized electronic document that includes the notary's name, jurisdiction, and commission expiration date, and generally corresponds to data in notary seals used on paper documents.

(f) Electronic Signature: "Electronic Signatures" means an electronic symbol or process attached to or logically associated with an electronic document and executed or adopted by a person with the intent to sign the document.

(g) Notary's Electronic Signature: "Notary's Electronic Signature" means those forms of electronic signature which have been approved by the Secretary of State, as authorized in G.S. 10B-53, as acceptable means for an electronic notary to affix his or her official signature to an electronic record that is being notarized.

(h) Official Electronic Journal of Notarial Acts and Official Electronic Journal: "Official Electronic Journal of Notarial Acts" and "Official Electronic Journal" mean the electronic mechanism for creating and preserving a chronological record of notarizations performed by a notary. It must be either (i) housed and maintained in the custody of the Secretary, or (ii) at another location, but only if it is maintained pursuant to standards set by the Secretary of State. If maintained by the notary at a location other than the custody of the Secretary, the notary must provide to the Secretary the location, password, or access instructions that will allow the journal to be viewed, minted out, and copied, but not altered and shall notify the Secretary when the password or access instructions are changed. The journal must:

(1) Allow entry by the notary only;

(2) Be maintained and accessible only by the notary;

(3) Not allow a journal entry to be altered in content or sequence by the notary or another person after a record of the notarization is entered and stored;
(4) Allow entries to be viewed, printed out, and copied electronically by any person using a password or another access method approved by the Secretary;
(5) Have a backup system in place to provide a duplicate record in the event of loss of the original record;
(6) Have the capability of printing out on paper and of providing electronic copies of any entry, any combination of entries, or all entries, including the images of related handwritten signatures or other identifiers which may be included in an electronic copy; and
(7) Contain the information for each notarial act as required in G.S. 10B-51."

"**§ 10B-42. Scope of this Article.**

Article 1 of this Chapter applies to all acts authorized under this Article.

"Part 2. Registration.

"**§ 10B-43. Qualifications.**

(a) A person qualified for electronic notary registration shall meet all of the following requirements:
(1) Hold a valid commission as a notary public in the State of North Carolina.
(2) Except as otherwise provided, abide by all the provisions of Article 1.
(3) Satisfy the requirements of G.S. 10B-45.
(4) Submit an electronic registration form containing no significant misstatement or omission of fact.
(5) Pay a nonrefundable registration fee of fifty dollars ($50.00).

(b) The Secretary may deny a registration as an electronic notary as authorized in G.S. 10B-4(d).

"**§ 10B-44. Registration with the Secretary of State.**

(a) Before performing electronic notarial acts electronically with the Secretary of State.

(b) The term of registration as an electronic notary shall coincide with the term of the notary's commission under Article 1 of this Chapter.

(c) An electronic notary shall reregister the capability to notarize electronically at the same time the notary reapplies for requirements for his or her regular commissioning pursuant to the requirements of this Chapter.

(d) An electronic form shall be used by an electronic notary in registering with the Secretary of State and it shall include, at least:
(1) The official name of the registrant;
(2) The state and county of commissioning of the registrant;
(3) The expiration date of the registrant's notary commission;
(4) Proof of successful completion of the course of instruction on electronic notarization as required by this Article;

(5) A description of the technology the registrant will use to create an electronic signature in performing official acts;

(6) If the device used to create the registrant's electronic signature was issued or registered through a licensed certification authority, the name of that authority, the source of the license, the starting and expiration dates of the device's term of registration, and any revocations, annulments, or other premature terminations of any registered device of the registrant device, of the registrant that was due to misuse or compromise of the device, with the date, cause, and nature of each termination explained in detail;

(7) The e-mail address of the registrant; and

(8) The location of the notary's electronic journal, including password or access instructions that will allow the journal to be viewed, printed out, and copied, but not altered, if the same is not to be maintained in the custody of the Secretary.

(e) The electronic registration form for an electronic notary shall be transmitted electronically to the Secretary of State and shall include any decrypting instructions, codes, keys, or software that allow the registration to be read.

(f) Within 10 business days after the change of any registration information required of an electronic notary, the notary shall electronically transmit to the Secretary of State a notice of the change of information signed with the notary's official electronic signature.

"**§ 10B-45. Course of instruction.**

(a) Before performing electronic notarial acts, a notary shall take a course of instruction of least three hours approved by the Secretary of State and pass an examination of this course, which shall be in addition to the educational requirements provided in Article 1 of this Chapter.

(b) The content of the course and the basis for the examination shall be notarial laws, procedures, technology, and ethics as they pertain to electronic notarization.

"**§ 10B-46. Fees for registration.**

The fee payable to the Secretary of State for registering or reregistering as an electronic notary is fifty dollars ($50.00), to be retained by the Secretary of State for the administration of the electronic notary program.

"Part 3. Electronic Notarial Acts, Powers, and Limitations.

"**§ 10B-47. Types of electronic notarial acts.**

The following types of notarial acts may be performed electronically:

(1) Acknowledgments;

(2) Jurats;

(3) Verifications or proofs; and

(4) Oaths or affirmations.

"**§ 10B-48. Prohibitions.**

An electronic notarization shall not be performed if the signer of the electronic document:

(1) Is not in the presence of the electronic notary at the time of notarization; and
(2) Is not personally known to the notary or identified by the evidence in accordance with other provisions of this Chapter.

"**§ 10B-49. Notarial components of electronic document.**

In performing an electronic notarial act, the following components shall be attached to, or logically associated with, the electronic document by the electronic notary, all of which shall be immediately perceptible and reproducible in the electronic record to which the notary's electronic signature is attached:

(a) The notary's name, state, and county of commissioning exactly as stated on the commission issued by the Secretary;
(b) The words "Electronic Notary Public";
(c) The words "State of North Carolina";
(d) The expiration date of the commission;
(e) The notary's electronic signature;
(f) The notary's e-mail address, and
(g) The completed wording of one of the following notarial certificates:
(1) General acknowledgment;
(2) Jurat;
(3) Verification or proof; or
(4) Oath or affirmation.

"**§ 10B-50. Maximum fees.**

For performing electronic notarial acts, the maximum fees that may be charged by an electronic notary are:

(1) For acknowledgments, $10.00 per signature;
(2) For jurats, $10.00 per signature;
(3) For verifications or proofs, $10.00 per signature; and
(4) For oaths or affirmations, $10.00 per signature.

"Part 4. Electronic Notary Records, Maintenance, and Disposition.

"**§ 10B-51. Requirements for official journal of electronic notarial acts.**

An electronic notary shall maintain a chronological official journal of electronic notarial acts in accordance with G.S. 10B-41(h). The electronic notary shall record each electronic notarial act in the official electronic journal in a form and manner required and prescribed by the Secretary of State. It is the duty and responsibility of the electronic notary to record the information required for the official electronic journal within 24 hours of performing the electronic notarial act.

(a) For every electronic notarial act, the electronic notary shall record in the official electronic journal the following:
(1) The date and time of day of the electronic notarial act;
(2) The name of each principal;
(3) The evidence of identity of each principal, in the form of one of the following:
a. A statement that the person is personally known to the notary;

b. A notation of the type of identification document presented and its serial or identification number;

c. The name and address of each credible witness swearing or affirming to the principal's identity;

(4) The fee, if any, charged for the electronic notarial act;

(5) The county where the electronic notarization was performed; and

(6) The type of electronic signature used by the principal to sign the notarized document.

(b) An electronic notary shall not record a social security or credit card number in the journal.

(c) This electronic journal requirement shall become effective one year after adoption of standards by the Secretary of State regarding the Uniform Real Property Electronic Recording Act.

"**§ 10B-52. Inspection of official journal of electronic notarial acts.**

(a) The official journal of electronic notarial acts shall be kept as a confidential record.

(b) In the notary's presence, any person who was a principal may inspect an entry in the official journal of electronic notarial acts during regular business hours, but only if:

(1) The person's identity is personally known to the notary or proven through satisfactory evidence;

(2) The person specifies the month, year, and name of act or acts sought; and

(3) The person is shown only the entry or entries specified.

(c) The official electronic journal may be examined as permitted by applicable law, subpoenaed by court order, or surrendered at the direction of the Secretary of State.

(d) Upon complying with a request under subsection (b) of this section, the notary shall provide a copy of a specified entry or entries in the official electronic journal at a cost of not more than one dollar ($1.00) per page; other entries on the same page shall be redacted.

"**§ 10B-53. Electronic signature, electronic seal, and official electronic journal.**

(a) The notary's electronic signature in combination with the electronic notary seal shall be used only for the purpose of performing electronic notarial acts.

(b) The notary's official journal of electronic notarial acts shall be maintained and shall be used only for the purpose of itemizing notarial acts, whether electronic or otherwise.

(c) The Secretary of State shall promulgate rules necessary to establish standards, procedures, practices, forms, and records relating to a notary's electronic signature, seal and journal. The notary's electronic seal, signature and journal shall conform to any standards promulgated by the Secretary.

"**§ 10B-54. Security measures.**

(a) A notary shall safeguard the notary's electronic signature, the official electronic journal, and all other notarial records and surrender or destroy them only

pursuant to applicable law, by court order, at the direction of the Secretary of State schedule established by rule by the Secretary of State.

(b) When not in use, the official electronic journal shall be kept in a secure area under the exclusive control of the notary and shall not be used by any other notary.

(c) Within 10 days after the official electronic journal is stolen, lost, destroyed, damaged, or otherwise rendered unusable or unreadable as a record of notarial acts, the notary after informing the appropriate law enforcement agency in the case of theft or vandalism, shall notify the Secretary of State by any tangible receipt or acknowledgement, including certified mail and electronic transmission, and also provide a copy or number of any pertinent police report.

(d) Upon resignation, revocation, or expiration of an electronic notary commission, or death of the notary, the official electronic journal and notarial records shall be delivered to the Secretary of State.

"**§ 10B-55. Maintenance of electronic device.**

(a) An electronic notary shall take reasonable steps to ensure that any registered device used to create the notary's electronic signature is current and has not beenrevoked or terminated by its issuing or registering authority.

(b) If the registration of the device used to create electronic signatures either expires or is changed during the electronic notary's term of office, the notary shall cease performing electronic notarizations until:

(1) A new device is duly issued or registered to the notary; and

(2) An electronically signed notice is sent to the Secretary that shall include the starting and expiration dates of any new registration term and any other new information at variance with information in the most recently executed electronic registration form.

"**§ 10B-56 Disposition of records.**

(a) Upon compliance with G.S. 10B-54 and except as provided in subsection (b) of this section, when an electronic notary's commission expires or is resigned or revoked, or when an electronic notary dies, the notary or the notary's duly authorized representative shall erase, delete, or destroy the coding, disk, certificate, card, software, file, or program that enables electronic affixation of the notary's official electronic signature.

(b) A former electronic notary whose previous commission or application was not revoked or denied by the Secretary need not erase, delete, or destroy the coding, disk, certificate, card, software, file, or program enabling electronic affixation of the official electronic signature if he or she is recommissioned and reregistered as an electronic notary using the same electronic signature within three months after commission expiration.

"Part 5. Certificate Forms.

"**§ 10B-57. Validity of notarial certificates.**

The provisions contained in Article 1, Part 6 of this Chapter, with regard to notarial certificate forms, are applicable for the purposes of this Article.

"**§ 10B-58. Form of evidence of authority of electronic notarial act.**

On a notarized electronic document transmitted to another state or nation, electronic evidence of the authenticity of the official signature and seal of an electronic notary of this State, if required, shall be attached to, or logically associated with, the document and shall be in the form of an electronic certificate of authority signed by the Secretary of State in conformance with any current and pertinent international treaties, agreements, and conventions subscribed to by the government of the United States.

"**§ 10B-59. Certificate of authority for electronic notarial act.**

(a) An electronic certificate of authority evidencing the authenticity of the official signature and seal of an electronic notary of this State shall contain substantially the following words:

Certificate of Authority for an Electronic Notarial Act

I, _____ (name, title, jurisdiction of commissioning official) certify that _____ (name of electronic notary), the person named as an electronic notary public in the attached or associated document, was indeed registered as an electronic notary public for the State of North Carolina and authorized to act as such at the time of the document's electronic notarization.

To verify this Certificate of Authority for an Electronic Notarial Act, I have included herewith my electronic signature this _____ day of _____, 20___.

(Electronic signature (and seal) of commissioning official)

(b) The Secretary of State may charge ten dollars ($10.00) for issuing an electronic certificate of authority.

"Part 6. Enforcement.

"**§ 10B-60. Restriction or revocation of registration.**

The Secretary or the Secretary's designee shall have the authority to warn, restrict, suspend, or revoke an electronic notary registration for a violation of this Chapter, and on any ground for which electronic notary registration may be denied under this Chapter.

"**§ 10B-61. Wrongful manufacture distribution, or possession of software or hardware.**

(a) Any person who knowingly creates, manufactures, or distributes software for the purpose of allowing a person to act as an electronic notary without being commissioned and registered in accordance with this act shall be guilty of a Class G felony.

(b) Any person who wrongfully obtains, conceals, damages, or destroys the certificate, disk, coding, card, program, software, file, or hardware enabling an electronic notary to affix an official electronic signature is guilty of a Class I felony."

SECTION 3. This act becomes effective December 1, 2005.

SENATE BILL 934:
Notary Public Act.-AB

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	April 25, 2005
Introduced by:	Sen. Hartsell	**Summary by:**	Kory Goldsmith
Version:	First Edition S934-CSRC-22		Committee Counsel

SUMMARY: ***Senate Bill 934 is an agency bill that repeals the current laws related to the qualification and commissioning of notaries public and enacts a more extensive Chapter related to the same. It also includes new provisions related to electronic notarizations.***

The Proposed Committee Substitute contains technical changes, removes certain provisions contained in the original bill requiring electronic notary journals, postpones for 18 months after the effective date of the act the Secretary's rulemaking authority regarding additional security measures for electronic notarial acts, and removes a provision that would have disqualified a notary from performing a notarial act if the notary is the spouse, domestic partner, or relative by blood or marriage within two degrees of the principal.

The act would become effective December 1, 2005 and would apply to applications for commissions and recommissions made on or after that date, and to offenses committed on or after that date. Commissions granted under Chapter 10A would remain effective until they expire are provided under that law.

BILL ANALYSIS:

Section 1 repeals Chapter 10A of the General Statutes, which contains the laws, related to the regulation of notaries public.

Section 2 creates a new Chapter 10B and divides it into 3 different Articles. The new statutes are outlined below to the extent they differ from existing law.

G.S. 10B-1 and 2 do not contain any substantive changes.

G.S. 10B-3 contains a number of new definitions including "Affirmation", "Credible Witness", "Jurat", "Moral Turpitude", "Nickname", "Notarial Certificate", "Personal Appearance", "Principal", "Record", "Regular Place of Business", "Seal", "Signature", and "Subscribing Witness". Most, if not all of these definitions come from National Notary Association's Model Draft Act.

G.S. 10B-4 outlines the qualifications a person must meet in order to be eligible to become a notary. The new statutory qualifications include that the person be literate in the English language (a requirement previously imposed by the North Carolina Courts), possess a high school diploma or its equivalent, and be legally emancipated unless at least 18 years of age. Would prohibit the Secretary from issuing a commission for a person within 5 years of the person completing all the conditions of any disciplinary order of a licensing agency.

G.S. 10B-5 sets-out specifically the information that must be included in an application for commission. These requirements were not previously included in the statutes.

G.S. 10B-6 requires the application for commission include a statement of certain personal qualifications. This requirement was not previously included in the statutes.

G.S. 10B-7 requires an applicant to complete a course of study, unless the applicant is a licensed member of the North Carolina State Bar, and to take and pass a written examination. The written examination requirement does not apply to members of the State Bar who are applying for recommission

G.S.10B-9 reflects changes recommended by several registers of deeds.

G.S. 10B-10 requires that a "Declaration of Applicant" be attached to any application for commission. The declaration is a sworn statement that the information provided by the applicant is true, complete and correct, and that the applicant understands the duties and responsibilities of a Notary Public.

G.S.10B-13 relates to the requirements to become a certified notary public instructor.

G.S. 10B-14 sets-out the acts a notary is allowed to perform and those that a notary is disqualified from performing. It includes new language that would prohibit a notary from performing a notarial act if the principal shows a demeanor that causes the notary to have a compelling doubt about whether the principal knows the consequences of the transaction requiring a notarial act, or if in the notary's judgment, the principal is not acting of his or her own free will. The statute would prohibit a notary from determining the proper type of notarial act or certificate to be used in a situation where the certificate language is not provided in the record.

G.S. 10B-16 prohibits a notary from executing a false certificate, or a certificate the notary believes to be false. It also prohibits the notary from executing a certificate that is not in the English language.

G.S. 10B-17 prohibits a notary from executing a certificate that is incomplete or blank, or that is a photograph.

G.S. 10B-18 prohibits a notary from using the notary's official title in a manner intended to endorse a political candidate, or a product or service.

G.S. 10B-19 prohibits a notary from charging a fee that is not authorized by statutes. It also increases the fee a notary may charge from $3 to $5.

G.S. 10B-22 requires a notary to sign any notarial act personally, using ink and the name that appears on the notary's seal. It prohibits a notary from using a facsimile stamp or electronic or other printing record.

G.S. 10B-23 imposes various requirements on a notary regarding keeping the notary seal secure and not allowing any other person to possess it or use it, and to inform the Secretary of the seal is lost, damaged or stolen. The seal must be delivered to the Secretary when the commission expires and is not renewed, or when the notary dies.

G.S. 10B-25 through 29 provide various new certificate forms.

G.S. 10B-31 through 36 provide the procedures a notary must use if the notary changes his or her name, changes his or her county of residence, resigns the commission or dies.

G.S. 10B-37 contains new criminal penalties. It would be a Class I felony for a notary to perform certain notarial acts the notary knows are false or fraudulent, or that are being perpetrated with the intent to commit fraud. It would be a Class I felony for one to hold themselves out as a notary if not commissioned, or to perform a notarial act when not commissioned. It would also be a class I felony to obtain use, conceal, deface or destroy the seal or notarial records of a notary. The presumptive minimum sentence for a Class I felony for a person with no prior convictions is 4-6 months of community punishment.

G.S. 10B-40 through G.S. 10B-59 contain provisions that allow electronic notarial acts and grant to the Secretary of State the authority to regulate these. It defines an electronic notary signature as those forms of electronic signature, which have been approved by the Secretary as an acceptable means for an electronic notary to affix the notary's official signature to an electronic records that is being notarized. The provisions would allow acknowledgements, jurats, verifications and proofs, and oath or affirmations to be performed electronically. It would be a Class G felony to knowingly create, manufacture, or distribute software for the purpose of allowing a person to act as an electronic notary without being commission. It would be a Class I felony for a person to wrongfully obtain, conceal, damage, or destroy the software that allows an electronic notary to affix an electronic seal to an official electronic signature. The presumptive minimum sentence for a Class G felony for a person with no prior convictions is 10-13 months of intermediate or active punishment. The presumptive minimum penalties for Class I felonies are outlined above.

G.S. 10B-60 creates the Notary Public Special Fund where fees for taking the notary public examination would be deposited. The Fund would be non-reverting, and the moneys would be appropriated annually to cover the cost of administration of the act.

Section 3 through 6 make conforming changes.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 934
PROPOSED COMMITTEE SUBSTITUTE S934-CSRC-22 [v.3]

4/27/2005 6:01:10 PM

Short Title: Notary Public Act.-AB (Public)

Sponsors:

Referred to:

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO REPEAL CHAPTER 10A REGARDING THE REGULATION OF NOTARIES PUBLIC, AND TO ENACT CHAPTER 10B RELATING TO NOTARIES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 10A of the General Statutes is repealed.

SECTION 2. The General Statutes of North Carolina are amended by adding a new Chapter to read:

"**Chapter 10B.**

"**Notaries.**

"Article 1.

"Notary Public Act.

"Part 1. General Provisions.

"**§ 10B-1. Short title.**

This act is the "Notary Public Act" and may be cited by that name.

"**§ 10B-2. Purposes.**

This Chapter shall be construed and applied to advance its underlying purposes, which are the following:

(1) To promote, serve, and protect the public interests.

(2) To simplify, clarify, and modernize the law governing notaries.

(3) To prevent fraud and forgery.

(4) To foster ethical conduct among notaries.

(5) To enhance interstate recognition of notarial acts.

(6) To integrate procedures for traditional paper and electronic notarial acts.

"**§ 10B-3. Definitions.**

The following definitions apply in this Chapter:

(1) "Acknowledgment" means a notarial act in which an individual, at a single time and place:
  a. Appears in person before the notary and presents a record; and
  b. Is personally known to the notary or identified by the notary through satisfactory evidence and indicates to the notary that the signature on the record was voluntarily affixed by the individual for the purposes stated within the record and, if applicable, that the individual had due authority to sign in a particular representative capacity.

(2) "Affirmation" means a notarial act, or part thereof, which is legally equivalent to an oath and in which an individual at a single time and place:
  a. Appears in person before the notary;
  b. Is personally known to the notary or identified by the notary through satisfactory evidence; and
  c. Makes a vow of truthfulness on penalty of perjury, based on personal honor and without invoking a deity or using any form of the word "swear".

(3) "Commission" means the empowerment to perform notarial acts and the written evidence of authority to perform those acts.

(4) "Credible Witness" means an honest, reliable, and impartial person who is personally known to the notary and takes an oath or affirmation from the notary to confirm a signer's identity.

(4a) "Department" means the North Carolina Department of the Secretary of State.

(5) "Director" means the Division Director for the North Carolina Department of the Secretary Notary Public Section.

(6) "Jurat" means an act in which the notary certifies the date, place, and person before whom an affidavit is sworn or affirmed.

(7) "Moral Turpitude" means conduct contrary to expected standards of honesty, morality, or integrity.

(8) "Nickname" means a descriptive, familiar, or shortened form of a proper name.

(9) "Notarial Act," "Notary Act," and "Notarization" mean any act that a notary is empowered to perform under this Chapter.

(10) "Notarial Certificate" and "Certificate" mean the portion of a notarized record that is completed by the notary, bears the notary's signature and seal, and states the facts attested by the notary in a particular notarization.

(11) "Notary Public" and "Notary" mean a person commissioned to perform notarial acts under this Chapter. A notary is a public officer of the State of North Carolina and shall act in full and strict compliance with this act.

(12) "Oath" means a notarial act, or part thereof, which is legally equivalent to an affirmation and in which an individual at a single time and place:
  a. Appears in person before a notary;
  b. Is personally known to the notary or identified by the notary through satisfactory evidence; and
  c. Makes a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear".

(13) "Official Misconduct" means either of the following:
  a. A notary's performance of a prohibited act or failure to perform a mandated act set forth in this Chapter or any other law in connection with notarization.
  b. A notary's performance of a notarial act in a manner found by the Secretary to be negligent or against the public interest.

(14) "Personal Appearance" and "Appear in Person Before a Notary" mean an individual and a notary are in close physical proximity to one other so that they may freely see and communicate with one another and exchange records back and forth during the notarization process.

(15) "Personal Knowledge of Identity" means familiarity with an individual resulting from interactions with that individual over a period of time sufficient to eliminate every reasonable doubt that the individual has the identity claimed.

(16) "Principal" means a person whose signature is notarized; or a person, other than a credible witness, taking an oath or affirmation from the notary.

(17) "Record" means information that is inscribed on a tangible medium and called a traditional or paper record.

(18) "Regular Place of Work or Business" means a location, office or other workspace, where an individual regularly spends all or part of the individual's work time.

(19) "Satisfactory Evidence of a Signer's Identity" means identification of an individual based on either of the following:
  a. At least one current document issued by a federal, state, or federal- or state-recognized tribal government agency bearing the photographic image of the individual's face and either the signature or a physical description of the individual.
  b. The oath or affirmation of one credible witness unaffected by the record or transaction who is personally known to the notary and who personally knows the individual seeking to be identified.

(20) "Seal" and "Stamp" mean a device for affixing on a paper record an image containing a notary's name, the words "Notary Public," and other information as required in G.S. 10B-24 of this Chapter.

(21) "Secretary" means the North Carolina Secretary of State or the Secretary's designee.

(22) "Signature" means the act of personally signing one's name in ink by hand.

(23) "Subscribing Witness" means a person who either watches another individual sign a record or takes that individual's acknowledgment of an already-signed record and appears before the notary on behalf of the principal. The subscribing witness must sign the document in addition to the principal, must be personally known by the notary or prove identity to the notary by satisfactory evidence, and must take an oath or affirmation stating that he or she witnessed the principal sign.

(24) "Verification" or "Proof" means a notarial act where a person certifies under oath or affirmation that the person witnessed the principal either execute, record, or acknowledge the principal's signature on an already-executed record.

"Part 2. Commissioning.

"**§ 10B-4. Qualifications.**

(a) Except as provided in subsection (d) of this section, the Secretary shall commission as a notary any qualified person who submits an application in accordance with this Chapter.

(b) A person qualified for a notarial commission shall meet all of the following requirements:

(1) Be at least 18 years of age or legally emancipated.

(2) Reside or have a regular place of work or business in this State.

(3) Reside legally in the United States.

(4) Speak, read, and write the English language.

(5) Possess a high school diploma or equivalent.

(6) Pass the course of instruction described in this Article, unless the person is a licensed member of the North Carolina State Bar.

(7) Purchase and keep as a reference the most recent manual approved by the Secretary that describes the duties and authority of notaries public.

(8) Submit an application containing no significant misstatement or omission of fact. The application form shall be provided by the Secretary and be available at the register of deeds office in each county. Every application shall include the signature of the applicant written with pen and ink, and the signature shall be acknowledged by the applicant before a person authorized to administer oaths. The applicant shall also obtain the recommendation of one publicly elected official in North Carolina whose recommendation shall be contained on the application.

(9) Pay a nonrefundable application fee of fifty dollars ($50.00).

(c) The notary shall be commissioned in his or her county of residence, unless the notary is not a North Carolina resident, in which case he or she shall be commissioned in the county of his or her employment or business.

(d) The Secretary may deny an application for commission or recommission if any of the following apply to an applicant:

(1) Submission of an incomplete application or an application containing material misstatement or omission of fact.

(2) The applicant's conviction or plea of admission or nolo contendere to a felony or any crime involving dishonesty or moral turpitude. In no case may a commission be issued to an applicant within 10 years after release from prison, probation, or parole, whichever is later.

(3) A finding or admission of liability against the applicant in a civil lawsuit based on the applicant's deceit.

(4) The revocation, suspension, restriction, or denial of a notarial commission or professional license by this or any other state or nation. In no case may a commission be issued to an applicant within five years after the completion of all conditions of any disciplinary order.

(5) A finding that the applicant has engaged in official misconduct, whether or not disciplinary action resulted.

(6) An applicant knowingly using false or misleading advertising in which the applicant as a notary represents that the applicant has powers, duties, rights, or privileges that the applicant does not possess by law.

(7) A finding by a state bar or court that the applicant has engaged in the unauthorized practice of law.

"**§ 10B-5. Application for commission.**

Every application for a notary commission shall be made on paper with original signatures, or in another form determined by the Secretary, and shall include all of the following:

(1) A statement of the applicant's personal qualifications as required by this Chapter.

(2) A certificate or signed statement by the instructor evidencing successful completion of the course of instruction as required by this Chapter.

(3) A notarized declaration of the applicant, as required by this Chapter.

(4) Any other information that the Secretary deems appropriate.

(5) The application fee required by this Chapter.

"**§ 10B-6. Statement of personal qualification.**

(a) The application for a notary commission shall include at least all of the following:

(1) The applicant's full legal name and the name to be used for commissioning, excluding nicknames.

(2) The applicant's date of birth.

(3) The mailing address for the applicant's residence, the street address for the applicant's residence, and the telephone number for the applicant's residence.

(4) The applicant's county of residence.

(5) The name of the applicant's employer, the street and mailing address for the applicant's employer, and telephone number for the applicant's employer.

(6) The applicant's last four digits of the applicant's social security number.
(7) The applicant's personal and business e-mail addresses.
(8) A declaration that the applicant is a citizen of the United States or proof of the applicant's legal residency in this country.
(9) A declaration that the applicant can speak, read, and write in the English language.
(10) A complete listing of any issuances, denials, revocations, suspensions, restrictions, and resignations of a notarial commission, professional license, or public office involving the applicant in this or any other state or nation.
(11) A complete listing of any criminal convictions of the applicant, including any pleas of admission or nolo contendere, in this or any other state or nation.
(12) A complete listing of any civil findings or admissions of fault or liability regarding the applicant's activities as a notary, in this or any other state or nation.

(b) The information contained in an application under this section is a public record as defined in G.S 132-1. The information contained in subsections (2), (3) and (6) of this subsection shall be considered confidential information.

"**§ 10B-7. Course of study and examination.**

(a) Every applicant for an initial notary commission shall within the three months preceding application, take a course of classroom instruction of not less than six hours approved by the Secretary and take a written examination approved by the Secretary. An applicant must answer at least eighty percent (80%) of the questions correctly in order to pass the exam. This subsection shall not apply to a licensed member of the North Carolina State Bar.

(b) Every applicant for recommissioning shall pass a written examination approved by and administered by or under the direction of the Secretary, unless the person is a licensed member of the North Carolina State Bar.

(c) The content of the course of instruction and the written examinations shall be notarial laws, procedures, and ethics.

(d) The Secretary may charge such fees as are reasonably necessary to pay the cost associated with developing and administering examinations permitted by this Chapter and for conducting the training of notaries and notary instructors. All funds received by the Secretary under this section shall be deposited into the Notary Public Special Fund and used for the purposes authorized under G.S. 10B-60.

"**§ 10B-8. Length of term and jurisdiction.**

A person commissioned under this Chapter may perform notarial acts in any part of this State for a term of five years, unless the commission is earlier revoked or resigned. No commissions shall be effective prior to the administration of the oath of office. Any notarial acts performed before the administration of the oath of office, either the original commissioning or recommissioning, are invalid.

"**§ 10B-9. Commission; oath of office.**

(a) If the Secretary grants a commission to an applicant, the Secretary shall notify the appointee and shall instruct the appointee regarding the proper procedure for taking the oath at the register of deeds office in the county of the appointee's commissioning.

(b) The appointee shall appear before the register of deeds no later than 45 days after commissioning and shall be duly qualified by taking the general oath of office prescribed in G.S. 11-11 and the oath prescribed for officers in G.S. 11-7.

(c) The register of deeds shall then place the notary record in a book designated for that purpose, or the notary record may be recorded in the Consolidated Document Book and indexed in the Consolidated Real Property Index under the notary's name in the grantor index. The notary record may be kept in electronic format so long as the signature of the notary public may be viewed and printed. The notary record shall contain the name and the signature of the notary as commissioned, the effective date and expiration date of the commission, the date the oath was administered, and the date of any restriction, suspension, revocation, or resignation. The record shall constitute the official record of the qualification of notaries public.

(d) The register of deeds shall deliver the commission to the notary following completion of the requirements of this section and shall notify the Secretary of the delivery.

(e) If the appointee does not appear before the register of deeds within 45 days of commissioning, the register of deeds must return the commission to the Secretary and the appointee must reapply for commissioning. If the appointee reapplies within one year of the granting of the commission, the Secretary may waive the educational requirements of this Chapter.

(f) As soon as practicable, or within twenty-four months of the effective date of this Act, all North Carolina registers of deed and clerks of superior courts shall submit to the Department for archiving in permanent storage legible and reproducible copies of the pages contained in their "Records of Notaries Public" created prior to 1991. The copies shall be reproduced pursuant to standards set by the Department to ensure the legibility of the copies and the compatibility with the Department's existing systems. The Department shall be responsible for any expense incurred relating to the shipment or transfer of these records.

"**§ 10B-10. Recommissioning.**

(a) A commissioned notary may apply for recommissioning no earlier than 10 weeks prior to the expiration date of the notary's commission.

(b) A notary whose commission has not expired must comply with the following requirements to be recommissioned:

(1) Submit a new application under G.S. 10B-5.

(2) Meet the requirements of G.S. 10B-4(b).

(3) Pass the written examination required under G.S. 10B-7, unless the notary is a licensed member of the North Carolina State Bar.

(c) An individual may apply for recommissioning within one year after the expiration of the individual's commission. The individual must comply with the requirement of subsection (b) of this section. The individual must also fulfill the

educational requirement under G.S. 10B-7(a), unless the Secretary waives that requirement.

"**§ 10B-11. Notarized declaration.**

The application for a notary public commission shall contain the following declaration to be executed by each applicant under oath:

Declaration of Applicant

I, _____ (name of applicant), solemnly swear or affirm under penalty of perjury that the information in this application is true, complete, and correct; that I understand the official duties and responsibilities of a notary public in this State, as described in the statutes; and that I will perform to the best of my ability all notarial acts in accordance with the law.

_____

(signature of applicant)

"**§ 10B-12. Application fee.**

Every applicant for a notary commission shall pay to the Secretary a nonrefundable application fee of fifty dollars ($50.00).

"**§ 10B-13. Instructor's certification.**

(a) The course of study required by G.S. 10B-4(b) shall be taught by an instructor certified under rules adopted by the Secretary. An instructor must meet the following requirements to be certified to teach a course of study for notaries public:

(1) Complete and pass an instructor certification course of not less than six hours taught by the Director or other person approved by the Secretary.
(2) Have at least one year of active experience as a notary public.
(3) Maintain a current commission as a notary public.
(4) Possess the current notary public guidebook.
(5) Pay a nonrefundable fee of fifty dollars ($50.00).

(b) Certification to teach a course of study for notaries shall be effective for two years. A certification may be renewed by passing a recertification course taught by the Director or other person approved by the Secretary and by paying a nonrefundable fee of fifty dollars ($50.00). All funds received by the Secretary under this section shall be deposited into the Notary Public Special Fund and used for the purposes authorized under G.S. 10B-60.

(c) The following individuals may be certified to teach a course of study for notaries public without paying the fee required by this section, and they may renew their certification without paying the renewal fee, so long as they remain actively employed in the capacities named:

(1) Registers of deeds.
(2) Clerks of court.
(3) The Director and other duly authorized employees of the Secretary.

(d) Former registers of deeds and clerks of court who have been certified as notary public instructors must apply for commissioning as a notary public but are exempt from the education requirements of G.S. 10B-7 after successful completion of an examination administered by the Secretary.

(e) Assistant and deputy registers of deeds and assistant and deputy clerks of court must have a regular notary commission prior to receiving a certification or recertification as a notary public instructor.

(f) The Secretary may suspend or revoke the certification of a notary instructor for violating the provisions of this Chapter or any of the administrative rules implementing it.

"Part 3. Notarial Acts, Powers, and Limitations.

"**§ 10B-14. Powers and limitations.**

(a) A notary may perform any of the following notarial acts:

(1) Acknowledgments.

(2) Oaths and affirmations.

(3) Execute jurats.

(4) Verifications or proofs.

(b) A notarial act shall be attested by all of the following:

(1) The signature of the notary, exactly as shown on the notary's commission.

(2) The readable appearance of the notary's name, either from the notary's signature or from the notary's typed or printed name near the signature.

(3) The clear and legible appearance of the notary's stamp or seal.

(4) A statement of the date the notary's commission expires.

(c) A notary is disqualified from performing a notarial act if any of the following apply:

(1) The principal or subscribing witness is not in the notary's presence at the time the notarial act is to be performed.

(2) The principal or subscribing witness is not personally known to the notary or identified by the notary through satisfactory evidence.

(3) The principal or subscribing witness shows a demeanor that causes the notary to have a compelling doubt about whether the principal knows the consequences of the transaction requiring a notarial act.

(4) The principal or subscribing witness, in the notary's judgment, is not acting of the principal's or the subscribing witness's own free will.

(5) The notary is a signer of or is named, other than as a trustee in a deed of trust, in the document that is to be notarized.

(6) The notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in G.S. 10B-20, other than fees or other consideration paid for services rendered by a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker.

(d) A notary may certify the affixation of a signature by mark on a record presented for notarization if:

(1) The mark is affixed in the presence of the notary;

(2) The notary writes below the mark: "Mark affixed by (name of signer by mark) in presence of undersigned notary"; and

(3) The notary notarizes the signature by performing an acknowledgment, oath or affirmation, jurat, or verification or proof.

(e) If a principal is physically unable to sign or make a mark on a record presented for notarization, that principal may designate another person as his or her designee, who shall be a disinterested party, to sign on the principal's behalf pursuant to the following procedure:

(1) The principal directs the designee to sign the record in the presence of the notary and two witnesses unaffected by the record;

(2) The designee signs the principal's name in the presence of the principal, the notary, and the two witnesses;

(3) Both witnesses sign their own names to the record near the principal's signature;

(4) The notary writes below the principal's signature: "Signature affixed by designee in the presence of (names and addresses of principal and witnesses)"; and

(5) The notary notarizes the signature through an acknowledgment, oath or affirmation, jurat, or verification or proof.

(f) A notarial act performed in another jurisdiction by a notary public of that jurisdiction is valid to the same extent as if it had been performed by a notary commissioned under this Chapter.

(g) Commissioned officers on active duty in the United States armed forces who are authorized to perform notarial acts may perform the acts for persons serving in or with the United States armed forces, their spouses, and their dependents.

(h) The Secretary and register of deeds in the county in which a notary qualified may certify to the commission of the notary.

(i) A notary public who is not an attorney licensed to practice law in this State who advertises the person's services as a notary public in a language other than English, by radio, television, signs, pamphlets, newspapers, other written communication, or in any other manner, shall post or otherwise include with the advertisement the notice set forth in this subsection in English and in the language used for the advertisement. The notice shall be of conspicuous size, if in writing, and shall state: "I AM NOT AN ATTORNEY LICENSED TO PRACTICE LAW IN THE STATE OF NORTH CAROLINA, AND I MAY NOT GIVE LEGAL ADVICE OR ACCEPT FEES FOR LEGAL ADVICE." If the advertisement is by radio or television, the statement may be modified but must include substantially the same message.

(j) A notary public who is not an attorney licensed to practice law in this State is prohibited from representing or advertising that the notary public is an "immigration consultant" or expert on immigration matters unless the notary public is an accredited representative of an organization recognized by the Board of Immigration Appeals

pursuant to Title 8, Part 292, Section 2(a-e) of the Code of Federal Regulations (8 CFR § 292.2(a-e)).

(k) A notary public who is not an attorney licensed to practice law in this State is prohibited from rendering any service that constitutes the unauthorized practice of law.

(l) A notary public required to comply with the provisions of subsection (g) of this section shall prominently post at the notary public's place of business a schedule of fees established by law, which a notary public may charge. The fee schedule shall be written in English and in the non-English language in which the notary services were solicited and shall contain the notice required in subsection (i) of this section, unless the notice is otherwise prominently posted at the notary public's place of business.

(m) If notarial certificate wording is not provided or indicated for a record, a nonattorney notary shall not determine the type of notarial act or certificate to be used. This does not prohibit a notary from offering the selection of certificate forms recognized in this Chapter or promulgated by the Department of the Secretary.

(n) A nonattorney notary shall not assist another person in drafting, completing, selecting, or understanding a record or transaction requiring a notarial act.

(o) A notary shall not claim to have powers, qualifications, rights, or privileges that the office of notary does not provide, including the power to counsel on immigration matters.

"**§ 10B-15. Notaries ex officio.**

(a) The clerks of the superior court may act as notaries public in their several counties by virtue of their offices as clerks and may certify their notarial acts only under the seals of their respective courts. Assistant and deputy clerks of superior court, by virtue of their offices, may perform the following notarial acts and may certify these notarial acts only under the seals of their respective courts:

(1) Oaths and affirmations.

(2) Verifications or proofs.

Upon completion of the course of study provided for in G.S. 10B-4(b), assistant and deputy clerks of superior court may, by virtue of their offices, perform all other notarial acts and may certify these notarial acts only under the seals of their respective courts. A course of study attended only by assistant and deputy clerks of superior court may be taught at any mutually convenient location agreed to by the Secretary and the Administrative Officer of the Courts.

(b) Registers of deeds may act as notaries public in their several counties by virtue of their offices as registers of deeds and may certify their notarial acts only under the seals of their respective offices. Assistant and deputy registers of deeds, by virtue of their offices, may perform the following notarial acts and may certify these notarial acts only under the seals of their respective offices:

(1) Oaths and affirmations.

(2) Verifications or proofs.

Upon completion of the course of study provided for in G.S. 10B-4(b), assistant and deputy registers of deeds may, by virtue of their offices, perform all other notarial acts and may certify these notarial acts only under the seals of their respective offices. A course of study attended only by assistant and deputy registers of deeds may be taught

at any mutually convenient location agreed to by the Secretary and the North Carolina Association of Registers of Deeds.

(c) The Director may act as a notary public by virtue of the Director's employment in the Department of the Secretary and may certify a notarial act performed in that capacity under the seal of the Secretary.

(d) Unless otherwise provided by law, a person designated a notary public by this section may charge a fee for a notarial act performed in accordance with G.S. 10B-20. The fee authorized by this section is payable to the governmental unit or agency by whom the person is employed.

(e) Nothing in this section shall authorize a person to act as a notary public other than in the performance of the official duties of the person's office unless the person complies fully with the requirements of G.S. 10B-4.

"**§ 10B-16. False certificate.**

(a) A notary shall not execute a notarial certificate containing information known or believed by the notary to be false.

(b) A notary shall not provide or send a signed or sealed notarial certificate to another person with the understanding that it will be completed or attached to a record outside of the notary's presence.

(c) A notary shall not affix an official signature or seal on a notarial certificate that is incomplete. Prior to performing a notarial act, the notary shall cross out blank lines and spaces in the certificate.

(d) A notary shall not execute a certificate that is not written in the English language. A notary may execute a certificate written in the English language that accompanies a record written in another language, which record may include a translation of the notarial certificate into the other language. In those instances, the notary shall execute only the English language certificate.

"**§ 10B-17. Improper records.**

(a) A notary shall not notarize a signature:

(1) On a blank or incomplete record; or

(2) On a record without a notarial certificate indicating what type of notarial act was performed.

(b) A notary shall neither certify, notarize, nor authenticate a photograph. A notary may notarize an affidavit regarding and attached to a photograph.

"**§ 10B-18. Testimonials.**

A notary shall not use the official notary title or seal in a manner intended to endorse, promote, denounce, or oppose any product, service, contest, candidate, or other offering. This section does not prohibit a notary public from performing a notarial act upon a record executed by another individual.

"Part 4. Fees.

"**§ 10B-19. Imposition and waiver of fees.**

(a) For performing a notarial act, a notary may charge up to the maximum fee specified in this Chapter.

(b) A notary shall not discriminatorily condition the fee for a notarial act on any attribute of the principal that would constitute unlawful discrimination.

(c) Nothing in this Chapter shall compel a notary to charge a fee.

"**§ 10B-20. Fees for notarial acts.**

The maximum fees that may be charged by a notary for notarial acts are as follows:

(1) For acknowledgments, jurats, verifications or proofs, five dollars ($5.00) per principal signature.

(2) For oaths or affirmations without a signature, five dollars ($5.00) per person, except for an oath or affirmation administered to a credible witness to vouch for a principal's identity.

"**§ 10B-21. Notice of fees.**

Notaries who charge for their notarial services shall conspicuously display in their places of business, or present to each principal outside their places of business, an English-language schedule of fees for notarial acts. No part of any notarial fee schedule shall be printed in smaller than 10-point type.

"Part 5. Signature and Seal.

"**§ 10B-22. Official signature.**

When notarizing a paper record, a notary shall sign by hand in ink on the notarial certificate exactly and only the name indicated on the notary's commission. The notary shall print or type his or her name directly below the official signature. The notary shall affix the official signature only at the time the notarial act is performed. The notary shall not sign a paper record using a facsimile stamp or an electronic or other printing method.

"**§ 10B-23. Official seal.**

(a) A notary shall keep an official seal or stamp (herein "seal") that is the exclusive property of the notary. The notary shall keep the seal in a secure location that is accessible only to the notary. A notary shall not allow another person to use or possess the seal, and shall not surrender the seal to the notary's employer upon termination of employment.

(b) The seal shall be impressed only at the time the notarial act is performed. The notary shall place the image or impression of the seal near the notary's signature on every paper record notarized. The seal and the signature shall appear on the same page.

(c) A notary shall do the following within 10 days of discovering that the notary's seal has been stolen, lost, damaged or otherwise rendered incapable of affixing a legible image:

(1) Inform the appropriate law enforcement agency in the case of theft or vandalism.

(2) Notify the appropriate register of deeds and the Secretary in writing and signed in the official name in which he or she was commissioned.

(d) As soon as is reasonably practicable after resignation, revocation, or expiration of a notary commission, or death of the notary, the seal shall be delivered to the Secretary for disposal.

"**§ 10B-24. Seal image.**

(a) Near the notary's official signature on the notarial certificate of a paper record, the notary shall place a sharp, legible, permanent, and photographically reproducible image of the official seal.

(b) A notary's official seal shall include the following elements:
(1) The notary's name exactly as commissioned;
(2) The words "Notary Public";
(3) The county of commissioning, including the word "County" or the abbreviation "Co."; and
(4) The words "North Carolina" or the abbreviation "NC".

(c) The notary seal may be either circular or rectangular in shape. The circular seal shall not be less than 1-1/2 inches, nor more than 2 inches in diameter. The rectangular seal shall not be over 1 inch high and 2-1/2 inches long. The perimeter of the seal shall contain a border that is visible when impressed.

(d) After December 31, 2009, notary seals shall not contain a commission expiration date.

"Part 6. Certificate Forms.

"**§ 10B-25. Notarial certificates in general.**

(a) In addition to the notarial certificates contained in this section, a notary public shall also use certificates that are in substantially the same form as those contained in Chapter 47 of the General Statutes. All statutory forms for the certification of acknowledgment or proof of written instruments shall include all of the following:
(1) The name of the state and county in which the certification occurs.
(2) The body of the certificate, stating before whom, by whom, and in what manner the signature was acknowledged or proved.
(3) The date of the acknowledgment or proof.
(4) The signature and seal or stamp of the officer who took the acknowledgment or proof.
(5) The notary's commission expiration date.

(b) Any certificate of acknowledgment taken in another jurisdiction shall be sufficient in this State if it is taken in accordance with the laws of the jurisdiction where the acknowledgment is made.

"**§ 10B-26. General acknowledgment.**

A notary public shall use a certificate in substantially the following form in notarizing the signature or mark of persons acknowledging for themselves or as partners, corporate officers, attorneys-in-fact, or in other representative capacities:

State of North Carolina
_____ County

I, [name of notary], a notary public of _____ County, North Carolina, do certify that on this _____ day of _____, 20 ____, before me personally appeared [name], [and title, if applicable], (personally known to me) (proved to me by satisfactory evidence) (proved to me on the oath or affirmation of _____, who is personally known to me,) to be the person(s) whose name(s) (is) (are) signed on the preceding or attached record, and acknowledged to me that (he) (she) (they) signed it voluntarily for its stated purpose.

(Official Seal) _____ Official Signature of Notary
My Commission Expires the _____ day of _____, 20____.

"**§ 10B-27. Verification or proof of acknowledgment.**

A notary shall use a certificate in substantially the following form in notarizing a signature or mark on an affidavit or other sworn or affirmed written declaration:

State of North Carolina
_____ County

I, [name of notary], a notary public of _____ County, North Carolina, do certify that on this _____ day of _____, 20____, before me personally appeared _____, (personally known to me) (proved to me by satisfactory evidence) (proved to me on the oath or affirmation of _____, who is personally known to me,) to be the person(s) who signed the preceding or attached record in my presence and who swore or affirmed to me that the signature(s) (is) (are) voluntary and the record truthful.

(Official Seal) _____ Official Signature of Notary
My Commission Expires the _____ day of _____, 20____.

"**§ 10B-28. Subscribing witness of absent signer.**

A notary shall use a certificate in substantially the following form to take an oath or affirmation from a subscribing witness that a signer, not appearing before the notary, did in fact execute or sign the record:

State of North Carolina
_____ County

I, [name of notary], a notary public of _____ County, North Carolina, do certify that on this _____ day of _____, 20____, before me personally appeared _____, (personally known to me) (proved to me by satisfactory evidence) (proved to me on the oath or affirmation of _____, who is personally known to me,) or (proved to me by satisfactory evidence) to be the person whose name is signed on the preceding or attached record as subscribing witness and who declared to me under oath that (he) (she) personally knows _____ (name of signer not appearing before notary), that they are not a named party to this and have no interest in this transaction, and that (he) (she) witnessed that individual sign or acknowledge the record having signed the same as witness.

_____

Signature of Subscribing Witness

Official Signature of Notary

(Official Seal)

My Commission Expires the day of , 20 .

"**§ 10B-29. Signer by mark; person unable to sign.**

As modified by the following provisions, the certificates in this chapter may be used for signers by mark or persons physically unable to sign or make a mark.

(a) A notary may certify the affixation of a signature by mark on a record presented for notarization if:

(1) The mark is affixed in the presence of the notary;

(2) The notary writes below the mark: "Mark affixed by (name of signer by mark) in presence of undersigned notary"; and

(3) The notary notarizes the signature by performing an acknowledgment or jurat.

(b) If a principal is physically unable to sign or make a mark on a record presented for notarization, that principal may designate another person as his or her designee, who shall be a disinterested party, to sign on the principal's behalf pursuant to the following procedure:

(1) The principal directs the designee to sign the record in the presence of the notary and two witnesses unaffected by the record;

(2) The designee signs the principal's name in the presence of the principal, the notary and the two witnesses;

(3) Both witnesses sign their own names to the record near the principal's signature;

(4) The notary writes below the principal's signature: "Signature affixed by designee in the presence of (names and addresses of principal and witnesses)"; and

(5) The notary notarizes the signature through an acknowledgment or jurat.

"**§ 10B-30. Other certificates allowed.**

In addition to the notarial certificates contained in this section, a notary public may also use other certificates provided by North Carolina law.

"Part 7. Changes in Status.

"**§ 10B-31. Change of address.**

Within 45 days after the change of a notary's residence, business, or any mailing address or telephone number, the notary shall send to the Secretary by fax, e-mail, or certified mail, return receipt requested, a signed notice of the change, giving both old and new addresses or telephone numbers.

"**§ 10B-32. Change of name.**

(a) Within 45 days after the legal change of a notary's name, the notary shall send to the Secretary by fax, e-mail, or certified mail, return receipt requested, a signed

notice of the change. The notice shall include both the notary's former name and the notary's new name.

(b) A notary with a new name may continue to use the former name in performing notarial acts until all of the following steps have been completed:

(1) The notary receives a confirmation of Notary's Name Change from the Secretary.

(2) The notary obtains a new seal bearing the new name exactly as that name appears in the confirmation from the Secretary.

(3) The notary appears before the register of deeds to which the commission was delivered within 45 days of the effective date of the change to be duly qualified by taking the general oath of office prescribed in G.S. 11-11 and the oath prescribed for officers in G.S. 11-7 under the new name and to have the notary public record changed to reflect the new commissioned name.

(c) Upon completion of the requirements in subsection (b) of this section, the notary shall use the new name.

"**§ 10B-33. Change of county.**

(a) A notary who has moved to another county in North Carolina remains commissioned until the current commission expires, is not required to obtain a new seal and may continue to notarize without changing his or her seal.

(b) When a notary who has moved applies to be recommissioned, if the commission is granted the Secretary shall issue a notice of recommissioning. The commission applicant shall then to all of the following:

(1) Obtain a new seal bearing the new county exactly as in the notice of recommissioning.

(2) Appear before the register of deeds to which the commission was delivered within 45 days of recommissioning, to be duly qualified by taking the general oath of office prescribed in G.S.11-11 and the oath prescribed for officers in G.S.11-7 under the new county and to have the notary public record changed to reflect the new county name.

"**10B-34. Change of both name and county.**

(a) Within 45 days after the legal change of a notary's name, and if the notary has also moved to a different county than as last commissioned, the notary shall submit to the Secretary a recommissioning application and fee pursuant to this Chapter. The notary may continue to perform notarial acts under the notary's previous name and seal until all of the following steps have been completed:

(1) The notary receives a transmittal receipt of reappointment due to name and county change from the Secretary.

(2) The notary obtains a new seal bearing the new name and county exactly as those items appear in the transmittal receipt.

(3) The notary appears before the register of deeds to which the commission was delivered within 45 days of recommissioning to be duly qualified by taking the general oath of office prescribed in G.S.11-11 and the oath prescribed for officers in G.S.11-7 under the

new name and county and to have the notary public record changed to reflect the new name and county.

"**§ 10B-35. Resignation.**

(a) A notary who resigns the notary's commission shall send to the Secretary by fax, e-mail, or certified mail, return receipt requested, a signed notice indicating the effective date of resignation.

(b) Notaries who cease to reside in or to maintain a regular place of work or business in this State, or who become permanently unable to perform their notarial duties, shall resign their commissions and shall deliver their seals to the Secretary by certified mail, return receipt requested.

"**§ 10B-36. Disposition of seal; death of notary.**

(a) When a notary commission is resigned or revoked, the notary shall deliver the notary's seal to the Secretary within 45 days of the resignation or revocation. Delivery shall be accomplished by certified mail, return receipt requested. The Secretary shall destroy any seal received under this subsection.

(b) A notary whose commission has expired and whose previous commission or application was not revoked or denied by this State, is not required to deliver the seal to the Secretary as provided under subsection (a) of this section if the notary intends to apply to be recommissioned and is recommissioned within three months after the notary's commission expires.

(c) If a notary dies while commissioned or before fulfilling the disposition of seal requirements in this section, the notary's estate shall, as soon as is reasonably practicable and no later than the closing of the estate, notify the Secretary in writing of the notary's death and deliver the notary's seal to the Secretary for destruction.

"Part 8. Enforcement, Sanctions, and Remedies.

"**§ 10B-37. Enforcement and penalties.**

(a) The Secretary may warn, restrict, suspend, or revoke a notarial commission for a violation of this Chapter and on any ground for which an application for a commission may be denied under this Chapter. Any period of restriction, suspension or revocation shall not extend the expiration date of a commission.

(b) Except as otherwise permitted by law, a person who commits any of the following acts is guilty of a Class 1 misdemeanor:

(1) Holding one's self out to the public as a notary if the person does not have a commission.

(2) Performing a notarial act if the person's commission has expired or been suspended.

(3) Performing a notarial act before the person had taken the oath of office.

(c) Any notary who takes an acknowledgment, performs an oath, affirmation, verification or proof, or jurat without the principal appearing before the notary, without personal knowledge, or without satisfactory evidence of the signer's identity is guilty of a Class 1 misdemeanor.

(d) A notary shall be guilty of a Class I felony if the notary does any of the following:

(1) Takes an acknowledgment, performs an oath, affirmation, verification or proof, or jurat knowing it is false or fraudulent.

(2) Takes an acknowledgment or verification or proof or jurat without the principal appearing with intent to commit fraud.

(e) Any person who holds himself or herself out to the public as a notary or who performs notarial acts in this State and is knowingly not commissioned under this Chapter is guilty of a Class I felony.

(f) Any person who without authority obtains, uses, conceals, defaces, or destroys the seal or notarial records of a notary is guilty of a Class I felony.

(g) For purposes of enforcing this Chapter and Article 34 of Chapter 66, the law enforcement agents of the Department of the Secretary have statewide jurisdiction and have all of the powers and authority of law enforcement officers. The agents have the authority to assist local law enforcement agencies in their investigations and to initiate and carry out, on their own or in coordination with local law enforcement agencies, investigations of violations.

(h) Resignation or expiration of a notarial commission does not terminate or preclude an investigation into a notary's conduct by the Secretary, who may pursue the investigation to a conclusion, whereupon it may be a matter of public record whether or not the finding would have been grounds for disciplinary action.

(i) The Secretary may seek injunctive relief against any person who violates the provisions of this Chapter. Nothing in this Chapter diminishes the authority of the North Carolina State Bar.

(j) Any person who knowingly solicits, coerces, or in any material way influences a notary to commit official misconduct is guilty as an aider and abettor and subject to the same level of punishment as the notary.

(k) The sanctions and remedies of this Chapter supplement other sanctions and remedies provided by law, including but not limited to, forgery and aiding and abetting.

"Part 9. Validation of Notarial Acts.

"**§ 10B-38. Acts of notaries public in certain instances validated.**

(a) Any acknowledgment taken and any instrument notarized by a person prior to qualification as a notary public but after commissioning or recommissioning as a notary public, or by a person whose notary commission has expired, is hereby validated. The acknowledgment and instrument shall have the same legal effect as if the person qualified as a notary public at the time the person performed the act.

(b) All documents bearing a notarial seal and which contain any of the following errors are validated and given the same legal effect as if the errors had not occurred:

(1) The date of the expiration of the notary's commission is stated, whether correctly or erroneously.

(2) The notarial seal does not contain a readable impression of the notary's name, contains an incorrect spelling of the notary's name, or does not bear the name of the notary exactly as it appears on the commission, as required under G.S. 10B-24.

(3) The notary's signature does not comport exactly with the name on the notary commission or on the notary seal, as required by G.S. 10A-14.

(4) The notarial seal contains typed, printed, drawn, or handwritten material added to the seal, fails to contain the words "North Carolina" or the abbreviation "NC", or contains correct information except that instead of the abbreviation for North Carolina contains the abbreviation for another state.

(c) All deeds of trust in which the notary was named in the document as a trustee only are validated.

(d) All notary acknowledgments performed before January 1, 1953, bearing a notarial seal are hereby validated.

(e) This section applies to notarial acts performed on or before July 1, 2002.

"**§ 10B-39. Certain notarial acts validated.**

(a) Any acknowledgment taken and any instrument notarized by a person whose notarial commission was revoked on or before January 30, 1997, is hereby validated.

(b) This section applies to notarial acts performed on or before August 1, 1998.

"Article 2.

"Electronic Notary Act.

"Part 1. General Provisions.

"**§ 10B-40. Short title.**

This act is the Electronic Notary Public Act and may be cited by that name.

"**§ 10B-41. Definitions.**

The following definitions apply in this Article:

(1) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(2) "Electronic Notary Public" and "Electronic Notary" mean a notary public who has registered with the Secretary the capability of performing electronic notarial acts in conformance with this Article.

(3) "Electronic Document" means information that is created, generated, sent, communicated, received, or stored by electronic means.

(4) "Electronic Notarial Act" and "Electronic Notarization" mean an official act by an electronic notary public that involves electronic documents.

(4) "Electronic Notary Seal" and "Electronic Seal" mean information within a notarized electronic document that includes the notary's name, jurisdiction, and commission expiration date, and generally corresponds to data in notary seals used on paper documents.

(5) "Electronic Signatures" means an electronic symbol or process attached to or logically associated with an electronic document and executed or adopted by a person with the intent to sign the document.

(6) "Notary's Electronic Signature" means those forms of electronic signature which have been approved by the Secretary as authorized in G.S. 10B-51, as an acceptable means for an electronic notary to affix the notary's official signature to an electronic record that is being notarized.

"**§ 10B-42. Scope of this Article.**

Article 1 of this Chapter applies to all acts authorized under this Article unless the provisions of Article 1 directly conflict with the provisions of this Article.

"Part 2. Registration.

"**§ 10B-43. Qualifications.**

(a) A person qualified for electronic notary registration shall meet all of the following requirements:

(1) Hold a valid commission as a notary public in the State of North Carolina.

(2) Except as otherwise provided, abide by all the provisions of Article 1 of this Chapter.

(3) Satisfy the requirements of G.S. 10B-45.

(4) Submit an electronic registration form containing no significant misstatement or omission of fact.

(5) Pay a nonrefundable registration fee of fifty dollars ($50.00).

(b) The Secretary may deny a registration as an electronic notary as authorized in G.S. 10B-4(d). All funds received by the Secretary under this section shall be deposited into the Notary Public Special Fund and used for the purposes authorized under G.S. 10B-60.

"**§ 10B-44. Registration with the Secretary of State.**

(a) Before performing notarial acts electronically, a notary shall register the capability to notarize electronically with the Secretary.

(b) The term of registration as an electronic notary shall coincide with the term of the notary's commission under Article 1 of this Chapter.

(c) An electronic notary shall reregister the capability to notarize electronically at the same time the notary applies for recommissioning under the requirements of Article 1 of this Chapter.

(d) An electronic form shall be used by an electronic notary in registering with the Secretary and it shall include, at least all of the following:

(1) The official name of the registrant.

(2) The state and county of commissioning of the registrant.

(3) The expiration date of the registrant's notary commission.

(4) Proof of successful completion of the course of instruction on electronic notarization as required by this Article.

(5) A description of the technology the registrant will use to create an electronic signature in performing official acts.

(6) If the device used to create the registrant's electronic signature was issued or registered through a licensed certification authority, the name of that authority, the source of the license, the starting and expiration dates of the device's term of registration, and any revocations, annulments, or other premature terminations of any registered device of the registrant device, of the registrant that was due to misuse or compromise of the device, with the date, cause, and nature of each termination explained in detail.

(7) The e-mail address of the registrant.

(e) The electronic registration form for an electronic notary shall be transmitted electronically to the Secretary and shall include any decrypting instructions, codes, keys, or software that allow the registration to be read.

(f) Within 10 business days after the change of any registration information required of an electronic notary, the notary shall electronically transmit to the Secretary a notice of the change of information signed with the notary's official electronic signature.

"**§ 10B-45. Course of instruction.**

(a) Before performing electronic notarial acts, a notary shall take a course of instruction of least three hours approved by the Secretary and pass an examination of this course, which shall be in addition to the educational requirements provided in Article 1 of this Chapter.

(b) The content of the course and the basis for the examination shall be notarial laws, procedures, technology, and ethics as they pertain to electronic notarization.

"**§ 10B-46. Fees for registration.**

The fee payable to the Secretary for registering or reregistering as an electronic notary is fifty dollars ($50.00). All funds received by the Secretary under this section shall be deposited into the Notary Public Special Fund and used for the purposes authorized under G.S. 10B-60.

"Part 3. Electronic Notarial Acts, Powers, and Limitations.

"**§ 10B-47. Types of electronic notarial acts.**

The following types of notarial acts may be performed electronically:

(1) Acknowledgments;
(2) Jurats;
(3) Verifications or proofs; and
(4) Oaths or affirmations.

"**§ 10B-48. Prohibitions.**

An electronic notarization shall not be performed if the signer of the electronic document:

(1) Is not in the presence of the electronic notary at the time of notarization; and
(2) Is not personally known to the notary or identified by the evidence in accordance with other provisions of this Chapter.

"**§ 10B-49. Notarial components of electronic document.**

In performing an electronic notarial act, all of the following components shall be attached to, or logically associated with, the electronic document by the electronic notary, all of which shall be immediately perceptible and reproducible in the electronic record to which the notary's electronic signature is attached:

(1) The notary's name, state, and county of commissioning exactly as stated on the commission issued by the Secretary;
(2) The words "Electronic Notary Public";
(3) The words "State of North Carolina";
(4) The expiration date of the commission;
(5) The notary's electronic signature;

(6) The notary's e-mail address, and
(7) The completed wording of one of the following notarial certificates:
a. General acknowledgment;
b. Jurat;
c. Verification or proof; or
d. Oath or affirmation.

"**§ 10B-50. Maximum fees.**

For performing electronic notarial acts, the maximum fees that may be charged by an electronic notary are as follows:

(1) For acknowledgments, $10.00 per signature.
(2) For jurats, $10.00 per signature.
(3) For verifications or proofs, $10.00 per signature.
(4) For oaths or affirmations, $10.00 per signature.

"Part 4. Electronic Notary Records, Maintenance, and Disposition.

"**§ 10B-51. Electronic signature, electronic seal.**

(a) The notary's electronic signature in combination with the electronic notary seal shall be used only for the purpose of performing electronic notarial acts.

(b) The Secretary shall adopt rules necessary to establish standards, procedures, practices, forms, and records relating to a notary's electronic signature and electronic seal. The notary's electronic seal and signature shall conform to any standards adopted by the Secretary.

"**§ 10B-52. Security measures.**

(a) A notary shall safeguard the notary's electronic signature, the notary's electronic seal, and all other notarial records. Notarial records shall be maintained by the notary and the notary shall not surrender or destroy the records except as required by a court order or as allowed under rules adopted by the Secretary.

(b) When not in use, the notary shall keep the notary's electronic signature, electronic seal, and all other notarial records secure, under the exclusive control of the notary, and shall not allow them to be used by any other notary or any other person.

(c) Within 10 days after the notary's electronic signature or any other notarial records maintained by the notary are stolen, lost, destroyed, damaged, or otherwise rendered unusable or unreadable, the notary after informing the appropriate law enforcement agency in the case of theft or vandalism, shall notify the Secretary by any tangible receipt or acknowledgement, including certified mail and electronic transmission, and also provide a copy or number of any pertinent police report.

(d) The Secretary may adopt rules necessary to insure the integrity, security, and authenticity of electronic notarizations.

(e) The Secretary may require an electronic notary to create and to maintain a record, journal or entry of each electronic notarial act. The rule-making authority contained in this subsection shall become effective eighteen months after the effective date of this act.

(f) The failure of an electronic notary to produce within ten days of the Department's request any record required by a rule adopted under this section shall

result in the suspension of the electronic notary's power to act as a notary under the provision of this Chapter until the Secretary reinstates the notary's commission.

(g) Upon resignation, revocation, or expiration of an electronic notary commission, or death of the notary, all notarial records required by statute or rule shall be delivered to the Secretary.

"**§ 10B-53. Maintenance of electronic device.**

(a) An electronic notary shall take reasonable steps to ensure that any registered device used to create the notary's electronic signature is current and has not been revoked or terminated by its issuing or registering authority.

(b) If the registration of the device used to create electronic signatures either expires or is changed during the electronic notary's term of office, the notary shall cease performing electronic notarizations until:

(1) A new device is duly issued or registered to the notary; and

(2) An electronically signed notice is sent to the Secretary that shall include the starting and expiration dates of any new registration term and any other new information at variance with information in the most recently executed electronic registration form.

"**§ 10B-54. Disposition of records.**

(a) Upon compliance with G.S. 10B-54 and except as provided in subsection (b) of this section, when an electronic notary's commission expires or is resigned or revoked, or when an electronic notary dies, the notary or the notary's duly authorized representative shall erase, delete, or destroy the coding, disk, certificate, card, software, file, or program that enables electronic affixation of the notary's official electronic signature.

(b) A former electronic notary whose previous commission or application was not revoked or denied by the Secretary need not erase, delete, or destroy the coding, disk, certificate, card, software, file, or program enabling electronic affixation of the official electronic signature if he or she is recommissioned and reregistered as an electronic notary using the same electronic signature within three months after commission expiration.

"Part 5. Certificate Forms.

"**§ 10B-55. Validity of notarial certificates.**

The provisions contained in Article 1, Part 6 of this Chapter, with regard to notarial certificate forms, are applicable for the purposes of this Article.

"**§ 10B-56. Form of evidence of authority of electronic notarial act.**

Electronic evidence of the authenticity of the official signature and seal of an electronic notary of this State, if required, shall be attached to, or logically associated with, a notarized electronic document transmitted to another state or nation, and shall be in the form of an electronic certificate of authority signed by the Secretary in conformance with any current and pertinent international treaties, agreements, and conventions subscribed to by the government of the United States.

"**§ 10B-57. Certificate of authority for electronic notarial act.**

(a) An electronic certificate of authority evidencing the authenticity of the official signature and seal of an electronic notary of this State shall contain substantially the following words:

Certificate of Authority for an Electronic Notarial Act
I, _____ (name, title, jurisdiction of commissioning official) certify that _____ (name of electronic notary), the person named as an electronic notary public in the attached or associated document, was indeed registered as an electronic notary public for the State of North Carolina and authorized to act as such at the time of the document's electronic notarization.

To verify this Certificate of Authority for an Electronic Notarial Act, I have included herewith my electronic signature this _____ day of _____, 20___.
(Electronic signature (and seal) of commissioning official)

(b) The Secretary may charge ten dollars ($10.00) for issuing an electronic certificate of authority.

"Part 6. Enforcement.

"**§ 10B-58. Restriction or revocation of registration.**

The Secretary or the Secretary's designee shall have the authority to warn, restrict, suspend, or revoke an electronic notary registration for a violation of this Chapter, and on any ground for which electronic notary registration may be denied under this Chapter.

"**§ 10B-59. Wrongful manufacture distribution, or possession of software or hardware.**

(a) Any person who knowingly creates, manufactures, or distributes software for the purpose of allowing a person to act as an electronic notary without being commissioned and registered in accordance with this act shall be guilty of a Class G felony.

(b) Any person who wrongfully obtains, conceals, damages, or destroys the certificate, disk, coding, card, program, software, file, or hardware enabling an electronic notary to affix an official electronic signature is guilty of a Class I felony."

"Article 3.

"Notary Public Special Fund.

"**§ 10B-60. Notary Public Special Fund; established.**

There is established the Notary Public Special Fund in the Secretary of State's Office. The Secretary shall hold the Fund separate and apart from all other moneys, funds, and accounts. Investment earnings credited to the assets of the Fund shall become part of the Fund. Any balance remaining in the Fund at the end of any fiscal year shall be carried forward in the Fund for the next succeeding fiscal year. Moneys from the Fund are appropriated annually and may be used that shall be used for the administration of this Chapter."

SECTION 3. G.S. 66-271 reads as rewritten:

"**§ 66-271. Definitions.**

The following definitions apply in this Article:

. . .

(5) Notary public. – Defined in ~~G.S. 10A-3.~~G.S. 10B-3.

. . .

"

SECTION 4. G.S. 66-272 reads as rewritten:

"**§ 66-272. Certificate of authentication.**

To authenticate a document, the Secretary must compare the official's seal and signature on the document with a specimen of the official's seal and signature on file in the Department. If no specimen is on file in the Department, the Secretary must require that the document be authenticated by an official for whom the Department does have a specimen. The Secretary must also verify the official's authority to perform a particular act when the law of a foreign jurisdiction requires it to be verified before it will recognize the authenticity of the document. When the Secretary is able to authenticate the official's seal, signature, position, and authority, the Secretary shall sign and issue a certificate of authentication. The certificate of authentication ~~may be placed on the document itself, if space is available, or by appending it~~ shall be appended to the document on a separate sheet."

SECTION 5. G.S. 66-273 reads as rewritten:

"**§ 66-273. Prerequisites for authentication.**

All of the following conditions must be met before a document can be authenticated:

(1) All seals and signatures must be originals.

(2) All dates must follow in chronological order on all certifications.

(3) All acknowledgments to be authenticated by the Secretary shall be in ~~English or accompanied by a certified or notarized English translation.~~ English and must comply with Chapter 10B of the General Statutes.

(4) Whenever a copy is used, it must include a statement that it is a true and accurate copy.

(5) Whenever a document is to be authenticated by the United States Department of State, it must comply with all applicable statutes, rules, and regulations of that office. "

SECTION 6. G.S. 161-10(a) reads as rewritten:

"(a) Except as provided in G.S. 161-11.1 or 161-11.2, all fees collected under this section shall be deposited into the county general fund. While performing the duties of the office, the register of deeds shall collect the following fees which shall be uniform throughout the State:

. . .

(12) Notarial Acts. – For taking an acknowledgment, oath, or affirmation or performing any other notarial act the maximum fee set in ~~G.S. 10A-10.~~ G.S. 10B-20 or G.S. 10B-50 for electronic notarial acts. This fee shall not be charged if the act is performed as a part of one of the services for which a fee is provided by this subsection; except that this fee shall

be charged in addition to the fees for registering, filing, or recording instruments or plats as provided by subdivisions (1) and (3) of this subsection.

. . .

(17) Qualification of Notary Public. – For administering the oaths of office to a notary public and making the appropriate record entries as provided in ~~G.S. 10A-8~~ G.S. 10B-9 ten dollars ($10.00).

. . ."

SECTION 7. This act becomes effective December 1, 2005, and applies to applications for notary commissions and recommissions made on or after that date, and to offenses committed under G.S. 10B-37 and G.S. 10B-59 on or after that date. Notary commissions issued under Chapter 10A of the General Statutes prior to December 1, 2005 shall remain valid until the commission expires as provided in Chapter 10A.

Senate Judiciary II Committee
Tuesday, May 3, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 934	Notary Public Act.-AB	Senator Hartsell
SB 774	Seat Belt Use Enhancements.	Senator Purcell
SB 574	Amend Post-Release Supervision Laws.	Senator Hartsell
SB 776	Amend Indecent Exposure Law.	Senator Snow, Jr.

Presentations

Other Business

Adjournment

MEETING CANCELLED

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	May 3, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 934	Notary Public Act.-AB	Senator Hartsell
SB 774	Seat Belt Use Enhancements.	Senator Purcell
SB 574	Amend Post-Release Supervision Laws.	Senator Hartsell
SB 776	Amend Indecent Exposure Law.	Senator Snow, Jr.

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk _____
Reading Clerk _____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	May 5, 2005	9:00 to 11:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 934	Notary Public Act.-AB	Senator Hartsell
SB 774	Seat Belt Use Enhancements.	Senator Purcell
SB 574	Amend Post-Release Supervision Laws.	Senator Hartsell
SB 776	Amend Indecent Exposure Law.	Senator Snow, Jr.
SB 806	Mediation Amendments.	Senator Hartsell
HB 1015	Clerks May Order Mediation.	Representative Hackney
SB 1058	Amend Assault Assistance Animal.	Senator Dalton
SB 887	NC Lien Law Revised.	Senator Hartsell
SB 940	Final Substantiation Appeal Process.	Senator Thomas
SB 963	Partition Sales of Real Property.	Senator Weinstein
SB 966	Definite Release Dates for Inmates.	Senator Bingham
SB 1004	State Personnel/Discrimination.	Senator Shaw

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, May 5, 2005, 9:00 to 11:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

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SB 934	Notary Public Act.-AB	Senator Hartsell
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SB 1004	State Personnel/Discrimination.	Senator Shaw
HB 1015	Clerks May Order Mediation.	Representative Hackney

Presentations

Other Business

Adjournment

Judiciary II Committee

Meeting

May 5, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee meeting to order on May 5, 2005, with sixteen members present. Senator Hartsell welcomed the pages and thanked them for serving.

SB 934 (Notary Public Act.-AB) Senator Hartsell noted that this bill was being continued from the previous meeting. Senator Bingham moved to accept the new Proposed Committee Substitute for purposes of discussion. All voted and the motion carried. Senator Hartsell recognized Deputy Secretary Hailey Montgomery from the office of Secretary of State to continue the bill explanation. Questions by Senators Apodaca, Bingham, Webster, Allran, Dannelly, Goodall, Kinnaird, Dorsett and Kerr were answered by Deputy Secretary Montgomery, Senator Hartsell and Robin Johnson, Staff Attorney. Senator Apodaca moved for a favorable report, unfavorable to the original bill, favorable to the proposed committee substitute with a referral to Finance. All voted and the motion carried.

SB 774 (Seat Belt Use Enhancements.) Senator Hartsell recognized Senator Purcell to explain the bill. Senator Bingham moved to accept the proposed committee substitute for purposes of discussion. All voted and the motion carried. Senator Purcell gave opening remarks on the bill and asked Kory Goldsmith, Staff Attorney, to continue with the explanation. Mr. Charlie Diehl, representing the North Carolina Trucker's Association, spoke on the bill. Mr. Darrell Jernigan, representing the Governor's Highway Safety Program, answered questions by Senators Webster and Goodall. Senator Apodaca moved for a favorable report, unfavorable to the original bill, favorable to the committee substitute with a referral to Finance. All voted and the motion carried.

SB 806 (Mediation Amendments.) Senator Thomas chaired while Senator Hartsell explained the bill. Judge Sanford Steelman, Chairman of the Dispute Resolution Committee spoke on the bill. Senator Goodall moved for a favorable report. All voted and the motion carried.

HB 1015 (Clerks May Order Mediation.) Senator Hartsell explained the bill in the absence of Representative Joe Hackney. Senator Hartsell answered Senator Berger's question. Senator Berger moved for a favorable report. All voted and the motion carried.

SB 776 (Amend Indecent Exposure Law.) Senator Hartsell recognized Senator Snow to explain the bill. Senator Allran moved to accept the proposed committee substitute for purposes of discussion. Senator Snow explained the bill. Senator Snow answered questions by Senators Berger, Goodall, Webster and Kinnaird. Senator Apodaca moved for a favorable report, unfavorable to the original bill, favorable to the committee substitute. All voted and the motion carried.

SB 1058 (Amend Assault Assistance Animal.) In the absence of Senator Dalton, Senator Hartsell asked Ben Popkin, Staff Attorney, to explain the bill. After his explanation, he answered questions by Senators Goodall, Thomas, Bingham and Snow. Ms. Cynthia Temoshenko spoke on the bill. The bill will be taken up again at the next meeting.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

SENATE BILL 934:
Notary Public Act.-AB

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 3, 2005
Introduced by:	Sen. Hartsell	**Summary by:**	Kory Goldsmith KG
Version:	PCS to First Edition S934-CSRC-22		Committee Counsel

SUMMARY: ***Senate Bill 934 is an agency bill that repeals the current laws related to the qualification and commissioning of notaries public and enacts a more extensive Chapter related to the same. It also includes new provisions related to electronic notarizations.***

The Proposed Committee Substitute contains technical changes, removes certain provisions contained in the original bill requiring electronic notary journals, postpones for 18 months after the effective date of the act the Secretary's rulemaking authority regarding additional security measures for electronic notarial acts, and removes a provision that would have disqualified a notary from performing a notarial act if the notary is the spouse, domestic partner, or relative by blood or marriage within two degrees of the principal. It also include a number of new criminal offenses.

The act would become effective December 1, 2005 and would apply to applications for commissions and recommissions made on or after that date. The criminal provisions would apply to offenses committed on or after December 1, 2005 regardless of whether the notary's commission was issued under Chapter 10A or 10B. Commissions granted under Chapter 10A would remain effective until they expire are provided under that law.

BILL ANALYSIS:

Section 1 repeals Chapter 10A of the General Statutes, which contains the laws, related to the regulation of notaries public.

Section 2 creates a new Chapter 10B and divides it into 3 different Articles. The new statutes are outlined below to the extent they differ from existing law.

G.S. 10B-1 and 2 do not contain any substantive changes.

G.S. 10B-3 contains a number of new definitions including "Affirmation", "Credible Witness", "Jurat", "Moral Turpitude", "Nickname", "Notarial Certificate", "Personal Appearance", "Principal", "Record", "Regular Place of Business", "Seal", "Signature", and "Subscribing Witness". Most, if not all of these definitions come from National Notary Association's Model Draft Act.

G.S. 10B-4 outlines the qualifications a person must meet in order to be eligible to become a notary. The new statutory qualifications include that the person be literate in the English language (a requirement previously imposed by the North Carolina Courts), possess a high school diploma or its equivalent, and be legally emancipated unless at least 18 years of age. Would prohibit the Secretary from issuing a commission for a person within 5 years of the person completing all the conditions of any disciplinary order of a licensing agency.

G.S. 10B-5 sets-out specifically the information that must be included in an application for commission. These requirements were not previously included in the statutes.

G.S. 10B-6 requires the application for commission include a statement of certain personal qualifications. This requirement was not previously included in the statutes.

G.S. 10B-7 requires an applicant to complete a course of study, and to take and pass a written examination. These requirements do not apply to members of the State Bar.

G.S.10B-9 reflects changes recommended by several registers of deeds.

G.S. 10B-10 requires that a "Declaration of Applicant" be attached to any application for commission. The declaration is a sworn statement that the information provided by the applicant is true, complete and correct, and that the applicant understands the duties and responsibilities of a Notary Public.

G.S.10B-13 relates to the requirements to become a certified notary public instructor.

G.S. 10B-14 sets-out the acts a notary is allowed to perform and those that a notary is disqualified from performing. It includes new language that would prohibit a notary from performing a notarial act if the principal shows a demeanor that causes the notary to have a compelling doubt about whether the principal knows the consequences of the transaction requiring a notarial act, or if in the notary's judgment, the principal is not acting of his or her own free will. The statute would prohibit a notary from determining the proper type of notarial act or certificate to be used in a situation where the certificate language is not provided in the record.

G.S. 10B-16 prohibits a notary from executing a false certificate, or a certificate the notary believes to be false. It also prohibits the notary from executing a certificate that is not in the English language.

G.S. 10B-17 prohibits a notary from executing a certificate that is incomplete or blank, or that is a photograph.

G.S. 10B-18 prohibits a notary from using the notary's official title in a manner intended to endorse a political candidate, or a product or service.

G.S. 10B-19 prohibits a notary from charging a fee that is not authorized by statutes. It also increases the fee a notary may charge from $3 to $5.

G.S. 10B-22 requires a notary to sign any notarial act personally, using ink and the name that appears on the notary's seal. It prohibits a notary from using a facsimile stamp or electronic or other printing record.

G.S. 10B-23 imposes various requirements on a notary regarding keeping the notary seal secure and not allowing any other person to possess it or use it, and to inform the Secretary of the seal is lost, damaged or stolen. The seal must be delivered to the Secretary when the commission expires and is not renewed, or when the notary dies.

G.S. 10B-25 through 29 provide various new certificate forms.

G.S. 10B-31 through 36 provide the procedures a notary must use if the notary changes his or her name, changes his or her county of residence, resigns the commission or dies.

G.S. 10B-37 contains new criminal penalties. It would be a Class I felony for a notary to perform certain notarial acts the notary knows are false or fraudulent, or that are being perpetrated with the intent to commit fraud. It would be a Class I felony for a person to perform a notarial act when the person know he or she is not commissioned. It would also be a class I felony to obtain use, conceal, deface or destroy the seal or notarial records of a notary. The presumptive minimum sentence for a Class I felony for a person with no prior convictions is 4-6 months of community punishment.

G.S. 10B-40 through G.S. 10B-59 contain provisions that allow electronic notarial acts and grant to the Secretary of State the authority to regulate these. It defines an electronic notary signature as those forms of electronic signature, which have been approved by the Secretary as an acceptable means for an electronic notary to affix the notary's official signature to an electronic records that is being notarized. The provisions would allow acknowledgements, jurats, verifications and proofs, and oath or affirmations to be performed electronically. It would be a Class G felony to knowingly create, manufacture, or distribute software for the purpose of allowing a person to act as an electronic notary without being commission. It would be a Class I felony for a person to wrongfully obtain, conceal, damage, or destroy the software that allows an electronic notary to affix an electronic seal to an official electronic signature. The presumptive minimum sentence for a Class G felony for a person with no prior convictions is 10-13 months of intermediate or active punishment. The presumptive minimum penalties for Class I felonies are outlined above.

G.S. 10B-60 creates the Notary Public Special Fund where fees for taking the notary public examination would be deposited. The Fund would be non-reverting, and the moneys would be appropriated annually to cover the cost of administration of the act.

Section 3 through 6 make conforming changes.

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, May 10, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **806** Mediation Amendments.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **774** Seat Belt Use Enhancements.
Draft Number: PCS75306
Sequential Referral: Finance
Recommended Referral: None
Long Title Amended: No

S.B. **776** Amend Indecent Exposure Law.
Draft Number: PCS55225
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

TOTAL REPORTED: 3

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, May 18, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B. **1015** Clerks May Order Mediation.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5-5-5

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Judy Gibson	Mecklenburg Co. Register of Deeds
Ann Shaw	NCARD
Rich Bavier	EDL
Kelley Montgomery	SOS
Robert Wilson	S.G.S.
Karen Gore	NC Sentencing Commission
P. Ben Hall	Annual Statutes Commission
Kevin Mills	Senator Purcell's Office
Rene E Cummins	
Anthea Jarrett	
DAVID KING	NC DOT

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Marvin Waters	CCPS
CJ Card	NCSHP
Colleen Kochanek	Holt York McDaniel High
[illegible]	[illegible]
Linford L Stutzman	Dispute Resolution Commission
Leslie Rutzift	Dispute Resolution Commission
Richard E Hunter jr	CSC- Warren Co.
JAMES C. SANFORD	Clerk of Superior Court- Orange Cty.
Chris M. HARTLEY	US DOT FMCSA
Kevin J. Breedlove	US DOT FMCSA
Jim McCulley	49 Jefferson Ave Asheville NC 28803
Andy Ellen	NCRMA
John Rustin	Family Policy Council

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Sheila Tatter DeWitt	JWP Civitas Institute
Angie Harris	Marpin Taylor
	Dee
W. Travis Painter	Marpin Taylor

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 934

Short Title:	Notary Public Act.-AB	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO ADD CHAPTER 10B TO THE GENERAL STATUTES RELATING TO NOTARIES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 10A of the General Statutes is repealed.

SECTION 2. The General Statutes of North Carolina are amended by adding a new Chapter to read:

"**Chapter 10B.**

"**Notaries.**

"Article 1.

"Notary Public Act.

"Part 1. General Provisions.

"**§ 10B-1. Short title.**

This act is the Notary Public Act and may be cited by that name.

"**§ 10B-2. Purposes.**

This Chapter shall be construed and applied to advance its underlying purposes, which are the following:

(1) To promote, serve, and protect the public interests.

(2) To simplify, clarify, and modernize the law governing notaries.

(3) To prevent fraud and forgery.

(4) To foster ethical conduct among notaries.

(5) To enhance cross-border recognition of notarial acts.

(6) To integrate procedures for traditional paper and electronic notarial acts.

"**§ 10B-3. Definitions.**

The following definitions apply in this Chapter:

(1) Acknowledgment. –"Acknowledgment" means a notarial act in which an individual, at a single time and place:

a. Appears in person before the notary and presents a record;

b. Is personally known to the notary or identified by the notary through satisfactory evidence and indicates to the notary that the signature on the record was voluntarily affixed by the individual for the purposes stated within the record and, if applicable, that the individual had due authority to sign in a particular representative capacity.

(2) Affirmation. –"Affirmation" means a notarial act, or part thereof, which is legally equivalent to an oath and in which an individual at a single time and place:

a. Appears in person before the notary;

b. Is personally known to the notary or identified by the notary through satisfactory evidence; and

c. Makes a vow of truthfulness on penalty of perjury, based on personal honor and without invoking a deity or using any form of the word "swear".

(3) Commission. –"Commission" means the empowerment to perform notarial acts and the written evidence of authority to perform those acts.

(4) Credible Witness. –"Credible Witness" means an honest, reliable, and impartial person who is personally known to the notary and takes an oath or affirmation from the notary to confirm a signer's identity.

(5) Director. –"Director" means the Division Director for the North Carolina Department of the Secretary of State Notary Public Section.

(6) Jurat. –"Jurat" means an act in which the notary certifies the date, place, and person before whom an affidavit is sworn or affirmed.

(7) Moral Turpitude. –"Moral Turpitude" means conduct contrary to expected standards of honesty, morality, or integrity.

(8) Nickname. –"Nickname" means a descriptive, familiar, or shortened form of a proper name.

(9) Notarial Act; Notary Act; Notarization. –"Notarial Act," "Notary Act," and "Notarization" mean any act that a notary is empowered to perform under this Chapter.

(10) Notarial Certificate; Certificate. –"Notarial Certificate" and "Certificate" mean the portion of a notarized record that is completed by the notary, bears the notary's signature and seal, and states the facts attested by the notary in a particular notarization.

(11) Notary Public; Notary. –"Notary Public" and "Notary" mean a person commissioned to perform notarial acts under this Chapter. A notary is a public officer of the State of North Carolina and shall act in full and strict compliance with this act.

(12) Oath. –"Oath" means a notarial act, or part thereof, which is legally equivalent to an affirmation and in which an individual at a single time and place:

a. Appears in person before a notary;

b. Is personally known to the notary or identified by the notary through satisfactory evidence; and

c. Makes a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear".

(13) Official Misconduct. –"Official Misconduct" means either of the following:

a. A notary's performance of a prohibited act or failure to perform a mandated act set forth in this Chapter or any other law in connection with notarization.

b. A notary's performance of a notarial act in a manner found by the Secretary to be negligent or against the public interest.

(14) Personal Appearance; Appear in Person Before a Notary. –"Personal Appearance" and "Appear in Person Before a Notary" mean an individual and a notary are physically before each other, e.g., in the same room, such that they may freely see and communicate with one another and exchange records back and forth during the notarization process.

(15) Personal Knowledge of Identity. –"Personal Knowledge of Identity" means familiarity with an individual resulting from interactions with that individual over a period of time sufficient to eliminate every reasonable doubt that the individual has the identity claimed.

(16) Principal. –"Principal" means a person whose signature is notarized; or a person, other than a credible witness, taking an oath or affirmation from the notary.

(17) Record. –"Record" means information that is inscribed on a tangible medium and called a traditional or paper record.

(18) Regular Place of Work or Business. –"Regular Place of Work or Business" means a location (office or other workspace) where an individual regularly spends all or part of his or her work time.

(19) Satisfactory Evidence of a Signer's Identity. –"Satisfactory Evidence of a Signer's Identity" means identification of an individual based on either of the following:

a. At least one current document issued by a federal, state, or federal- or state-recognized tribal government agency bearing the photographic image of the individual's face and either the signature or a physical description of the individual.

b. The oath or affirmation of one credible witness unaffected by the record or transaction who is personally known to the notary and who personally knows the individual seeking to be identified.

(20) Seal; Stamp. –"Seal" and "Stamp" mean a device for affixing on a paper record an image containing a notary's name, the words "Notary Public," and other information as required in G.S. 10B-24 of this Chapter.

(21) Secretary. –"Secretary" means the North Carolina Secretary of State or the Secretary's designee.

(22) Signature. –"Signature" means a traditional original signature ink on paper transactions of the notary's name under which the notary is commissioned. A facsimile signature is not acceptable for notary purposes unless otherwise permitted by law.

(23) Subscribing Witness. –"Subscribing Witness" means a person who either watches another individual sign a record or takes that individual's acknowledgment of an already-signed record and appears before the notary on behalf of the principal. The subscribing witness must sign the document in addition to the principal, must be personally known by the notary or prove identity to the notary by satisfactory evidence, and must take an oath or affirmation stating that he or she witnessed the principal sign.

(24) Verification; Proof. –"Verification" or "Proof" means a notarial act where a person certifies under oath or affirmation that he or she witnessed the principal either execute, record, or acknowledge his or her signature on an already-executed record.

"Part 2. Commissioning.

"**§ 10B-4. Qualifications.**

(a) Except as provided in subsection (d) of this section, the Secretary shall commission as a notary any qualified person who submits an application in accordance with this Chapter.

(b) A person qualified for a notarial commission shall meet all of the following requirements:

(1) Be at least 18 years of age or legally emancipated.

(2) Reside or have a regular place of work or business in this State.

(3) Reside legally in the United States.

(4) Speak, read, and write the English language.

(5) Possess a high school diploma or equivalent.

(6) Pass the course of instruction described in this Article, unless the person is a licensed member of the North Carolina State Bar.

(7) Purchase and keep as a reference the most recent manual approved by the Secretary that describes the duties and authority of notaries public.

(8) Submit an application containing no significant misstatement or omission of fact. The application form shall be provided by the Secretary and be available at the register of deeds office in each county. Every application shall bear the signature of the applicant written with pen and ink, and the signature shall be acknowledged by the applicant before a person authorized to administer oaths. The applicant shall also obtain the recommendation of one publicly elected official in North Carolina whose recommendation shall be contained on the application.

(9) Pay a nonrefundable application fee of fifty dollars ($50.00).

(c) The notary shall be commissioned in his or her county of residence, unless the notary is not a North Carolina resident, in which case he or she shall be commissioned in the county of his or her employment or business.

(d) The Secretary may deny an application for commission or recommission based upon:

(1) Submission of an incomplete application or an application containing material misstatement or omission of fact;

(2) The applicant's conviction or plea of admission or nolo contendere to a felony or any crime involving dishonesty or moral turpitude. In no case may a commission be issued to an applicant within 10 years after release from prison, probation, or parole, whichever is later;

(3) A finding or admission of liability against the applicant in a civil lawsuit based on the applicant's deceit;

(4) The revocation, suspension, restriction, or denial of a notarial commission or professional license by this or any other state or nation. In no case may a commission be issued to an applicant within five years after the completion of all conditions of any disciplinary order;

(5) A finding that the applicant has engaged in official misconduct, whether or not disciplinary action resulted;

(6) An applicant knowingly using false or misleading advertising in which the applicant as a notary represents that the applicant has powers, duties, rights, or privileges that the applicant does not possess by law;

(7) A finding by a state bar or court that the applicant has engaged in the unauthorized practice of law.

"**§ 10B-5. Application for commission.**

Every application for a notary commission shall be made on paper with original signatures, or in another form determined by the Secretary, and shall include:

(1) A statement of the applicant's personal qualifications as required by this Chapter;

(2) A certificate or signed statement by the instructor evidencing successful completion of the course of instruction as required by this Chapter;

(3) A notarized declaration of the applicant, as required by this Chapter;

(4) Any other information that the Secretary deems appropriate; and

(5) The application fee required by this Chapter.

"**§ 10B-6. Statement of personal qualification.**

(a) The application for a notary commission shall state or include at least:

(1) The applicant's full legal name and the name to be used for commissioning, excluding nicknames;

(2) The applicant's date of birth;

(3) The applicant's residence mailing and street address(es) and telephone number(s);

(4) The applicant's county of residence;

(5) The applicant's employer's name, business street and mailing address(es) and telephone number(s);
(6) The applicant's last four digits of his or her social security number;
(7) The applicant's personal and business e-mail addresses;
(8) A declaration that the applicant is a citizen of the United States or proof of the applicant's legal residency in this country;
(9) A declaration that the applicant can speak, read, and write in the English language;
(10) A complete listing of any issuances, denials, revocations, suspensions, restrictions, and resignations of a notarial commission, professional license, or public office involving the applicant in this or any other state or nation;
(11) A complete listing of any criminal convictions of the applicant, including any pleas of admission or nolo contendere, in this or any other state or nation;
(12) A complete listing of any civil findings or admissions of fault or liability regarding the applicant's activities as a notary, in this or any other state or nation.

(b) Except as provided herein, the information contained on an application shall be a public record. The applicant's date of birth, social security number, personal e-mail address(es), residence street address and residence telephone number(s) shall be considered confidential information.

"**§ 10B-7. Course of study and examination.**

(a) Every applicant for an initial notary commission shall, within the three months preceding application, take a course of classroom instruction of not less than six hours approved by the Secretary of State and pass an examination approved by the Secretary. Each examination approved by the Director has a minimum passing grade of eighty percent (80%).

(b) Every applicant for recommissioning shall pass a written examination approved by and administered by or under the direction of the Secretary, unless the person is a licensed member of the North Carolina State Bar.

(c) The content of the course of instruction and the basis for the written examinations shall be notarial laws, procedures, and ethics.

(d) The Secretary may charge such fees as are reasonably necessary to pay the cost associated with developing and administering examinations permitted by this Chapter and for conducting the training of notaries and notary instructors. All funds received by the Secretary under this section shall be deposited into a Notary Public Special Fund, which shall be subject to audit pursuant to the Executive Budget Act and shall not revert to the General Fund. The Special Fund shall be used for the administration of this Chapter.

"**§ 10B-8. Length of term and jurisdiction.**

A person commissioned under this Chapter may perform notarial acts in any part of this State for a term of five years, unless the commission is earlier revoked or resigned.

"**§ 10B-9. Commission; oath of office.**

(a) If granted, the Secretary shall notify the appointee and shall instruct the appointee regarding the proper procedure for taking the oath at the register of deeds office in the county of his or her commissioning.

(b) The appointee shall appear before the register of deeds no later than 45 days after commissioning and shall be duly qualified by taking the general oath of office prescribed in G.S. 11-11 and the oath prescribed for officers in G.S. 11-7.

(c) The register of deeds shall then place the notary record in a book designated for that purpose, or the notary record may be recorded in the Consolidated Document Book and indexed in the Consolidated Real Property Index under the notary's name in the grantor index. The notary record may be kept in electronic format so long as the signature of the notary public may be viewed and printed. The notary record shall contain the name and the signature of the notary as commissioned, the effective date and expiration date of the commission, the date the oath was administered, and the date of any restriction, suspension, revocation, or resignation. The record shall constitute the official record of the qualification of notaries public.

(d) The register of deeds shall deliver the commission to the notary following completion of the requirements of this section and shall notify the Secretary of State of the delivery.

(e) If the appointee does not appear before the register of deeds within 45 days of commissioning, the register of deeds must return the commission to the Secretary and the appointee must reapply for commissioning. If the appointee reapplies within one year of the granting of the commission, the Secretary may waive the educational requirements of this Chapter.

(f) As soon as practicable, or within six months of the effective date of this act, North Carolina registers of deeds and clerks of superior court shall send the pages and documents contained in their "Records of Notaries Public" created prior to 1991 to the Department for permanent storage.

"**§ 10B-10. Recommissioning.**

(a) A commissioned notary may apply for recommissioning no earlier than 10 weeks prior to the commission expiration date.

(b) A previously commissioned individual may apply for recommissioning as a notary within one year after the expiration of a previous commission; the Secretary may waive the educational requirements of this Chapter.

(c) Except as hereinafter set forth, an applicant for recommissioning as a notary shall submit a new application and comply anew with the provisions of this Chapter, except that an applicant for recommissioning shall not be required to complete the classroom course of study required by this Chapter if he or she complies with subsection (d) of this section and shall not be required to obtain the recommendation of a publicly elected official.

(d) An applicant for recommissioning shall be required to pass a written examination required by this Chapter, unless the person is a licensed member of the North Carolina State Bar.

"**§ 10B-11. Notarized declaration.**

The application for a notary public commission shall contain the following declaration to be executed by each applicant under oath:

Declaration of Applicant

I, _____ (name of applicant), solemnly swear or affirm under penalty of perjury that the information in this application is true, complete, and correct; that I understand the official duties and responsibilities of a notary public in this State, as described in the statutes; and that I will perform to the best of my ability all notarial acts in accordance with the law.

_____
(signature of applicant)

"**§ 10B-12. Application fee.**

Every applicant for a notary commission shall pay to the Secretary of State a nonrefundable application fee of fifty dollars ($50.00).

"**§ 10B-13. Instructor's certification.**

(a) The course of study required by G.S. 10B-4(b) shall be taught by an instructor certified in accordance with rules adopted by the Secretary. An instructor must meet the following requirements to be certified to teach a course of study for notaries public:

(1) Complete and pass an instructor certification course of not less than six hours taught by the Director or other person approved by the Secretary.
(2) Have at least one year of active experience as a notary public.
(3) Maintain a current commission as a notary public.
(4) Possess the current notary public guidebook.
(5) Pay a nonrefundable fee of fifty dollars ($50.00).

(b) Certification to teach a course of study for notaries effective for two years. A certification may be renewed by passing a recertification course taught by the Director or other person approved by the Secretary and by paying a nonrefundable fee of fifty dollars ($50.00).

(c) The following individuals may be certified to teach a course of study for notaries public without paying the fee required by this section, and they may renew their certification without paying the renewal fee, so long as they remain actively employed in the capacities named:

(1) Registers of deeds.
(2) Clerks of court.
(3) The Director and other duly authorized employees of the Secretary.

(d) Former registers of deeds and clerks of court who have been certified as notary public instructors must apply for commissioning as a notary public but are exempt from the education requirements of G.S. 10B-7 after successful completion of an examination administered by the Secretary.

(e) Assistant and deputy registers of deeds and assistant and deputy clerks of court must have a regular notary commission prior to receiving a certification or recertification as a notary public instructor.

(f) The Secretary may suspend or revoke the certification of a notary instructor for violating the provisions of this Chapter or any of the administrative rules promulgated hereunder.

"Part 3. Notarial Acts, Powers, and Limitations.

"**§ 10B-14. Powers and limitations.**

(a) A notary may perform any of the following notarial acts:

(1) Acknowledgments.

(2) Oaths and affirmations.

(3) Execute jurats.

(4) Verifications or proofs.

(b) A notarial act shall be attested by all of the following:

(1) The signature of the notary, exactly as shown on the notary's commission.

(2) The readable appearance of the notary's name, either from the notary's signature or from the notary's typed or printed name near the signature.

(3) The clear and legible appearance of the notary's stamp or seal.

(4) A statement of the date the notary's commission expires.

(c) A notary is disqualified from performing a notarial act if any of the following apply:

(1) The principal is not in the notary's presence at the time the notarial act is to be performed.

(2) The principal is not personally known to the notary or identified by the notary through satisfactory evidence.

(3) The principal shows a demeanor that causes the notary to have a compelling doubt about whether the principal knows the consequences of the transaction requiring a notarial act.

(4) The principal, in the notary's judgment, is not acting of his or her own free will.

(5) The notary is a signer of or is named, other than as a trustee in a deed of trust, in the document that is to be notarized.

(6) The notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in G.S. 10B-20, other than fees or other consideration paid for services rendered by a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker.

(7) The notary is a spouse, domestic partner, or relative by blood or marriage within two degrees of the principal, including in-law, step, and half relatives, unless the notary is an employee or a partner of an attorney licensed to practice law in North Carolina.

(d) A notary may certify the affixation of a signature by mark on a record presented for notarization if:

(1) The mark is affixed in the presence of the notary;

(2) The notary writes below the mark: "Mark affixed by (name of signer by mark) in presence of undersigned notary"; and

(3) The notary notarizes the signature by performing an acknowledgment, oath or affirmation, jurat, or verification or proof.

(e) If a principal is physically unable to sign or make a mark on a record presented for notarization, that principal may designate another person as his or her designee, who shall be a disinterested party, to sign on the principal's behalf pursuant to the following procedure:

(1) The principal directs the designee to sign the record in the presence of the notary and two witnesses unaffected by the record;

(2) The designee signs the principal's name in the presence of the principal, the notary, and the two witnesses;

(3) Both witnesses sign their own names to the record near the principal's signature;

(4) The notary writes below the principal's signature: "Signature affixed by designee in the presence of (names and addresses of principal and witnesses)"; and

(5) The notary notarizes the signature through an acknowledgment, oath or affirmation, jurat, or verification or proof.

(f) A notarial act performed in another jurisdiction by a notary public of that jurisdiction is valid to the same extent as if it had been performed by a notary commissioned under this Chapter.

(g) Commissioned officers on active duty in the United States armed forces who are authorized to perform notarial acts may perform the acts for persons serving in or with the United States armed forces, their spouses, and their dependents.

(h) The Secretary of State and register of deeds in the county in which a notary qualified may certify to the commission of the notary.

(i) A notary public who is not an attorney licensed to practice law in this State who advertises the person's services as a notary public in a language other than English, by radio, television, signs, pamphlets, newspapers, other written communication, or in any other manner, shall post or otherwise include with the advertisement the notice set forth in this subsection in English and in the language used for the advertisement. The notice shall be of conspicuous size, if in writing, and shall state: "I AM NOT AN ATTORNEY LICENSED TO PRACTICE LAW IN THE STATE OF NORTH CAROLINA, AND I MAY NOT GIVE LEGAL ADVICE OR ACCEPT FEES FOR LEGAL ADVICE." If the advertisement is by radio or television, the statement may be modified but must include substantially the same message.

(j) A notary public who is not an attorney licensed to practice law in this State is prohibited from representing or advertising that the notary public is an "immigration consultant" or expert on immigration matters unless the notary public is an accredited representative of an organization recognized by the Board of Immigration Appeals

pursuant to Title 8, Part 292, Section 2(a-e) of the Code of Federal Regulations (8 CFR § 292.2(a-e)).

(k) A notary public who is not an attorney licensed to practice law in this State is prohibited from rendering any service that constitutes the unauthorized practice of law.

(l) A notary public required to comply with the provisions of subsection (g) of this section shall prominently post at the notary public's place of business a schedule of fees established by law, which a notary public may charge. The fee schedule shall be written in English and in the non-English language in which the notary services were solicited and shall contain the notice required in subsection (i) of this section, unless the notice is otherwise prominently posted at the notary public's place of business.

(m) If notarial certificate wording is not provided or indicated for a record, a nonattorney notary shall not determine the type of notarial act or certificate to be used. This does not prohibit a notary from offering the selection of certificate forms recognized in this Chapter or promulgated by the Department of the Secretary of State.

(n) A nonattorney notary shall not assist another person in drafting, completing, selecting, or understanding a record or transaction requiring a notarial act.

(o) A notary shall not claim to have powers, qualifications, rights, or privileges that the office of notary does not provide, including the power to counsel on immigration matters.

"**§ 10B-15. Notaries ex officio.**

(a) The clerks of the superior court may act as notaries public in their several counties by virtue of their offices as clerks and may certify their notarial acts only under the seals of their respective courts. Assistant and deputy clerks of superior court, by virtue of their offices, may perform the following notarial acts and may certify these notarial acts only under the seals of their respective courts:

(1) Oaths and affirmations.

(2) Verifications or proofs.

Upon completion of the course of study provided for in G.S. 10B-4(b), assistant and deputy clerks of superior court may, by virtue of their offices, perform all other notarial acts and may certify these notarial acts only under the seals of their respective courts. A course of study attended only by assistant and deputy clerks of superior court may be taught at any mutually convenient location agreed to by the Secretary and the Administrative Officer of the Courts.

(b) Registers of deeds may act as notaries public in their several counties by virtue of their offices as registers of deeds and may certify their notarial acts only under the seals of their respective offices. Assistant and deputy registers of deeds, by virtue of their offices, may perform the following notarial acts and may certify these notarial acts only under the seals of their respective offices:

(1) Oaths and affirmations.

(2) Verifications or proofs.

Upon completion of the course of study provided for in G.S. 10B-4(b), assistant and deputy registers of deeds may, by virtue of their offices, perform all other notarial acts and may certify these notarial acts only under the seals of their respective offices. A course of study attended only by assistant and deputy registers of deeds may be taught

at any mutually convenient location agreed to by the Secretary and the North Carolina Association of Registers of Deeds.

(c) The Director may act as a notary public by virtue of the Director's employment in the Department of the Secretary of State and may certify a notarial act performed in that capacity under the seal of the Secretary of State.

(d) Unless otherwise provided by law, a person designated a notary public by this section may charge a fee for a notarial act performed in accordance with G.S. 10A-20. The fee authorized by this section is payable to the governmental unit or agency by whom the person is employed.

(e) Nothing in this section shall authorize a person to act as a notary public other than in the performance of the official duties of the person's office unless the person complies fully with the requirements of G.S. 10B-4.

"**§ 10B-16. False certificate.**

(a) A notary shall not execute a certificate containing information known or believed by the notary to be false.

(b) A notary shall not provide or send a signed or sealed notarial certificate to another person with the understanding that it will be completed or attached to a record outside of the notary's presence.

(c) A notary shall not affix an official signature or seal on a notarial certificate that is incomplete. Prior to performing a notarial act, the notary shall cross out blank lines and spaces in the certificate.

(d) A notary shall not execute a certificate that is not written in the English language. A notary may execute a certificate written in the English language that accompanies a record written in another language, which record may include a translation of the notarial certificate into the other language. In such cases, the notary shall execute only the English language certificate.

"**§ 10B-17. Improper records.**

(a) A notary shall not notarize a signature:

(1) On a blank or incomplete record; or

(2) On a record without a notarial certificate indicating what type of notarial act was performed.

(b) A notary shall neither certify, notarize, nor authenticate a photograph. A notary may notarize an affidavit regarding and attached to a photograph.

"**§ 10B-18. Testimonials.**

A notary shall not use the official notary title or seal in a manner intended to endorse, promote, denounce, or oppose any product, service, contest, candidate, or other offering. This section does not prohibit a notary public from performing a notarial act upon a record executed by another individual.

"Part 4. Fees.

"**§ 10B-19. Imposition and waiver of fees.**

(a) For performing a notarial act, a notary may charge up to the maximum fee specified in this Chapter.

(b) A notary shall not discriminatorily condition the fee for a notarial act on any attribute of the principal that would constitute unlawful discrimination.

(c) Nothing in this Chapter shall compel a notary to charge a fee.

"**§ 10B-20. Fees for notarial acts.**

The maximum fees that may be charged by a notary for notarial acts are as follows:

(1) For acknowledgments, jurats, verifications or proofs, five dollars ($5.00) per principal signature.

(2) For oaths or affirmations without a signature, five dollars ($5.00) per person, except for an oath or affirmation administered to a credible witness to vouch for a principal's identity.

"**§ 10B-21. Notice of fees.**

Notaries who charge for their notarial services shall conspicuously display in their places of business, or present to each principal outside their places of business, an English-language schedule of fees for notarial acts. No part of any notarial fee schedule shall be printed in smaller than 10-point type.

"Part 5. Signature and Seal.

"**§ 10B-22. Official signature.**

When notarizing a paper record, a notary shall sign by hand in ink on the notarial certificate exactly and only the name indicated on the notary's commission. The notary shall print or type his or her name directly below the official signature. The notary shall affix the official signature only at the time the notarial act is performed. The notary shall not sign a paper record using a facsimile stamp or an electronic or other printing method.

"**§ 10B-23. Official seal.**

(a) A notary shall keep an official seal or stamp (herein "seal") that is the exclusive property of the notary. The seal shall not be possessed or used by any other person, nor surrendered to an employer upon termination of employment.

(b) The seal shall be placed by the notary near the notary's signature and on the same page on every paper record notarized.

(c) The seal shall be impressed only at the time the notarial act is performed.

(d) When not in use, the seal shall be kept secure and accessible only to the notary.

(e) If a seal is stolen, lost, damaged or otherwise rendered incapable of affixing a legible image, within 10 days of such discovery the notary shall do the following:

(1) Inform the appropriate law enforcement agency in the case of theft or vandalism.

(2) Notify the appropriate register of deeds and the Secretary of State in writing and signed in the official name in which he or she was commissioned.

As soon as is reasonably practicable after resignation, revocation, or expiration of a notary commission, or death of the notary, the seal shall be delivered to the Secretary of State for disposal.

"**§ 10B-24. Seal image.**

(a) Near the notary's official signature on the notarial certificate of a paper record, the notary shall place a sharp, legible, permanent, and photographically reproducible image of the official seal.

(b) A notary's official seal shall include the following elements:
(1) The notary's name exactly as commissioned;
(2) The words "Notary Public";
(3) The County of commissioning, including the word "County" or the abbreviation "Co."; and
(4) The words "North Carolina" or the abbreviation "NC".

(c) The notary seal may be either circular or rectangular in shape. The circular seal may not be over 2 inches in diameter; the rectangular seal may not be over 1 inch wide and 2-1/2 inches long. The perimeter of the seal shall contain a border that is visible when impressed.

(d) After December 31, 2009, notary seals shall not contain a commission expiration date.

"Part 6. Certificate Forms.

"**§ 10B-25. Notarial certificates in general.**

(a) In addition to the notarial certificates contained in this section, a notary public shall also use certificates that are in substantially the same form as those contained in G.S. 47. All statutory forms for the certification of acknowledgment or proof of written instruments shall include:
(1) The name of the state and county in which the certification occurs;
(2) The body of the certificate, stating before whom, by whom, and in what manner the signature was acknowledged or proved;
(3) The date of the acknowledgment or proof;
(4) The signature and seal or stamp of the officer who took the acknowledgment or proof; and
(5) The notary's commission expiration date.

(b) Any certificate of acknowledgment taken in another jurisdiction shall be sufficient in this State if it is taken in accordance with the laws of the jurisdiction where the acknowledgment is made.

"**§ 10B-26. General acknowledgment.**

A notary public shall use a certificate in substantially the following form in notarizing the signature or mark of persons acknowledging for themselves or as partners, corporate officers, attorneys-in-fact, or in other representative capacities:

State of North Carolina
_____ County

I, [name of notary], a notary public of _____ County, North Carolina, do certify that on this _____ day of _____, 20____, before me personally appeared [name], [and title, if applicable], (personally known to me) (proved to me by satisfactory evidence) (proved to me on the oath or affirmation of _____, who is personally known to me,) to be the person(s) whose name(s) (is) (are) signed on the preceding or attached record, and acknowledged to me that (he) (she) (they) signed it voluntarily for its stated purpose.

(Official Seal) _____ Official Signature of Notary

My Commission Expires the _____ day of _____, 20____.

"**§ 10B-27. Verification or proof of acknowledgment.**

A notary shall use a certificate in substantially the following form in notarizing a signature or mark on an affidavit or other sworn or affirmed written declaration:

State of North Carolina
_____ County

I, [name of notary], a notary public of _____ County, North Carolina, do certify that on this _____ day of _____, 20____, before me personally appeared _____, (personally known to me) (proved to me by satisfactory evidence) (proved to me on the oath or affirmation of _____, who is personally known to me,) to be the person(s) who signed the preceding or attached record in my presence and who swore or affirmed to me that the signature(s) (is) (are) voluntary and the record truthful.

(Official Seal) _____ Official Signature of Notary

My Commission Expires the _____ day of _____, 20____.

"**§ 10B-28. Subscribing witness of absent signer.**

A notary shall use a certificate in substantially the following form to take an oath or affirmation from a subscribing witness that a signer, not appearing before the notary, did in fact execute or sign the record:

State of North Carolina
_____ County

I, [name of notary], a notary public of _____ County, North Carolina, do certify that on this _____ day of _____, 20____, before me personally appeared _____, (personally known to me) (proved to me by satisfactory evidence) (proved to me on the oath or affirmation of _____, who is personally known to me,) or (proved to me by satisfactory evidence) to be the person whose name is signed on the preceding or attached record as subscribing witness and who declared to me under oath that (he) (she) personally knows _____ (name of signer not appearing before notary), that they are not a named party to this and have no interest in this transaction, and that (he) (she) witnessed that individual sign or acknowledge the record having signed the same as witness.

_____

Signature of Subscribing Witness

(Official Seal) Official Signature of Notary

My Commission Expires the day of , 20 .

"**§ 10B-29. Signer by mark; person unable to sign.**

As modified by the following provisions, the certificates in this chapter may be used for signers by mark or persons physically unable to sign or make a mark.

(a) A notary may certify the affixation of a signature by mark on a record presented for notarization if:

(1) The mark is affixed in the presence of the notary;

(2) The notary writes below the mark: "Mark affixed by (name of signer by mark) in presence of undersigned notary"; and

(3) The notary notarizes the signature by performing an acknowledgment or jurat.

(b) If a principal is physically unable to sign or make a mark on a record presented for notarization, that principal may designate another person as his or her designee, who shall be a disinterested party, to sign on the principal's behalf pursuant to the following procedure:

(1) The principal directs the designee to sign the record in the presence of the notary and two witnesses unaffected by the record;

(2) The designee signs the principal's name in the presence of the principal, the notary and the two witnesses;

(3) Both witnesses sign their own names to the record near the principal's signature;

(4) The notary writes below the principal's signature: "Signature affixed by designee in the presence of (names and addresses of principal and witnesses)"; and

(5) The notary notarizes the signature through an acknowledgment or jurat.

"**§ 10B-30. Other certificates allowed.**

In addition to the notarial certificates contained in this section, a notary public may also use other certificates provided by North Carolina law.

"Part 7. Changes in Status.

"**§ 10B-31. Change of address.**

Within 45 days after the change of a notary's residence, business, or any mailing address or telephone number, the notary shall send to the Secretary of State by fax, e-mail, or certified mail, return receipt requested, a signed notice of the change, giving both old and new addresses or telephone numbers.

"**§ 10B-32. Change of name.**

(a) Within 45 days after the change of a notary's name, the notary shall send to the Secretary of State by fax, e-mail, or certified mail, return receipt requested, a signed notice of the change, giving both former and new names.

(b) A notary with a new name may continue to use the former name in performing notarial acts until all of the following steps have been completed, after which point the notary shall use the new name:

(1) The notary has received a confirmation of Notary's Name Change from the Secretary of State;

(2) A new seal bearing the new name exactly as in the confirmation has been obtained; and

(3) The notary shall appear before the register of deeds to which the commission was delivered within 45 days of the effective date of the change to be duly qualified by taking the general oath of office prescribed in G.S. 11-11 and the oath prescribed for officers in G.S. 11-7 under the new name and to have the notary public record changed to reflect the new commissioned name.

"**§ 10B-33. Change of county.**

(a) A notary who has moved to another county in North Carolina remains commissioned until the current commission expires and may continue to notarize without changing his or her seal.

(b) When a notary who has moved applies to be recommissioned, if the commission is granted the Secretary of State shall issue a notice of recommissioning. The commission applicant shall then:

(1) Obtain a new seal bearing the new county exactly as in the notice of recommissioning; and

(2) Appear before the register of deeds to which the commission was delivered within 45 days of recommissioning, to be duly qualified by taking the general oath of office prescribed in G.S.11-11 and the oath prescribed for officers in G.S.11-7 under the new county and to have the notary public record changed to reflect the new county name.

"**10B-34. Change of both name and county.**

(a) Within 45 days after the legal change of a notary's name, and if the notary has also moved to a different county than as last commissioned, the notary shall submit to the Secretary of State a recommissioning application and fee pursuant to this Chapter.

(b) A notary with a new name and county may continue to perform notarial acts under his or her previous name and seal until the following steps have been completed:

(1) A transmittal receipt of reappointment due to name and county change has been received from the Secretary of State;

(2) A new seal bearing the new name and county exactly as in the transmittal receipt has been obtained; and

(3) The notary has appeared before the register of deeds to which the commission was delivered within 45 days of recommissioning to be duly qualified by taking the general oath of office prescribed in G.S.11-11 and the oath prescribed for officers in G.S.11-7 under the new name and county and to have the notary public record changed to reflect the new name and county.

"**§ 10B-35. Resignation.**

(a) A notary who resigns his or her commission shall send to the Secretary of State by fax, e-mail, or certified mail, return receipt requested, a signed notice indicating the effective date of resignation.

(b) Notaries who cease to reside in or to maintain a regular place of work or business in this State, or who become permanently unable to perform their notarial duties, shall resign their commissions and shall deliver their seals to the Secretary of State by certified mail, return receipt requested.

"**§ 10B-36. Disposition of seal; death of notary.**

(a) Except as provided below, when a notary commission expires, is resigned or revoked, within 45 days the notary shall deliver his or her seal to the Secretary of State for destruction. Delivery shall be accomplished by certified mail, return receipt requested.

(b) A former notary who intends to apply for a new commission and whose previous commission or application was not revoked or denied by this State, need not deliver the seal within 45 days after commission expiration, but must do so within three months after expiration unless recommissioned within that period.

(c) If a notary dies while commissioned or before fulfilling the disposition of seal requirements in this section, the notary's estate shall, as soon as is reasonably practicable and no later than the closing of the estate, notify the Secretary of State in writing of the notary's death and deliver the notary's seal to the Secretary for destruction.

"Part 8. Enforcement, Sanctions, and Remedies.

"**§ 10B-37. Enforcement and penalties.**

(a) The Secretary of State may warn, restrict, suspend, or revoke a notarial commission for a violation of this Chapter and on any ground for which an application for a commission may be denied under this Chapter.

(b) Except as otherwise permitted by law, any person without a commission who holds himself or herself out to the public as a notary, or who performs notarial acts in this State after his or her commission has expired, or during a period of commission suspension or before a commission oath has been administered, is guilty of a Class 1 misdemeanor.

(c) Any notary who performs a notarial act without personal knowledge or without satisfactory evidence of the signer's identity is guilty of a Class 1 misdemeanor.

(d) Any notary who:

(1) Takes an acknowledgment, performs an oath, affirmation, verification or proof, or jurat knowing it is false or fraudulent; or

(2) Takes an acknowledgment or verification or proof or jurat without the principal appearing before the notary is guilty of a Class I felony.

(e) Any person who holds himself or herself out to the public as a notary or who performs notarial acts in this State and is knowingly not commissioned under this Chapter is guilty of a Class I felony.

(f) Any person who without authority obtains, uses, conceals, defaces, or destroys the seal or notarial records of a notary is guilty of a Class I felony.

(g) For purposes of enforcing this Chapter and Article 34 of Chapter 66, the law enforcement agents of the Department of the Secretary of State have statewide jurisdiction and have all of the powers and authority of law enforcement officers. The agents have the authority to assist local law enforcement agencies in their investigations and to initiate and carry out, on their own or in coordination with local law enforcement agencies, investigations of violations.

(h) Resignation or expiration of a notarial commission does not terminate or preclude an investigation into a notary's conduct by the Secretary, who may pursue the investigation to a conclusion, whereupon it may be a matter of public record whether or not the finding would have been grounds for disciplinary action.

(i) The Secretary of State may seek injunctive relief against any person who violates the provisions of this Chapter. Nothing in this Chapter diminishes the authority of the North Carolina State Bar.

(j) Any person who knowingly solicits, coerces, or in any material way influences a notary to commit official misconduct is guilty as an aider and abettor and subject to the same level of punishment as the notary.

(k) The sanctions and remedies of this Chapter supplement other sanctions and remedies provided by law, including but not limited to, forgery and aiding and abetting.

"Part 9. Validation of Notarial Acts.

"**§ 10B-38. Acts of notaries public in certain instances validated.**

(a) Any acknowledgment taken and any instrument notarized by a person prior to qualification as a notary public but after commissioning or recommissioning as a notary public, or by a person whose notary commission has expired, is hereby validated. The acknowledgment and instrument shall have the same legal effect as if the person qualified as a notary public at the time the person performed the act.

(b) All documents bearing a notarial seal and which contain any of the following errors are validated and given the same legal effect as if the errors had not occurred:

(1) The date of the expiration of the notary's commission is stated, whether correctly or erroneously.

(2) The notarial seal does not contain a readable impression of the notary's name, contains an incorrect spelling of the notary's name.

(3) The notary's signature does not comport exactly with the name on the notary commission or on the notary seal, as required by G.S. 10A-14.

(4) The notarial seal contains typed, printed, drawn, or handwritten material added to the seal, fails to contain the words "North Carolina" or the abbreviation "NC", or contains correct information except that instead of the abbreviation for North Carolina contains the abbreviation for another state.

(c) All deeds of trust in which the notary was named in the document as a trustee only are validated.

(d) All notary acknowledgments performed before January 1, 1953, bearing a notarial seal are hereby validated.

(e) This section applies to notarial acts performed on or before July 1, 2002.

"**§ 10B-39. Certain notarial acts validated.**

(a) Any acknowledgment taken and any instrument notarized by a person whose notarial commission was revoked on or before January 30, 1997, is hereby validated.

(b) This section applies to notarial acts performed on or before August 1, 1998.

"Article 2.

"Electronic Notary Act.

"Part 1. General Provisions.

"**§ 10B-40. Short title.**

This act is the Electronic Notary Public Act and may be cited by that name.

"**§ 10B-41. Definitions.**

The following definitions apply in this Article:

(a) Electronic: "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(b) Electronic Notary Public and Electronic Notary: "Electronic Notary Public" and "Electronic Notary" mean a notary public who has registered with the Secretary of State the capability of performing electronic notarial acts in conformance with this Article.

(c) Electronic Document: "Electronic Document" means information that is created, generated, sent, communicated, received, or stored by electronic means.

(d) Electronic Notarial Act and Electronic Notarization: "Electronic Notarial Act" and "Electronic Notarization" mean an official act by an electronic notary public that involves electronic documents.

(e) Electronic Notary Seal: "Electronic Notary Seal" and "Electronic Seal" mean information within a notarized electronic document that includes the notary's name, jurisdiction, and commission expiration date, and generally corresponds to data in notary seals used on paper documents.

(f) Electronic Signature: "Electronic Signatures" means an electronic symbol or process attached to or logically associated with an electronic document and executed or adopted by a person with the intent to sign the document.

(g) Notary's Electronic Signature: "Notary's Electronic Signature" means those forms of electronic signature which have been approved by the Secretary of State. as authorized in G.S. 10B-53, as acceptable means for an electronic notary to affix his or her official signature to an electronic record that is being notarized.

(h) Official Electronic Journal of Notarial Acts and Official Electronic Journal: "Official Electronic Journal of Notarial Acts" and "Official Electronic Journal" mean the electronic mechanism for creating and preserving a chronological record of notarizations performed by a notary. It must be either (i) housed and maintained in the custody of the Secretary, or (ii) at another location, but only if it is maintained pursuant to standards set by the Secretary of State. If maintained by the notary at a location other than the custody of the Secretary, the notary must provide to the Secretary the location, password, or access instructions that will allow the journal to be viewed, minted out, and copied, but not altered and shall notify the Secretary when the password or access instructions are changed. The journal must:

(1) Allow entry by the notary only;

(2) Be maintained and accessible only by the notary;

(3) Not allow a journal entry to be altered in content or sequence by the notary or another person after a record of the notarization is entered and stored;
(4) Allow entries to be viewed, printed out, and copied electronically by any person using a password or another access method approved by the Secretary;
(5) Have a backup system in place to provide a duplicate record in the event of loss of the original record;
(6) Have the capability of printing out on paper and of providing electronic copies of any entry, any combination of entries, or all entries, including the images of related handwritten signatures or other identifiers which may be included in an electronic copy; and
(7) Contain the information for each notarial act as required in G.S. 10B-51."

"**§ 10B-42. Scope of this Article.**

Article 1 of this Chapter applies to all acts authorized under this Article.

"Part 2. Registration.

"**§ 10B-43. Qualifications.**

(a) A person qualified for electronic notary registration shall meet all of the following requirements:
(1) Hold a valid commission as a notary public in the State of North Carolina.
(2) Except as otherwise provided, abide by all the provisions of Article 1.
(3) Satisfy the requirements of G.S. 10B-45.
(4) Submit an electronic registration form containing no significant misstatement or omission of fact.
(5) Pay a nonrefundable registration fee of fifty dollars ($50.00).

(b) The Secretary may deny a registration as an electronic notary as authorized in G.S. 10B-4(d).

"**§ 10B-44. Registration with the Secretary of State.**

(a) Before performing electronic notarial acts electronically with the Secretary of State.

(b) The term of registration as an electronic notary shall coincide with the term of the notary's commission under Article 1 of this Chapter.

(c) An electronic notary shall reregister the capability to notarize electronically at the same time the notary reapplies for requirements for his or her regular commissioning pursuant to the requirements of this Chapter.

(d) An electronic form shall be used by an electronic notary in registering with the Secretary of State and it shall include, at least:
(1) The official name of the registrant;
(2) The state and county of commissioning of the registrant;
(3) The expiration date of the registrant's notary commission;
(4) Proof of successful completion of the course of instruction on electronic notarization as required by this Article;

(5) A description of the technology the registrant will use to create an electronic signature in performing official acts;

(6) If the device used to create the registrant's electronic signature was issued or registered through a licensed certification authority, the name of that authority, the source of the license, the starting and expiration dates of the device's term of registration, and any revocations, annulments, or other premature terminations of any registered device of the registrant device, of the registrant that was due to misuse or compromise of the device, with the date, cause, and nature of each termination explained in detail;

(7) The e-mail address of the registrant; and

(8) The location of the notary's electronic journal, including password or access instructions that will allow the journal to be viewed, printed out, and copied, but not altered, if the same is not to be maintained in the custody of the Secretary.

(e) The electronic registration form for an electronic notary shall be transmitted electronically to the Secretary of State and shall include any decrypting instructions, codes, keys, or software that allow the registration to be read.

(f) Within 10 business days after the change of any registration information required of an electronic notary, the notary shall electronically transmit to the Secretary of State a notice of the change of information signed with the notary's official electronic signature.

"**§ 10B-45. Course of instruction.**

(a) Before performing electronic notarial acts, a notary shall take a course of instruction of least three hours approved by the Secretary of State and pass an examination of this course, which shall be in addition to the educational requirements provided in Article 1 of this Chapter.

(b) The content of the course and the basis for the examination shall be notarial laws, procedures, technology, and ethics as they pertain to electronic notarization.

"**§ 10B-46. Fees for registration.**

The fee payable to the Secretary of State for registering or reregistering as an electronic notary is fifty dollars ($50.00), to be retained by the Secretary of State for the administration of the electronic notary program.

"Part 3. Electronic Notarial Acts, Powers, and Limitations.

"**§ 10B-47. Types of electronic notarial acts.**

The following types of notarial acts may be performed electronically:

(1) Acknowledgments;

(2) Jurats;

(3) Verifications or proofs; and

(4) Oaths or affirmations.

"**§ 10B-48. Prohibitions.**

An electronic notarization shall not be performed if the signer of the electronic document:

(1) Is not in the presence of the electronic notary at the time of notarization; and
(2) Is not personally known to the notary or identified by the evidence in accordance with other provisions of this Chapter.

"**§ 10B-49. Notarial components of electronic document.**

In performing an electronic notarial act, the following components shall be attached to, or logically associated with, the electronic document by the electronic notary, all of which shall be immediately perceptible and reproducible in the electronic record to which the notary's electronic signature is attached:

(a) The notary's name, state, and county of commissioning exactly as stated on the commission issued by the Secretary;
(b) The words "Electronic Notary Public";
(c) The words "State of North Carolina";
(d) The expiration date of the commission;
(e) The notary's electronic signature;
(f) The notary's e-mail address, and
(g) The completed wording of one of the following notarial certificates:
(1) General acknowledgment;
(2) Jurat;
(3) Verification or proof; or
(4) Oath or affirmation.

"**§ 10B-50. Maximum fees.**

For performing electronic notarial acts, the maximum fees that may be charged by an electronic notary are:

(1) For acknowledgments, $10.00 per signature;
(2) For jurats, $10.00 per signature;
(3) For verifications or proofs, $10.00 per signature; and
(4) For oaths or affirmations, $10.00 per signature.

"Part 4. Electronic Notary Records, Maintenance, and Disposition.

"**§ 10B-51. Requirements for official journal of electronic notarial acts.**

An electronic notary shall maintain a chronological official journal of electronic notarial acts in accordance with G.S. 10B-41(h). The electronic notary shall record each electronic notarial act in the official electronic journal in a form and manner required and prescribed by the Secretary of State. It is the duty and responsibility of the electronic notary to record the information required for the official electronic journal within 24 hours of performing the electronic notarial act.

(a) For every electronic notarial act, the electronic notary shall record in the official electronic journal the following:
(1) The date and time of day of the electronic notarial act;
(2) The name of each principal;
(3) The evidence of identity of each principal, in the form of one of the following:
a. A statement that the person is personally known to the notary;

b. A notation of the type of identification document presented and its serial or identification number;

c. The name and address of each credible witness swearing or affirming to the principal's identity;

(4) The fee, if any, charged for the electronic notarial act;

(5) The county where the electronic notarization was performed; and

(6) The type of electronic signature used by the principal to sign the notarized document.

(b) An electronic notary shall not record a social security or credit card number in the journal.

(c) This electronic journal requirement shall become effective one year after adoption of standards by the Secretary of State regarding the Uniform Real Property Electronic Recording Act.

"**§ 10B-52. Inspection of official journal of electronic notarial acts.**

(a) The official journal of electronic notarial acts shall be kept as a confidential record.

(b) In the notary's presence, any person who was a principal may inspect an entry in the official journal of electronic notarial acts during regular business hours, but only if:

(1) The person's identity is personally known to the notary or proven through satisfactory evidence;

(2) The person specifies the month, year, and name of act or acts sought; and

(3) The person is shown only the entry or entries specified.

(c) The official electronic journal may be examined as permitted by applicable law, subpoenaed by court order, or surrendered at the direction of the Secretary of State.

(d) Upon complying with a request under subsection (b) of this section, the notary shall provide a copy of a specified entry or entries in the official electronic journal at a cost of not more than one dollar ($1.00) per page; other entries on the same page shall be redacted.

"**§ 10B-53. Electronic signature, electronic seal, and official electronic journal.**

(a) The notary's electronic signature in combination with the electronic notary seal shall be used only for the purpose of performing electronic notarial acts.

(b) The notary's official journal of electronic notarial acts shall be maintained and shall be used only for the purpose of itemizing notarial acts, whether electronic or otherwise.

(c) The Secretary of State shall promulgate rules necessary to establish standards, procedures, practices, forms, and records relating to a notary's electronic signature, seal and journal. The notary's electronic seal, signature and journal shall conform to any standards promulgated by the Secretary.

"**§ 10B-54. Security measures.**

(a) A notary shall safeguard the notary's electronic signature, the official electronic journal, and all other notarial records and surrender or destroy them only

pursuant to applicable law, by court order, at the direction of the Secretary of State schedule established by rule by the Secretary of State.

(b) When not in use, the official electronic journal shall be kept in a secure area under the exclusive control of the notary and shall not be used by any other notary.

(c) Within 10 days after the official electronic journal is stolen, lost, destroyed, damaged, or otherwise rendered unusable or unreadable as a record of notarial acts, the notary after informing the appropriate law enforcement agency in the case of theft or vandalism, shall notify the Secretary of State by any tangible receipt or acknowledgement, including certified mail and electronic transmission, and also provide a copy or number of any pertinent police report.

(d) Upon resignation, revocation, or expiration of an electronic notary commission, or death of the notary, the official electronic journal and notarial records shall be delivered to the Secretary of State.

"**§ 10B-55. Maintenance of electronic device.**

(a) An electronic notary shall take reasonable steps to ensure that any registered device used to create the notary's electronic signature is current and has not beenrevoked or terminated by its issuing or registering authority.

(b) If the registration of the device used to create electronic signatures either expires or is changed during the electronic notary's term of office, the notary shall cease performing electronic notarizations until:

(1) A new device is duly issued or registered to the notary; and

(2) An electronically signed notice is sent to the Secretary that shall include the starting and expiration dates of any new registration term and any other new information at variance with information in the most recently executed electronic registration form.

"**§ 10B-56 Disposition of records.**

(a) Upon compliance with G.S. 10B-54 and except as provided in subsection (b) of this section, when an electronic notary's commission expires or is resigned or revoked, or when an electronic notary dies, the notary or the notary's duly authorized representative shall erase, delete, or destroy the coding, disk, certificate, card, software, file, or program that enables electronic affixation of the notary's official electronic signature.

(b) A former electronic notary whose previous commission or application was not revoked or denied by the Secretary need not erase, delete, or destroy the coding, disk, certificate, card, software, file, or program enabling electronic affixation of the official electronic signature if he or she is recommissioned and reregistered as an electronic notary using the same electronic signature within three months after commission expiration.

"Part 5. Certificate Forms.

"**§ 10B-57. Validity of notarial certificates.**

The provisions contained in Article 1, Part 6 of this Chapter, with regard to notarial certificate forms, are applicable for the purposes of this Article.

"**§ 10B-58. Form of evidence of authority of electronic notarial act.**

On a notarized electronic document transmitted to another state or nation, electronic evidence of the authenticity of the official signature and seal of an electronic notary of this State, if required, shall be attached to, or logically associated with, the document and shall be in the form of an electronic certificate of authority signed by the Secretary of State in conformance with any current and pertinent international treaties, agreements, and conventions subscribed to by the government of the United States.

"**§ 10B-59. Certificate of authority for electronic notarial act.**

(a) An electronic certificate of authority evidencing the authenticity of the official signature and seal of an electronic notary of this State shall contain substantially the following words:

Certificate of Authority for an Electronic Notarial Act

I, _____ (name, title, jurisdiction of commissioning official) certify that _____ (name of electronic notary), the person named as an electronic notary public in the attached or associated document, was indeed registered as an electronic notary public for the State of North Carolina and authorized to act as such at the time of the document's electronic notarization.

To verify this Certificate of Authority for an Electronic Notarial Act, I have included herewith my electronic signature this _____ day of _____, 20___.

(Electronic signature (and seal) of commissioning official)

(b) The Secretary of State may charge ten dollars ($10.00) for issuing an electronic certificate of authority.

"Part 6. Enforcement.

"**§ 10B-60. Restriction or revocation of registration.**

The Secretary or the Secretary's designee shall have the authority to warn, restrict, suspend, or revoke an electronic notary registration for a violation of this Chapter, and on any ground for which electronic notary registration may be denied under this Chapter.

"**§ 10B-61. Wrongful manufacture distribution, or possession of software or hardware.**

(a) Any person who knowingly creates, manufactures, or distributes software for the purpose of allowing a person to act as an electronic notary without being commissioned and registered in accordance with this act shall be guilty of a Class G felony.

(b) Any person who wrongfully obtains, conceals, damages, or destroys the certificate, disk, coding, card, program, software, file, or hardware enabling an electronic notary to affix an official electronic signature is guilty of a Class I felony."

SECTION 3. This act becomes effective December 1, 2005.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 934
PROPOSED COMMITTEE SUBSTITUTE S934-CSRC-22 [v.4]

4/29/2005 3:04:30 PM

Short Title: Notary Public Act.-AB (Public)

Sponsors:

Referred to:

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO REPEAL CHAPTER 10A REGARDING THE REGULATION OF NOTARIES PUBLIC, AND TO ENACT CHAPTER 10B RELATING TO NOTARIES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 10A of the General Statutes is repealed.

SECTION 2. The General Statutes of North Carolina are amended by adding a new Chapter to read:

"**Chapter 10B.**

"**Notaries.**

"Article 1.

"Notary Public Act.

"Part 1. General Provisions.

"**§ 10B-1. Short title.**

This act is the "Notary Public Act" and may be cited by that name.

"**§ 10B-2. Purposes.**

This Chapter shall be construed and applied to advance its underlying purposes, which are the following:

(1) To promote, serve, and protect the public interests.

(2) To simplify, clarify, and modernize the law governing notaries.

(3) To prevent fraud and forgery.

(4) To foster ethical conduct among notaries.

(5) To enhance interstate recognition of notarial acts.

(6) To integrate procedures for traditional paper and electronic notarial acts.

"**§ 10B-3. Definitions.**

The following definitions apply in this Chapter:

(1) "Acknowledgment" means a notarial act in which an individual, at a single time and place:
  a. Appears in person before the notary and presents a record; and
  b. Is personally known to the notary or identified by the notary through satisfactory evidence and indicates to the notary that the signature on the record was voluntarily affixed by the individual for the purposes stated within the record and, if applicable, that the individual had due authority to sign in a particular representative capacity.

(2) "Affirmation" means a notarial act, or part thereof, which is legally equivalent to an oath and in which an individual at a single time and place:
  a. Appears in person before the notary;
  b. Is personally known to the notary or identified by the notary through satisfactory evidence; and
  c. Makes a vow of truthfulness on penalty of perjury, based on personal honor and without invoking a deity or using any form of the word "swear".

(3) "Commission" means the empowerment to perform notarial acts and the written evidence of authority to perform those acts.

(4) "Credible Witness" means an honest, reliable, and impartial person who is personally known to the notary and takes an oath or affirmation from the notary to confirm a signer's identity.

(4a) "Department" means the North Carolina Department of the Secretary of State.

(5) "Director" means the Division Director for the North Carolina Department of the Secretary Notary Public Section.

(6) "Jurat" means a notarial act in which the notary certifies the date, place, and person before whom an affidavit is sworn or affirmed.

(7) "Moral Turpitude" means conduct contrary to expected standards of honesty, morality, or integrity.

(8) "Nickname" means a descriptive, familiar, or shortened form of a proper name.

(9) "Notarial Act," "Notary Act," and "Notarization" mean any act that a notary is empowered to perform under this Chapter.

(10) "Notarial Certificate" and "Certificate" mean the portion of a notarized record that is completed by the notary, bears the notary's signature and seal, and states the facts attested by the notary in a particular notarization.

(11) "Notary Public" and "Notary" mean a person commissioned to perform notarial acts under this Chapter. A notary is a public officer of the State of North Carolina and shall act in full and strict compliance with this act.

(12) "Oath" means a notarial act, or part thereof, which is legally equivalent to an affirmation and in which an individual at a single time and place:
  a. Appears in person before a notary;
  b. Is personally known to the notary or identified by the notary through satisfactory evidence; and
  c. Makes a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear".

(13) "Official Misconduct" means either of the following:
  a. A notary's performance of a prohibited act or failure to perform a mandated act set forth in this Chapter or any other law in connection with notarization.
  b. A notary's performance of a notarial act in a manner found by the Secretary to be negligent or against the public interest.

(14) "Personal Appearance" and "Appear in Person Before a Notary" mean an individual and a notary are in close physical proximity to one other so that they may freely see and communicate with one another and exchange records back and forth during the notarization process.

(15) "Personal Knowledge of Identity" means familiarity with an individual resulting from interactions with that individual over a period of time sufficient to eliminate every reasonable doubt that the individual has the identity claimed.

(16) "Principal" means a person whose signature is notarized; or a person, other than a credible witness, taking an oath or affirmation from the notary.

(17) "Record" means information that is inscribed on a tangible medium and called a traditional or paper record.

(18) "Regular Place of Work or Business" means a location, office or other workspace, where an individual regularly spends all or part of the individual's work time.

(19) "Satisfactory Evidence of a Signer's Identity" means identification of an individual based on either of the following:
  a. At least one current document issued by a federal, state, or federal- or state-recognized tribal government agency bearing the photographic image of the individual's face and either the signature or a physical description of the individual.
  b. The oath or affirmation of one credible witness unaffected by the record or transaction who is personally known to the notary and who personally knows the individual seeking to be identified.

(20) "Seal" and "Stamp" mean a device for affixing on a paper record an image containing a notary's name, the words "Notary Public," and other information as required in G.S. 10B-24 of this Chapter.

(21) "Secretary" means the North Carolina Secretary of State or the Secretary's designee.

(22) "Signature" means the act of personally signing one's name in ink by hand.

(23) "Subscribing Witness" means a person who either watches another individual sign a record or takes that individual's acknowledgment of an already-signed record and appears before the notary on behalf of the principal. The subscribing witness must sign the document in addition to the principal, must be personally known by the notary or prove identity to the notary by satisfactory evidence, and must take an oath or affirmation stating that he or she witnessed the principal sign.

(24) "Verification" or "Proof" means a notarial act where a person certifies under oath or affirmation that the person witnessed the principal either execute, record, or acknowledge the principal's signature on an already-executed record.

"Part 2. Commissioning.

"**§ 10B-4. Qualifications.**

(a) Except as provided in subsection (d) of this section, the Secretary shall commission as a notary any qualified person who submits an application in accordance with this Chapter.

(b) A person qualified for a notarial commission shall meet all of the following requirements:

(1) Be at least 18 years of age or legally emancipated.

(2) Reside or have a regular place of work or business in this State.

(3) Reside legally in the United States.

(4) Speak, read, and write the English language.

(5) Possess a high school diploma or equivalent.

(6) Pass the course of instruction described in this Article, unless the person is a licensed member of the North Carolina State Bar.

(7) Purchase and keep as a reference the most recent manual approved by the Secretary that describes the duties and authority of notaries public.

(8) Submit an application containing no significant misstatement or omission of fact. The application form shall be provided by the Secretary and be available at the register of deeds office in each county. Every application shall include the signature of the applicant written with pen and ink, and the signature shall be acknowledged by the applicant before a person authorized to administer oaths. The applicant shall also obtain the recommendation of one publicly elected official in North Carolina whose recommendation shall be contained on the application.

(9) Pay a nonrefundable application fee of fifty dollars ($50.00).

(c) The notary shall be commissioned in his or her county of residence, unless the notary is not a North Carolina resident, in which case he or she shall be commissioned in the county of his or her employment or business.

(d) The Secretary may deny an application for commission or recommission if any of the following apply to an applicant:

(1) Submission of an incomplete application or an application containing material misstatement or omission of fact.
(2) The applicant's conviction or plea of admission or nolo contendere to a felony or any crime involving dishonesty or moral turpitude. In no case may a commission be issued to an applicant within 10 years after release from prison, probation, or parole, whichever is later.
(3) A finding or admission of liability against the applicant in a civil lawsuit based on the applicant's deceit.
(4) The revocation, suspension, restriction, or denial of a notarial commission or professional license by this or any other state or nation. In no case may a commission be issued to an applicant within five years after the completion of all conditions of any disciplinary order.
(5) A finding that the applicant has engaged in official misconduct, whether or not disciplinary action resulted.
(6) An applicant knowingly using false or misleading advertising in which the applicant as a notary represents that the applicant has powers, duties, rights, or privileges that the applicant does not possess by law.
(7) A finding by a state bar or court that the applicant has engaged in the unauthorized practice of law.

"**§ 10B-5. Application for commission.**

Every application for a notary commission shall be made on paper with original signatures, or in another form determined by the Secretary, and shall include all of the following:

(1) A statement of the applicant's personal qualifications as required by this Chapter.
(2) A certificate or signed statement by the instructor evidencing successful completion of the course of instruction as required by this Chapter.
(3) A notarized declaration of the applicant, as required by this Chapter.
(4) Any other information that the Secretary deems appropriate.
(5) The application fee required by this Chapter.

"**§ 10B-6. Statement of personal qualification.**

(a) The application for a notary commission shall include at least all of the following:

(1) The applicant's full legal name and the name to be used for commissioning, excluding nicknames.
(2) The applicant's date of birth.
(3) The mailing address for the applicant's residence, the street address for the applicant's residence, and the telephone number for the applicant's residence.
(4) The applicant's county of residence.
(5) The name of the applicant's employer, the street and mailing address for the applicant's employer, and telephone number for the applicant's employer.

(6) The applicant's last four digits of the applicant's social security number.
(7) The applicant's personal and business e-mail addresses.
(8) A declaration that the applicant is a citizen of the United States or proof of the applicant's legal residency in this country.
(9) A declaration that the applicant can speak, read, and write in the English language.
(10) A complete listing of any issuances, denials, revocations, suspensions, restrictions, and resignations of a notarial commission, professional license, or public office involving the applicant in this or any other state or nation.
(11) A complete listing of any criminal convictions of the applicant, including any pleas of admission or nolo contendere, in this or any other state or nation.
(12) A complete listing of any civil findings or admissions of fault or liability regarding the applicant's activities as a notary, in this or any other state or nation.

(b) The information contained in an application under this section is a public record as defined in G.S 132-1. The information contained in subsections (2), (3) and (6) of this subsection shall be considered confidential information.

"**§ 10B-7. Course of study and examination.**

(a) Every applicant for an initial notary commission shall within the three months preceding application, take a course of classroom instruction of not less than six hours approved by the Secretary and take a written examination approved by the Secretary. An applicant must answer at least eighty percent (80%) of the questions correctly in order to pass the exam. This subsection shall not apply to a licensed member of the North Carolina State Bar.

(b) Every applicant for recommissioning shall pass a written examination approved by and administered by or under the direction of the Secretary, unless the person is a licensed member of the North Carolina State Bar.

(c) The content of the course of instruction and the written examinations shall be notarial laws, procedures, and ethics.

(d) The Secretary may charge such fees as are reasonably necessary to pay the cost associated with developing and administering examinations permitted by this Chapter and for conducting the training of notaries and notary instructors. All funds received by the Secretary under this section shall be deposited into the Notary Public Special Fund and used for the purposes authorized under G.S. 10B-60.

"**§ 10B-8. Length of term and jurisdiction.**

A person commissioned under this Chapter may perform notarial acts in any part of this State for a term of five years, unless the commission is earlier revoked or resigned. No commissions shall be effective prior to the administration of the oath of office. Any notarial acts performed before the administration of the oath of office, either the original commissioning or recommissioning, are invalid.

"**§ 10B-9. Commission; oath of office.**

(a) If the Secretary grants a commission to an applicant, the Secretary shall notify the appointee and shall instruct the appointee regarding the proper procedure for taking the oath at the register of deeds office in the county of the appointee's commissioning.

(b) The appointee shall appear before the register of deeds no later than 45 days after commissioning and shall be duly qualified by taking the general oath of office prescribed in G.S. 11-11 and the oath prescribed for officers in G.S. 11-7.

(c) The register of deeds shall then place the notary record in a book designated for that purpose, or the notary record may be recorded in the Consolidated Document Book and indexed in the Consolidated Real Property Index under the notary's name in the grantor index. The notary record may be kept in electronic format so long as the signature of the notary public may be viewed and printed. The notary record shall contain the name and the signature of the notary as commissioned, the effective date and expiration date of the commission, the date the oath was administered, and the date of any restriction, suspension, revocation, or resignation. The record shall constitute the official record of the qualification of notaries public.

(d) The register of deeds shall deliver the commission to the notary following completion of the requirements of this section and shall notify the Secretary of the delivery.

(e) If the appointee does not appear before the register of deeds within 45 days of commissioning, the register of deeds must return the commission to the Secretary and the appointee must reapply for commissioning. If the appointee reapplies within one year of the granting of the commission, the Secretary may waive the educational requirements of this Chapter.

(f) As soon as practicable, or within twenty-four months of the effective date of this Act, all North Carolina registers of deed and clerks of superior courts shall submit to the Department for archiving in permanent storage legible and reproducible copies of the pages contained in their "Records of Notaries Public" created prior to 1991. The copies shall be reproduced pursuant to standards set by the Department to ensure the legibility of the copies and the compatibility with the Department's existing systems. The Department shall be responsible for any expense incurred relating to the shipment or transfer of these records.

"**§ 10B-10. Recommissioning.**

(a) A commissioned notary may apply for recommissioning no earlier than 10 weeks prior to the expiration date of the notary's commission.

(b) A notary whose commission has not expired must comply with the following requirements to be recommissioned:

(1) Submit a new application under G.S. 10B-5.

(2) Meet the requirements of G.S. 10B-4(b).

(3) Pass the written examination required under G.S. 10B-7, unless the notary is a licensed member of the North Carolina State Bar.

(c) An individual may apply for recommissioning within one year after the expiration of the individual's commission. The individual must comply with the requirement of subsection (b) of this section. The individual must also fulfill the

educational requirement under G.S. 10B-7(a), unless the Secretary waives that requirement.

"**§ 10B-11. Notarized declaration.**

The application for a notary public commission shall contain the following declaration to be executed by each applicant under oath:

Declaration of Applicant

I, _____ (name of applicant), solemnly swear or affirm under penalty of perjury that the information in this application is true, complete, and correct; that I understand the official duties and responsibilities of a notary public in this State, as described in the statutes; and that I will perform to the best of my ability all notarial acts in accordance with the law.

_____

(signature of applicant)

"**§ 10B-12. Application fee.**

Every applicant for a notary commission shall pay to the Secretary a nonrefundable application fee of fifty dollars ($50.00).

"**§ 10B-13. Instructor's certification.**

(a) The course of study required by G.S. 10B-4(b) shall be taught by an instructor certified under rules adopted by the Secretary. An instructor must meet the following requirements to be certified to teach a course of study for notaries public:

(1) Complete and pass an instructor certification course of not less than six hours taught by the Director or other person approved by the Secretary.
(2) Have at least one year of active experience as a notary public.
(3) Maintain a current commission as a notary public.
(4) Possess the current notary public guidebook.
(5) Pay a nonrefundable fee of fifty dollars ($50.00).

(b) Certification to teach a course of study for notaries shall be effective for two years. A certification may be renewed by passing a recertification course taught by the Director or other person approved by the Secretary and by paying a nonrefundable fee of fifty dollars ($50.00). All funds received by the Secretary under this section shall be deposited into the Notary Public Special Fund and used for the purposes authorized under G.S. 10B-60.

(c) The following individuals may be certified to teach a course of study for notaries public without paying the fee required by this section, and they may renew their certification without paying the renewal fee, so long as they remain actively employed in the capacities named:

(1) Registers of deeds.
(2) Clerks of court.
(3) The Director and other duly authorized employees of the Secretary.

(d) Former registers of deeds and clerks of court who have been certified as notary public instructors must apply for commissioning as a notary public but are exempt from the education requirements of G.S. 10B-7 after successful completion of an examination administered by the Secretary.

(e) Assistant and deputy registers of deeds and assistant and deputy clerks of court must have a regular notary commission prior to receiving a certification or recertification as a notary public instructor.

(f) The Secretary may suspend or revoke the certification of a notary instructor for violating the provisions of this Chapter or any of the administrative rules implementing it.

"Part 3. Notarial Acts, Powers, and Limitations.

"**§ 10B-14. Powers and limitations.**

(a) A notary may perform any of the following notarial acts:

(1) Acknowledgments.

(2) Oaths and affirmations.

(3) Execute jurats.

(4) Verifications or proofs.

(b) A notarial act shall be attested by all of the following:

(1) The signature of the notary, exactly as shown on the notary's commission.

(2) The readable appearance of the notary's name, either from the notary's signature or from the notary's typed or printed name near the signature.

(3) The clear and legible appearance of the notary's stamp or seal.

(4) A statement of the date the notary's commission expires.

(c) A notary is disqualified from performing a notarial act if any of the following apply:

(1) The principal or subscribing witness is not in the notary's presence at the time the notarial act is to be performed.

(2) The principal or subscribing witness is not personally known to the notary or identified by the notary through satisfactory evidence.

(3) The principal or subscribing witness shows a demeanor that causes the notary to have a compelling doubt about whether the principal knows the consequences of the transaction requiring a notarial act.

(4) The principal or subscribing witness, in the notary's judgment, is not acting of the principal's or the subscribing witness's own free will.

(5) The notary is a signer of or is named, other than as a trustee in a deed of trust, in the document that is to be notarized.

(6) The notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in G.S. 10B-20, other than fees or other consideration paid for services rendered by a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker.

(d) A notary may certify the affixation of a signature by mark on a record presented for notarization if:

(1) The mark is affixed in the presence of the notary;

(2) The notary writes below the mark: "Mark affixed by (name of signer by mark) in presence of undersigned notary"; and

(3) The notary notarizes the signature by performing an acknowledgment, oath or affirmation, jurat, or verification or proof.

(e) If a principal is physically unable to sign or make a mark on a record presented for notarization, that principal may designate another person as his or her designee, who shall be a disinterested party, to sign on the principal's behalf pursuant to the following procedure:

(1) The principal directs the designee to sign the record in the presence of the notary and two witnesses unaffected by the record;

(2) The designee signs the principal's name in the presence of the principal, the notary, and the two witnesses;

(3) Both witnesses sign their own names to the record near the principal's signature;

(4) The notary writes below the principal's signature: "Signature affixed by designee in the presence of (names and addresses of principal and witnesses)"; and

(5) The notary notarizes the signature through an acknowledgment, oath or affirmation, jurat, or verification or proof.

(f) A notarial act performed in another jurisdiction by a notary public of that jurisdiction is valid to the same extent as if it had been performed by a notary commissioned under this Chapter.

(g) Commissioned officers on active duty in the United States armed forces who are authorized to perform notarial acts may perform the acts for persons serving in or with the United States armed forces, their spouses, and their dependents.

(h) The Secretary and register of deeds in the county in which a notary qualified may certify to the commission of the notary.

(i) A notary public who is not an attorney licensed to practice law in this State who advertises the person's services as a notary public in a language other than English, by radio, television, signs, pamphlets, newspapers, other written communication, or in any other manner, shall post or otherwise include with the advertisement the notice set forth in this subsection in English and in the language used for the advertisement. The notice shall be of conspicuous size, if in writing, and shall state: "I AM NOT AN ATTORNEY LICENSED TO PRACTICE LAW IN THE STATE OF NORTH CAROLINA, AND I MAY NOT GIVE LEGAL ADVICE OR ACCEPT FEES FOR LEGAL ADVICE." If the advertisement is by radio or television, the statement may be modified but must include substantially the same message.

(j) A notary public who is not an attorney licensed to practice law in this State is prohibited from representing or advertising that the notary public is an "immigration consultant" or expert on immigration matters unless the notary public is an accredited representative of an organization recognized by the Board of Immigration Appeals

pursuant to Title 8, Part 292, Section 2(a-e) of the Code of Federal Regulations (8 CFR § 292.2(a-e)).

(k) A notary public who is not an attorney licensed to practice law in this State is prohibited from rendering any service that constitutes the unauthorized practice of law.

(l) A notary public required to comply with the provisions of subsection (g) of this section shall prominently post at the notary public's place of business a schedule of fees established by law, which a notary public may charge. The fee schedule shall be written in English and in the non-English language in which the notary services were solicited and shall contain the notice required in subsection (i) of this section, unless the notice is otherwise prominently posted at the notary public's place of business.

(m) If notarial certificate wording is not provided or indicated for a record, a nonattorney notary shall not determine the type of notarial act or certificate to be used. This does not prohibit a notary from offering the selection of certificate forms recognized in this Chapter or promulgated by the Department of the Secretary.

(n) A nonattorney notary shall not assist another person in drafting, completing, selecting, or understanding a record or transaction requiring a notarial act.

(o) A notary shall not claim to have powers, qualifications, rights, or privileges that the office of notary does not provide, including the power to counsel on immigration matters.

"**§ 10B-15. Notaries ex officio.**

(a) The clerks of the superior court may act as notaries public in their several counties by virtue of their offices as clerks and may certify their notarial acts only under the seals of their respective courts. Assistant and deputy clerks of superior court, by virtue of their offices, may perform the following notarial acts and may certify these notarial acts only under the seals of their respective courts:

(1) Oaths and affirmations.

(2) Verifications or proofs.

Upon completion of the course of study provided for in G.S. 10B-4(b), assistant and deputy clerks of superior court may, by virtue of their offices, perform all other notarial acts and may certify these notarial acts only under the seals of their respective courts. A course of study attended only by assistant and deputy clerks of superior court may be taught at any mutually convenient location agreed to by the Secretary and the Administrative Officer of the Courts.

(b) Registers of deeds may act as notaries public in their several counties by virtue of their offices as registers of deeds and may certify their notarial acts only under the seals of their respective offices. Assistant and deputy registers of deeds, by virtue of their offices, may perform the following notarial acts and may certify these notarial acts only under the seals of their respective offices:

(1) Oaths and affirmations.

(2) Verifications or proofs.

Upon completion of the course of study provided for in G.S. 10B-4(b), assistant and deputy registers of deeds may, by virtue of their offices, perform all other notarial acts and may certify these notarial acts only under the seals of their respective offices. A course of study attended only by assistant and deputy registers of deeds may be taught

at any mutually convenient location agreed to by the Secretary and the North Carolina Association of Registers of Deeds.

(c) The Director may act as a notary public by virtue of the Director's employment in the Department of the Secretary and may certify a notarial act performed in that capacity under the seal of the Secretary.

(d) Unless otherwise provided by law, a person designated a notary public by this section may charge a fee for a notarial act performed in accordance with G.S. 10B-20. The fee authorized by this section is payable to the governmental unit or agency by whom the person is employed.

(e) Nothing in this section shall authorize a person to act as a notary public other than in the performance of the official duties of the person's office unless the person complies fully with the requirements of G.S. 10B-4.

"**§ 10B-16. False certificate.**

(a) A notary shall not execute a notarial certificate containing information known or believed by the notary to be false.

(b) A notary shall not provide or send a signed or sealed notarial certificate to another person with the understanding that it will be completed or attached to a record outside of the notary's presence.

(c) A notary shall not affix an official signature or seal on a notarial certificate that is incomplete. Prior to performing a notarial act, the notary shall cross out blank lines and spaces in the certificate.

(d) A notary shall not execute a certificate that is not written in the English language. A notary may execute a certificate written in the English language that accompanies a record written in another language, which record may include a translation of the notarial certificate into the other language. In those instances, the notary shall execute only the English language certificate.

"**§ 10B-17. Improper records.**

(a) A notary shall not notarize a signature:

(1) On a blank or incomplete record; or

(2) On a record without a notarial certificate indicating what type of notarial act was performed.

(b) A notary shall neither certify, notarize, nor authenticate a photograph. A notary may notarize an affidavit regarding and attached to a photograph.

"**§ 10B-18. Testimonials.**

A notary shall not use the official notary title or seal in a manner intended to endorse, promote, denounce, or oppose any product, service, contest, candidate, or other offering. This section does not prohibit a notary public from performing a notarial act upon a record executed by another individual.

"Part 4. Fees.

"**§ 10B-19. Imposition and waiver of fees.**

(a) For performing a notarial act, a notary may charge up to the maximum fee specified in this Chapter.

(b) A notary shall not discriminatorily condition the fee for a notarial act on any attribute of the principal that would constitute unlawful discrimination.

(c) Nothing in this Chapter shall compel a notary to charge a fee.

"**§ 10B-20. Fees for notarial acts.**

The maximum fees that may be charged by a notary for notarial acts are as follows:

(1) For acknowledgments, jurats, verifications or proofs, five dollars ($5.00) per principal signature.

(2) For oaths or affirmations without a signature, five dollars ($5.00) per person, except for an oath or affirmation administered to a credible witness to vouch for a principal's identity.

"**§ 10B-21. Notice of fees.**

Notaries who charge for their notarial services shall conspicuously display in their places of business, or present to each principal outside their places of business, an English-language schedule of fees for notarial acts. No part of any notarial fee schedule shall be printed in smaller than 10-point type.

"Part 5. Signature and Seal.

"**§ 10B-22. Official signature.**

When notarizing a paper record, a notary shall sign by hand in ink on the notarial certificate exactly and only the name indicated on the notary's commission. The notary shall print or type his or her name directly below the official signature. The notary shall affix the official signature only at the time the notarial act is performed. The notary shall not sign a paper record using a facsimile stamp or an electronic or other printing method.

"**§ 10B-23. Official seal.**

(a) A notary shall keep an official seal or stamp (herein "seal") that is the exclusive property of the notary. The notary shall keep the seal in a secure location that is accessible only to the notary. A notary shall not allow another person to use or possess the seal, and shall not surrender the seal to the notary's employer upon termination of employment.

(b) The seal shall be impressed only at the time the notarial act is performed. The notary shall place the image or impression of the seal near the notary's signature on every paper record notarized. The seal and the signature shall appear on the same page.

(c) A notary shall do the following within 10 days of discovering that the notary's seal has been stolen, lost, damaged or otherwise rendered incapable of affixing a legible image:

(1) Inform the appropriate law enforcement agency in the case of theft or vandalism.

(2) Notify the appropriate register of deeds and the Secretary in writing and signed in the official name in which he or she was commissioned.

(d) As soon as is reasonably practicable after resignation, revocation, or expiration of a notary commission, or death of the notary, the seal shall be delivered to the Secretary for disposal.

"**§ 10B-24. Seal image.**

(a) Near the notary's official signature on the notarial certificate of a paper record, the notary shall place a sharp, legible, permanent, and photographically reproducible image of the official seal.

(b) A notary's official seal shall include the following elements:
(1) The notary's name exactly as commissioned;
(2) The words "Notary Public";
(3) The county of commissioning, including the word "County" or the abbreviation "Co."; and
(4) The words "North Carolina" or the abbreviation "NC".

(c) The notary seal may be either circular or rectangular in shape. The circular seal shall not be less than 1-1/2 inches, nor more than 2 inches in diameter. The rectangular seal shall not be over 1 inch high and 2-1/2 inches long. The perimeter of the seal shall contain a border that is visible when impressed.

(d) After December 31, 2009, notary seals shall not contain a commission expiration date.

"Part 6. Certificate Forms.

"**§ 10B-25. Notarial certificates in general.**

(a) In addition to the notarial certificates contained in this section, a notary public shall also use certificates that are in substantially the same form as those contained in Chapter 47 of the General Statutes. All statutory forms for the certification of acknowledgment or proof of written instruments shall include all of the following:
(1) The name of the state and county in which the certification occurs.
(2) The body of the certificate, stating before whom, by whom, and in what manner the signature was acknowledged or proved.
(3) The date of the acknowledgment or proof.
(4) The signature and seal or stamp of the officer who took the acknowledgment or proof.
(5) The notary's commission expiration date.

(b) Any certificate of acknowledgment taken in another jurisdiction shall be sufficient in this State if it is taken in accordance with the laws of the jurisdiction where the acknowledgment is made.

"**§ 10B-26. General acknowledgment.**

A notary public shall use a certificate in substantially the following form in notarizing the signature or mark of persons acknowledging for themselves or as partners, corporate officers, attorneys-in-fact, or in other representative capacities:

State of North Carolina
_____ County

I, [name of notary], a notary public of _____ County, North Carolina, do certify that on this _____ day of _____, 20____, before me personally appeared [name], [and title, if applicable], (personally known to me) (proved to me by satisfactory evidence) (proved to me on the oath or affirmation of _____, who is personally known to me,) to be the person(s) whose name(s) (is) (are) signed on the preceding or attached record, and acknowledged to me that (he) (she) (they) signed it voluntarily for its stated purpose.

(Official Seal) _____ Official Signature of Notary
My Commission Expires the _____ day of _____, 20____.

"**§ 10B-27. Verification or proof of acknowledgment.**

A notary shall use a certificate in substantially the following form in notarizing a signature or mark on an affidavit or other sworn or affirmed written declaration:

State of North Carolina
_____ County

I, [name of notary], a notary public of _____ County, North Carolina, do certify that on this _____ day of _____, 20____, before me personally appeared _____, (personally known to me) (proved to me by satisfactory evidence) (proved to me on the oath or affirmation of _____, who is personally known to me,) to be the person(s) who signed the preceding or attached record in my presence and who swore or affirmed to me that the signature(s) (is) (are) voluntary and the record truthful.

(Official Seal) _____ Official Signature of Notary
My Commission Expires the _____ day of _____, 20____.

"**§ 10B-28. Subscribing witness of absent signer.**

A notary shall use a certificate in substantially the following form to take an oath or affirmation from a subscribing witness that a signer, not appearing before the notary, did in fact execute or sign the record:

State of North Carolina
_____ County

I, [name of notary], a notary public of _____ County, North Carolina, do certify that on this _____ day of _____, 20____, before me personally appeared _____, (personally known to me) (proved to me by satisfactory evidence) (proved to me on the oath or affirmation of _____, who is personally known to me,) or (proved to me by satisfactory evidence) to be the person whose name is signed on the preceding or attached record as subscribing witness and who declared to me under oath that (he) (she) personally knows _____(name of signer not appearing before notary), that they are not a named party to this and have no interest in this transaction, and that (he) (she) witnessed that individual sign or acknowledge the record having signed the same as witness.

_____

Signature of Subscribing Witness

(Official Seal) Official Signature of Notary

My Commission Expires the day of , 20 .

"**§ 10B-29. Signer by mark; person unable to sign.**

As modified by the following provisions, the certificates in this chapter may be used for signers by mark or persons physically unable to sign or make a mark.

(a) A notary may certify the affixation of a signature by mark on a record presented for notarization if:

(1) The mark is affixed in the presence of the notary;

(2) The notary writes below the mark: "Mark affixed by (name of signer by mark) in presence of undersigned notary"; and

(3) The notary notarizes the signature by performing an acknowledgment or jurat.

(b) If a principal is physically unable to sign or make a mark on a record presented for notarization, that principal may designate another person as his or her designee, who shall be a disinterested party, to sign on the principal's behalf pursuant to the following procedure:

(1) The principal directs the designee to sign the record in the presence of the notary and two witnesses unaffected by the record;

(2) The designee signs the principal's name in the presence of the principal, the notary and the two witnesses;

(3) Both witnesses sign their own names to the record near the principal's signature;

(4) The notary writes below the principal's signature: "Signature affixed by designee in the presence of (names and addresses of principal and witnesses)"; and

(5) The notary notarizes the signature through an acknowledgment or jurat.

"**§ 10B-30. Other certificates allowed.**

In addition to the notarial certificates contained in this section, a notary public may also use other certificates provided by North Carolina law.

"Part 7. Changes in Status.

"**§ 10B-31. Change of address.**

Within 45 days after the change of a notary's residence, business, or any mailing address or telephone number, the notary shall send to the Secretary by fax, e-mail, or certified mail, return receipt requested, a signed notice of the change, giving both old and new addresses or telephone numbers.

"**§ 10B-32. Change of name.**

(a) Within 45 days after the legal change of a notary's name, the notary shall send to the Secretary by fax, e-mail, or certified mail, return receipt requested, a signed

notice of the change. The notice shall include both the notary's former name and the notary's new name.

(b) A notary with a new name may continue to use the former name in performing notarial acts until all of the following steps have been completed:

(1) The notary receives a confirmation of Notary's Name Change from the Secretary.

(2) The notary obtains a new seal bearing the new name exactly as that name appears in the confirmation from the Secretary.

(3) The notary appears before the register of deeds to which the commission was delivered within 45 days of the effective date of the change to be duly qualified by taking the general oath of office prescribed in G.S. 11-11 and the oath prescribed for officers in G.S. 11-7 under the new name and to have the notary public record changed to reflect the new commissioned name.

(c) Upon completion of the requirements in subsection (b) of this section, the notary shall use the new name.

"**§ 10B-33. Change of county.**

(a) A notary who has moved to another county in North Carolina remains commissioned until the current commission expires, is not required to obtain a new seal and may continue to notarize without changing his or her seal.

(b) When a notary who has moved applies to be recommissioned, if the commission is granted the Secretary shall issue a notice of recommissioning. The commission applicant shall then to all of the following:

(1) Obtain a new seal bearing the new county exactly as in the notice of recommissioning.

(2) Appear before the register of deeds to which the commission was delivered within 45 days of recommissioning, to be duly qualified by taking the general oath of office prescribed in G.S.11-11 and the oath prescribed for officers in G.S.11-7 under the new county and to have the notary public record changed to reflect the new county name.

"**10B-34. Change of both name and county.**

(a) Within 45 days after the legal change of a notary's name, and if the notary has also moved to a different county than as last commissioned, the notary shall submit to the Secretary a recommissioning application and fee pursuant to this Chapter. The notary may continue to perform notarial acts under the notary's previous name and seal until all of the following steps have been completed:

(1) The notary receives a transmittal receipt of reappointment due to name and county change from the Secretary.

(2) The notary obtains a new seal bearing the new name and county exactly as those items appear in the transmittal receipt.

(3) The notary appears before the register of deeds to which the commission was delivered within 45 days of recommissioning to be duly qualified by taking the general oath of office prescribed in G.S.11-11 and the oath prescribed for officers in G.S.11-7 under the

new name and county and to have the notary public record changed to reflect the new name and county.

"**§ 10B-35. Resignation.**

(a) A notary who resigns the notary's commission shall send to the Secretary by fax, e-mail, or certified mail, return receipt requested, a signed notice indicating the effective date of resignation.

(b) Notaries who cease to reside in or to maintain a regular place of work or business in this State, or who become permanently unable to perform their notarial duties, shall resign their commissions and shall deliver their seals to the Secretary by certified mail, return receipt requested.

"**§ 10B-36. Disposition of seal; death of notary.**

(a) When a notary commission is resigned or revoked, the notary shall deliver the notary's seal to the Secretary within 45 days of the resignation or revocation. Delivery shall be accomplished by certified mail, return receipt requested. The Secretary shall destroy any seal received under this subsection.

(b) A notary whose commission has expired and whose previous commission or application was not revoked or denied by this State, is not required to deliver the seal to the Secretary as provided under subsection (a) of this section if the notary intends to apply to be recommissioned and is recommissioned within three months after the notary's commission expires.

(c) If a notary dies while commissioned or before fulfilling the disposition of seal requirements in this section, the notary's estate shall, as soon as is reasonably practicable and no later than the closing of the estate, notify the Secretary in writing of the notary's death and deliver the notary's seal to the Secretary for destruction.

"Part 8. Enforcement, Sanctions, and Remedies.

"**§ 10B-37. Enforcement and penalties.**

(a) The Secretary may warn, restrict, suspend, or revoke a notarial commission for a violation of this Chapter and on any ground for which an application for a commission may be denied under this Chapter. Any period of restriction, suspension or revocation shall not extend the expiration date of a commission.

(b) Except as otherwise permitted by law, a person who commits any of the following acts is guilty of a Class 1 misdemeanor:

(1) Holding one's self out to the public as a notary if the person does not have a commission.

(2) Performing a notarial act if the person's commission has expired or been suspended.

(3) Performing a notarial act before the person had taken the oath of office.

(c) Any notary who takes an acknowledgment, performs an oath, affirmation, verification or proof, or jurat without the principal appearing before the notary, without personal knowledge, or without satisfactory evidence of the signer's identity is guilty of a Class 1 misdemeanor.

(d) A notary shall be guilty of a Class I felony if the notary does any of the following:

(1) Takes an acknowledgment, verification, proof, or jurat, or performs an oath or affirmation if the notary knows it is false or fraudulent.

(2) Takes an acknowledgment, verification, proof, or jurat without the principal appearing if the notary does so with the intent to commit fraud.

(e) It is a Class I felony for any person to perform notarial acts in this State with the knowledge that the person is not commissioned under this Chapter.

(f) Any person who without authority obtains, uses, conceals, defaces, or destroys the seal or notarial records of a notary is guilty of a Class I felony.

(g) For purposes of enforcing this Chapter and Article 34 of Chapter 66, the law enforcement agents of the Department of the Secretary have statewide jurisdiction and have all of the powers and authority of law enforcement officers. The agents have the authority to assist local law enforcement agencies in their investigations and to initiate and carry out, on their own or in coordination with local law enforcement agencies, investigations of violations.

(h) Resignation or expiration of a notarial commission does not terminate or preclude an investigation into a notary's conduct by the Secretary, who may pursue the investigation to a conclusion, whereupon it may be a matter of public record whether or not the finding would have been grounds for disciplinary action.

(i) The Secretary may seek injunctive relief against any person who violates the provisions of this Chapter. Nothing in this Chapter diminishes the authority of the North Carolina State Bar.

(j) Any person who knowingly solicits, coerces, or in any material way influences a notary to commit official misconduct is guilty as an aider and abettor and subject to the same level of punishment as the notary.

(k) The sanctions and remedies of this Chapter supplement other sanctions and remedies provided by law, including but not limited to, forgery and aiding and abetting.

"Part 9. Validation of Notarial Acts.

"**§ 10B-38. Acts of notaries public in certain instances validated.**

(a) Any acknowledgment taken and any instrument notarized by a person prior to qualification as a notary public but after commissioning or recommissioning as a notary public, or by a person whose notary commission has expired, is hereby validated. The acknowledgment and instrument shall have the same legal effect as if the person qualified as a notary public at the time the person performed the act.

(b) All documents bearing a notarial seal and which contain any of the following errors are validated and given the same legal effect as if the errors had not occurred:

(1) The date of the expiration of the notary's commission is stated, whether correctly or erroneously.

(2) The notarial seal does not contain a readable impression of the notary's name, contains an incorrect spelling of the notary's name, or does not bear the name of the notary exactly as it appears on the commission, as required under G.S. 10B-24.

(3) The notary's signature does not comport exactly with the name on the notary commission or on the notary seal, as required by G.S. 10A-14.

(4) The notarial seal contains typed, printed, drawn, or handwritten material added to the seal, fails to contain the words "North Carolina" or the abbreviation "NC", or contains correct information except that instead of the abbreviation for North Carolina contains the abbreviation for another state.

(c) All deeds of trust in which the notary was named in the document as a trustee only are validated.

(d) All notary acknowledgments performed before January 1, 1953, bearing a notarial seal are hereby validated.

(e) This section applies to notarial acts performed on or before July 1, 2002.

"**§ 10B-39. Certain notarial acts validated.**

(a) Any acknowledgment taken and any instrument notarized by a person whose notarial commission was revoked on or before January 30, 1997, is hereby validated.

(b) This section applies to notarial acts performed on or before August 1, 1998.

"Article 2.

"Electronic Notary Act.

"Part 1. General Provisions.

"**§ 10B-40. Short title.**

This act is the Electronic Notary Public Act and may be cited by that name.

"**§ 10B-41. Definitions.**

The following definitions apply in this Article:

(1) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(2) "Electronic Notary Public" and "Electronic Notary" mean a notary public who has registered with the Secretary the capability of performing electronic notarial acts in conformance with this Article.

(3) "Electronic Document" means information that is created, generated, sent, communicated, received, or stored by electronic means.

(4) "Electronic Notarial Act" and "Electronic Notarization" mean an official act by an electronic notary public that involves electronic documents.

(4) "Electronic Notary Seal" and "Electronic Seal" mean information within a notarized electronic document that includes the notary's name, jurisdiction, and commission expiration date, and generally corresponds to data in notary seals used on paper documents.

(5) "Electronic Signatures" means an electronic symbol or process attached to or logically associated with an electronic document and executed or adopted by a person with the intent to sign the document.

(6) "Notary's Electronic Signature" means those forms of electronic signature which have been approved by the Secretary as authorized in G.S. 10B-51, as an acceptable means for an electronic notary to affix the notary's official signature to an electronic record that is being notarized.

"**§ 10B-42. Scope of this Article.**

Article 1 of this Chapter applies to all acts authorized under this Article unless the provisions of Article 1 directly conflict with the provisions of this Article.

"Part 2. Registration.

"**§ 10B-43. Qualifications.**

(a) A person qualified for electronic notary registration shall meet all of the following requirements:

(1) Hold a valid commission as a notary public in the State of North Carolina.

(2) Except as otherwise provided, abide by all the provisions of Article 1 of this Chapter.

(3) Satisfy the requirements of G.S. 10B-45.

(4) Submit an electronic registration form containing no significant misstatement or omission of fact.

(5) Pay a nonrefundable registration fee of fifty dollars ($50.00).

(b) The Secretary may deny a registration as an electronic notary as authorized in G.S. 10B-4(d). All funds received by the Secretary under this section shall be deposited into the Notary Public Special Fund and used for the purposes authorized under G.S. 10B-60.

"**§ 10B-44. Registration with the Secretary of State.**

(a) Before performing notarial acts electronically, a notary shall register the capability to notarize electronically with the Secretary.

(b) The term of registration as an electronic notary shall coincide with the term of the notary's commission under Article 1 of this Chapter.

(c) An electronic notary shall reregister the capability to notarize electronically at the same time the notary applies for recommissioning under the requirements of Article 1 of this Chapter.

(d) An electronic form shall be used by an electronic notary in registering with the Secretary and it shall include, at least all of the following:

(1) The official name of the registrant.

(2) The state and county of commissioning of the registrant.

(3) The expiration date of the registrant's notary commission.

(4) Proof of successful completion of the course of instruction on electronic notarization as required by this Article.

(5) A description of the technology the registrant will use to create an electronic signature in performing official acts.

(6) If the device used to create the registrant's electronic signature was issued or registered through a licensed certification authority, the name of that authority, the source of the license, the starting and expiration dates of the device's term of registration, and any revocations, annulments, or other premature terminations of any registered device of the registrant device, of the registrant that was due to misuse or compromise of the device, with the date, cause, and nature of each termination explained in detail.

(7) The e-mail address of the registrant.

(e) The electronic registration form for an electronic notary shall be transmitted electronically to the Secretary and shall include any decrypting instructions, codes, keys, or software that allow the registration to be read.

(f) Within 10 business days after the change of any registration information required of an electronic notary, the notary shall electronically transmit to the Secretary a notice of the change of information signed with the notary's official electronic signature.

"**§ 10B-45. Course of instruction.**

(a) Before performing electronic notarial acts, a notary shall take a course of instruction of least three hours approved by the Secretary and pass an examination of this course, which shall be in addition to the educational requirements provided in Article 1 of this Chapter.

(b) The content of the course and the basis for the examination shall be notarial laws, procedures, technology, and ethics as they pertain to electronic notarization.

"**§ 10B-46. Fees for registration.**

The fee payable to the Secretary for registering or reregistering as an electronic notary is fifty dollars ($50.00). All funds received by the Secretary under this section shall be deposited into the Notary Public Special Fund and used for the purposes authorized under G.S. 10B-60.

"Part 3. Electronic Notarial Acts, Powers, and Limitations.

"**§ 10B-47. Types of electronic notarial acts.**

The following types of notarial acts may be performed electronically:

(1) Acknowledgments;
(2) Jurats;
(3) Verifications or proofs; and
(4) Oaths or affirmations.

"**§ 10B-48. Prohibitions.**

An electronic notarization shall not be performed if the signer of the electronic document:

(1) Is not in the presence of the electronic notary at the time of notarization; and
(2) Is not personally known to the notary or identified by the evidence in accordance with other provisions of this Chapter.

"**§ 10B-49. Notarial components of electronic document.**

In performing an electronic notarial act, all of the following components shall be attached to, or logically associated with, the electronic document by the electronic notary, all of which shall be immediately perceptible and reproducible in the electronic record to which the notary's electronic signature is attached:

(1) The notary's name, state, and county of commissioning exactly as stated on the commission issued by the Secretary;
(2) The words "Electronic Notary Public";
(3) The words "State of North Carolina";
(4) The expiration date of the commission;
(5) The notary's electronic signature;

(6) The notary's e-mail address, and

(7) The completed wording of one of the following notarial certificates:

a. General acknowledgment;

b. Jurat;

c. Verification or proof; or

d. Oath or affirmation.

"**§ 10B-50. Maximum fees.**

For performing electronic notarial acts, the maximum fees that may be charged by an electronic notary are as follows:

(1) For acknowledgments, $10.00 per signature.

(2) For jurats, $10.00 per signature.

(3) For verifications or proofs, $10.00 per signature.

(4) For oaths or affirmations, $10.00 per signature.

"Part 4. Electronic Notary Records, Maintenance, and Disposition.

"**§ 10B-51. Electronic signature, electronic seal.**

(a) The notary's electronic signature in combination with the electronic notary seal shall be used only for the purpose of performing electronic notarial acts.

(b) The Secretary shall adopt rules necessary to establish standards, procedures, practices, forms, and records relating to a notary's electronic signature and electronic seal. The notary's electronic seal and signature shall conform to any standards adopted by the Secretary.

"**§ 10B-52. Security measures.**

(a) A notary shall safeguard the notary's electronic signature, the notary's electronic seal, and all other notarial records. Notarial records shall be maintained by the notary and the notary shall not surrender or destroy the records except as required by a court order or as allowed under rules adopted by the Secretary.

(b) When not in use, the notary shall keep the notary's electronic signature, electronic seal, and all other notarial records secure, under the exclusive control of the notary, and shall not allow them to be used by any other notary or any other person.

(c) Within 10 days after the notary's electronic signature or any other notarial records maintained by the notary are stolen, lost, destroyed, damaged, or otherwise rendered unusable or unreadable, the notary after informing the appropriate law enforcement agency in the case of theft or vandalism, shall notify the Secretary by any tangible receipt or acknowledgement, including certified mail and electronic transmission, and also provide a copy or number of any pertinent police report.

(d) The Secretary may adopt rules necessary to insure the integrity, security, and authenticity of electronic notarizations.

(e) The Secretary may require an electronic notary to create and to maintain a record, journal or entry of each electronic notarial act. The rule-making authority contained in this subsection shall become effective eighteen months after the effective date of this act.

(f) The failure of an electronic notary to produce within ten days of the Department's request any record required by a rule adopted under this section shall

result in the suspension of the electronic notary's power to act as a notary under the provision of this Chapter until the Secretary reinstates the notary's commission.

(g) Upon resignation, revocation, or expiration of an electronic notary commission, or death of the notary, all notarial records required by statute or rule shall be delivered to the Secretary.

"**§ 10B-53. Maintenance of electronic device.**

(a) An electronic notary shall take reasonable steps to ensure that any registered device used to create the notary's electronic signature is current and has not been revoked or terminated by its issuing or registering authority.

(b) If the registration of the device used to create electronic signatures either expires or is changed during the electronic notary's term of office, the notary shall cease performing electronic notarizations until:

(1) A new device is duly issued or registered to the notary; and

(2) An electronically signed notice is sent to the Secretary that shall include the starting and expiration dates of any new registration term and any other new information at variance with information in the most recently executed electronic registration form.

"**§ 10B-54. Disposition of records.**

(a) Upon compliance with G.S. 10B-54 and except as provided in subsection (b) of this section, when an electronic notary's commission expires or is resigned or revoked, or when an electronic notary dies, the notary or the notary's duly authorized representative shall erase, delete, or destroy the coding, disk, certificate, card, software, file, or program that enables electronic affixation of the notary's official electronic signature.

(b) A former electronic notary whose previous commission or application was not revoked or denied by the Secretary need not erase, delete, or destroy the coding, disk, certificate, card, software, file, or program enabling electronic affixation of the official electronic signature if he or she is recommissioned and reregistered as an electronic notary using the same electronic signature within three months after commission expiration.

"Part 5. Certificate Forms.

"**§ 10B-55. Validity of notarial certificates.**

The provisions contained in Article 1, Part 6 of this Chapter, with regard to notarial certificate forms, are applicable for the purposes of this Article.

"**§ 10B-56. Form of evidence of authority of electronic notarial act.**

Electronic evidence of the authenticity of the official signature and seal of an electronic notary of this State, if required, shall be attached to, or logically associated with, a notarized electronic document transmitted to another state or nation, and shall be in the form of an electronic certificate of authority signed by the Secretary in conformance with any current and pertinent international treaties, agreements, and conventions subscribed to by the government of the United States.

"**§ 10B-57. Certificate of authority for electronic notarial act.**

(a) An electronic certificate of authority evidencing the authenticity of the official signature and seal of an electronic notary of this State shall contain substantially the following words:

Certificate of Authority for an Electronic Notarial Act

I, _____ (name, title, jurisdiction of commissioning official) certify that _____ (name of electronic notary), the person named as an electronic notary public in the attached or associated document, was indeed registered as an electronic notary public for the State of North Carolina and authorized to act as such at the time of the document's electronic notarization.

To verify this Certificate of Authority for an Electronic Notarial Act, I have included herewith my electronic signature this _____ day of _____, 20___.

(Electronic signature (and seal) of commissioning official)

(b) The Secretary may charge ten dollars ($10.00) for issuing an electronic certificate of authority.

"Part 6. Enforcement.

"**§ 10B-58. Restriction or revocation of registration.**

The Secretary or the Secretary's designee shall have the authority to warn, restrict, suspend, or revoke an electronic notary registration for a violation of this Chapter, and on any ground for which electronic notary registration may be denied under this Chapter.

"**§ 10B-59. Wrongful manufacture distribution, or possession of software or hardware.**

(a) Any person who knowingly creates, manufactures, or distributes software for the purpose of allowing a person to act as an electronic notary without being commissioned and registered in accordance with this act shall be guilty of a Class G felony.

(b) Any person who wrongfully obtains, conceals, damages, or destroys the certificate, disk, coding, card, program, software, file, or hardware enabling an electronic notary to affix an official electronic signature is guilty of a Class I felony."

"Article 3.

"Notary Public Special Fund.

"**§ 10B-60. Notary Public Special Fund; established.**

There is established the Notary Public Special Fund in the Secretary of State's Office. The Secretary shall hold the Fund separate and apart from all other moneys, funds, and accounts. Investment earnings credited to the assets of the Fund shall become part of the Fund. Any balance remaining in the Fund at the end of any fiscal year shall be carried forward in the Fund for the next succeeding fiscal year. Moneys from the Fund are appropriated annually and may be used that shall be used for the administration of this Chapter."

SECTION 3. G.S. 66-271 reads as rewritten:

"**§ 66-271. Definitions.**

The following definitions apply in this Article:

. . .

(5) Notary public. – Defined in ~~G.S. 10A-3.~~G.S. 10B-3.

. . .

"

SECTION 4. G.S. 66-272 reads as rewritten:

"**§ 66-272. Certificate of authentication.**

To authenticate a document, the Secretary must compare the official's seal and signature on the document with a specimen of the official's seal and signature on file in the Department. If no specimen is on file in the Department, the Secretary must require that the document be authenticated by an official for whom the Department does have a specimen. The Secretary must also verify the official's authority to perform a particular act when the law of a foreign jurisdiction requires it to be verified before it will recognize the authenticity of the document. When the Secretary is able to authenticate the official's seal, signature, position, and authority, the Secretary shall sign and issue a certificate of authentication. The certificate of authentication ~~may be placed on the document itself, if space is available, or by appending it~~ shall be appended to the document on a separate sheet."

SECTION 5. G.S. 66-273 reads as rewritten:

"**§ 66-273. Prerequisites for authentication.**

All of the following conditions must be met before a document can be authenticated:

(1) All seals and signatures must be originals.

(2) All dates must follow in chronological order on all certifications.

(3) All acknowledgments to be authenticated by the Secretary shall be in ~~English or accompanied by a certified or notarized English translation.~~ English and must comply with Chapter 10B of the General Statutes.

(4) Whenever a copy is used, it must include a statement that it is a true and accurate copy.

(5) Whenever a document is to be authenticated by the United States Department of State, it must comply with all applicable statutes, rules, and regulations of that office. "

SECTION 6. G.S. 161-10(a) reads as rewritten:

"(a) Except as provided in G.S. 161-11.1 or 161-11.2, all fees collected under this section shall be deposited into the county general fund. While performing the duties of the office, the register of deeds shall collect the following fees which shall be uniform throughout the State:

. . .

(12) Notarial Acts. – For taking an acknowledgment, oath, or affirmation or performing any other notarial act the maximum fee set in ~~G.S. 10A-10.~~ G.S. 10B-20 or G.S. 10B-50 for electronic notarial acts. This fee shall not be charged if the act is performed as a part of one of the services for which a fee is provided by this subsection; except that this fee shall

be charged in addition to the fees for registering, filing, or recording instruments or plats as provided by subdivisions (1) and (3) of this subsection.

. . .

(17) Qualification of Notary Public. – For administering the oaths of office to a notary public and making the appropriate record entries as provided in ~~G.S. 10A-8~~ G.S. 10B-9 ten dollars ($10.00).

. . ."

SECTION 7. This act becomes effective December 1, 2005, and applies to notarial acts and applications for notary commissions and recommissions made on or after that date. Notary commissions issued under Chapter 10A of the General Statutes prior to December 1, 2005, shall remain valid unless otherwise revoked or suspended by the Secretary until those commissions expire as provided in Chapter 10A. G.S. 10B-37 and G.S. 10B-59 apply to offenses committed on or after December 1, 2005, without regard to whether a commission was issued under Chapter 10A or Chapter 10B of the General Statutes.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

S 1

SENATE BILL 774

Short Title:	Seat Belt Use Enhancements.	(Public)
Sponsors:	Senators Purcell; Dannelly, Kinnaird, Lucas, and Malone.	
Referred to:	Judiciary II.	

March 22, 2005

A BILL TO BE ENTITLED

AN ACT TO MODIFY THE SEAT BELT USE STATUTES TO ENHANCE THE USE OF SEAT BELTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-135.2A(a) reads as rewritten:

"(a) Each ~~front seat~~ occupant ~~who is 16 years of age or older and each driver~~ of a passenger motor vehicle manufactured with seat belts shall have a seat belt properly fastened about his or her body at all times when the vehicle is in forward motion on a street or highway in this State."

SECTION 2. G.S. 20-135.2A(e) reads as rewritten:

"(e) Any driver or passenger who fails to wear a seat belt as required by this section shall have committed an infraction and shall pay a penalty of ~~twenty-five dollars ($25.00)~~ fifty dollars ($50.00) plus court costs in the sum of fifty dollars ($50.00). The driver shall be assessed the penalty and costs for any unbelted passenger under the age of 16 years. In the case of multiple violations arising out of the same incident, the driver shall be subject to a maximum of one penalty. Court costs assessed under this section are for the support of the General Court of Justice and shall be remitted to the State Treasurer. Conviction of an infraction under this section has no other consequence."

SECTION 3. G.S. 20-135.2A(f) reads as rewritten:

"(f) ~~No~~ One drivers license ~~points or insurance surcharge~~ point shall be assessed on account of a violation of this ~~section.~~section involving the driver or a passenger under the age of 16 years. In the case of multiple violations arising out of the same incident, the driver shall only be assessed one drivers license point. Only the driver of the vehicle may be assessed drivers license points for a violation."

SECTION 4. G.S. 20-16(c) reads as rewritten:

"(c) The Division shall maintain a record of convictions of every person licensed or required to be licensed under the provisions of this Article as an operator and shall enter therein records of all convictions of such persons for any violation of the motor vehicle laws of this State and shall assign to the record of such person, as of the date of

commission of the offense, a number of points for every such conviction in accordance with the following schedule of convictions and points, except that points shall not be assessed for convictions resulting in suspensions or revocations under other provisions of laws: Further, any points heretofore charged for violation of the motor vehicle inspection laws shall not be considered by the Division of Motor Vehicles as a basis for suspension or revocation of driver's license:

Schedule of Point Values

Passing stopped school bus 5
Aggressive driving 5
Reckless driving 4
Hit and run, property damage only 4
Following too close 4
Driving on wrong side of road 4
Illegal passing 4
Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2)b. 4
Failure to yield right-of-way to bicycle, motor scooter, or motorcycle 4
Running through stop sign 3
Speeding in excess of 55 miles per hour 3
Failing to yield right-of-way 3
Running through red light 3
No driver's license or license expired more than one year 3
Failure to stop for siren 3
Driving through safety zone 3
No liability insurance 3
Failure to report accident where such report is required 3
Speeding in a school zone in excess of the posted school zone speed limit 3
Failure to properly restrain a child in a restraint or seat belt 2
All other moving violations 2
Failure to use a seat belt as required by G.S. 20-135.2A, a moving violation 1
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle 1

Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle

Passing stopped school bus 8
Rail-highway crossing violation 6
Careless and reckless driving in violation of G.S. 20-140(f) 6

Speeding in violation of G.S. 20-141(j3) 6
Aggressive driving 6
Reckless driving 5
Hit and run, property damage only 5
Following too close 5
Driving on wrong side of road 5
Illegal passing 5
Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2)b. 5
Failure to yield right-of-way to bicycle, motor scooter, or motorcycle 5
Running through stop sign 4
Speeding in excess of 55 miles per hour 4
Failing to yield right-of-way 4
Running through red light 4
No driver's license or license expired more than one year 4
Failure to stop for siren 4
Driving through safety zone 4
No liability insurance 4
Failure to report accident where such report is required 4
Speeding in a school zone in excess of the posted school zone speed limit 4
Possessing alcoholic beverages in the passenger area of a commercial motor vehicle 4
All other moving violations 3
Failure to use a seat belt as required by G.S. 20-135.2A, a moving violation 1
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle 1

The above provisions of this subsection shall only apply to violations and convictions which take place within the State of North Carolina. The Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle shall not apply to any commercial motor vehicle known as an "aerial lift truck" having a hydraulic arm and bucket station, and to any commercial motor vehicle known as a "line truck" having a hydraulic lift for cable, if the vehicle is owned, operated by or under contract to a public utility, electric or telephone membership corporation or municipality and used in connection with installation, restoration or maintenance of utility services.

No points shall be assessed for conviction of the following offenses:

Overloads
Over length
Over width
Over height

Illegal parking
Carrying concealed weapon
Improper plates
Improper registration
Improper muffler
Improper display of license plates or dealers' tags
Unlawful display of emblems and insignia
Failure to display current inspection certificate.

In case of the conviction of a licensee of two or more traffic offenses committed on a single occasion, such licensee shall be assessed points for one offense only and if the offenses involved have a different point value, such licensee shall be assessed for the offense having the greater point value.

Upon the restoration of the license or driving privilege of such person whose license or driving privilege has been suspended or revoked because of conviction for a traffic offense, any points that might previously have been accumulated in the driver's record shall be cancelled.

Whenever any licensee accumulates as many as seven points or accumulates as many as four points during a three-year period immediately following reinstatement of his license after a period of suspension or revocation, the Division may request the licensee to attend a conference regarding such licensee's driving record. The Division may also afford any licensee who has accumulated as many as seven points or any licensee who has accumulated as many as four points within a three-year period immediately following reinstatement of his license after a period of suspension or revocation an opportunity to attend a driver improvement clinic operated by the Division and, upon the successful completion of the course taken at the clinic, three points shall be deducted from the licensee's conviction record; provided, that only one deduction of points shall be made on behalf of any licensee within any five-year period.

When a license is suspended under the point system provided for herein, the first such suspension shall be for not more than 60 days; the second such suspension shall not exceed six months and any subsequent suspension shall not exceed one year.

Whenever the driver's license of any person is subject to suspension under this subsection and at the same time also subject to suspension or revocation under other provisions of laws, such suspensions or revocations shall run concurrently.

In the discretion of the Division, a period of probation not to exceed one year may be substituted for suspension or for any unexpired period of suspension under subsections (a)(1) through (a)(10a) of this section. Any violation of probation during the probation period shall result in a suspension for the unexpired remainder of the suspension period. Any accumulation of three or more points under this subsection during a period of probation shall constitute a violation of the condition of probation."

SECTION 5. G.S. 20-183.3(a) reads as rewritten:

"(a) Safety. – A safety inspection of a motor vehicle consists of an inspection of the following equipment to determine if the vehicle has the equipment required by Part 9 of Article 3 of this Chapter and if the equipment is in a safe operating condition:

(1) Brakes, as required by G.S. 20-124.
(2) Lights, as required by G.S. 20-129 or G.S. 20-129.1.
(3) Horn, as required by G.S. 20-125(a).
(4) Steering mechanism, as required by G.S. 20-123.1.
(5) Windows and windshield wipers, as required by G.S. 20-127. To determine if a vehicle window meets the window tinting restrictions, a safety inspection mechanic must first determine, based on use of an automotive film check card or knowledge of window tinting techniques, if after-factory tint has been applied to the window. If after-factory tint has been applied, the mechanic must use a light meter approved by the Commissioner to determine if the window meets the window tinting restrictions.
(6) Directional signals, as required by G.S. 20-125.1.
(7) Tires, as required by G.S. 20-122.1.
(8) Mirrors, as required by G.S. 20-126.
(9) Exhaust system and emissions control devices, as required by G.S. 20-128. For a vehicle that is subject to an emissions inspection in addition to a safety inspection, a visual inspection of the vehicle's emissions control devices is included in the emissions inspection rather than the safety inspection.
(10) Seat belts, as required by G.S. 20-135.2A."

SECTION 6. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 774
PROPOSED COMMITTEE SUBSTITUTE S774-CSRH-18 [v.2]

5/4/2005 6:47:30 PM

Short Title: Seat Belt Use Enhancements. (Public)

Sponsors:

Referred to:

March 22, 2005

A BILL TO BE ENTITLED

AN ACT TO MODIFY THE SEAT BELT USE STATUTES TO ENHANCE THE USE OF SEAT BELTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-135.2A reads as rewritten:

"**§ 20-135.2A. Seat belt use mandatory.**

(a) ~~Each front seat occupant who is 16 years of age or older and each driver of a passenger~~ Each occupant of a motor vehicle manufactured with seat belts shall have a seat belt properly fastened about his or her body at all times when the vehicle is in forward motion on a street or highway in this State.

~~(b) "Passenger Motor Vehicle," as used in this section, means a motor vehicle with motive power designed for carrying 10 passengers or fewer, but does not include a motorcycle, a motorized pedacycle or a trailer.~~

(c) This section shall not apply to any of the following:

(1) A driver or occupant with a medical or physical condition that prevents appropriate restraint by a safety belt or with a professionally certified mental phobia against the wearing of vehicle restraints;

(2) A motor vehicle operated by a rural letter carrier of the United States Postal Service while performing duties as a rural letter carrier and a motor vehicle operated by a newspaper delivery person while actually engaged in delivery of newspapers along the person's specified route;

(3) A driver or passenger frequently stopping and leaving the vehicle or delivering property from the vehicle if the speed of the vehicle between stops does not exceed 20 miles per hour; or

(4) Any vehicle registered and licensed as a property carrying vehicle in accordance with G.S. 20 88, while being used for agricultural ~~or commercial~~ purposes; or

(5) A motor vehicle not required to be equipped with seat safety belts under federal law.

(d) Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section or as justification for the stop of a vehicle or detention of a vehicle operator and passengers.

(e) Any driver or passenger who fails to wear a seat belt as required by this section shall have committed an infraction and shall pay a penalty of twenty-five dollars ($25.00) plus court costs in the sum of ~~fifty dollars ($50.00).~~ seventy-five dollars ($75.00). Court costs assessed under this section are for the support of the General Court of Justice and shall be remitted to the State Treasurer. Conviction of an infraction under this section has no other consequence.

(f) ~~No drivers license points or insurance surcharge shall be assessed on account of violation of this section.~~ One drivers license point shall be assessed against a driver who violates this section. No drivers license points shall be assessed other occupants who violate this section.

(g) The Commissioner of ~~the Division of~~ Motor Vehicles and the Department of Public Instruction shall incorporate in driver education programs and driver licensing programs instructions designed to encourage compliance with this section as an important means of reducing the severity of injury to the users of restraint devices and on the requirements and penalties specified in this law.

(h) Repealed by Session Laws 1999-183, s. 3, effective October 1, 1999."

SECTION 2. G.S. 20-16(c) reads as rewritten:

"(c) The Division shall maintain a record of convictions of every person licensed or required to be licensed under the provisions of this Article as an operator and shall enter therein records of all convictions of such persons for any violation of the motor vehicle laws of this State and shall assign to the record of such person, as of the date of commission of the offense, a number of points for every such conviction in accordance with the following schedule of convictions and points, except that points shall not be assessed for convictions resulting in suspensions or revocations under other provisions of laws: Further, any points heretofore charged for violation of the motor vehicle inspection laws shall not be considered by the Division of Motor Vehicles as a basis for suspension or revocation of driver's license:

Schedule of Point Values

Passing stopped school bus	5
Aggressive driving	5
Reckless driving	4
Hit and run, property damage only	4
Following too close	4
Driving on wrong side of road	4
Illegal passing	4
Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2)b.	4

Failure to yield right-of-way to bicycle, motor scooter, or motorcycle 4
Running through stop sign 3
Speeding in excess of 55 miles per hour 3
Failing to yield right-of-way 3
Running through red light 3
No driver's license or license expired more than one year 3
Failure to stop for siren 3
Driving through safety zone 3
No liability insurance 3
Failure to report accident where such report is required 3
Speeding in a school zone in excess of the posted school zone speed limit 3
Failure to properly restrain a child in a restraint or seat belt 2
All other moving violations 2
Failure to use a seat belt as required by G.S. 20-135.2A, a moving violation 1
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle 1

Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle

Passing stopped school bus 8
Rail-highway crossing violation 6
Careless and reckless driving in violation of G.S. 20-140(f) 6
Speeding in violation of G.S. 20-141(j3) 6
Aggressive driving 6
Reckless driving 5
Hit and run, property damage only 5
Following too close 5
Driving on wrong side of road 5
Illegal passing 5
Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2)b. 5
Failure to yield right-of-way to bicycle, motor scooter, or motorcycle 5
Running through stop sign 4
Speeding in excess of 55 miles per hour 4
Failing to yield right-of-way 4
Running through red light 4
No driver's license or license expired more than one year 4
Failure to stop for siren 4

Driving through safety zone 4
No liability insurance 4
Failure to report accident where such report is required 4
Speeding in a school zone in excess of the posted school zone speed limit 4
Possessing alcoholic beverages in the passenger area of a commercial motor vehicle 4
All other moving violations 3
Failure to use a seat belt as required by G.S. 20-135.2A, a moving violation 1
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle 1

The above provisions of this subsection shall only apply to violations and convictions which take place within the State of North Carolina. The Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle shall not apply to any commercial motor vehicle known as an "aerial lift truck" having a hydraulic arm and bucket station, and to any commercial motor vehicle known as a "line truck" having a hydraulic lift for cable, if the vehicle is owned, operated by or under contract to a public utility, electric or telephone membership corporation or municipality and used in connection with installation, restoration or maintenance of utility services.

No points shall be assessed for conviction of the following offenses:

Overloads
Over length
Over width
Over height
Illegal parking
Carrying concealed weapon
Improper plates
Improper registration
Improper muffler
Improper display of license plates or dealers' tags
Unlawful display of emblems and insignia
Failure to display current inspection certificate.

In case of the conviction of a licensee of two or more traffic offenses committed on a single occasion, such licensee shall be assessed points for one offense only and if the offenses involved have a different point value, such licensee shall be assessed for the offense having the greater point value.

Upon the restoration of the license or driving privilege of such person whose license or driving privilege has been suspended or revoked because of conviction for a traffic offense, any points that might previously have been accumulated in the driver's record shall be cancelled.

Whenever any licensee accumulates as many as seven points or accumulates as many as four points during a three-year period immediately following reinstatement of his license after a period of suspension or revocation, the Division may request the licensee to attend a conference regarding such licensee's driving record. The Division may also afford any licensee who has accumulated as many as seven points or any licensee who has accumulated as many as four points within a three-year period immediately following reinstatement of his license after a period of suspension or revocation an opportunity to attend a driver improvement clinic operated by the Division and, upon the successful completion of the course taken at the clinic, three points shall be deducted from the licensee's conviction record; provided, that only one deduction of points shall be made on behalf of any licensee within any five-year period.

When a license is suspended under the point system provided for herein, the first such suspension shall be for not more than 60 days; the second such suspension shall not exceed six months and any subsequent suspension shall not exceed one year.

Whenever the driver's license of any person is subject to suspension under this subsection and at the same time also subject to suspension or revocation under other provisions of laws, such suspensions or revocations shall run concurrently.

In the discretion of the Division, a period of probation not to exceed one year may be substituted for suspension or for any unexpired period of suspension under subsections (a)(1) through (a)(10a) of this section. Any violation of probation during the probation period shall result in a suspension for the unexpired remainder of the suspension period. Any accumulation of three or more points under this subsection during a period of probation shall constitute a violation of the condition of probation."

SECTION 3. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

SENATE BILL 774:
Seat Belt Use Enhancements

BILL ANALYSIS

Committee:	Senate Ref to Judiciary II. If fav, re-ref to Finance	**Date:**	May 4, 2005
Introduced by:	Sen. Purcell	**Summary by:**	Robin Johnson
Version:	PCS to First Edition S774-CSRH-18[v.2]		Committee Counsel

SUMMARY: ***Senate Bill 774, a recommendation of the Executive Committee for Highway Safety, would require all vehicle occupants to wear a seatbelt while the vehicle is in forward motion and increase the costs and points related to a violation.***

The Proposed Committee Substitute would clarify that the bill applies to all occupants of motor vehicles manufactured with seat belts, excluding vehicles with farm plates. The PCS also would delete the additional $25.00 penalty and would increase court costs by $25.00. Finally, the PCS would eliminate the requirement that vehicle safety inspections include the inspection of seat belts.

CURRENT LAW: G.S. 20-135.2A requires front seat passengers who are under 18 and drivers of passenger motor vehicles to wear a seat belt when the vehicle is moving forward on a street or highway. Certain vehicles, including licensed property-carrying vehicles being used for farm or agricultural purposes, are exempt from this requirement. Violation is an infraction, punishable by a penalty of $25.00 plus court costs of $50.00. No insurance surcharges or drivers license points may be assessed.

The Division of Motor Vehicles may suspend a drivers license when a person accumulates 12 or more drivers license points within a three-year period or 8 or more of these points during a three-year period immediately following the reinstatement of a license that has been suspended or revoked.

BILL ANALYSIS: Senate Bill 774 would require all occupants of a motor vehicle manufactured with seat belts to wear a seat belt when the vehicle is in forward motion. This would extend to commercial vehicles, but not to property-carrying vehicles licensed for agricultural use.

Court costs would be increased from $50.00 to $75.00. However, the penalty for a violation would not be increased from $25.00. (In the case of a person operating a commercial motor vehicle, the penalty may be doubled.[1])

Senate Bill 774 also would require one drivers license point to be assessed against a driver who is convicted for failure to wear a seat belt.

EFFECTIVE DATE: This act would become effective December 1, 2005, and would apply to offenses occurring on or after that date.

S0774e1-SMRH-CSRH-18v2

[1] ***§ 20-16.01. Double penalties for offenses committed while operating a commercial motor vehicle.***
Any person who commits an offense for which points may be assessed pursuant to the Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle as provided in G.S. 20-16(c) may be assessed double the amount of any fine or penalty authorized by statute.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 776

Short Title:	Amend Indecent Exposure Law.	(Public)
Sponsors:	Senators Snow; Apodaca, Atwater, Berger of Franklin, Blake, Boseman, Brock, Cowell, Dalton, East, Garrou, Goodall, Graham, Holloman, Hunt, Kerr, Kinnaird, Nesbitt, Presnell, Purcell, Rand, Smith, Stevens, Swindell, Thomas, Tillman, and Weinstein.	
Referred to:	Judiciary II.	

March 22, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE INDECENT EXPOSURE LAW TO APPLY TO INDECENT EXPOSURE TO PERSONS OF THE SAME SEX WITH GREATER PENALTIES FOR INDECENT EXPOSURE TO PERSONS UNDER AGE SIXTEEN.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-190.9 reads as rewritten:

"**§ 14-190.9. Indecent exposure.**

(a) ~~Any~~ Unless the conduct is punishable under subsection (a1) of this section, any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, ~~of the opposite sex,~~ except for any place provided or set apart for that purpose, or aids or abets in any such act, or who procures another to perform such act; or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act, shall be guilty of a Class 2 misdemeanor.

(a1) Unless the conduct is prohibited by another law providing greater punishment, any person at least 18 years of age who shall willfully expose the private parts of his or her person in any public place in the presence of any other person less than 16 years of age for the purpose of arousing or gratifying sexual desire shall be guilty of a Class H felony. An offense committed under this subsection shall not be considered to be a lesser included offense under G.S. 14-202.1.

(b) Notwithstanding any other provision of law, a woman may breast feed in any public or private location where she is otherwise authorized to be, irrespective of

whether the nipple of the mother's breast is uncovered during or incidental to the breast feeding.

(c) Notwithstanding any other provision of law, a local government may regulate the location and operation of sexually oriented businesses. Such local regulation may restrict or prohibit nude, seminude, or topless dancing to the extent consistent with the constitutional protection afforded free speech."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 776
PROPOSED COMMITTEE SUBSTITUTE S776-CSRU-22 [v.1]

4/26/2005 6:53:41 PM

Short Title: Amend Indecent Exposure Law. (Public)

Sponsors:

Referred to:

March 22, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE INDECENT EXPOSURE LAW TO APPLY TO INDECENT EXPOSURE TO PERSONS OF THE SAME SEX WITH GREATER PENALTIES FOR INDECENT EXPOSURE TO PERSONS UNDER AGE SIXTEEN.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-190.9 reads as rewritten:

"**§ 14-190.9. Indecent exposure.**

(a) ~~Any~~ Unless the conduct is punishable under subsection (a1) of this section, any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, ~~of the opposite sex,~~ except for those places designated for a public purpose where the same sex exposure is incidental to a necessary activity, or aids or abets in any such act, or who procures another to perform such act; or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act, shall be guilty of a Class 2 misdemeanor.

(a1) Unless the conduct is prohibited by another law providing greater punishment, any person at least 18 years of age who shall willfully expose the private parts of his or her person in any public place in the presence of any other person less than 16 years of age for the purpose of arousing or gratifying sexual desire shall be guilty of a Class H felony. An offense committed under this subsection shall not be considered to be a lesser included offense under G.S. 14-202.1.

(b) Notwithstanding any other provision of law, a woman may breast feed in any public or private location where she is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breast feeding.

(c) Notwithstanding any other provision of law, a local government may regulate the location and operation of sexually oriented businesses. Such local regulation may restrict or prohibit nude, seminude, or topless dancing to the extent consistent with the constitutional protection afforded free speech."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

SENATE BILL 776:
Amend Indecent Exposure Law

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 2, 2005
Introduced by:	Sen. Snow	**Summary by:**	Ben Popkin
Version:	PCS to First Edition S776-CSSS		Committee Counsel

SUMMARY: Senate Bill 776 would amend General Statute 14-190.9 'Indecent Exposure' to expand its application to include certain instances of same sex exposure and to increase the penalty for offenses involving a victim of less than 16 years of age.

CURRENT LAW: A person is guilty of the Class 2 misdemeanor of Indecent Exposure when their actions satisfy the following essential elements:

1. A person willfully exposes, or aids and abets, or procures another to expose, the private parts of his or her body;
2. in a public place; *and*
3. in the presence of a person of the opposite sex.

Knowingly permitting one's land to be used for indecent exposure is also a violation of this statute[1].

Current law provides an exception to this offense to allow for the exposure of a mother's breast during or incidental to breast feeding.

BILL ANALYSIS: The bill would amend the current law by removing the gender-specific language requiring the victim be of the opposite sex, modifying element 3 of the offense above to read as follows:

3. in the presence of any other person or persons.

The bill provides an exception to this offense to allow for same sex exposure when it occurs in a place designated for a public purpose where the same sex exposure is incidental to a necessary activity (such as when changing clothing in a locker room).

The bill adds a new subsection to create a Class H felony offense consisting of the following elements:

1. A person at least 18 years of age;
2. willfully exposes his or her private parts;
3. in any public place;
4. in the presence of any other person less than 16 years of age; and
5. for the purpose of arousing or gratifying sexual desire.

EFFECTIVE DATE: The act would become effective on December 1, 2005.

BACKGROUND: An instance in which an individual exposed himself in a public place (inside a department store) to a young member of the same sex was deemed offensive but did not constitute a criminal offense as currently defined by the General Statutes.

S0776e1-SMSS-CSSS

[1] G.S. 14-190.9(a).

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 806

Short Title:	Mediation Amendments.	(Public)
Sponsors:	Senators Hartsell; and Bingham.	
Referred to:	Judiciary II.	

March 23, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW REGARDING MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT, MEDIATION IN DISTRICT COURT DOMESTIC CASES, AND THE REGULATION OF MEDIATORS, AS RECOMMENDED BY THE DISPUTE RESOLUTION COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7A-38.1(l) reads as rewritten:

"(l) Inadmissibility of negotiations. – Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, ~~except in~~ except:

(1) In proceedings for sanctions under this section;

(2) ~~or~~ In proceedings to enforce or rescind a settlement of the ~~action.~~ action;

(3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(4) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No ~~such~~ settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement ~~conference.~~ conference or other settlement proceeding.

No ~~mediator~~ mediator, other neutral, or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any ~~such~~ agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for ~~mediators,~~ mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse."

SECTION 2. G.S. 7A-38.2 reads as rewritten:

"**§ 7A-38.2. Regulation of ~~mediators.~~ mediators and other neutrals.**

(a) The Supreme Court is authorized to adopt standards of conduct for ~~the certification and conduct of~~ mediators and other neutrals who are certified or otherwise qualified pursuant to G.S. 7A-38.1, 7A-38.3, and 7A-38.4A, or who participate in ~~the mediated settlement conference program established pursuant to G.S. 7A-38.1.~~ proceedings conducted pursuant to those sections. The standards may also regulate mediator and other neutral training programs. The Supreme Court may adopt procedures for the enforcement of those standards.

(b) The administration of ~~mediator certification, regulation of mediator conduct, and decertification~~ the certification and qualification of mediators and other neutrals, and mediator and other neutral training programs shall be conducted through the Dispute Resolution Commission, established under the Judicial Department. ~~The rules and regulations governing the operation of the Commission shall be adopted by the Supreme Court. The Commission shall be administered under the direction and supervision of the Director of the Administrative Office of the Courts. The Commission shall exercise all of its duties independently of the Director, except all management functions shall be performed under the direction and supervision of the Director.~~ The Supreme Court shall adopt rules and regulations governing the operation of the Commission. The Commission shall exercise all of its duties independently of the Director of the Administrative Office of the Courts, except that the Commission shall consult with the Director regarding personnel and budgeting matters.

(c) The Dispute Resolution Commission shall consist of ~~14~~ 15 members: five judges appointed by the Chief Justice of the Supreme Court, at least two of whom shall be superior court judges, and at least two of whom shall be district court judges; one clerk of superior court appointed by the Chief Justice of the Supreme Court; two mediators certified to conduct superior court mediated settlement conferences and two mediators certified to conduct equitable distribution mediated settlement conferences appointed by the Chief Justice of the Supreme Court; two practicing attorneys who are not certified as mediators appointed by the President of the North Carolina State Bar, one of whom shall be a family law specialist; and three citizens knowledgeable about mediation, one of whom shall be appointed by the Governor, one by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, and one by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with

G.S. 120-121. Members shall initially serve four-year terms, except that one judge, one mediator, one attorney, and the citizen member appointed by the Governor, shall be appointed for an initial term of two years. Incumbent members as of September 30, 1998 shall serve the remainder of the terms to which they were appointed. Members appointed to newly-created membership positions effective October 1, 1998 shall serve initial terms of two years. Thereafter, members shall serve three-year terms and shall be ineligible to serve more than two consecutive terms. The Chief Justice shall designate one of the members to serve as chair for a two-year term. Members of the Commission shall be compensated pursuant to G.S. 138-5.

Vacancies shall be filled for unexpired terms and full terms in the same manner as incumbents were appointed. Appointing authorities may receive and consider suggestions and recommendations of persons for appointment from the Dispute Resolution Commission, the Family Law, Litigation, and Dispute Resolution Sections of the North Carolina Bar Association, the North Carolina Association of Professional Family Mediators, the North Carolina Association of Clerks of Superior Court, the North Carolina Conference of Court Administrators, the Mediation Network of North Carolina, the Dispute Resolution Committee of the Supreme Court, the Conference of Chief District Court Judges, the Conference of Superior Court Judges, the Director of the Administrative Office of the Courts, and the Child Custody Mediation Advisory Committee of the Administrative Office of the Courts.

(d) An administrative fee, not to exceed two hundred dollars ($200.00), may be charged by the Administrative Office of the Courts to applicants for certification and annual renewal of certification for mediators and mediation training programs ~~operation~~ operating under this Article. The fees collected may be used by the Director of the Administrative Office of the Courts to establish and maintain the operations of the Commission and its staff.

(e) The chair of the Commission may employ an executive secretary and other staff as necessary to assist the Commission in carrying out its duties. The chair may also employ special counsel or call upon the Attorney General to furnish counsel to assist the Commission in conducting hearings pursuant to its certification or qualification and regulatory responsibilities. Special counsel or counsel furnished by the Attorney General may present the evidence in support of a denial or revocation of certification or qualification or a complaint against a mediator, other neutral, training program, or trainers or staff affiliated with a program. Special counsel or counsel furnished by the Attorney General may also represent the Commission when its final determinations are the subject of an appeal.

(f) In connection with any investigation or hearing conducted pursuant to an application for certification or qualification of any mediator, other neutral, or training program, or conducted pursuant to any disciplinary matter, the chair of the Dispute Resolution Commission or his/her designee, may:

(1) Administer oaths and affirmations;

(2) Sign and issue subpoenas in the name of the Dispute Resolution Commission or direct its executive secretary to issue such subpoenas on its behalf requiring attendance and the giving of testimony by

witnesses and the production of books, papers, and other documentary evidence;

(3) Apply to the General Court of Justice, Superior Court Division, for any order necessary to enforce the power conferred in this section.

(g) The General Court of Justice, Superior Court Division, may enforce subpoenas issued in the name of the Dispute Resolution Commission and requiring attendance and the giving of testimony by witnesses and the production of books, papers, and other documentary evidence.

(h) The Commission shall keep confidential all information in its files pertaining to the certification of mediators, the qualification of other neutrals, the certification or qualification of training programs for mediators or other neutrals, and the renewal of such certifications and qualifications. However, disciplinary matters reported by an applicant for certification or qualification, a mediator, other neutral, trainer, or manager shall be treated as a complaint as set forth below. The Commission shall also keep confidential the identity of those persons requesting informal guidance or the issuance of formal advisory opinions from the Commission or its staff.

Unless an applicant, mediator, other neutral, or training program trainer or manager requests otherwise, all information in the Commission's disciplinary files pertaining to a complaint regarding the conduct of an applicant, mediator, other neutral, trainer, or manager shall remain confidential until such time as a preliminary investigation is completed and a determination is made that probable cause exists to believe that the applicant, mediator, neutral, trainer, or manager's words or actions:

(1) Violate standards for the conduct of mediators or other neutrals;

(2) Violate other standards of professional conduct to which the applicant, mediator, neutral, trainer, or manager is subject;

(3) Violate program rules; or

(4) Consist of conduct or actions that are inconsistent with good moral character or reflect a lack of fitness to serve as a mediator, other neutral, trainer, or manager.

The Commission may publish names, contact information, and biographical information for mediators, neutrals, and training programs that have been certified or qualified.

(i) The Commission shall conduct its initial review of all applications for certification and certification renewal or qualification and qualification renewal in private. The Commission shall also conduct its initial review of complaints regarding the qualifications of any certified mediator, other neutral, or training program, but not involving issues of ethics or conduct, in private. Appeals of denials of applications for certification, qualification, or renewal and appeals of revocations of certification or qualification for reasons that do not relate to ethics or conduct, shall be heard by the Commission in private unless the applicant, certified mediator, qualified neutral, or certified or qualified training program requests a public hearing.

(j) The Commission shall conduct in private its initial review of all matters relating to the ethics or conduct of an applicant for certification, qualification, or renewal of certification or qualification or the ethics or conduct of a mediator, other

neutral, trainer, or training program manager. If an applicant appeals the Commission's initial determination that sanctions be imposed, the hearing of such appeal by the Commission shall be open to the public, except that for good cause shown, the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing shall be closed to the public over the objection of an applicant, mediator, other neutral, trainer, or training program manager.

(k) Appeals of final determinations by the Commission to deny certification or renewal of certification, to revoke certification, or to discipline a mediator, trainer, or training program manager shall be filed in the General Court of Justice, Wake County Superior Court Division. Notice of appeal shall be filed within 30 days of the date of the Commission's decision."

SECTION 3. G.S. 7A-38.4A(j) reads as rewritten:

"(j) Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this ~~section~~ section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, ~~except~~ except:

(1) ~~in~~ In proceedings for sanctions under this section;

(2) ~~or~~ In proceedings to enforce or rescind a settlement of the ~~action.~~ action;

(3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(4) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at ~~a settlement conference or settlement~~ the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, ~~or other neutral conducting a settlement procedure~~ other neutral, or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement ~~procedure~~ proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any ~~of these~~ agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for ~~mediators,~~ mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse."

SECTION 4. If "A Bill To Be Entitled An Act To Authorize The Clerk Of Superior Court To Order Mediation In Matters Within The Clerk's Jurisdiction" becomes law, then G.S. 7A-38.2(a), as amended by Section 2 of this act, reads as rewritten:

"(a) The Supreme Court is authorized to adopt standards of conduct for mediators and other neutrals who are certified or otherwise qualified pursuant to G.S. 7A-38.1, G.S. 7A-38.3, G.S. 7A-38.3B, and G.S. 7A-38.4A who participate in proceedings conducted pursuant to those sections. The standards may also regulate mediator and other neutral training programs. The Supreme Court may adopt procedures for the enforcement of those standards."

SECTION 5. This act is effective when it becomes law.

SENATE BILL 806:
Mediation Amendments

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 4, 2005
Introduced by:	Sen. Hartsell	**Summary by:**	Ben Popkin
Version:	First Edition		Committee Counsel

SUMMARY: Senate Bill 806 would act upon the recommendations of the North Carolina Dispute Resolution Commission to make a series of changes to the practices of mediated settlement conferences in Superior Court, the practices of mediation in District Court domestic cases, and the regulation of mediators.

CURRENT LAW: ***The North Carolina Dispute Resolution Commission*** was established in October of 1995, pursuant to N.C. General Statute 7A-38.2. The Commission is charged primarily with certifying mediators who serve North Carolina's statewide superior court Mediated Settlement Conference and district court Family Financial Settlement Programs. The Commission is also charged with regulating mediator conduct. In addition, the Commission recommends policy, rules, and rule revisions to the Dispute Resolution Committee of the State Judicial Council, serves as a clearinghouse for information about the Mediated Settlement Conference and Family Financial Settlement Programs, provides technical and other support to State agencies interested in dispute resolution. The Commission also certifies mediator training programs and monitors the activities of trainers who have been approved. Mediators certified by the Commission are appointed by the courts or selected by the parties to mediate pending cases.

Mediated Settlement Conferences – Pursuant to General Statute 7A-38.1 and the North Carolina Supreme Court's Rules Implementing Mediated Settlement Conferences (MSC Rules), a Senior Resident Superior Court Judge in any district may order parties in any civil action to attend a pre-trial mediated settlement conference or, with the parties' consent, one of the other settlement procedures provided for in MSC Rules. The only cases excluded are actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

Family Financial Settlement Programs – General Statute 7A-38.4A provides that the Chief District Court Judge in any district may order a mediated settlement conference or other settlement procedure as provided for in the statute in actions involving equitable distribution, child support, alimony, post-separation support, or claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52B. The Supreme Court's Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases provide that once such an order is entered, the parties and their attorneys must attend.

BILL ANALYSIS: Senate Bill 806 would make a wide range of changes to the statutes addressing the current practices of mediated settlement conferences in Superior Court, mediation in District Court domestic cases, and the regulation of mediators and other 'neutrals' who are certified or otherwise qualified or participating in proceedings pursuant to G.S. 7A-38.1, 7A-38.3, or 7A-38.4A. The changes would include revisions to the statutory language to achieve the following ends:

- Clarify the inadmissibility in civil actions of statements made during settlement conferences and other mediation proceedings;
- Clarify the role of the Dispute Resolution Commission in certifying and training mediators;

- Increase the membership in the Commission to a total of 15 members, by adding a clerk of superior court to be appointed by the Chief Justice of the Supreme Court;
- Authorize the chair of the Commission to employ staff as necessary to carry out Commission duties;
- Allow the Committee to employ counsel or assistance from the Attorney General's office in conducting hearings;
- Authorize the chair of the Commission to administer oaths, sign and issue subpoenas, and apply to the Superior Court Division of the General Court of Justice for "any order necessary to enforce the power conferred by the section addressing the regulation of mediators and other neutrals;
- Require that information collected relating to mediator certification or qualification be kept confidential; and
- Require that final determinations of the Commission relating certification or disciplinary actions taken be filed with the Wake County clerk of court.

Evidence of statements made by any person present at a mediated settlement conference or other settlement proceeding under G.S. 7A-38.1 would be made inadmissible, and the exception would be enlarged to allow discovery when in disciplinary proceedings or juvenile or elder abuse cases.

The Supreme Court would be authorized to adopt standards for all 'neutrals' qualified or participating in proceedings pursuant to G.S. 7A-38.1, 7A-38.3, or 7A-38.4A. The Commission would still operate according to rules and regulations adopted by the Supreme Court but would operate independently of the Director of the Administrative Office of the Courts except in matters relating to personnel and budgeting.

Additional powers would be granted the Commission to conduct investigations or hearings, "pursuant to an application for certification or qualification of any mediator, other neutral, or training program, or conducted pursuant to any disciplinary matter."

EFFECTIVE DATE: The bill would be effective when it becomes law.

S0806e1-SMSS

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 1058

Short Title:	Amend Assault Assistance Animal.	(Public)
Sponsors:	Senator Dalton.	
Referred to:	Judiciary II.	

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO MAKE IT A CRIMINAL OFFENSE TO ASSAULT AN ASSISTANCE ANIMAL WITH THE INTENT TO CAUSE PSYCHOLOGICAL HARM TO THE ANIMAL.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-163.1 reads as rewritten:

"**§ 14-163.1. Assaulting a law enforcement agency animal or an assistance animal.**

(a) The following definitions apply in this section:

(1) Assistance animal. – An animal that is trained and may be used to assist a "~~handicapped~~ person with a disability" as defined in ~~G.S. 168-1.~~ G.S. 168A-3. The term "assistance animal" is not limited to a dog and includes any animal trained to assist a ~~handicapped~~ person with a disability as provided in Article 1 of Chapter 168 of the General Statutes.

(2) Law enforcement agency animal. – An animal that is trained and may be used to assist a law enforcement officer in the performance of the officer's official duties.

(3) Physical harm. – Any injury, illness, or other physiological impairment.

(4) Serious physical harm. – Physical harm that does any of the following:

a. Creates a substantial risk of death.

b. Causes maiming or causes substantial loss or impairment of bodily function.

c. Causes acute pain of a duration that results in substantial suffering.

(5) Psychological harm. – Any mental or behavioral impairment that impedes or interferes with duties performed by a law enforcement agency animal or assistance animal.

(6) Serious psychological harm. – Psychological harm that does any of the following:

a. Requires retraining of the law enforcement agency animal or assistance animal.

b. Requires retirement of the law enforcement agency animal or assistance animal from performing duties.

(b) Any person who knows or has reason to know that an animal is a law enforcement agency animal or an assistance animal and who willfully causes or attempts to cause serious physical or psychological harm to the animal is guilty of a Class I felony.

(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who knows or has reason to know that an animal is a law enforcement agency animal or an assistance animal and who willfully causes or attempts to cause physical or psychological harm to the animal is guilty of a Class 1 misdemeanor.

(d) Unless the conduct is covered under some other provision of law providing greater punishment, any person who knows or has reason to know that an animal is a law enforcement agency animal or an assistance animal and who willfully taunts, teases, harasses, delays, obstructs, or attempts to delay or obstruct the animal in the performance of its duty as a law enforcement agency animal or assistance animal is guilty of a Class 2 misdemeanor.

(d1) A defendant convicted of a violation of this section shall be ordered to make restitution to the person with a disability, or to a person, group, or law enforcement agency who owns or is responsible for the care of the law enforcement agency animal for any of the following as appropriate:

(1) Veterinary, medical care, and boarding expenses for the assistance animal or law enforcement animal.

(2) Medical expenses for the person with the disability.

(3) Replacement and training or retraining expenses for the assistance animal or law enforcement animal without any differentiation for the age of the animal.

(4) Expenses for a person to provide temporary mobility services to the person with a disability.

(5) Lost wages or income as a result of receiving training or retraining.

(6) The salary of the animal handler for the period of time the services are lost to the law enforcement agency.

(7) Any other expense reasonably incurred as a result of the offense.

(e) This section shall not apply to a licensed veterinarian whose conduct is in accordance with Article 11 of Chapter 90 of the General Statutes.

(f) Self-defense is an affirmative defense to a violation of this section.

(g) Nothing in this section shall affect any civil remedies available for violation of this section."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

SENATE BILL 1058:
Amend Assault Assistance Animal

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 4, 2005
Introduced by:	Sen. Dalton	**Summary by:**	Ben Popkin
Version:	First Edition		Committee Counsel

SUMMARY: ***Senate Bill 1058 would expand an existing offense "Assaulting a law enforcement agency animal or an assistance animal"[1] to apply to instances where psychological harm has been inflicted upon the animal. The bill would also require individuals convicted of this offense to make restitution to the owner or agency caring for the animal.***

CURRENT LAW: The offense of "Assaulting a law enforcement agency animal or an assistance animal" is a criminal offense that provides for three levels of punishment based on the specific action committed by the person. The punishments range from a Class I felony for incidents involving serious physical harm to the animal, to a Class 1 misdemeanor for incidents involving physical harm, and to a Class 2 misdemeanor for incidents involving a person who, "taunts, teases, harasses, delays, obstructs, or attempts to delay or obstruct the animal in the performance of its duty..."[2]

These offenses are committed when a person's actions satisfy the essential elements below:

1. A person knows or has reason to know that an animal is a law enforcement animal or an assistance animal; and
2. Willfully causes or attempts to cause (serious physical harm – Class I felony/physical harm – Class 1 misdemeanor) to the animal; or
3. Willfully taunts, teases, harasses, delays, obstructs, or attempts to do so while in the performance of its duty (Class 2 misdemeanor).

BILL ANALYSIS: Senate Bill 1058 would expand the existing offenses to apply to instances where psychological harm has been inflicted upon the animal. The bill would add definitions for 'psychological harm' (Class 1 misdemeanor, involving mental or behavioral impairment that impedes or interferes with its duties) and 'serious psychological harm' (Class I felony, involving harm that requires retraining or retirement from duty) to section 14-163.1(a) of the statute. The bill would insert 'psychological' into the appropriate corresponding subsections of the statute.

The bill would also require individuals convicted of this offense to make restitution to the owner or agency caring for the animal. The bill would include a list of seven specific categories of expenses to be included when determining the amount of restitution. The bill would clearly state that restitution ordered pursuant to this section of the statutes would in no way affect the availability of civil remedies for violations of this section. The bill would also make changes in terminology to reflect more current usage regarding references to persons with disabilities[3].

EFFECTIVE DATE: The act would become effective December 1, 2005 and would apply to offenses committed on or after that date.

S1058e1-SMSS

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[1] G. S. 14-163.1.
[2] G. S. 14-163.1(b), (c) and (d).
[3] G. S. 14-163.1(a)(1).

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1015*

Second Edition Engrossed 4/27/05

Short Title:	Clerks May Order Mediation.	(Public)
Sponsors:	Representatives Hackney; Coleman, Faison, and Insko.	
Referred to:	Judiciary I.	

March 31, 2005

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE THE CLERK OF SUPERIOR COURT TO ORDER MEDIATION IN MATTERS WITHIN THE CLERK'S JURISDICTION.

The General Assembly of North Carolina enacts:

SECTION 1. Article 5 of Chapter 7A of the General Statutes is amended by adding a new section to read:

"**§ 7A-38.3B. Mediation in matters within the jurisdiction of the clerk of superior court.**

(a) Purpose. – The General Assembly finds that the clerk of superior court in the General Court of Justice should have the discretion and authority to order that mediation be conducted in matters within the clerk's jurisdiction in order to facilitate a more economical, efficient, and satisfactory resolution of those matters.

(b) Enabling Authority. – The clerk of superior court may order that mediation be conducted in any matter in which the clerk has exclusive or original jurisdiction, except for matters under Chapters 45 and 48 of the General Statutes and except in matters in which the jurisdiction of the clerk is ancillary. The Supreme Court may adopt rules to implement this section. Such mediations shall be conducted pursuant to this section and the Supreme Court rules as adopted.

(c) Attendance. – In those matters ordered to mediation pursuant to this section, the following persons or entities, along with their attorneys, may be ordered by the clerk to attend the mediation:

(1) Named parties.

(2) Interested persons, meaning persons or entities who have a right, interest, or claim in the matter; heirs or devisees in matters under Chapter 28A of the General Statutes, next of kin under Chapter 35A of the General Statutes, and other persons or entities as the clerk deems necessary for the adjudication of the matter. The meaning of "interested person" may vary according to the issues involved in the matter.

(3) Nonparty participants, meaning any other person or entity identified by the clerk as possessing useful information about the matter and whose attendance would be beneficial to the mediation.

(4) Fiduciaries, meaning persons or entities who serve as fiduciaries, as that term is defined by G.S. 36A-22.1, of named parties, interested persons, or nonparty participants.

Any person or entity ordered to attend a mediation shall be notified of its date, time, and location and shall attend unless excused by rules of the Supreme Court or by order of the clerk. No one attending the mediation shall be required to make a settlement offer or demand that it deems contrary to its best interests.

(d) Selection of Mediator. – Persons ordered to mediation pursuant to this section have the right to designate a mediator in accordance with rules promulgated by the Supreme Court implementing this section. Upon failure of those persons to agree upon a designation within the time established by rules of the Supreme Court, a mediator certified by the Dispute Resolution Commission pursuant to those rules shall be appointed by the clerk.

(e) Immunity. – Mediators acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators may be disciplined in accordance with procedures adopted by the Supreme Court pursuant to G.S. 7A-38.2.

(f) Costs of Mediation. – Costs of mediation under this section shall be borne by the named parties, interested persons, and fiduciaries ordered to attend the mediation. The rules adopted by the Supreme Court implementing this section shall set out the manner in which costs shall be paid and a method by which an opportunity to participate without cost shall be afforded to persons found by the clerk to be unable to pay their share of the costs of mediation. Costs may only be assessed against the estate of a decedent, the estate of an adjudicated or alleged incompetent, a trust corpus, or against a fiduciary upon the entry of a written order making specific findings of fact justifying the taxing of costs.

(g) Inadmissibility of Negotiations. – Evidence of statements made or conduct occurring during a mediation conducted pursuant to this section, whether attributable to any participant, mediator, expert, or neutral observer, shall not be subject to discovery and shall be inadmissible in any proceeding in the matter or other civil actions on the same claim, except in:

(1) Proceedings for sanctions pursuant to this section;

(2) Proceedings to enforce or rescind a written and signed settlement agreement;

(3) Incompetency, guardianship, or estate proceedings in which a mediated agreement is presented to the clerk;

(4) Disciplinary proceedings before the North Carolina State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(5) Proceedings for abuse, neglect, or dependency of a juvenile, or for abuse, neglect, or exploitation of an adult, for which there is a duty to

report under G.S. 7B-301 and Article 6 of Chapter 108A of the General Statutes, respectively.

No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in mediation.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

(h) Testimony. – No mediator or neutral observer shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to the mediation in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the matter except to attest to the signing of any agreements reached in mediation, and except in:

(1) Proceedings for sanctions pursuant to this section;

(2) Disciplinary proceedings before the North Carolina State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(3) Proceedings for abuse, neglect, or dependency of a juvenile, or for abuse, neglect, or exploitation of an adult, for which there is a duty to report under G.S. 7B-301 and Article 6 of Chapter 108A of the General Statutes, respectively.

(i) Agreements. – In matters before the clerk in which agreements are reached in a mediation conducted pursuant to this section, or during one of its recesses, those agreements shall be treated as follows:

(1) Where as a matter of law, a matter may be resolved by agreement of the parties, a settlement is enforceable only if it has been reduced to writing and signed by the parties.

(2) In all other matters before the clerk, including guardianship and estate matters, all agreements shall be delivered to the clerk for consideration in deciding the matter.

(j) Sanctions. – The clerk may sanction any person ordered to attend a mediation conducted pursuant to this section and rules of the Supreme Court who, without good cause, fails to attend the mediation, by imposing an appropriate monetary sanction, including the payment of attorneys' fees, mediator fees, and expenses incurred in attending the conference. If the clerk imposes sanctions, the clerk shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with G.S. 1-301.2 and G.S. 1-301.3, as applicable, and thereafter by the appellate courts in accordance with G.S. 7A-38.1(g).

(k) Authority to Supplement Procedural Details. – The clerk of superior court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with rules adopted by the Supreme Court implementing this section."

SECTION 2. G.S. 35A-1108 reads as rewritten:

"**§ 35A-1108. Issuance of notice.**

(a) Within five days after filing of the petition, the clerk shall issue a written notice of the date, time, and place for a hearing on the petition, which shall be held not less than 10 days nor more than 30 days after service of the notice and petition on the respondent, unless the clerk extends the time for good ~~cause or~~ cause, for preparation of a multidisciplinary evaluation as provided in ~~G.S. 35A-1111.~~ G.S. 35A-1111, or for the completion of a mediation.

(b) If a multidisciplinary evaluation or mediation is ordered after a notice of hearing has been issued, the clerk may extend the time for hearing and issue a notice to the parties that the hearing has been continued, the reason therefor, and the date, time, and place of the new hearing, which shall not be less than 10 days nor more than 30 days after service of such notice on the respondent.

(c) Subsequent notices to the parties shall be served as provided by G.S. 1A-1, Rule 5, Rules of Civil Procedure, unless the clerk orders otherwise."

SECTION 3. G.S. 35A-1116 is amended by adding a new subsection to read:

"(c1) Mediator fees and other costs associated with mediation shall be assessed in accordance with G.S. 7A-38.3B."

SECTION 4. G.S. 46-27 reads as rewritten:

"**§ 46-27. Sale of land required for public use on cotenant's petition.**

When the lands of joint tenants or tenants in common are required for public purposes, one or more of such tenants, or their guardian for them, may file a petition verified by oath, in the superior court of the county where the lands or any part of them lie, setting forth therein that the lands are required for public purposes, and that their interests would be promoted by a sale thereof. Whereupon the court, all proper parties being before it, and the facts alleged in the petition being ascertained to be true, shall order a sale of such lands, or so much thereof as may be necessary. The expenses, fees and costs of this proceeding shall be paid in the discretion of the court. Mediator fees and costs of mediation shall be assessed in accordance with G.S. 7A-38.3B."

SECTION 5. This act is effective when it becomes law and applies to all matters pending before a clerk of superior court on, or filed with the clerk after, the date the Supreme Court adopts rules implementing this act.

HOUSE BILL 1015:
Clerks May Order Mediation

BILL ANALYSIS

Committee:	Senate Judiciary II Committee	**Introduced by:**	Representative Hackney
Date:	May 5, 2005	**Summary by:**	Ben Popkin
Version:	First Edition		Committee Counsel

SUMMARY: House Bill 1015 authorizes the clerk of superior court to order mediation in matters within the clerk's jurisdiction. This authority would not apply to matters involving mortgages and deeds of trust (Chapter 45 of the General Statutes), and adoption procedures (Chapter 48 of the General Statutes).

The Supreme Court is authorized to adopt rules to implement this section.

BILL ANALYSIS: Under the bill, the clerk is authorized to order the attendance of named parties, interested persons (persons with rights, interests or claims), heirs, or other persons deemed necessary. The clerk is also authorized to order the attendance of nonparty participants identified as possessing useful information, and fiduciaries of named parties. No one attending the mediation shall be required to make a settlement offer or demand that it deems contrary to its best interests.

The persons ordered to mediation by the clerk may select a mediator. If no agreement on the selection of a mediator is reached the within the time frame of the rules established by the Supreme Court, the clerk may select a mediator.

The costs of mediation are borne by the named parties, interested persons and others ordered to attend by the clerk. Rules adopted by the Supreme Court must provide for the manner is which costs are paid and a method by which those unable to pay may participate in the mediation. Costs against an estate or fiduciary may only be assessed upon the entry of a written order by the clerk with specific findings of fact.

Evidence of statements or conduct during the mediation are not discoverable and are inadmissible in other proceedings on the same claim with certain exceptions including the following:

- Proceedings for sanctions under this section
- Proceedings to enforce or rescind a written, signed settlement agreement
- Incompetency, guardianship or estate proceedings in which a mediated agreement is presented to the clerk
- Disciplinary proceedings before the State Bar
- Proceedings for abuse, neglect, or dependency of a juvenile, or abuse, neglect or exploitation of an adult

Evidence otherwise discoverable is not inadmissible merely because it was presented in mediation.

Mediators and neutral observers to a mediation may not be compelled to testify in subsequent proceedings except to attest to the signing of settlement agreements, in proceedings for sanctions, in disciplinary proceedings, or in proceedings for abuse of a juvenile or adult.

Where settlements are reached during mediation, the settlement may only be enforced where it is reduced to writing and signed by the parties. All other matters, including guardianship and estate matters must be delivered to the clerk for consideration.

The clerk may impose monetary sanctions against parties refusing to attend, including the payment of fees and expenses. An order by the clerk imposing sanctions is subject to review by the superior court and the appellate courts.

EFFECTIVE DATE: House Bill 1015 is effective when it becomes law and applies to all matters pending before a clerk of superior court on or filed with the clerk after the Supreme Court adopts rules implementing the act.

This summary is based in large part on the prior work of Staff Attorney Tim Hovis.

H1015-SMSS-001

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	May 10, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 669	State Land Not Subject to Municipal Control.	Senator Hartsell
SB 966	Definite Release Dates for Inmates.	Senator Bingham
SB 991	Authorize Judge/Concealed Weapon in Cths.	Senator Apodaca
SB 1058	Amend Assault Assistance Animal.	Senator Dalton

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk ____
Reading Clerk ____

MEETING CANCELLED

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

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SB 1058	Amend Assault Assistance Animal.	Senator Dalton
SB 805	Clerks May Order Mediation.	Senator Hartsell
SB 887	NC Lien Law Revised.	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	May 12, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 1058	Amend Assault Assistance Animal.	Senator Dalton
SB 991	Authorize Judge/Concealed Weapon in Cths.	Senator Apodaca
SB 887	NC Lien Law Revised.	Senator Hartsell
SB 805	Clerks May Order Mediation.	Senator Hartsell
SB 688	Indigent Defense of Parents During Appeals.	Senator Kerr

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, May 12, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 1058	Amend Assault Assistance Animal.	Senator Dalton
SB 991	Authorize Judge/Concealed Weapon in Cths.	Senator Apodaca
SB 887	NC Lien Law Revised.	Senator Hartsell
SB 805	Clerks May Order Mediation.	Senator Hartsell
SB 688	Indigent Defense of Parents During Appeals.	Senator Kerr

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

May 12, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on May 12, 2005, with sixteen members present. Senator Hartsell introduced pages Samantha Kessler, Channing Carter, Jo Ellen Billotte and thanked them from serving.

SB 1058 (Amend Assault Assistance Animal.) Senator Hartsell invited Senator Dalton to continue with the explanation of the Proposed Committee Substitute. The PCS was first heard at the May 5th meeting. Questions from Senators Bingham, Forrester, Thomas, Webster and Allran were answered by Senators Dalton and Hartsell and Ben Popkin, Staff Attorney. Dr. Al Wentzy, DSS Director from Northampton County and Mr. Lorin Mueller, representing the North Carolina Coalition of Police spoke on the bill. Senator Forrester moved for a favorable report, unfavorable to the original bill, favorable to the Proposed Committee Substitute. All voted and the motion carried.

SB 887 (NC Lien Law Revised.) Senator Thomas chaired the meeting and recognized Senator Swindell who moved to accept the proposed committee substitute for purposes of discussion. All voted and the motion carried. Senator Hartsell explained the bill and then recognized Mr. David Layton, Attorney, representing the Bar Association, to continue the explanation. Senator Swindell moved for a favorable report, unfavorable to the original bill, favorable to the proposed committee substitute. All voted and the motion carried.

SB 805 (Clerks May Order Mediation.) Senator Thomas chaired while Senator Hartsell explained the bill. Senator Apodaca moved for a favorable report. All voted and the motion carried.

SB 991 (Authorize Judge/Concealed Weapon in Cths.) Senator Hartsell recognized Senator Apodaca to explain the bill. Senator Apodaca moved to accept the proposed committee substitute for purposes of discussion. All voted and the motion carried. Questions from Senators Kinnaird, Allran, Swindell, Bingham, Snow, Webster, Dannelly, Dalton and Thomas were answered by Senator Apodaca and Senator Snow. Mr. John Carr spoke on the bill. Senator Thomas moved for a favorable report. After much discussion, Senator Apodaca decided to have the bill heard again after some modifications. The bill will be heard again at the Tuesday meeting.

With no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5-12-05

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
DAVID BARNES	Poyner + Spruill
Kathleen Edwards	UNC-CH Legis. Reporting Service
Fred Johnson	Alliance of Disability Advocates
Bill Wilson	NC Academy of Trial Lawyers
Michelle Frazier	NC Bar Ass'n
Lorin Mueller	NC Coalition of Police
[illegible]	Attorney
Pamela Best	AOC
Jami Fitzgerald	NCFPA
Staples Hughes	Office of the Appellate Defender
Pete Wood	Private attorney, Raleigh

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5/12/05

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Bill Gammon	Nelson Mullins, Raleigh NCBA Construction Section
DAVID LOUTIN	NCBA CONSTR SECTION
Charles Meier	Marshall, Williams & Gorham, LLP NCBA Construction Law Section
KAREN CLARK	GUIDE DOG USER 6221 GARRETT RD RALEIGH 27606

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, May 12, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **805** Clerks May Order Mediation.

Sequential Referral:	None
Recommended Referral:	None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **934** Notary Public Act.-AB

Draft Number:	PCS55226
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

TOTAL REPORTED: 2

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Monday, May 16, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **887** NC Lien Law Revised.

Draft Number:	PCS85245
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

S.B. **1058** Amend Assault Assistance Animal.

Draft Number:	PCS65318
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

TOTAL REPORTED: 2

Committee Clerk Comments:

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 1058

Short Title:	Amend Assault Assistance Animal.	(Public)
Sponsors:	Senator Dalton.	
Referred to:	Judiciary II.	

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO MAKE IT A CRIMINAL OFFENSE TO ASSAULT AN ASSISTANCE ANIMAL WITH THE INTENT TO CAUSE PSYCHOLOGICAL HARM TO THE ANIMAL.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-163.1 reads as rewritten:

"**§ 14-163.1. Assaulting a law enforcement agency animal or an assistance animal.**

(a) The following definitions apply in this section:

(1) Assistance animal. – An animal that is trained and may be used to assist a "~~handicapped~~ person with a disability" as defined in ~~G.S. 168-1.~~ G.S. 168A-3. The term "assistance animal" is not limited to a dog and includes any animal trained to assist a ~~handicapped~~ person with a disability as provided in Article 1 of Chapter 168 of the General Statutes.

(2) Law enforcement agency animal. – An animal that is trained and may be used to assist a law enforcement officer in the performance of the officer's official duties.

(3) Physical harm. – Any injury, illness, or other physiological impairment.

(4) Serious physical harm. – Physical harm that does any of the following:

a. Creates a substantial risk of death.

b. Causes maiming or causes substantial loss or impairment of bodily function.

c. Causes acute pain of a duration that results in substantial suffering.

(5) Psychological harm. – Any mental or behavioral impairment that impedes or interferes with duties performed by a law enforcement agency animal or assistance animal.

(6) Serious psychological harm. – Psychological harm that does any of the following:

a. Requires retraining of the law enforcement agency animal or assistance animal.

b. Requires retirement of the law enforcement agency animal or assistance animal from performing duties.

(b) Any person who knows or has reason to know that an animal is a law enforcement agency animal or an assistance animal and who willfully causes or attempts to cause serious physical or psychological harm to the animal is guilty of a Class I felony.

(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who knows or has reason to know that an animal is a law enforcement agency animal or an assistance animal and who willfully causes or attempts to cause physical or psychological harm to the animal is guilty of a Class 1 misdemeanor.

(d) Unless the conduct is covered under some other provision of law providing greater punishment, any person who knows or has reason to know that an animal is a law enforcement agency animal or an assistance animal and who willfully taunts, teases, harasses, delays, obstructs, or attempts to delay or obstruct the animal in the performance of its duty as a law enforcement agency animal or assistance animal is guilty of a Class 2 misdemeanor.

(d1) A defendant convicted of a violation of this section shall be ordered to make restitution to the person with a disability, or to a person, group, or law enforcement agency who owns or is responsible for the care of the law enforcement agency animal for any of the following as appropriate:

(1) Veterinary, medical care, and boarding expenses for the assistance animal or law enforcement animal.

(2) Medical expenses for the person with the disability.

(3) Replacement and training or retraining expenses for the assistance animal or law enforcement animal without any differentiation for the age of the animal.

(4) Expenses for a person to provide temporary mobility services to the person with a disability.

(5) Lost wages or income as a result of receiving training or retraining.

(6) The salary of the animal handler for the period of time the services are lost to the law enforcement agency.

(7) Any other expense reasonably incurred as a result of the offense.

(e) This section shall not apply to a licensed veterinarian whose conduct is in accordance with Article 11 of Chapter 90 of the General Statutes.

(f) Self-defense is an affirmative defense to a violation of this section.

(g) Nothing in this section shall affect any civil remedies available for violation of this section."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 1058
PROPOSED COMMITTEE SUBSTITUTE S1058-CSSS-15 [v.4]

5/11/2005 9:58:36 AM

Short Title: Amend Assault Assistance Animal. (Public)

Sponsors:

Referred to:

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO EXPAND THE SCOPE OF THE CRIMINAL OFFENSE OF ASSAULT ON AN ASSISTANCE ANIMAL AND TO REQUIRE RESTITUTION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-163.1 reads as rewritten:

"**§ 14-163.1. Assaulting a law enforcement agency animal or an assistance animal.**

(a) The following definitions apply in this section:

(1) Assistance animal. – An animal that is trained and may be used to assist a ~~"handicapped person~~ "person with a disability" as defined in ~~G.S. 168-1.~~ G.S. 168A-3. The term "assistance animal" is not limited to a dog and includes any animal trained to assist a ~~handicapped~~ person with a disability as provided in Article 1 of Chapter 168 of the General Statutes.

(2) Law enforcement agency animal. – An animal that is trained and may be used to assist a law enforcement officer in the performance of the officer's official duties.

(3) ~~Physical harm.~~Harm. – Any injury, illness, or other physiological ~~impairment.~~ impairment; or any behavioral impairment that impedes or interferes with duties performed by a law enforcement agency animal or an assistance animal.

(4) Serious ~~physical~~ harm. ~~Physical harm~~ Harm that does any of the following:

a. Creates a substantial risk of death.

b. Causes maiming or causes substantial loss or impairment of bodily function.

c. Causes acute pain of a duration that results in substantial suffering.

d. Requires retraining of the law enforcement agency animal or assistance animal.

e. Requires retirement of the law enforcement agency animal or assistance animal from performing duties.

(b) Any person who knows or has reason to know that an animal is a law enforcement agency animal or an assistance animal and who willfully causes or attempts to cause serious ~~physical~~ harm to the animal is guilty of a Class I felony.

(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who knows or has reason to know that an animal is a law enforcement agency animal or an assistance animal and who willfully causes or attempts to cause ~~physical~~ harm to the animal is guilty of a Class 1 misdemeanor.

(d) Unless the conduct is covered under some other provision of law providing greater punishment, any person who knows or has reason to know that an animal is a law enforcement agency animal or an assistance animal and who willfully taunts, teases, harasses, delays, obstructs, or attempts to delay or obstruct the animal in the performance of its duty as a law enforcement agency animal or assistance animal is guilty of a Class 2 misdemeanor.

(d1) A defendant convicted of a violation of this section shall be ordered to make restitution to the person with a disability, or to a person, group, or law enforcement agency who owns or is responsible for the care of the law enforcement agency animal for any of the following as appropriate:

(1) Veterinary, medical care, and boarding expenses for the assistance animal or law enforcement animal.

(2) Medical expenses for the person with the disability relating to the harm inflicted upon the assistance animal.

(3) Replacement and training or retraining expenses for the assistance animal or law enforcement animal.

(4) Expenses incurred to provide temporary mobility services to the person with a disability.

(5) Wages or income lost while the person with a disability is with the assistance animal receiving training or retraining.

(6) The salary of the law enforcement agency animal handler as a result of the lost services to the agency during the time the handler is with the law enforcement agency animal receiving training or retraining.

(7) Any other expense reasonably incurred as a result of the offense.

(e) This section shall not apply to a licensed veterinarian whose conduct is in accordance with Article 11 of Chapter 90 of the General Statutes.

(f) Self-defense is an affirmative defense to a violation of this section.

(g) Nothing in this section shall affect any civil remedies available for violation of this section."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

SENATE BILL 1058:
Amend Assault Assistance Animal

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 9, 2005
Introduced by:	Sen. Dalton	**Summary by:**	Ben Popkin
Version:	PCS to First Edition S1058-CSSS		Committee Counsel

SUMMARY: ***Senate Bill 1058 would expand an existing offense "Assaulting a law enforcement agency animal or an assistance animal"[1] to apply to instances where mental or behavioral harm has been inflicted upon the animal. The bill would also require individuals convicted of this offense to make restitution to the owner or agency caring for the animal.***

CURRENT LAW: The offense of "Assaulting a law enforcement agency animal or an assistance animal" is a criminal offense that provides for three levels of punishment based on the specific action committed by the person. The punishments range from a Class I felony (with a presumptive minimum sentence of 4-6 months of community punishment) for incidents involving serious physical harm to the animal, to a Class 1 misdemeanor (with a presumptive minimum sentence of 1-45 days of community punishment) for incidents involving physical harm, and to a Class 2 misdemeanor (with a presumptive minimum sentence of 1-30 days of community punishment) for incidents involving a person who, "taunts, teases, harasses, delays, obstructs, or attempts to delay or obstruct the animal in the performance of its duty..."[2]

The first two offenses (which involve harm to the animal) are committed when a person's actions satisfy the essential elements below:

1. A person knows or has reason to know that an animal is a law enforcement animal or an assistance animal; and
2. Willfully causes or attempts to cause (serious physical harm – Class I felony; or physical harm – Class 1 misdemeanor) to the animal.

The remaining offense is committed when a person's actions satisfy the essential elements below:

1. A person knows or has reason to know that an animal is a law enforcement animal or an assistance animal; and
2. Willfully taunts, teases, harasses, delays, obstructs, or attempts to do so to a law enforcement animal or an assistance animal while in the performance of its duty (Class 2 misdemeanor).

BILL ANALYSIS: Senate Bill 1058 would expand the existing offenses to apply to any instance where any kind of harm has been inflicted upon the animal, whether it is physical, mental or behavioral harm. The bill would expand the current law from being limited to only 'physical harm' or 'serious physical harm' to the broader 'harm' or 'serious harm'. The term 'harm' would be defined in the statute to include incidents involving mental or behavioral impairment of the animal that impedes or interferes with its duties (Class 1 misdemeanor); and 'serious harm' would be defined to include incidents involving harm that requires and animal to be retrained or retired from duty (Class I felony). The bill would insert 'psychological' into the appropriate corresponding subsections of the statute.

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[1] G. S. 14-163.1.

[2] G. S. 14-163.1(b), (c) and (d).

The bill would also require individuals convicted of this offense to make restitution to the owner or agency caring for the animal. The bill would include a list of seven specific categories of expenses to be included when determining the amount of restitution. The bill would clearly state that restitution ordered pursuant to this section of the statutes would in no way affect the availability of civil remedies for violations of this section. The bill would also make changes in terminology to reflect more current usage regarding references to persons with disabilities[3].

EFFECTIVE DATE: The act would become effective December 1, 2005 and would apply to offenses committed on or after that date.

S1058e1-SMSS-CSSS

[3] G. S. 14-163.1(a)(1).

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 991*

Short Title:	Authorize Judge/Concealed Weapon in Cths.	(Public)
Sponsors:	Senator Apodaca.	
Referred to:	Judiciary II.	

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A DISTRICT COURT JUDGE OR SUPERIOR COURT JUDGE WHO HAS A CONCEALED HANDGUN PERMIT MAY CARRY OR POSSESS A CONCEALED HANDGUN WHILE IN A COURTHOUSE TO DISCHARGE OFFICIAL DUTIES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-269.4 reads as rewritten:

"**§ 14-269.4. Weapons on State property and in courthouses.**

It shall be unlawful for any person to possess, or carry, whether openly or concealed, any deadly weapon, not used solely for instructional or officially sanctioned ceremonial purposes in the State Capitol Building, the Executive Mansion, the Western Residence of the Governor, or on the grounds of any of these buildings, and in any building housing any court of the General Court of Justice. If a court is housed in a building containing nonpublic uses in addition to the court, then this prohibition shall apply only to that portion of the building used for court purposes while the building is being used for court purposes.

This section shall not apply to:

(1) Repealed by S.L. 1997-238, s. 3.

(1a) A person exempted by the provisions of G.S. 14-269(b),

(2) through (4) Repealed by S.L. 1997-238, s. 3.

(4a) Any person in a building housing a court of the General Court of Justice in possession of a weapon for evidentiary purposes, to deliver it to a law-enforcement agency, or for purposes of registration,

(4b) Any district court judge or superior court judge who carries or possesses a concealed handgun in a building housing a court of the General Court of Justice if the judge is in the building to discharge his or her official duties and the judge has a concealed handgun permit issued in accordance with Article 54B of this Chapter or considered valid under G.S. 415.24.

(5) State-owned rest areas, rest stops along the highways, and State-owned hunting and fishing reservations.

Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 991*
PROPOSED COMMITTEE SUBSTITUTE S991-CSRC-39 [v.2]

5/7/2005 11:17:34 AM

Short Title: Authorize Judge/Concealed Weapon in Cths. (Public)

Sponsors:

Referred to:

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A DISTRICT COURT JUDGE OR SUPERIOR COURT JUDGE WHO HAS A CONCEALED HANDGUN PERMIT MAY CARRY OR POSSESS A CONCEALED HANDGUN WHILE IN A COURTHOUSE TO DISCHARGE OFFICIAL DUTIES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-269.4 reads as rewritten:

"**§ 14-269.4. Weapons on State property and in courthouses.**

(a) It shall be unlawful for any person to possess, or carry, whether openly or concealed, any deadly weapon, not used solely for instructional or officially sanctioned ceremonial purposes in the State Capitol Building, the Executive Mansion, the Western Residence of the Governor, or on the grounds of any of these buildings, and in any building housing any court of the General Court of Justice. If a court is housed in a building containing nonpublic uses in addition to the court, then this prohibition shall apply only to that portion of the building used for court purposes while the building is being used for court purposes.

(b) ~~This section~~ Subsection (a) of this section shall not apply to:

(1) Repealed by S.L. 1997-238, s. 3.

(1a) A person exempted by the provisions of G.S. 14-269(b),

(2) through (4) Repealed by S.L. 1997-238, s. 3.

(4a) Any person in a building housing a court of the General Court of Justice in possession of a weapon for evidentiary purposes, to deliver it to a law-enforcement agency, or for purposes of registration,

(4b) Any district court judge or superior court judge who carries or possesses a concealed handgun in a building housing a court of the General Court of Justice if the judge is in the building to discharge the judge's official duties and the judge has a concealed handgun permit

issued under Article 54B of this Chapter or considered valid under G.S. 14-415.24.

(5) State-owned rest areas, rest stops along the highways, and State-owned hunting and fishing reservations.

(c) Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 991:
Authorize Judge/Concealed Weapon in Cths

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 10, 2005
Introduced by:	Sen. Apodaca	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	PCS to First Edition S991-CSRC-39		

SUMMARY: ***Senate Bill 991 would authorize superior court and district court judges to carry or possess a concealed handgun in a court of the General Court of Justice if the judge is in the building to discharge the judge's official duties and if the judge has a concealed handgun permit.***

The Committee Substitute corrects an incomplete citation and makes other technical changes.

This act would be effective when it became law.

CURRENT LAW: G.S. 14-269.4 prohibits any person to possess or carry any deadly weapon in the State Capital Building, the Executive Manson, the Western Residence of the Governor, on the grounds of these buildings, in any building housing any court of the General Court of Justice, or in the portion of a building that is being used for court purposes if the building where the court is housed also contains nonpublic uses. Case law has defined a deadly weapon as any instrument that under the circumstances of its use is likely to cause death or serious bodily injury.[1] Some weapons, such as guns, are deadly by their very nature.[2]

This prohibition does not apply to a the following individuals:

(1) Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms and weapons;

(2) Civil and law enforcement officers of the United States while in the discharge of their official duties;

(3) Officers and soldiers of the militia and the national guard when called into actual service;

(4) Officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties;

(5) Sworn law-enforcement officers, when off-duty, if:

a. Written regulations authorizing the carrying of concealed weapons have been filed with the clerk of superior court in the county where the law-enforcement unit is located by the sheriff or chief of police or other superior officer in charge; and

b. Such regulations specifically prohibit the carrying of concealed weapons while the officer is consuming or under the influence of alcoholic beverages.[3]

BILL ANALYSIS: Senate Bill 991 would authorize superior court and district court judges to carry or possess a concealed handgun in a court of the General Court of Justice if the judge is in the building to discharge the judge's official duties and if the judge has a concealed handgun permit, or a permit from

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[1] State v. Lane, 1 N.C. App. 539.
[2] State v. Torain, 316 N.C. 111.
[3] G.S. 14-269.4(1a) and G.S. 14-269(b).

another state that is recognized by North Carolina under the reciprocity provisions of G.S. 14-415.24. Although judges are officers of the State, the current exemption in G.S. 14-269.4(1a) probably does not give judges this authority because carrying a deadly weapon would not fall within acts that are necessary for the discharge of their official duties.

The exemption in this bill probably applies to special superior court and district court judges and to emergency special superior court and district court judges. It would not apply to appellate division justices and judges.

Any judge who carried a concealed handgun into a court would have to also carry the permit together with valid identification. The judge would be required to disclose to any law enforcement officer that the judge holds a valid permit and is carrying a concealed handgun when approached or addressed by the officer, and display both the permit and the proper identification upon the request of a law enforcement officer.[4]

EFFECTIVE DATE: The bill would become effective when it becomes law.

S0991e1-SMRC-CSRC-39

[4] G.S. 14-425.11(a).

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 887

Short Title:	NC Lien Law Revised.	(Public)
Sponsors:	Senators Hartsell, Hoyle; and Apodaca.	
Referred to:	Judiciary II.	

March 23, 2005

A BILL TO BE ENTITLED

AN ACT TO REVISE THE STATUTES THAT ADDRESS STATUTORY LIENS ON REAL PROPERTY.

The General Assembly of North Carolina enacts:

SECTION 1. Article 2 of Chapter 44A of the General Statutes reads as rewritten:

"Article 2.

"Statutory Liens on Real Property.

"Part 1. Liens of Mechanics, ~~Laborers~~ Laborers, and Materialmen Dealing with Owner.

"**§ 44A-7. Definitions.**

Unless the context otherwise requires in this Article:

(1) "Improve" means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements, and shall also mean and include any design or other professional or skilled services furnished by architects, engineers, land surveyors and landscape architects registered under Chapter 83A, 89A or 89C of the General Statutes, and rental of equipment directly utilized on the real property in making the improvement.

(2) "Improvement" means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property.

(3) An "owner" is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the

improvement to be made. "Owner" includes successors in interest of the owner and agents of the owner acting within their authority.

(4) "Real property" means the real estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon.

"§ 44A-8. Mechanics', ~~laborers'~~ laborers', and materialmen's lien; persons entitled to ~~lien.~~claim of lien on real property.

Any person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a claim of lien on real property on such real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to such contract.

"§ 44A-9. Extent of ~~lien.~~claim of lien on real property.

~~Liens~~ A claim of lien on real property authorized under the provisions of this Article shall extend to the improvement and to the lot or tract on which the improvement is situated, to the extent of the interest of the owner. When the lot or tract on which a building is erected is not surrounded at the time of making the contract with the owner by an enclosure separating it from adjoining land of the same owner, the lot or tract to which any claim of lien on real property extends shall be such area as is reasonably necessary for the convenient use and occupation of such building, but in no case shall the area include a building, structure, or improvement not normally used or occupied or intended to be used or occupied with the building with respect to which the claim of lien on real property is claimed.

"§ 44A-10. Effective date of ~~liens.~~claim of lien on real property.

~~Liens~~ A claim of lien on real property granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the ~~lien.~~claim of lien on real property.

"§ 44A-11. Perfecting ~~liens.~~claim of lien on real property.

~~Liens~~ A claim of lien on real property granted by this Article shall be perfected as of the time set forth in G.S. 44A-10 upon the filing of the claim of lien on real property pursuant to G.S. 44A-12 and may be enforced pursuant to G.S. 44A-13.

"§ 44A-12. Filing claim of ~~lien.~~lien on real property.

(a) Place of Filing. – All claims of lien ~~against any~~ on real property must be filed in the office of the clerk of superior court in each county wherein the real property subject to the claim of lien on real property is located. The clerk of superior court shall note the claim of lien on real property on the judgment docket and index the same under the name of the record owner of the real property at the time the claim of lien on real property is filed. An additional copy of the claim of lien on real property may also be filed with any receiver, referee in bankruptcy or assignee for benefit of creditors who obtains legal authority over the real property.

(b) Time of Filing. – Claims of lien on real property may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the

last furnishing of labor or materials at the site of the improvement by the person claiming the lien.

(c) Contents of Claim of Lien on Real Property to Be Filed. – All claims of lien on real property must be filed using a form substantially as follows:

CLAIM OF LIEN ON REAL PROPERTY

(1) Name and address of the person claiming the ~~lien:~~claim of lien on real property:

(2) Name and address of the record owner of the real property claimed to be subject to the claim of lien on real property at the time the claim of lien on real property is filed:

(3) Description of the real property upon which the claim of lien on real property 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 _____, _____

_____

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.

(d) No Amendment of Claim of ~~Lien.~~ Lien on Real Property. – A claim of lien on real property may not be amended. A claim of lien on real property may be cancelled by a claimant or his authorized agent or attorney and a new claim of lien on real property substituted therefor within the time herein provided for original filing.

(e) Notice of Assignment of Claim of ~~Lien.~~ Lien on Real Property. – When a claim of lien on real property has been filed, it may be assigned of record by the lien claimant in a writing filed with the clerk of superior court who shall note said assignment in the margin of the judgment docket containing the claim of ~~lien.~~ lien on real property. Thereafter the assignee becomes the lien claimant of record.

(f) Waiver of Right to ~~File~~ File, Serve, or Claim Liens as Consideration for Contract Against Public Policy. – An agreement to waive the right to file a claim of lien on real property granted under this Part, or ~~claim~~ an agreement to waive the right to serve a notice of claim of lien upon funds granted under Part 2 of this Article, which agreement is in anticipation of and in consideration for the awarding of any contract, either expressed or implied, for the making of an improvement upon real property under this Article is against public policy and is unenforceable. This section does not prohibit subordination or release of a lien granted under this Part or Part 2 of this Article.

"§ 44A-12.1. No docketing of lien unless authorized by statute.

(a) The clerk of superior court shall not index, docket, or record a claim of lien on real property or other document purporting to claim or assert a lien on real property in such a way as to affect the title to any real property unless the document:

(1) Is offered for filing under this Article or another statute that provides for indexing and docketing of claims of lien on real property; and

(2) Appears on its face to contain all of the information required by the statute under which it is offered for filing.

(b) The clerk may accept, for filing only, any document that does not meet the criteria established for indexing, docketing, or recording under subsection (a) of this section. If the clerk does accept this document, the clerk shall inform the person offering the document that it will not be indexed, docketed, or recorded in any way as to affect the title to any real property.

(c) Any person who causes or attempts to cause a claim of lien on real property or other document to be filed, knowing that the filing is not authorized by statute, or with the intent that the filing is made for an improper purpose such as to hinder, harass, or otherwise wrongfully interfere with any person, shall be guilty of a Class 1 ~~misdemeanor.~~misdemeanor. A claim of lien on real property, a claim of lien on real property with a notice of claim of lien upon funds attached thereto, or other document purporting to claim or assert a lien on real property that is filed by an attorney licensed in the State of North Carolina and that otherwise complies with subsection (a) of this section shall not be rejected by the clerk of superior court for indexing, docketing, recording, or filing.

"§ 44A-13. Action to enforce ~~lien.~~claim of lien on real property.

(a) Where and When Action ~~Instituted.~~ Commenced. – An action to enforce ~~the~~ a claim of lien ~~created by this Article~~ on real property may be ~~instituted~~ commenced in any county ~~in which the lien is filed.~~ where venue is otherwise proper. No such action may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the ~~lien.~~ claim of lien on real property. If the title to the real property against which the claim of lien on real property is asserted is by law vested in a receiver or ~~trustee in bankruptcy,~~ is subject to the control of the bankruptcy court, the claim of lien on real property shall be enforced in accordance with the orders of the court having jurisdiction over said real ~~property.~~property, and the filing of a proof of claim with a receiver or in bankruptcy within the time required by this section satisfies the requirement for the commencement of a civil action and the filing of a notice of lis pendens.

(b) Judgment. ~~Judgment~~ A judgment enforcing a claim of lien on real property under this Article may be entered for the ~~principal~~ amount shown to be ~~due, not exceeding~~ due and shall bear interest as provided in G.S. 24-5, unless the contract with ~~principal amount stated in~~ the owner ~~claim~~ of ~~lien enforced thereby.~~ real property specifies otherwise. The judgment shall direct a sale of the real property subject to the claim of lien on real property thereby enforced.

(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~~ 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,~~ claim of lien on real property, a notice of lis pendens shall be filed in each county in which the real property subject to the claim of lien on real property is located except ~~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~~ commenced. The notice of lis pendens ~~is~~ shall be filed ~~in each county in which the real property subject to the lien is located~~ within ~~180 days after~~ the time provided in subsection (a) ~~last furnishing~~ of this section for ~~labor or materials at~~ the ~~site~~ commencement of the action ~~improvement~~ by the ~~person claiming the lien, as to real property claimed to be subject to the lien in such counties where the~~ lien claimant. If neither an action ~~was neither commenced~~ nor a notice of lis pendens ~~filed,~~ is filed in accordance with this section, the judgment entered in the action enforcing the claim of lien on real property shall not direct a sale of the real property subject to the claim of lien on real property 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.

"§ 44A-14. Sale of property in satisfaction of judgment enforcing claim of lien on real property or upon order prior to judgment; distribution of proceeds.

(a) Execution Sale; Effect of Sale. – Except as provided in subsection (b) of this section, sales under this Article and distribution of proceeds thereof shall be made in accordance with the execution sale provisions set out in G.S. 1-339.41 through 1-339.76. The sale of real property to satisfy a claim of lien on real property granted by this Article shall 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 a lien.

(b) Sale of Property upon Order Prior to Judgment. – A resident judge of superior court in the district in which the action to enforce the claim of lien on real property is pending, a judge regularly holding the superior courts of the said district, any judge holding a session of superior court, either civil or criminal, in the said district, a special judge of superior court residing in the said district, or the chief judge of the district court in which the action to enforce the claim of lien on real property is pending, may, upon notice to all interested parties and after a hearing thereupon and upon a finding that a

sale prior to judgment is necessary to prevent substantial waste, destruction, depreciation or other damage to said real property prior to the final determination of said action, order any real property against which a claim of lien on real property under this Article is asserted, sold in any manner determined by said judge to be commercially reasonable. The rights of all parties shall be transferred to the proceeds of the sale. Application for such order and further proceedings thereon may be heard in or out of session.

"**§ 44A-15. Attachment available to lien claimant.**

In addition to other grounds for attachment, in all cases where the owner removes or attempts or threatens to remove an improvement from real property subject to a claim of lien on real property under this Article, without the written permission of the lien claimant or with the intent to deprive the lien claimant of his ~~lien,~~ or her claim of lien on real property, the remedy of attachment of the property subject to the claim of lien on real property shall be available to the lien claimant or any other person.

"**§ 44A-16. Discharge of record ~~lien.~~claim of lien on real property.**

Any claim of lien on real property filed under this Article may be discharged by any of the following methods:

(1) The lien claimant of record, ~~his~~ the claimant's agent or attorney, in the presence of the clerk of superior court may acknowledge the satisfaction of the claim of lien on real property indebtedness, whereupon the clerk of superior court shall forthwith make upon the record of such claim of lien on real property an entry of such acknowledgment of satisfaction, which shall be signed by the lien claimant of record, ~~his~~ the claimant's agent or attorney, and witnessed by the clerk of superior court.

(2) The owner may exhibit an instrument of satisfaction signed and acknowledged by the lien claimant of record which instrument states that the claim of lien on real property indebtedness has been paid or satisfied, whereupon the clerk of superior court shall cancel the claim of lien on real property by entry of satisfaction on the record of such ~~lien.~~claim of lien on real property.

(3) By failure to enforce the claim of lien on real property within the time prescribed in this Article.

(4) By filing in the office of the clerk of superior court the original or certified copy of a judgment or decree of a court of competent jurisdiction showing that the action by the claimant to enforce the claim of lien on real property has been dismissed or finally determined adversely to the claimant.

(5) Whenever a sum equal to the amount of the claim or claims of lien ~~or liens~~ on real property claimed is deposited with the clerk of court, to be applied to the payment finally determined to be due, whereupon the clerk of superior court shall cancel the claim or claims of lien on real property or ~~liens~~ claims of lien on real property of record.

(6) Whenever a corporate surety bond, in a sum equal to one and one-fourth times the amount of the ~~lien~~ claim or ~~liens~~ claims of lien on real property claimed and conditioned upon the payment of the amount finally determined to be due in satisfaction of said claim or claims of lien ~~or liens,~~ on real property, is deposited with the clerk of court, whereupon the clerk of superior court shall cancel the claim or claims of lien on real property ~~or liens~~ of record.

"Part 2. Liens of Mechanics, ~~Laborers~~ Laborers, and Materialmen Dealing with One Other Than Owner.

"§ 44A-17. Definitions.

Unless the context otherwise requires in this Article:

(1) "Contractor" means a person who contracts with an owner to improve real property.

(2) "First tier subcontractor" means a person who contracts with a contractor to improve real property.

(3) "Obligor" means an owner, contractor or subcontractor in any tier who owes money to another as a result of the other's partial or total performance of a contract to improve real property.

(4) "Second tier subcontractor" means a person who contracts with a first tier subcontractor to improve real property.

(5) "Third tier subcontractor" means a person who contracts with a second tier subcontractor to improve real property.

"§ 44A-18. Grant of ~~lien;~~ lien upon funds; subrogation; perfection.

Upon compliance with this Article:

(1) A first tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds ~~which~~ that are owed to the contractor with whom the first tier subcontractor dealt and ~~which~~ that arise out of the improvement on which the first tier subcontractor worked or furnished materials.

(2) A second tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds ~~which~~ that are owed to the first tier subcontractor with whom the second tier subcontractor dealt and ~~which~~ that arise out of the improvement on which the second tier subcontractor worked or furnished materials. A second tier subcontractor, to the extent of his ~~lien~~ or her lien upon funds provided in this subdivision, shall also be entitled to be subrogated to the lien of the first tier subcontractor with whom he or she dealt provided for in subdivision (1) of this section and shall be entitled to perfect it by notice of claim of lien upon funds to the extent of ~~his~~ the claim.

(3) A third tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds ~~which~~ that are owed to the second tier subcontractor with whom the third tier subcontractor dealt and ~~which~~ that arise out of the

improvement on which the third tier subcontractor worked or furnished materials. A third tier subcontractor, to the extent of his or her lien upon funds provided in this subdivision, shall also be entitled to be subrogated to the lien upon funds of the second tier subcontractor with whom he or she dealt and to the lien upon funds of the first tier subcontractor with whom the second tier subcontractor dealt to the extent that the second tier subcontractor is entitled to be subrogated thereto, and in either case shall be entitled to perfect the same by notice of claim of lien upon funds to the extent of ~~his~~ the claim.

(4) Subcontractors more remote than the third tier who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds ~~which~~ that are owed to the person with whom they dealt and ~~which~~ that arise out of the improvement on which they furnished labor, materials, or rental equipment, but such remote tier subcontractor shall not be entitled to subrogation to the rights of other persons.

(5) The liens upon funds granted under this section shall secure amounts earned by the lien claimant as a result of ~~his~~ having furnished labor, materials, or rental equipment at the site of the improvement under the contract to improve real property, including interest at the legal rate provided in G.S. 24-5, whether or not such amounts are due and whether or not performance or delivery is complete. In the event insufficient funds are retained to satisfy all lien claimants, subcontractor lien claimants may recover the interest due under this subdivision on a pro rata basis, but in no event shall interest due under this subdivision increase the liability of the obligor under G.S. 44A-20.

(6) A lien upon funds granted under this section is perfected upon the giving of notice of claim of lien upon funds in writing to the obligor as provided in G.S. 44A-19 and shall be effective upon the obligor's receipt of the notice. The subrogation rights of a first, second, or third tier subcontractor to the claim of lien on real property of the contractor created by Part 1 of Article 2 of this Chapter are perfected as provided in G.S. 44A-23.

"**§ 44A-19. Notice ~~to obligor.~~of claim of lien upon funds.**

(a) Notice of a claim of lien upon funds shall set ~~forth:~~forth all of the following information:

(1) The name and address of the person claiming the ~~lien.~~lien upon funds.

(2) A general description of the real property ~~improved,~~improved.

(3) The name and address of the person with whom the lien claimant contracted to improve real ~~property,~~property.

(4) The name and address of each person against or through whom subrogation rights are ~~claimed,~~claimed.

(5) A general description of the contract and the person against whose interest the lien upon funds is ~~claimed, and~~claimed.

(6) The amount of the lien upon funds claimed by the lien claimant under ~~his~~ the contract.

(b) All notices of claims of liens upon funds by first, ~~second~~ second, or third tier subcontractors must be given using a form substantially as follows:

NOTICE OF CLAIM OF LIEN UPON FUNDS BY
FIRST, ~~SECOND~~ SECOND, OR THIRD TIER SUBCONTRACTOR

To:

1. _____, owner of property involved.
(Name and address)
2. _____, general contractor.
(Name and address)
3. _____, first tier subcontractor against or through
(Name and address) whom subrogation is claimed, if any.
4. _____, second tier subcontractor against or through
(Name and address) whom subrogation is claimed, if any.

General description of real property where labor performed or material furnished:

_____

_____

_____

General description of undersigned lien claimant's contract including the names of the parties thereto: _____

_____

_____

The amount of lien upon funds claimed pursuant to the above described contract:

$ _____

The undersigned lien claimant gives this notice of claim of lien upon funds pursuant to North Carolina law and claims all rights of subrogation to which he is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated _____

_____, Lien Claimant

_____
(Address)

(c) All notices of claims of liens upon funds by subcontractors more remote than the third tier must be given using a form substantially as follows:

NOTICE OF CLAIM OF LIEN UPON FUNDS BY SUBCONTRACTOR
MORE REMOTE THAN THE THIRD TIER

To:

_____, person holding funds against which lien upon funds is
(Name and Address)

claimed.

General description of real property where labor performed or material furnished:

_____

_____

_____

General description of undersigned lien claimant's contract including the names of the parties thereto: _____

_____

_____

The amount of lien upon funds claimed pursuant to the above described contract:

$ _____

The undersigned lien claimant gives this notice of claim of lien upon funds pursuant to North Carolina law and claims all rights to which he or she is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated: _____

_____, Lien Claimant

_____

(Address)

(d) Notices of claims of lien upon funds under this section shall be served upon the obligor ~~in person~~by personal delivery or ~~by certified mail~~ in any manner authorized by Rule 4 of the North Carolina Rules of Civil Procedure. A copy of the notice of claim of lien upon funds shall be attached to any claim of lien on real property filed pursuant to ~~G.S. 44A-20(d).~~G.S. 44A-20(d) or G.S. 44A-23.

(e) Notices of claims of lien upon funds shall not be filed with the clerk of superior court and shall not be indexed, docketed, or recorded in any way as to affect title to any real property, except a notice of a claim of lien upon funds may be filed with the clerk of superior court under either of the following circumstances:

(1) When the notice of claim of lien upon funds is attached to a claim of lien on real property filed pursuant to G.S. 44A-20(d) or G.S. 44A-23.

(2) When the notice of claim of lien upon funds is filed by the obligor for the purpose of discharging the claim of lien upon funds in accordance with G.S. 44A-20(e).

(f) Filing a notice of claim of lien upon funds pursuant to subsection (e) of this section is not a violation of G.S. 44A-12.1.

"**§ 44A-20. Duties and liability of obligor.**

(a) Upon receipt of the notice of claim of lien upon funds provided for in this ~~Article~~Article, the obligor shall be under a duty to retain any funds subject to the lien or liens upon funds under this Article up to the total amount of such liens upon funds as to which ~~notice has~~ notices of claims of lien upon funds have been received.

(b) If, after the receipt of the notice of claim of lien upon funds to the obligor, the obligor ~~shall make~~makes further payments to a contractor or subcontractor against whose interest the lien or liens upon funds are claimed, the lien upon funds shall continue upon the funds in the hands of the contractor or subcontractor who received the payment, and in addition the obligor shall be personally liable to the person or

persons entitled to liens upon funds up to the amount of such wrongful payments, not exceeding the total claims with respect to which the notice of claim of lien upon funds was received prior to payment.

(c) If an obligor ~~shall make~~makes a payment after receipt of notice of claim of lien on funds and ~~incur~~ incurs personal liability ~~therefor,~~under subsection (b) of this section, the obligor shall be entitled to reimbursement and indemnification from the party receiving such payment.

(d) If the obligor is an owner of the property being improved, the lien claimant shall be entitled to a claim of lien upon real property upon the interest of the obligor in the real property to the extent of the owner's personal liability under ~~subsection (b),~~ subsection (b) of this section, which claim of lien on real property shall be enforced only in the manner set forth in G.S. 44A-7 through 44A-16 and which claim of lien on real property shall be entitled to the same priorities and subject to the same filing requirements and periods of limitation applicable to the contractor. The claim of lien on real property is perfected as of the time set forth in G.S. 44A-10 upon the filing of the claim of lien on real property pursuant to G.S. 44A-12. The claim of lien on real property shall be in the form set out in G.S. 44A-12(c) and shall contain, in addition, a copy of the notice of claim of lien upon funds given pursuant to G.S. 44A-19 as an exhibit together with proof of service thereof by affidavit, and shall state the grounds the lien claimant has to believe that the obligor is personally liable for the debt under ~~subsection (b).~~subsection (b) of this section.

(e) A notice of claim of lien upon funds under G.S. 44-19 may be filed by the obligor with the clerk of superior court in each county where the real property upon which the filed notice of claim of lien upon funds is located for the purpose of discharging the notice of claim of lien upon funds by any of the methods described in G.S. 44A-16.

(f) A bond deposited under this section to discharge a filed notice of claim of lien upon funds shall be effective to discharge any claim of lien on real property filed by the same lien claimant pursuant to subsection (d) of this section or G.S. 44A-23 and shall further be effective to discharge any notices of claims of lien upon funds served by lower tier subcontractors or any claims of lien on real property filed by lower tier subcontractors pursuant to subsection (d) of this section or G.S. 44A-23 claiming through or against the contractor or higher tier subcontractors up to the amount of the bond.

"§ 44A-21. Pro rata payments.

(a) Where the obligor is a contractor or subcontractor and the funds in the hands of the obligor and the obligor's personal liability, if any, under G.S. 44A-20 are less than the amount of valid liens upon funds that have been received by the obligor under this Article, the parties entitled to liens upon funds shall share the funds on a pro rata basis.

~~In the event that~~ (b) Where the obligor is an owner and the funds in the hands of the obligor and the obligor's personal liability, if any, under G.S. 44A-20 are less than the sum of the amount of valid ~~lien~~ claims of liens upon funds that have been ~~filed with~~ received by the obligor under this Article and the amount of the valid claims of liens on real property upon the owner's property filed by the subcontractors with the clerk of

superior court under G.S. 44A-23, the parties entitled to liens upon funds and the parties entitled to subrogation claims of liens on real property upon the owner's property shall share the funds on a pro rata basis.

"§ 44A-22. Priority of ~~liens.~~liens upon funds.

Liens upon funds perfected under this Article have priority over all other interests or claims theretofore or thereafter created or suffered in the funds by the person against whose interest the lien upon funds is asserted, including, but not limited to, liens arising from garnishment, attachment, levy, judgment, assignments, security interests, and any other type of transfer, whether voluntary or involuntary. Any person who receives payment from an obligor in bad faith with knowledge of a ~~claim of~~ lien upon funds shall take such payment subject to the ~~claim of lien.~~lien upon funds.

"§ 44A-23. Contractor's ~~lien;~~ claim of lien on real property; perfection of subrogation rights of subcontractor.

(a) First tier subcontractor. – A first tier subcontractor, who gives notice of claim of lien upon funds as provided in this Article, may, to the extent of ~~his~~ this claim, enforce the claim of lien on real property of the contractor created by Part 1 of ~~Article 2 of this Chapter.~~this Article. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The claim of lien on real property is perfected as of the time set forth in G.S. 44A-10 upon filing of the claim of lien on real property pursuant to G.S. 44A-12. Upon the filing of the claim of lien on real property, with the notice ~~and~~ of claim of lien upon funds attached, and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

(b) Second or third subcontractor. –

(1) A second or third tier subcontractor, who gives notice of claim of lien upon funds as provided in this Article, may, to the extent of his claim, enforce the claim of lien on real property of the contractor created by Part 1 of Article 2 of the Chapter except when:

a. The contractor, within 30 days following the date the building permit is issued for the improvement of the real property involved, posts on the property in a visible location adjacent to the posted building permit and files in the office of the ~~Clerk of Superior Court~~clerk of superior court in each county wherein the real property to be improved is located, a completed and signed ~~Notice of Contract~~notice of contract form and the second or third tier subcontractor fails to serve upon the contractor a completed and signed ~~Notice of Subcontract~~notice of subcontract form by the same means of service as described in G.S. 44A-19(d); or

b. After the posting and filing of a signed ~~Notice of Contract~~notice of contract and the service upon the contractor of a signed ~~Notice of Subcontract,~~ notice of subcontract, the contractor serves upon the second or third tier subcontractor, within five days following each subsequent payment, by the same means of

service as described in G.S. 44A-19(d), the written notice of payment setting forth the date of payment and the period for which payment is made as requested in the ~~Notice of Subcontract~~notice of subcontract form set forth herein.

(2) The form of the ~~Notice of Contract~~notice of contract to be so utilized under this section shall be substantially as follows and the fee for filing the same with the ~~Clerk of Superior Court~~ clerk of superior court shall be the same as charged for filing a ~~Claim~~ claim of ~~Lien:~~ lien on real property:

"NOTICE OF CONTRACT

"(1) Name and address of the Contractor:

"(2) Name and address of the owner of the real property at the time this Notice of Contract is recorded:

"(3) General description of the real property to be improved (street address, tax map lot and block number, reference to recorded instrument, or any other description that reasonably identifies the real property):

"(4) Name and address of the person, firm or corporation filing this Notice of Contract:

"Dated: _____

_____

"Contractor

"Filed this the _____ day of _____, _____.

_____

Clerk of Superior Court"

(3) The form of the ~~Notice of Subcontract~~notice of subcontract to be so utilized under this section shall be substantially as follows:

"NOTICE OF SUBCONTRACT

"(1) Name and address of the subcontractor:

"(2) General description of the real property where the labor was performed or the material was furnished (street address, tax map lot and block number, reference to recorded instrument, or any description that reasonably identifies the real property):

"(3)

"(i) General description of the subcontractor's contract, including the names of the parties thereto:

"(ii) General description of the labor and material performed and furnished thereunder:

"(4) Request is hereby made by the undersigned subcontractor that he be notified in writing by the contractor of, and within five days following, each subsequent payment by the contractor to the first tier

subcontractor for labor performed or material furnished at the improved real property within the above descriptions of such in paragraph (2) and subparagraph (3)(ii), respectively, the date payment was made and the period for which payment is made.

"Dated: _____

_____

Subcontractor"

(4) The manner of such enforcement shall be as provided by G.S. 44A-7 through G.S. 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon the filing of a ~~Claim of Lien~~claim of lien on real property pursuant to G.S. 44A-12. Upon the filing of the claim of lien on real property, with the notice ~~and~~ of claim of lien upon funds attached, and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the second or third tier subcontractor without his written consent.

(c) Interest. – The amount of any claim of lien on real property under this section may include interest as provided in G.S. 44A-13."

SECTION 2. This act becomes effective October 1, 2005, and applies to any causes of action arising on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 887
PROPOSED COMMITTEE SUBSTITUTE S887-CSRC-43 [v.2]

5/11/2005 8:27:38 PM

Short Title: NC Lien Law Revised. (Public)

Sponsors:

Referred to:

March 23, 2005

A BILL TO BE ENTITLED

AN ACT TO REVISE THE STATUTES THAT ADDRESS STATUTORY LIENS ON REAL PROPERTY.

The General Assembly of North Carolina enacts:

SECTION 1. Article 2 of Chapter 44A of the General Statutes reads as rewritten:

"Article 2.

"Statutory Liens on Real Property.

"Part 1. Liens of Mechanics, ~~Laborers~~ Laborers, and Materialmen Dealing with Owner.

"**§ 44A-7. Definitions.**

Unless the context otherwise requires in this Article:

(1) "Improve" means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements, and shall also mean and include any design or other professional or skilled services furnished by architects, engineers, land surveyors and landscape architects registered under Chapter 83A, 89A or 89C of the General Statutes, and rental of equipment directly utilized on the real property in making the improvement.

(2) "Improvement" means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property.

(3) An "owner" is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made. "Owner" includes successors in interest of the owner and agents of the owner acting within their authority.

(4) "Real property" means the real estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon.

"§ 44A-8. Mechanics', ~~laborers'~~ laborers', and materialmen's lien; persons entitled to ~~lien.~~claim of lien on real property.

Any person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a claim of lien on real property on ~~such~~ the real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to ~~such~~ the contract.

"§ 44A-9. Extent of ~~lien.~~claim of lien on real property.

~~Liens~~ A claim of lien on real property authorized under ~~the provisions of~~ this Article shall extend to the improvement and to the lot or tract on which the improvement is situated, to the extent of the interest of the owner. When the lot or tract on which a building is erected is not surrounded at the time of making the contract with the owner by an enclosure separating it from adjoining land of the same owner, the lot or tract to which any claim of lien on real property extends shall be ~~such~~ the area ~~as~~ that is reasonably necessary for the convenient use and occupation of ~~such~~ the building, but in no case shall the area include a building, structure, or improvement not normally used or occupied or intended to be used or occupied with the building with respect to which the claim of lien on real property is claimed.

"§ 44A-10. Effective date of ~~liens.~~claim of lien on real property.

~~Liens~~ A claim of lien on real property granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the ~~lien.~~claim of lien on real property.

"§ 44A-11. Perfecting ~~liens.~~claim of lien on real property.

~~Liens~~ A claim of lien on real property granted by this Article shall be perfected as of the time ~~set forth~~ provided in G.S. 44A-10 upon the filing of the claim of lien on real property ~~pursuant to~~ under G.S. 44A-12 and may be enforced pursuant to G.S. 44A-13.

"§ 44A-12. Filing claim of ~~lien.~~lien on real property.

(a) Place of Filing. – All claims of lien ~~against any~~ on real property must be filed in the office of the clerk of superior court in each county ~~wherein~~ where the real property subject to the claim of lien on real property is located. The clerk of superior court shall note the claim of lien on real property on the judgment docket and index the same under the name of the record owner of the real property at the time the claim of lien on real property is filed. An additional copy of the claim of lien on real property may also be filed with any receiver, referee in bankruptcy or assignee for benefit of creditors who obtains legal authority over the real property.

(b) Time of Filing. – Claims of lien on real property may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien.

(c) Contents of Claim of Lien on Real Property to Be Filed. – All claims of lien on real property must be filed using a form substantially as follows:

CLAIM OF LIEN ON REAL PROPERTY

(1) Name and address of the person claiming the ~~lien:~~claim of lien on real property:

(2) Name and address of the record owner of the real property claimed to be subject to the claim of lien on real property at the time the claim of lien on real property is filed:

(3) Description of the real property upon which the claim of lien on real property 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 _____, _____

_____

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.

(d) No Amendment of Claim of ~~Lien.~~ Lien on Real Property. – A claim of lien on real property may not be amended. A claim of lien on real property may be cancelled by a claimant or ~~his~~ the claimant's authorized agent or attorney and a new claim of lien on real property substituted therefor within the time herein provided for original filing.

(e) Notice of Assignment of Claim of ~~Lien.~~ Lien on Real Property. – When a claim of lien on real property has been filed, it may be assigned of record by the lien claimant in a writing filed with the clerk of superior court who shall note ~~said~~ the

assignment in the margin of the judgment docket containing the claim of ~~lien.~~ lien on real property. Thereafter the assignee becomes the lien claimant of record.

(f) Waiver of Right to ~~File~~ File, Serve, or Claim Liens as Consideration for Contract Against Public Policy. – An agreement to waive the right to file a claim of lien on real property granted under this Part, or ~~claim~~ an agreement to waive the right to serve a notice of claim of lien upon funds granted under Part 2 of this Article, which agreement is in anticipation of and in consideration for the awarding of any contract, either expressed or implied, for the making of an improvement upon real property under this Article is against public policy and is unenforceable. This section does not prohibit subordination or release of a lien granted under this Part or Part 2 of this Article.

"§ 44A-12.1. No docketing of lien unless authorized by statute.

(a) The clerk of superior court shall not index, docket, or record a claim of lien on real property or other document purporting to claim or assert a lien on real property in such a way as to affect the title to any real property unless the document:

(1) Is offered for filing under this Article or another statute that provides for indexing and docketing of claims of lien on real property; and

(2) Appears on its face to contain all of the information required by the statute under which it is offered for filing.

(b) The clerk may accept, for filing only, any document that does not meet the criteria established for indexing, docketing, or recording under subsection (a) of this section. If the clerk does accept this document, the clerk shall inform the person offering the document that it will not be indexed, docketed, or recorded in any way as to affect the title to any real property.

(c) Any person who causes or attempts to cause a claim of lien on real property or other document to be filed, knowing that the filing is not authorized by statute, or with the intent that the filing is made for an improper purpose such as to hinder, harass, or otherwise wrongfully interfere with any person, shall be guilty of a Class 1 misdemeanor.

(d) A claim of lien on real property, a claim of lien on real property with a notice of claim of lien upon funds attached thereto, or other document purporting to claim or assert a lien on real property that is filed by an attorney licensed in the State of North Carolina and that otherwise complies with subsection (a) of this section shall not be rejected by the clerk of superior court for indexing, docketing, recording, or filing.

"§ 44A-13. Action to enforce ~~lien.~~claim of lien on real property.

(a) Where and When Action ~~Instituted.~~ Commenced. – An action to enforce ~~the~~ a claim of lien ~~created by this Article~~ on real property may be ~~instituted~~ commenced in any county ~~in which the lien is filed.~~ where venue is otherwise proper. No such action may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the ~~lien.~~ claim of lien on real property. If the title to the real property against which the claim of lien on real property is asserted is by law vested in a receiver or ~~trustee in bankruptcy,~~ is subject to the control of the bankruptcy court, the claim of lien on real property shall be enforced in accordance with the orders of the court having jurisdiction over said real property. The filing of a proof of claim with a receiver or in bankruptcy and the filing of a notice of lis

pendens is each county where the real property subject to the claim of lien on real property is located within the time required by this section satisfies the requirement for the commencement of a civil action.

(b) Judgment. ~~Judgment~~ A judgment enforcing a lien under this Article may be entered for the principal amount shown to be due, not exceeding the principal amount stated in the claim of lien enforced thereby. The judgment shall direct a sale of the real property subject to the lien thereby enforced.

(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~~ 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,~~ claim of lien on real property, a notice of lis pendens shall be filed in each county in which the real property subject to the claim of lien on real property is located except ~~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~~ commenced. The notice of lis pendens ~~is~~ shall be filed ~~in each county in which the real property subject to the lien is located~~ within ~~180 days after~~ the time provided in subsection (a) ~~last furnishing~~ of this section for ~~labor or materials at~~ the ~~site~~ commencement of the action ~~improvement~~ by the ~~person claiming the lien, as to real property claimed to be subject to the lien in such counties where the~~ lien claimant. If neither an action ~~was neither commenced~~ nor a notice of lis pendens ~~filed,~~ is filed in accordance with this section, the judgment entered in the action enforcing the claim of lien on real property shall not direct a sale of the real property subject to the claim of lien on real property 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.

"§ 44A-14. Sale of property in satisfaction of judgment enforcing claim of lien on real property or upon order prior to judgment; distribution of proceeds.

(a) Execution Sale; Effect of Sale. – Except as provided in subsection (b) of this section, sales under this Article and distribution of proceeds thereof shall be made in accordance with the execution sale provisions set out in G.S. 1-339.41 through 1-339.76. The sale of real property to satisfy a claim of lien on real property granted by this Article shall 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 a lien.

(b) Sale of Property upon Order Prior to Judgment. – A resident judge of superior court in the district in which the action to enforce the claim of lien on real property is pending, a judge regularly holding the superior courts of the said district, any judge holding a session of superior court, either civil or criminal, in the said district, a special judge of superior court residing in the said district, or the chief judge of the district court in which the action to enforce the claim of lien on real property is pending, may, upon

notice to all interested parties and after a hearing thereupon and upon a finding that a sale prior to judgment is necessary to prevent substantial waste, destruction, depreciation or other damage to said real property prior to the final determination of said action, order any real property against which a claim of lien on real property under this Article is asserted, sold in any manner determined by said judge to be commercially reasonable. The rights of all parties shall be transferred to the proceeds of the sale. Application for such order and further proceedings thereon may be heard in or out of session.

"§ 44A-15. Attachment available to lien claimant.

In addition to other grounds for attachment, in all cases where the owner removes or attempts or threatens to remove an improvement from real property subject to a claim of lien on real property under this Article, without the written permission of the lien claimant or with the intent to deprive the lien claimant of his ~~lien,~~ or her claim of lien on real property, the remedy of attachment of the property subject to the claim of lien on real property shall be available to the lien claimant or any other person.

"§ 44A-16. Discharge of record ~~lien.~~claim of lien on real property.

Any claim of lien on real property filed under this Article may be discharged by any of the following methods:

(1) The lien claimant of record, ~~his~~ the claimant's agent or attorney, in the presence of the clerk of superior court may acknowledge the satisfaction of the claim of lien on real property indebtedness, whereupon the clerk of superior court shall forthwith make upon the record of such claim of lien on real property an entry of such acknowledgment of satisfaction, which shall be signed by the lien claimant of record, ~~his~~ the claimant's agent or attorney, and witnessed by the clerk of superior court.

(2) The owner may exhibit an instrument of satisfaction signed and acknowledged by the lien claimant of record which instrument states that the claim of lien on real property indebtedness has been paid or satisfied, whereupon the clerk of superior court shall cancel the claim of lien on real property by entry of satisfaction on the record of such ~~lien.~~claim of lien on real property.

(3) By failure to enforce the claim of lien on real property within the time prescribed in this Article.

(4) By filing in the office of the clerk of superior court the original or certified copy of a judgment or decree of a court of competent jurisdiction showing that the action by the claimant to enforce the claim of lien on real property has been dismissed or finally determined adversely to the claimant.

(5) Whenever a sum equal to the amount of the claim or claims of lien ~~or liens~~ on real property claimed is deposited with the clerk of court, to be applied to the payment finally determined to be due, whereupon the clerk of superior court shall cancel the claim or claims of lien on real property or ~~liens~~ claims of lien on real property of record.

(6) Whenever a corporate surety bond, in a sum equal to one and one-fourth times the amount of the ~~lien~~ claim or ~~liens~~ claims of lien on real property claimed and conditioned upon the payment of the amount finally determined to be due in satisfaction of said claim or claims of lien ~~or liens,~~ on real property, is deposited with the clerk of court, whereupon the clerk of superior court shall cancel the claim or claims of lien on real property ~~or liens~~ of record.

"Part 2. Liens of Mechanics, ~~Laborers~~ Laborers, and Materialmen Dealing with One Other Than Owner.

"**§ 44A-17. Definitions.**

Unless the context otherwise requires in this Article:

(1) "Contractor" means a person who contracts with an owner to improve real property.

(2) "First tier subcontractor" means a person who contracts with a contractor to improve real property.

(3) "Obligor" means an owner, contractor or subcontractor in any tier who owes money to another as a result of the other's partial or total performance of a contract to improve real property.

(4) "Second tier subcontractor" means a person who contracts with a first tier subcontractor to improve real property.

(5) "Third tier subcontractor" means a person who contracts with a second tier subcontractor to improve real property.

"**§ 44A-18. Grant of ~~lien;~~ lien upon funds; subrogation; perfection.**

Upon compliance with this Article:

(1) A first tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds ~~which~~ that are owed to the contractor with whom the first tier subcontractor dealt and ~~which~~ that arise out of the improvement on which the first tier subcontractor worked or furnished materials.

(2) A second tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds ~~which~~ that are owed to the first tier subcontractor with whom the second tier subcontractor dealt and ~~which~~ that arise out of the improvement on which the second tier subcontractor worked or furnished materials. A second tier subcontractor, to the extent of ~~his~~ the second tier subcontractor's lien provided in this subdivision, shall also be entitled to be subrogated to the lien of the first tier subcontractor with whom ~~he~~ the second tier contractor dealt provided for in subdivision (1) of this section and shall be entitled to perfect it by notice of claim of lien upon funds to the extent of ~~his~~ the claim.

(3) A third tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds ~~which~~ that are owed to the second tier subcontractor with whom the third tier subcontractor dealt and ~~which~~ that arise out of the

improvement on which the third tier subcontractor worked or furnished materials. A third tier subcontractor, to the extent of ~~his~~ the third tier subcontract's lien upon funds provided in this subdivision, shall also be entitled to be subrogated to the lien upon funds of the second tier subcontractor with whom ~~he~~ the third tier contractor dealt and to the lien upon funds of the first tier subcontractor with whom the second tier subcontractor dealt to the extent that the second tier subcontractor is entitled to be subrogated thereto, and in either case shall be entitled to perfect the same by notice of claim of lien upon funds to the extent of ~~his~~ the claim.

(4) Subcontractors more remote than the third tier who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds ~~which~~ that are owed to the person with whom they dealt and ~~which~~ that arise out of the improvement on which they furnished labor, materials, or rental equipment, but such remote tier subcontractor shall not be entitled to subrogation to the rights of other persons.

(5) The liens upon funds granted under this section shall secure amounts earned by the lien claimant as a result of ~~his~~ having furnished labor, materials, or rental equipment at the site of the improvement under the contract to improve real property, including interest at the legal rate provided in G.S. 24-5, whether or not such amounts are due and whether or not performance or delivery is complete. In the event insufficient funds are retained to satisfy all lien claimants, subcontractor lien claimants may recover the interest due under this subdivision on a pro rata basis, but in no event shall interest due under this subdivision increase the liability of the obligor under G.S. 44A-20.

(6) A lien upon funds granted under this section is perfected upon the giving of notice of claim of lien upon funds in writing to the obligor as provided in G.S. 44A-19 and shall be effective upon the obligor's receipt of the notice. The subrogation rights of a first, second, or third tier subcontractor to the claim of lien on real property of the contractor created by Part 1 of Article 2 of this Chapter are perfected as provided in G.S. 44A-23.

"**§ 44A-19. Notice ~~to obligor.~~of claim of lien upon funds.**

(a) Notice of a claim of lien upon funds shall set ~~forth:~~forth all of the following information:

(1) The name and address of the person claiming the ~~lien.~~lien upon funds.

(2) A general description of the real property ~~improved,~~improved.

(3) The name and address of the person with whom the lien claimant contracted to improve real ~~property,~~property.

(4) The name and address of each person against or through whom subrogation rights are ~~claimed,~~claimed.

(5) A general description of the contract and the person against whose interest the lien upon funds is ~~claimed, and~~claimed.

(6) The amount of the lien upon funds claimed by the lien claimant under ~~his~~ the contract.

(b) All notices of claims of liens upon funds by first, ~~second~~ second, or third tier subcontractors must be given using a form substantially as follows:

NOTICE OF CLAIM OF LIEN UPON FUNDS BY
FIRST, ~~SECOND~~ SECOND, OR THIRD TIER SUBCONTRACTOR

To:

1. _____, owner of property involved.
(Name and address)
2. _____, general contractor.
(Name and address)
3. _____, first tier subcontractor against or through whom subrogation is claimed, if any.
(Name and address)
4. _____, second tier subcontractor against or through whom subrogation is claimed, if any.
(Name and address)

General description of real property where labor performed or material furnished:

_____

_____

_____

General description of undersigned lien claimant's contract including the names of the parties thereto: _____

_____

_____

The amount of lien upon funds claimed pursuant to the above described contract:

$ _____

The undersigned lien claimant gives this notice of claim of lien upon funds pursuant to North Carolina law and claims all rights of subrogation to which he is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated _____

_____, Lien Claimant

_____
(Address)

(c) All notices of claims of liens upon funds by subcontractors more remote than the third tier must be given using a form substantially as follows:

NOTICE OF CLAIM OF LIEN UPON FUNDS BY SUBCONTRACTOR
MORE REMOTE THAN THE THIRD TIER

To:

_____, person holding funds against which lien upon funds is
(Name and Address)
claimed.
General description of real property where labor performed or material furnished:
_____
_____
_____
General description of undersigned lien claimant's contract including the names of the parties thereto: _____
_____
_____
The amount of lien upon funds claimed pursuant to the above described contract:
$ _____
The undersigned lien claimant gives this notice of claim of lien upon funds pursuant to North Carolina law and claims all rights to which he or she is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.
Dated: _____
_____, Lien Claimant
_____
(Address)

(d) Notices of claims of lien upon funds under this section shall be served upon the obligor ~~in person~~by personal delivery or ~~by certified mail~~ in any manner authorized by Rule 4 of the North Carolina Rules of Civil Procedure. A copy of the notice of claim of lien upon funds shall be attached to any claim of lien on real property filed pursuant to ~~G.S. 44A-20(d).~~G.S. 44A-20(d) or G.S. 44A-23.

(e) Notices of claims of lien upon funds shall not be filed with the clerk of superior court and shall not be indexed, docketed, or recorded in any way as to affect title to any real property, except a notice of a claim of lien upon funds may be filed with the clerk of superior court under either of the following circumstances:

(1) When the notice of claim of lien upon funds is attached to a claim of lien on real property filed pursuant to G.S. 44A-20(d) or G.S. 44A-23.

(2) When the notice of claim of lien upon funds is filed by the obligor for the purpose of discharging the claim of lien upon funds in accordance with G.S. 44A-20(e).

(f) Filing a notice of claim of lien upon funds pursuant to subsection (e) of this section is not a violation of G.S. 44A-12.1.

"**§ 44A-20. Duties and liability of obligor.**

(a) Upon receipt of the notice of claim of lien upon funds provided for in this ~~Article~~ Article, the obligor shall be under a duty to retain any funds subject to the lien or liens upon funds under this Article up to the total amount of such liens upon funds as to which ~~notice has~~ notices of claims of lien upon funds have been received.

(b) If, after the receipt of the notice of claim of lien upon funds to the obligor, the obligor ~~shall make~~makes further payments to a contractor or subcontractor against whose interest the lien or liens upon funds are claimed, the lien upon funds shall

continue upon the funds in the hands of the contractor or subcontractor who received the payment, and in addition the obligor shall be personally liable to the person or persons entitled to liens upon funds up to the amount of such wrongful payments, not exceeding the total claims with respect to which the notice of claim of lien upon funds was received prior to payment.

(c) If an obligor ~~shall make~~makes a payment after receipt of notice of claim of lien on funds and ~~incur~~ incurs personal liability ~~therefor,~~under subsection (b) of this section, the obligor shall be entitled to reimbursement and indemnification from the party receiving such payment.

(d) If the obligor is an owner of the property being improved, the lien claimant shall be entitled to a claim of lien upon real property upon the interest of the obligor in the real property to the extent of the owner's personal liability under ~~subsection (b),~~ subsection (b) of this section, which claim of lien on real property shall be enforced only in the manner set forth in G.S. 44A-7 through 44A-16 and which claim of lien on real property shall be entitled to the same priorities and subject to the same filing requirements and periods of limitation applicable to the contractor. The claim of lien on real property is perfected as of the time set forth in G.S. 44A-10 upon the filing of the claim of lien on real property pursuant to G.S. 44A-12. The claim of lien on real property shall be in the form set out in G.S. 44A-12(c) and shall contain, in addition, a copy of the notice of claim of lien upon funds given pursuant to G.S. 44A-19 as an exhibit together with proof of service thereof by affidavit, and shall state the grounds the lien claimant has to believe that the obligor is personally liable for the debt under ~~subsection (b).~~subsection (b) of this section.

(e) A notice of claim of lien upon funds under G.S. 44A-19 may be filed by the obligor with the clerk of superior court in each county where the real property upon which the filed notice of claim of lien upon funds is located for the purpose of discharging the notice of claim of lien upon funds by any of the methods described in G.S. 44A-16.

(f) A bond deposited under this section to discharge a filed notice of claim of lien upon funds shall be effective to discharge any claim of lien on real property filed by the same lien claimant pursuant to subsection (d) of this section or G.S. 44A-23 and shall further be effective to discharge any notices of claims of lien upon funds served by lower tier subcontractors or any claims of lien on real property filed by lower tier subcontractors pursuant to subsection (d) of this section or G.S. 44A-23 claiming through or against the contractor or higher tier subcontractors up to the amount of the bond.

"**§ 44A-21. Pro rata payments.**

(a) Where the obligor is a contractor or subcontractor and the funds in the hands of the obligor and the obligor's personal liability, if any, under G.S. 44A-20 are less than the amount of valid liens upon funds that have been received by the obligor under this Article, the parties entitled to liens upon funds shall share the funds on a pro rata basis.

~~In the event that~~ (b) Where the obligor is an owner and the funds in the hands of the obligor and the obligor's personal liability, if any, under G.S. 44A-20 are less than the sum of the amount of valid ~~lien~~ claims of liens upon funds that have been ~~filed with~~

received by the obligor under this Article and the amount of the valid claims of liens on real property upon the owner's property filed by the subcontractors with the clerk of superior court under G.S. 44A-23, the parties entitled to liens upon funds and the parties entitled to subrogation claims of liens on real property upon the owner's property shall share the funds on a pro rata basis.

"**§ 44A-22. Priority of ~~liens.~~liens upon funds.**

Liens upon funds perfected under this Article have priority over all other interests or claims theretofore or thereafter created or suffered in the funds by the person against whose interest the lien upon funds is asserted, including, but not limited to, liens arising from garnishment, attachment, levy, judgment, assignments, security interests, and any other type of transfer, whether voluntary or involuntary. Any person who receives payment from an obligor in bad faith with knowledge of a ~~claim of~~ lien upon funds shall take such payment subject to the ~~claim of lien.~~lien upon funds.

"**§ 44A-23. Contractor's ~~lien;~~ claim of lien on real property; perfection of subrogation rights of subcontractor.**

(a) First tier subcontractor. – A first tier subcontractor, who gives notice of claim of lien upon funds as provided in this Article, may, to the extent of ~~his~~ this claim, enforce the claim of lien on real property of the contractor created by Part 1 of ~~Article 2 of this Chapter.~~this Article. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The claim of lien on real property is perfected as of the time set forth in G.S. 44A-10 upon filing of the claim of lien on real property pursuant to G.S. 44A-12. Upon the filing of the claim of lien on real property, with the notice ~~and~~ of claim of lien upon funds attached, and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

(b) Second or third subcontractor. –

(1) A second or third tier subcontractor, who gives notice of claim of lien upon funds as provided in this Article, may, to the extent of his claim, enforce the claim of lien on real property of the contractor created by Part 1 of Article 2 of the Chapter except when:

a. The contractor, within 30 days following the date the building permit is issued for the improvement of the real property involved, posts on the property in a visible location adjacent to the posted building permit and files in the office of the ~~Clerk of Superior Court~~clerk of superior court in each county wherein the real property to be improved is located, a completed and signed ~~Notice of Contract~~notice of contract form and the second or third tier subcontractor fails to serve upon the contractor a completed and signed ~~Notice of Subcontract~~notice of subcontract form by the same means of service as described in G.S. 44A-19(d); or

b. After the posting and filing of a signed ~~Notice of Contract~~notice of contract and the service upon the contractor of a signed ~~Notice of Subcontract,~~ notice of subcontract, the contractor

serves upon the second or third tier subcontractor, within five days following each subsequent payment, by the same means of service as described in G.S. 44A-19(d), the written notice of payment setting forth the date of payment and the period for which payment is made as requested in the ~~Notice of Subcontract~~notice of subcontract form set forth herein.

(2) The form of the ~~Notice of Contract~~notice of contract to be so utilized under this section shall be substantially as follows and the fee for filing the same with the ~~Clerk of Superior Court~~ clerk of superior court shall be the same as charged for filing a ~~Claim~~ claim of ~~Lien:~~ lien on real property:

"NOTICE OF CONTRACT

"(1) Name and address of the Contractor:

"(2) Name and address of the owner of the real property at the time this Notice of Contract is recorded:

"(3) General description of the real property to be improved (street address, tax map lot and block number, reference to recorded instrument, or any other description that reasonably identifies the real property):

"(4) Name and address of the person, firm or corporation filing this Notice of Contract:

"Dated: _____

_____

"Contractor

"Filed this the _____ day of _____, _____.

_____

Clerk of Superior Court"

(3) The form of the ~~Notice of Subcontract~~notice of subcontract to be so utilized under this section shall be substantially as follows:

"NOTICE OF SUBCONTRACT

"(1) Name and address of the subcontractor:

"(2) General description of the real property where the labor was performed or the material was furnished (street address, tax map lot and block number, reference to recorded instrument, or any description that reasonably identifies the real property):

"(3)

"(i) General description of the subcontractor's contract, including the names of the parties thereto:

"(ii) General description of the labor and material performed and furnished thereunder:

"(4) Request is hereby made by the undersigned subcontractor that he be notified in writing by the contractor of, and within five days following, each subsequent payment by the contractor to the first tier subcontractor for labor performed or material furnished at the improved real property within the above descriptions of such in paragraph (2) and subparagraph (3)(ii), respectively, the date payment was made and the period for which payment is made.

"Dated: _____

_____

Subcontractor"

(4) The manner of such enforcement shall be as provided by G.S. 44A-7 through G.S. 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon the filing of a ~~Claim of Lien~~claim of lien on real property pursuant to G.S. 44A-12. Upon the filing of the claim of lien on real property, with the notice ~~and~~ of claim of lien upon funds attached, and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the second or third tier subcontractor without his written consent."

SECTION 2. This act becomes effective October 1, 2005, and applies to claims of line on real property filed and claims of lien upon funds serviced on or after that date.

SENATE BILL 887: NC Lien Law Revised

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 12, 2005
Introduced by:	Sen. Hartsell	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	PCS to First Edition S887-CSRC		

SUMMARY: ***Senate Bill 887 makes changes to Article 2 of Chapter 44A to clarify the names of the different forms used to enforce mechanics and materialmen liens. It also creates a procedure for "bonding-off" claims of lien upon funds, and clarifies what documents need to be filed and in what order when filing either a subrogation of claim of lien on real property under G.S. 44A-23 or a direct obligation lien (claim of lien upon funds) under G.S. 44A-20.***

The PCS reflects compromise language negotiated between the Bar Association and the Land Title Association regarding the enforcement of a claim of lien on real property is situations where the real property is subject to the control of the bankruptcy court. It also removes language from the original bill regarding the interest on a claim of lien on real property.

The act would become effective October 1, 2005 and would apply to claims of lien on real property filed or claims of lien upon funds served on or after that date.

CURRENT LAW: Under Part 1 of Article 2 of Chapter 44A, a person who provides labor or materials to the owner of real property for improvements made to that property has a statutory lien against the real property for payments not made under the contract between the property. There are two types of liens recognized under Article 2, those that attach to the real property of the owner and those that are upon the funds owed to the person who provided the labor or materials. As a general rule, only those persons who contracted directly with the owner are entitled to a lien upon the real property.[1] Subcontractors are entitled to liens against funds owed to them by the person or company (obligor) who owes the subcontractor money. The claim of lien on real property "relates back" to the date when the first materials or labor was supplied, and is "perfected" when the person who supplied the labor or material files a claim of lien. The claim of lien must be filed with the clerk of superior court in every county where the real property is located. The lien can be enforced by the lien holder bringing an action no later than 180 days from the last day that materials are provided or services rendered. A judgment enforcing a claim of lien can be enforced by a judicial sale of the real property.

The claim of lien upon funds secures the amounts earned by the lien claimant. The claim of lien is perfected upon giving notice to the obligor of the claim of lien. These claims lien upon funds generally do not affect title to real property, and are served upon the obligor.

BILL ANALYSIS: The bill makes changes through-out Article 2 of Chapter 44A to specify when the statutes are dealing with claims of lien on real property (generally only applicable to the party that contracted directly with the owner of the real property) and when the statutes are dealing with claims of lien upon funds (applicable to the various tiers of subcontractors).

It amends G.S. 44A-12.1 by creating a new subsection (d) that if a claim of lien on real property is filed by an attorney licensed in the State of North Carolina, and the document is being filed under the

[1] However, a subcontractor may obtain a lien upon the real property through subrogation of a claim of lien on real property by the general contractor.

provisions of Article 2 of Chapter 44A or other State law, and if the document appears on its face to meet the requirements of the statutory form, the clerk of court may not reject the document for indexing, docketing, recording, or filing. This provision would not apply to an out-of-state attorney or any non-attorney filing the claim on lien on real property.

The bill clarifies that it is not necessary to file a Notice of Lis Pendens in a count where the lien claim and lien enforcement lawsuit are filed.

Changes to G.S. 44A-19(d) would allow for personal delivery of a claim of lien upon funds on the obligor or any other method of service allowed under Rule 4 of the Rules of Civil Procedure.

A new subsection G.S. 44A-20(f) provides that the deposit of a bond to discharge a filed notice of claim of lien upon funds is also effective to discharge any claim of lien on real property that is filed by the same lien claimant. It will also be effective to discharge claims of lien on funds by lower tier subcontractors up to the amount of the bond.

G.S. 44A-21 is amended to provide that where the funds in the hands of the obligor are less than the total amount of the valid liens upon those funds, the parties entitled to liens upon the funds share the funds on a pro rata basis.

BACKGROUND: These changes come at the request of the State Bar Association's Construction Law Section.

S0887e1-SMRC-CSRC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 805

Short Title:	Clerks May Order Mediation.	(Public)
Sponsors:	Senators Hartsell; and Bingham.	
Referred to:	Judiciary II.	

March 23, 2005

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE THE CLERK OF SUPERIOR COURT TO ORDER MEDIATION IN MATTERS WITHIN THE CLERK'S JURISDICTION.

The General Assembly of North Carolina enacts:

SECTION 1. Article 5 of Chapter 7A of the General Statutes is amended by adding a new section to read:

"**§ 7A-38.3B. Mediation in matters within the jurisdiction of the clerk of superior court.**

(a) Purpose. – The General Assembly finds that the clerk of superior court in the General Court of Justice should have the discretion and authority to order that mediation be conducted in matters within the clerk's jurisdiction in order to facilitate a more economical, efficient, and satisfactory resolution of those matters.

(b) Enabling Authority. – The clerk of superior court may order that mediation be conducted in any matter in which the clerk has exclusive or original jurisdiction, except for matters under Chapters 45 and 48 of the General Statutes and except in matters in which the jurisdiction of the clerk is ancillary. The Supreme Court may adopt rules to implement this section. Such mediations shall be conducted pursuant to this section and the Supreme Court rules as adopted.

(c) Attendance. – In those matters ordered to mediation pursuant to this section, the following persons or entities, along with their attorneys, may be ordered by the clerk to attend the mediation:

(1) Named parties.

(2) Interested persons, meaning persons or entities who have a right, interest, or claim in the matter; heirs or devisees in matters under Chapter 28A of the General Statutes, next of kin under Chapter 35A of the General Statutes, and other persons or entities as the clerk deems necessary for the adjudication of the matter. The meaning of "interested person" may vary according to the issues involved in the matter.

(3) Nonparty participants, meaning any other person or entity identified by the clerk as possessing useful information about the matter and whose attendance would be beneficial to the mediation.

(4) Fiduciaries, meaning persons or entities who serve as fiduciaries, as that term is defined by G.S. 36A-22.1, of named parties, interested persons, or nonparty participants.

Any person or entity ordered to attend a mediation shall be notified of its date, time, and location and shall attend unless excused by rules of the Supreme Court or by order of the clerk. No one attending the mediation shall be required to make a settlement offer or demand that it deems contrary to its best interests.

(d) Selection of Mediator. – Persons ordered to mediation pursuant to this section have the right to designate a mediator in accordance with rules promulgated by the Supreme Court implementing this section. Upon failure of those persons to agree upon a designation within the time established by rules of the Supreme Court, a mediator certified by the Dispute Resolution Commission pursuant to those rules shall be appointed by the clerk.

(e) Immunity. – Mediators acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators may be disciplined in accordance with procedures adopted by the Supreme Court pursuant to G.S. 7A-38.2.

(f) Costs of Mediation. – Costs of mediation under this section shall be borne by the named parties, interested persons, and fiduciaries ordered to attend the mediation. The rules adopted by the Supreme Court implementing this section shall set out the manner in which costs shall be paid and a method by which an opportunity to participate without cost shall be afforded to persons found by the clerk to be unable to pay their share of the costs of mediation. Costs may only be assessed against the estate of a decedent, the estate of an adjudicated or alleged incompetent, a trust corpus, or against a fiduciary upon the entry of a written order making specific findings of fact justifying the taxing of costs.

(g) Inadmissibility of Negotiations. – Evidence of statements made or conduct occurring during a mediation conducted pursuant to this section, whether attributable to any participant, mediator, expert, or neutral observer, shall not be subject to discovery and shall be inadmissible in any proceeding in the matter or other civil actions on the same claim, except in:

(1) Proceedings for sanctions pursuant to this section;

(2) Proceedings to enforce or rescind a written and signed settlement agreement;

(3) Incompetency, guardianship, or estate proceedings in which a mediated agreement is presented to the clerk;

(4) Disciplinary proceedings before the North Carolina State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(5) Proceedings for abuse, neglect, or dependency of a juvenile, or for abuse, neglect, or exploitation of an adult, for which there is a duty to

report under G.S. 7B-301 and Article 6 of Chapter 108A of the General Statutes, respectively.

No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in mediation.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

(h) Testimony. – No mediator or neutral observer shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to the mediation in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the matter except to attest to the signing of any agreements reached in mediation, and except in:

(1) Proceedings for sanctions pursuant to this section;

(2) Disciplinary proceedings before the North Carolina State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(3) Proceedings for abuse, neglect, or dependency of a juvenile, or for abuse, neglect, or exploitation of an adult, for which there is a duty to report under G.S. 7B-301 and Article 6 of Chapter 108A of the General Statutes, respectively.

(i) Agreements. – In matters before the clerk in which agreements are reached in a mediation conducted pursuant to this section, or during one of its recesses, those agreements shall be treated as follows:

(1) Where as a matter of law, a matter may be resolved by agreement of the parties, a settlement is enforceable only if it has been reduced to writing and signed by the parties.

(2) In all other matters before the clerk, including guardianship and estate matters, all agreements shall be delivered to the clerk for consideration in deciding the matter.

(j) Sanctions. – The clerk may sanction any person ordered to attend a mediation conducted pursuant to this section and rules of the Supreme Court who, without good cause, fails to attend the mediation, by imposing an appropriate monetary sanction, including the payment of attorneys' fees, mediator fees, and expenses incurred in attending the conference. If the clerk imposes sanctions, the clerk shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with G.S. 1-301.2 and G.S. 1-301.3, as applicable, and thereafter by the appellate courts in accordance with G.S. 7A-38.1(g).

(k) Authority to Supplement Procedural Details. – The clerk of superior court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with rules adopted by the Supreme Court implementing this section."

SECTION 2. G.S. 35A-1108 reads as rewritten:

"**§ 35A-1108. Issuance of notice.**

(a) Within five days after filing of the petition, the clerk shall issue a written notice of the date, time, and place for a hearing on the petition, which shall be held not less than 10 days nor more than 30 days after service of the notice and petition on the respondent, unless the clerk extends the time for good ~~cause or~~ cause, for preparation of a multidisciplinary evaluation as provided in ~~G.S. 35A-1111.~~ G.S. 35A-1111, or for the completion of a mediation.

(b) If a multidisciplinary evaluation or mediation is ordered after a notice of hearing has been issued, the clerk may extend the time for hearing and issue a notice to the parties that the hearing has been continued, the reason therefor, and the date, time, and place of the new hearing, which shall not be less than 10 days nor more than 30 days after service of such notice on the respondent.

(c) Subsequent notices to the parties shall be served as provided by G.S. 1A-1, Rule 5, Rules of Civil Procedure, unless the clerk orders otherwise."

SECTION 3. G.S. 35A-1116 is amended by adding a new subsection to read:

"(d) Mediator fees and other costs associated with mediation shall be assessed in accordance with G.S. 7A-38.B."

SECTION 4. G.S. 46-27 reads as rewritten:

"**§ 46-27. Sale of land required for public use on cotenant's petition.**

When the lands of joint tenants or tenants in common are required for public purposes, one or more of such tenants, or their guardian for them, may file a petition verified by oath, in the superior court of the county where the lands or any part of them lie, setting forth therein that the lands are required for public purposes, and that their interests would be promoted by a sale thereof. Whereupon the court, all proper parties being before it, and the facts alleged in the petition being ascertained to be true, shall order a sale of such lands, or so much thereof as may be necessary. The expenses, fees and costs of this proceeding shall be paid in the discretion of the court. Mediator fees and costs of mediation shall be assessed in accordance with G.S. 7A-38.3B."

SECTION 5. This act is effective when it becomes law and applies to all matters pending before a clerk of superior court on, or filed with the clerk after, the date the Supreme Court adopts rules implementing this act.

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	May 17, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 991	Authorize Judge/Concealed Weapon in Cths.	Senator Apodaca
SB 1032	Protection of Inherently Dangerous Animals.	Senator Garwood
SB 574	Amend Post-Release Supervision Laws.	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, May 17, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 991	Authorize Judge/Concealed Weapon in Cths.	Senator Apodaca
SB 1032	Protection of Inherently Dangerous Animals.	Senator Garwood
SB 574	Amend Post-Release Supervision Laws.	Senator Hartsell

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Meeting

May 17, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on May 17, 2005, with fifteen members present. Senator Hartsell introduced pages Christopher Garcia and Daniel Keys, and thanked them for serving.

SB 991 (Authorize Judge/Concealed Weapon in Cths.) Senator Hartsell called for a motion to accept the proposed committee substitute for purposes of discussion. Senator Forrester so moved, all voted and the motion carried. Senator Apodaca was recognized to explain the bill. Questions from Senators Dannelly, Forrester and Jacumin were answered by Senators Apodaca and Hartsell. Mr. Joe McClees, representing the North Carolina Firearms Dealers Group, spoke on the bill and Mr. Jon Carr, representing the North Carolinians Against Gun Violence Education Fund spoke in opposition to the bill. Senator Berger spoke on the bill and moved for a favorable report, unfavorable to the original bill, favorable to the proposed committee substitute. All voted and the motion carried.

SB 1032 (Protection of Inherently Dangerous Animals.) Senator Forrester moved to accept the proposed committee substitute for purposes of discussion. All voted and the motion carried. Senator Garwood was recognized to explain the bill. Senator Allran's question was answered by Senator Garwood. Senators Goodall and Webster spoke on the bill. Dr. David Jones, Director of the North Carolina Zoo was recognized to comment on the bill and Ms. Barbara Riley, Staff Attorney, added comments regarding the bill. Senator Apodaca moved for a favorable report, unfavorable to the original bill, favorable to the committee substitute. All voted and the motion carried.

SB 574 (Amend Post-Release Supervision Laws.) Senator Allran moved to accept the proposed committee substitute for purposes of discussion. Senator Allran chaired the committee while Senator Hartsell explained the bill. Senator Hartsell answered Senator Allran's question and then moved for a favorable report, unfavorable to the original bill, favorable to the committee substitute. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, May 18, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **574** Amend Post-Release Supervision Laws.

Draft Number:	PCS 35226
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

S.B. **991** Authorize Judge/Concealed Weapon in Cths.

Draft Number:	PCS 75311
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

S.B. **1032** Protection of Inherently Dangerous Animals.

Draft Number:	PCS 55232
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

TOTAL REPORTED: 3

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 04-17-05

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jon Carr	~~NCC~~ Jordan Price Law Firm
Joe McClure	TNTPA X
Dick Hamilton	WILDLIFE
Robert Card	Domestic Panthera
Roger Figg	www.DomesticPanthera.com
Johanna Reese	DENR
Jessica Waluqera	North ~~Carolina~~ Zoo
Lorraine Smith	"
Dr. Miava Binkley	USDA
David Jones	North Carolina Zoo
Steve Woodson	NC Farm Bureau

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
TROY PAGE	NC SENTENCING COMMISSION
Karen Jones	" "
Tim Moore	NC DOC
David McLeod	NCDA&CS
Rob Rudoll	ADC
Maggie Hall	ADC
SCOTT SCHEARR	UNCTV
Eric Bridenstine	UNC TV
MELIGA GROOMES	PAROLE COMMISSION
John Long	Martin Marietta

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 991*

Short Title:	Authorize Judge/Concealed Weapon in Cths.	(Public)
Sponsors:	Senator Apodaca.	
Referred to:	Judiciary II.	

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A DISTRICT COURT JUDGE OR SUPERIOR COURT JUDGE WHO HAS A CONCEALED HANDGUN PERMIT MAY CARRY OR POSSESS A CONCEALED HANDGUN WHILE IN A COURTHOUSE TO DISCHARGE OFFICIAL DUTIES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-269.4 reads as rewritten:

"**§ 14-269.4. Weapons on State property and in courthouses.**

It shall be unlawful for any person to possess, or carry, whether openly or concealed, any deadly weapon, not used solely for instructional or officially sanctioned ceremonial purposes in the State Capitol Building, the Executive Mansion, the Western Residence of the Governor, or on the grounds of any of these buildings, and in any building housing any court of the General Court of Justice. If a court is housed in a building containing nonpublic uses in addition to the court, then this prohibition shall apply only to that portion of the building used for court purposes while the building is being used for court purposes.

This section shall not apply to:

(1) Repealed by S.L. 1997-238, s. 3.

(1a) A person exempted by the provisions of G.S. 14-269(b),

(2) through (4) Repealed by S.L. 1997-238, s. 3.

(4a) Any person in a building housing a court of the General Court of Justice in possession of a weapon for evidentiary purposes, to deliver it to a law-enforcement agency, or for purposes of registration,

(4b) Any district court judge or superior court judge who carries or possesses a concealed handgun in a building housing a court of the General Court of Justice if the judge is in the building to discharge his or her official duties and the judge has a concealed handgun permit issued in accordance with Article 54B of this Chapter or considered valid under G.S. 415.24.

(5) State-owned rest areas, rest stops along the highways, and State-owned hunting and fishing reservations.

Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 991*
PROPOSED COMMITTEE SUBSTITUTE S991-CSRC-39 [v.3]

5/16/2005 2:18:20 PM

Short Title: Authorize Judge/Concealed Weapon in Cths. (Public)

Sponsors:

Referred to:

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A DISTRICT COURT JUDGE OR SUPERIOR COURT JUDGE WHO HAS A CONCEALED HANDGUN PERMIT MAY CARRY OR POSSESS A CONCEALED HANDGUN WHILE IN A COURTHOUSE TO DISCHARGE OFFICIAL DUTIES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-269.4 reads as rewritten:

"**§ 14-269.4. Weapons on State property and in courthouses.**

(a) It shall be unlawful for any person to possess, or carry, whether openly or concealed, any deadly weapon, not used solely for instructional or officially sanctioned ceremonial purposes in the State Capitol Building, the Executive Mansion, the Western Residence of the Governor, or on the grounds of any of these buildings, and in any building housing any court of the General Court of Justice. If a court is housed in a building containing nonpublic uses in addition to the court, then this prohibition shall apply only to that portion of the building used for court purposes while the building is being used for court purposes.

(b) ~~This section~~ Subsection (a) of this section shall not apply to:

(1) Repealed by S.L. 1997-238, s. 3.

(1a) A person exempted by the provisions of G.S. 14-269(b),

(2) through (4) Repealed by S.L. 1997-238, s. 3.

(4a) Any person in a building housing a court of the General Court of Justice in possession of a weapon for evidentiary purposes, to deliver it to a law-enforcement agency, or for purposes of registration,

(4b) Any district court judge or superior court judge who carries or possesses a handgun in a building housing a court of the General Court of Justice if the judge is in the building to discharge the judge's official duties and the judge has a concealed handgun permit issued under Article 54B of this Chapter or considered valid under G.S. 14-415.24.

If a judge displays or openly possesses the handgun, the judge shall also take reasonable precautions to prevent other persons from obtaining unauthorized possession of the weapon.

(5) State-owned rest areas, rest stops along the highways, and State-owned hunting and fishing reservations.

(c) Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 991:
Authorize Judge/Concealed Weapon in Cths

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 10, 2005
Introduced by:	Sen. Apodaca	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	PCS to First Edition S991-CSRC-39		

SUMMARY: ***Senate Bill 991 would authorize superior court and district court judges to carry or possess a handgun in a court of the General Court of Justice if the judge is in the building to discharge the judge's official duties and if the judge has a concealed handgun permit.***

The Committee Substitute requires that a judge who displays or does not conceal the handgun must take reasonable precautions to prevent other persons from obtaining unauthorized possession of the handgun.

This act would be effective when it becomes law.

CURRENT LAW: G.S. 14-269.4 prohibits any person to possess or carry any deadly weapon in the State Capital Building, the Executive Manson, the Western Residence of the Governor, on the grounds of these buildings, in any building housing any court of the General Court of Justice, or in the portion of a building that is being used for court purposes if the building where the court is housed also contains nonpublic uses. Case law has defined a deadly weapon as any instrument that under the circumstances of its use is likely to cause death or serious bodily injury.[1] Some weapons, such as guns, are deadly by their very nature.[2]

This prohibition does not apply to a the following individuals:

(1) Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms and weapons;
(2) Civil and law enforcement officers of the United States while in the discharge of their official duties;
(3) Officers and soldiers of the militia and the national guard when called into actual service;
(4) Officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties;
(5) Sworn law-enforcement officers, when off-duty, if:
    a. Written regulations authorizing the carrying of concealed weapons have been filed with the clerk of superior court in the county where the law-enforcement unit is located by the sheriff or chief of police or other superior officer in charge; and
    b. Such regulations specifically prohibit the carrying of concealed weapons while the officer is consuming or under the influence of alcoholic beverages.[3]

[1] State v. Lane, 1 N.C. App. 539.
[2] State v. Torain, 316 N.C. 111.
[3] G.S. 14-269.4(1a) and G.S. 14-269(b).

BILL ANALYSIS: Senate Bill 991 would authorize superior court and district court judges to carry or possess a handgun in a court of the General Court of Justice if the judge is in the building to discharge the judge's official duties and if the judge has a concealed handgun permit, or a permit from another state that is recognized by North Carolina under the reciprocity provisions of G.S. 14-415.24. It also provides that a judge who openly displays or possesses the handgun must take reasonable precautions to prevent other persons from obtaining unauthorized possession of the handgun.

Although judges are officers of the State, the current exemption in G.S. 14-269.4(1a) probably does not give judges this authority because carrying a deadly weapon would not fall within acts that are necessary for the discharge of their official duties.

The exemption in this bill probably applies to special superior court and district court judges and to emergency special superior court and district court judges. It would not apply to appellate division justices and judges.

Any judge who carried a concealed handgun into a court would have to also carry the permit together with valid identification. The judge would be required to disclose to any law enforcement officer that the judge holds a valid permit and is carrying a concealed handgun when approached or addressed by the officer, and display both the permit and the proper identification upon the request of a law enforcement officer.[4]

EFFECTIVE DATE: The bill would become effective when it becomes law.

S0991e1-SMRC-CSRC-39

[4] G.S. 14-425.11(a).

NORTH CAROLINIANS AGAINST GUN VIOLENCE EDUCATION FUND
• P.O. Box 9204 • Chapel Hill, NC 27515 • 919/403-7665 • Fax 919/403-6585 • www.ncgv.org • E-mail: safenc@intrex.net •

To: Members of Senate J-II Committee
Subject: REMARKS, S 991 Authorize Judge/Concealed Weapon in Courthouses, Committee Substitute 991CSRC-39[v.2]
From: Lisa Price, Executive Director
Date: May 17, 2005

Apparently, this legislation may have been introduced in part because some judges with CCW permits are already carrying handguns in their courtrooms, thereby breaking the present law that prohibits citizens except law enforcement and military personnel from carrying or possessing guns in courtrooms. The legislation may also have been influenced by the recent terrible breakdown of law enforcement in a Georgia courtroom in which a judge and several others were killed by a prisoner who grabbed a handgun from a guard.

But is there a problem in NC with judges or other courtroom personnel being threatened by deadly weapons by suspects, prisoners, or others in the judicial system? NCGV believes this is a fearful, over-reaction to a possibly non-existent problem.

If there is problem, the solution lies with law enforcement, not with allowing judges to have a CCW in their courtroom. It is the job of law enforcement to protect the public safety. They can be right there, in the courthouse. It is different when a judge is in his car or home, or somewhere else where law enforcement cannot be present; then it is appropriate for a judge to carry a concealed handgun. If courthouse protection is inadequate in certain areas of the state -- and what is the evidence for this belief? -- then law enforcement can be improved, depending on the nature of the problem. Perhaps we need more or better-trained personnel, better equipment, more metal detectors, etc.

The solution is not arming judges in their crowded courtrooms. Imagine the threat to public safety if there were shoot-outs in courtrooms between judges and suspected or actual antagonists. Are judges well-trained in law enforcement and shooting? Arming individuals rather than calling on law enforcement do its job could lead to arming other court individuals, such as lawyers, who might also be frightened by the irresponsible, law-breaking types of people one may encounter in court. Some Americans would extend this vigilante philosophy and call for changing laws so that citizens will be able to carry weapons in other public places where guns may currently be carried only by law enforcement.

What happened in the Georgia courthouse was very sad -- and very unusual. But to our knowledge, law enforcement offers good protection in North Carolina courthouses. If there is a problem, law enforcement can fix it. We do not need a law to arm judges in their courtrooms. I urge Senate J-II to vote against S 991.

###

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 1032

Short Title:	Protection of Inherently Dangerous Animals.	(Public)
Sponsors:	Senator Garwood.	
Referred to:	Judiciary II.	

March 24, 2005

A BILL TO BE ENTITLED

AN ACT PROVIDING FOR THE PROTECTION OF THE PUBLIC AGAINST THE HEALTH AND SAFETY RISKS THAT INHERENTLY DANGEROUS ANIMALS POSE AND TO PROTECT THE WELFARE OF INHERENTLY DANGEROUS ANIMALS.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 19A of the General Statutes is amended by adding a new Article to read:

"Article 6.

"Protection of Inherently Dangerous Animals.

"**§ 19A-70. Intent.**

(a) It is the intent of the General Assembly to protect the public against health and safety risks that inherently dangerous animals pose to the community and to protect the welfare of the individual animals held in private possession and at roadside zoos. The General Assembly finds that by their very nature these animals are wild and inherently dangerous and do not adjust well in captivity without sufficient provisions for animal welfare and professional animal care expertise.

(b) The General Assembly finds that inherently dangerous animals are extremely unpredictable and dangerous creatures; the Animal and Plant Health Inspection Service of United States Department of Agriculture (USDA/APHIS), the American Zoo and Aquarium Association (AZA), the American Veterinary Medical Association, and numerous animal welfare and public safety organizations believe that only properly trained professionals and certified institutions should keep these animals.

(c) The General Assembly finds that care and handling of these inherently dangerous animals should be left to those qualified individuals who have the knowledge and means to maintain them properly; the average owner of an inherently dangerous animal lacks the specialized equipment and expertise necessary to provide properly for the containment, medical care, husbandry, and nutrition of a wild animal, and it is

virtually impossible for an inherently dangerous animal to adapt to traditional household settings or inadequate living spaces and conditions.

"**§ 19A-71. Definitions.**

(a) "Animal control authority" means the municipal or county animal control agency or a county sheriff in an area that does not have an animal control office.

(b) "Department" means the Department of Environment and Natural Resources.

(c) "Inherently dangerous animal" means an animal that is capable of inflicting serious or fatal injuries, or which has the potential to become a menace to the public health or indigenous wildlife populations, whether the animal is bred in the wild or in captivity, and includes all hybrids of that animal. The term does not include indigenous wild animals, the taking or possessing of which are regulated by the Wildlife Resources Commission under Article 22 of Chapter 113 of the General Statutes. The following are examples of inherently dangerous animals, but indigenous varieties of the listed classifications are not included within the definition, regardless of whether specifically exempted here:

(1.) Class Mammalia

a. Order Carnivora

1. Family Felidae (lions, tigers, leopards, ocelots, servals, etc.) – all species except domestic cats.
2. Family Canidae (wolves, foxes, jackals, etc.) – all species except domestic dogs and indigenous foxes.
3. Family Ursidae (bears) – all species except black bears.
4. Family Viverridae (only binturongs).
5. Family Procyonidae (only kinkajous and coatis).
6. Family Hyaenidae (hyenas, etc.) – all species.

b. Order Marsupialia – only kangaroos.

c. Order Perissodactyla – only rhinoceroses.

d. Order Primates (lemurs, monkeys, chimpanzees, gorillas) – all species.

e. Order Proboscidae (elephants, etc.) – all species.

f. Order Rodentia – only prairie dogs and Gambian rats.

(2) Class Reptilia

a. Order Squamata

1. Family Varanidae – only water monitors and crocodile monitors.
2. Family Boidae – all species whose adult length has the potential to exceed eight feet in length.
3. Family Colubridae – only boomslangs and African twig snakes.
4. Family Elapidae (cobras, mambas, etc.) – all species.
5. Family Nactricidae – only keelback snakes.
6. Family Viperidae (vipers) – only nonindigenous species.
7. Family Helodermatidae (beaded lizards, Gila monsters, etc.) – all species.

8. Family Hydrophiidae (sea snakes, etc.) – all species.
9. Family Atractaspidae (mole vipers, etc.) – all species.

b. Order Crocodilia (crocodiles, alligators, caimans, gavials, etc.) – all species.

The Department may declare any additional species, families, or classes of wild animals not specifically listed in G.S. 19A-71(c) to be an inherently dangerous animal for the purposes of this Article if the animal meets the definition set forth in this subsection.

(d) "Person" means any individual, partnership, corporation, organization, trade or professional association, firm, limited liability company, joint venture, association, trust, estate, or any other legal entity, and any officer, member, shareholder, director, employee, agent or representative of the entity.

(e) "Possessor" means any person who owns, possesses, keeps, harbors, brings into the State, acts as a custodian of, or has custody or control of, an inherently dangerous animal.

(f) "Wildlife sanctuary" means a nonprofit organization described in section 170(b)(1)(A)(vi) of the Internal Revenue Code of 1986, and its subsequent amendments, that operates a place of refuge where abused, neglected, unwanted, impounded, abandoned, orphaned, or displaced inherently dangerous animals are provided care for their lifetimes or are released back to their natural habitat and, with respect to any animal owned by the organization, does not:

(1) Conduct any activity that is not inherent to the animal's nature;
(2) Use the animal for any type of entertainment;
(3) Sell, trade, or barter the animal or the animal's body parts; or
(4) Breed the animal for any purpose.

"**§ 19A-72. Exemptions.**

(a) The provisions of this Article do not apply to:

(1) Institutions accredited by the American Zoo and Aquarium Association (AZA) or under mentorship through the AZA.
(2) Duly incorporated nonprofit animal protection organizations housing an inherently dangerous animal at the written request of the animal control authority.
(3) Wildlife enforcement officers acting under the authority of this act.
(4) Animal control or law enforcement agencies or officers acting under the authority of this act.
(5) Licensed veterinary hospitals or clinics.
(6) Any wildlife sanctuary as defined in G.S. 19A-71(f).
(7) Any licensed or accredited research or medical institution.
(8) Any licensed or accredited educational institution.
(9) Any lawfully operated circus or rodeo.
(10) A person temporarily transporting an inherently dangerous animal through the State if the transit time is not more than 96 hours and the animal is at all times maintained within a confinement sufficient to prevent the inherently dangerous animal from escaping.

"**§ 19A-73. Keeping of inherently dangerous animals prohibited.**

(a) A person shall not own, possess, keep, harbor, bring into the State, act as a custodian of, or have custody or control of, an inherently dangerous animal, except in compliance with this Article.

(b) A person shall not breed an inherently dangerous animal.

"**§ 19A-74. Personal possession permit required for possessor.**

(a) A person may not own, possess, keep, harbor, bring into the State, act as a custodian of, or have custody or control of, an inherently dangerous animal unless that person holds a personal possession permit for that animal issued by the Department. A person may obtain a personal possession permit for an inherently dangerous animal only if the following requirements are met:

(1) The person was in legal possession of the inherently dangerous animal prior to January 1, 2006, and is the legal possessor of the inherently dangerous animal.

(2) The person applies for and is granted a personal possession permit for each inherently dangerous animal in the person's possession by March 31, 2006.

(b) Persons who meet the requirements of subsection (a) of this section shall annually obtain a personal possession permit. From and after January 1, 2006, no new inherently dangerous animal shall be brought into possession under authority of a personal possession permit.

(c) A possessor shall file an application to receive a personal possession permit with the Department on forms provided by the Department. The application shall include the following:

(1) A written statement that sets forth at least the following information:

a. The name, address, telephone number, and date of birth of the possessor;

b. A description of the inherently dangerous animal possessed, including the scientific name, name, sex, age, color, weight, and any distinguishing marks or coloration that would aid in the identification of the animal;

c. A photograph of the inherently dangerous animal;

d. The address of the location where the inherently dangerous animal is to be kept, including directions to the location if no address exists;

e. The name, address, and telephone number of the person from whom the possessor obtained the inherently dangerous animal, if known;

f. The microchip number of the inherently dangerous animal, excluding inherently dangerous animals exempted under G.S. 19A-75; and

g. The name, address, and telephone number of the veterinarian providing veterinary care to the inherently dangerous animal

and a certificate of good health from the possessor's veterinarian.

(2) The possessor's certification in writing and notarized, that:

a. The applicant is 18 years of age or older;

b. The applicant has not been convicted of, or found responsible for, violating a State or local law prohibiting cruelty, neglect, or mistreatment of an animal, and has not within the past 10 years been convicted of a felony or convicted for possession, sale, or use of illegal narcotics;

c. The requirements set forth in subsection (a) of this section and of G.S. 19A-75 have been met;

d. The facility and the conditions in which the inherently dangerous animal will be kept are in compliance with this Article;

e. The applicant has regularly provided veterinary care to the inherently dangerous animal when needed and will provide such care in the future; and

f. Proof that a licensed veterinarian has spayed or neutered the inherently dangerous animal, as required by G.S. 19A-76.

(3) The possessor's plan for the quick and safe recapture of the inherently dangerous animal if the inherently dangerous animal escapes at the time of filing of the application.

(4) A copy of the possessor's policy for liability insurance at the time of filing of the application, as required by G.S. 19A-79.

(5) Any additional information the Department may deem necessary to carry out the provisions of this Article.

(6) Payment of a fee to be established by the Department for application, issuance, and renewal of a personal possession permit in order to recover the costs associated with the administration and enforcement of this Article. The fee collected under this section may be used only to administer and enforce the provisions of this Article.

(d) A permit shall not be granted unless the Department finds that all of the requirements in subsection (c) of this section have been met.

(e) The personal possession permit shall set forth all of the following information:

(1) The name, address, phone number, and date of birth of the permit holder;

(2) The address where the inherently dangerous animal or animals will be kept;

(3) The name, number, sex, species, age of the inherently dangerous animal or animals, and any distinguishing marks or coloration that would aid in the identification of the animals;

(4) The identification number required under G.S. 19A-75, if applicable;

(5) The name, address, and phone number of the veterinarian who provides veterinary care to the inherently dangerous animal or animals named on the permit; and

(6) Any other relevant information the Department may deem necessary.

(f) If a person can no longer care for an inherently dangerous animal, that person may only transfer the animal to another person currently holding a valid personal possession permit.

(g) The Department shall keep records of persons carrying a valid permit. A permit holder shall notify the Department of any changes in the stated information on the permit, including the death of an inherently dangerous animal.

"**§ 19A-75. Identification number.**

Every inherently dangerous animal shall be implanted with a microchip, at the expense of the possessor, by or under the supervision of a veterinarian. This provision does not apply if a veterinarian determines that the implant of a microchip would endanger the well-being of the animal.

"**§ 19A-76. Spaying or neutering.**

Every inherently dangerous animal must be spayed or neutered, at the expense of the possessor, by or under the supervision of a veterinarian. This provision does not apply if a veterinarian determines that the spay or neuter procedure would endanger the well-being of the animal.

"**§ 19A-77. Caging requirements and standards for inherently dangerous animals.**

For each inherently dangerous animal, the possessor shall comply with the American Zoo and Aquarium Association's (AZA's) Minimum Husbandry Guidelines for animal care and maintenance of that animal.

"**§ 19A-78. Care and treatment of inherently dangerous animals.**

(a) An inherently dangerous animal shall not be tethered, leashed, chained outdoors, or allowed to run at large.

(b) An inherently dangerous animal shall not be mistreated, neglected, abandoned, deprived of necessary food, water, and sustenance, or otherwise treated in a manner that violates Article 47 of Chapter 14 of the General Statutes.

(c) A possessor transporting an inherently dangerous animal in a vehicle shall keep the animal securely caged in the vehicle at all times.

(d) Each possessor shall have a plan for the quick and safe recapture of the inherently dangerous animal if the animal escapes, and a plan for the destruction of the animal if recapture is impossible.

(e) The possessor shall contact the Department, a wildlife sanctuary, or an American Zoo and Aquarium Association (AZA) accredited facility if the possessor can no longer care for the inherently dangerous animal prior to euthanasia of the inherently dangerous animal, and shall do so before resorting to euthanasia.

"**§ 19A-79. Insurance; signs; notification.**

(a) The possessor of an inherently dangerous animal shall maintain liability insurance coverage in an amount of not less than one hundred thousand dollars ($100,000) for each occurrence for liability damages for destruction of or damage to property, and for death or bodily injury to a person caused by the inherently dangerous

animal. The possessor of an inherently dangerous animal shall provide a copy of the policy for liability insurance to the Department on an annual basis.

(b) The possessor of an inherently dangerous animal shall have continuously posted and displayed, at each possible entrance onto the premises where an inherently dangerous animal is kept, a conspicuous sign, clearly legible, and easily readable by the public, warning that there is an inherently dangerous animal on the premises. The Department may prescribe the exact content and size of the sign.

(c) No person may intentionally release an inherently dangerous animal.

(d) If any inherently dangerous animal escapes, either intentionally or unintentionally, the possessor of the animal shall immediately contact the Department and the animal control authority or a law enforcement officer of the city or county in which the possessor resides to report the escape or release.

(e) If an inherently dangerous animal escapes or is intentionally released, the possessor is liable for all reasonable expenses associated with efforts to recapture the animal, unless the escape is due to the criminal act of another person. If the inherently dangerous animal cannot be recaptured safely by the Department, animal control authority, or law enforcement officer, or if proper and safe housing cannot be found, the Department may immediately euthanize the animal.

"**§ 19A-80. Public contact.**

Unless prior approval has been received from the Department, a person shall not bring an inherently dangerous animal to any public property or commercial or retail establishment unless the person is bringing the animal to a licensed veterinarian or a veterinarian clinic.

"**§ 19A-81. Enforcement of Article.**

The provisions of this Article are enforceable by the Department, its staff, its agents, animal control authorities, local law enforcement agents, and county sheriffs.

"**§ 19A-82. Inspection.**

The possessor of an inherently dangerous animal shall, at all reasonable times, allow the Department, its staff, and its agents to enter the premises where the animal is kept to ensure compliance with this Article.

"**§ 19A-83. Denial of personal possession permit; appeal.**

(a) If the Department finds that an applicant for an original or renewal of a personal possession permit does not meet the requirements set forth in G.S. 19A-74, the Department shall deny the applicant a personal possession permit and give the applicant written notice of the denial and the reasons for the denial.

(b) If the Department finds that a person has not complied with this Article, the Department may suspend or revoke the personal possession permit and give the possessor written notice of the suspension or revocation and the reasons for the suspension or revocation.

(c) A person who is denied a personal possession permit, who is denied a renewal of a personal possession permit, or who has had a permit suspended or revoked, may appeal the decision to the district court for the district in which the animal is located no later than 15 days after the permit is denied, suspended, or revoked. The decision of the court may not be appealed.

"**§ 19A-84. Confiscation and disposition of inherently dangerous animals.**

(a) The Department may immediately confiscate any inherently dangerous animal if the animal is kept in violation of this Article. The possessor is liable for the costs of placement and care for the inherently dangerous animal from the time of confiscation until the time of return to the possessor, or until the time the animal has been relocated to an approved facility, such as a wildlife sanctuary or an institution accredited by the American Zoo and Aquarium Association (AZA).

(b) If an inherently dangerous animal is confiscated as a result of the animal being kept in violation of this Article, the possessor shall post a security bond or cash with the Department in an amount sufficient to guarantee payment of all reasonable expenses expected to be incurred in capturing, caring for, providing for, and placing the animal, including the estimated cost of feeding, medical care, and housing for at least 30 days, plus the cost of relocating the animal. The security bond or cash shall not prevent the Department from disposing of the animal at the end of the 30 days unless the person claiming the animal posts an additional security bond or cash with the Department to secure payment of all reasonable expenses expected to be incurred in caring and providing for the animal for an additional 30 days, and does so prior to the expiration of the first 30-day period. The amount of the security bond or cash shall be determined by the Department and based on the current rate to feed, provide medical care, and house the animal, plus the cost of relocating the animal and costs already incurred for capturing and relocating the animal.

(c) If the possessor of a confiscated animal cannot be located, or if a confiscated animal remains unclaimed, the Department may, in its discretion, contact an approved facility, such as a wildlife sanctuary or an institution accredited by the American Zoo and Aquarium Association (AZA), allow the animal to be adopted by a person who currently possesses a personal possession permit, or euthanize the animal.

(d) If the inherently dangerous animal cannot be taken up or recaptured safely by the Department, or if proper and safe housing cannot be found, the Department may immediately euthanize the animal.

(e) An inherently dangerous animal may be returned to the possessor only if, to the satisfaction of the Department, the possessor has a personal possession permit, has corrected the conditions resulting in the confiscation, and has paid the cost of placement and care of the animal while under the care and control of the Department.

"**§ 19A-85. Penalties.**

(a) Any possessor who fails to obtain a personal possession permit under G.S. 19A-74 for an inherently dangerous animal or renew a personal possession permit for each inherently dangerous animal shall be liable for a civil penalty of not less than two hundred dollars ($200.00) and not more than two thousand dollars ($2,000) for each animal with respect to which there is a violation and for each day the violation continues. A civil penalty collected pursuant to this subsection may be retained by the Department.

(b) A person who violates the provisions of G.S. 19A-74(f), 19A-75, 19A-77, 19A-79(b), 19A-79(d), 19A-80, or 19A-82 is guilty of a Class 3 misdemeanor.

(c) A person who violates G.S. 19A-73(b), 19A-76, 19A-78, 19A-79(a), 19A-79(c), or 19A-84(b) is guilty of a Class 2 misdemeanor.

"**§ 19A-86. Local governing bodies.**

Pursuant to its authority under G.S. 153A-131 and G.S. 160A-187, a city or county may adopt an ordinance governing inherently dangerous animals that is more restrictive than this Article. Such an ordinance may apply to animals not covered by this Article, provide additional caging standards, provide stricter care and treatment standards, or otherwise restrict or prohibit the possession of inherently dangerous animals.

"**§ 19A-87. Severability.**

If any part of this act is found to be unconstitutional or unenforceable, it shall not affect the constitutionality or enforceability of any other part."

SECTION 2. This act becomes effective January 1, 2006, and applies to inherently dangerous animals existing in this State on or after that date. A person who meets the legal requirements for possessing an inherently dangerous animal set forth in Article 6 of Chapter 19A of the General Statutes, as enacted in this act, is not required to obtain a personal possession permit by that date, but shall obtain that permit by March 31, 2006. The Department of Environment and Natural Resources shall implement and administer the provisions of Article 6 of Chapter 19A of the General Statutes, and shall establish the fee authorized by that Article and the personal possession permit program necessary to implement the provisions of that Article no later than January 1, 2006.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 1032
PROPOSED COMMITTEE SUBSTITUTE S1032-CSRC-46 [v.2]

5/16/2005 2:03:34 PM

Short Title: Study Inherently Dangerous Animals. (Public)

Sponsors:

Referred to:

March 24, 2005

A BILL TO BE ENTITLED

AN ACT DIRECTING THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES TO DETERMINE THE BEST MEANS OF PROTECTING THE PUBLIC AGAINST THE HEALTH AND SAFETY RISKS POSED BY INHERENTLY DANGEROUS ANIMALS.

The General Assembly of North Carolina enacts:

SECTION 1. The Department of Environment and Natural Resources, in consultation with the North Carolina Zoological Park and the Wildlife Resources Commission, shall study the need to protect the public against the health and safety risks posed by inherently dangerous animals and propose a means of best providing that protection to the public while protecting the welfare of inherently dangerous animals as well. In developing recommendations, the Department shall consult with the following entities or groups, or appropriate representatives of those entities or groups:

(1) The North Carolina Department of Agriculture and Consumer Services;
(2) The North Carolina School of Veterinary Medicine;
(3) The State Animal Response Team;
(4) Local law enforcement officials;
(5) Local animal control officials;
(6) Wild animal breeders;
(7) Exotic pet hobbyists;
(8) Commercial pet retailers;
(9) Small zoo owners;
(10) Humane organizations; and
(11) Any other entities or groups whose interests may be affected by proposed regulations.

The Department shall report its findings to the General Assembly no later than the convening of the 2006 Regular Session of the 2005 General Assembly. Any legislation

recommended in the report may be considered during the 2006 Regular Session of the 2005 General Assembly.

SECTION 2. The report made by the Department of Environment and Natural Resources pursuant to this act shall include:

(1) A list of the types of animals that possess such inherently dangerous characteristics that they should not be owned or possessed by persons who do not have special expertise or training, and a determination as to whether these animals should be grouped into classes for differential treatment based upon the nature and extent of the threat they pose to the public. This list should also include information about the nature of the dangers posed by each type of animal.

(2) A suggested means for regulating ownership of certain animals, including a means of enforcing any proposed restrictions on the ownership or possession of those animals. This portion of the report may include an evaluation of regulations in place in other jurisdictions that have proven to be effective in protecting the public from inherently dangerous animals.

(3) A plan for addressing inherently dangerous animals that are indigenous species within the jurisdiction of the Wildlife Resources Commission under Article 22 of Chapter 113 and a consideration as to whether any potential legislation should broadly address the keeping of any wildlife as pets, whether indigenous or not and whether inherently dangerous or not. This portion of the report should result from extensive consultation with the Wildlife Resources Commission.

(4) A recommendation as to whether persons owning or possessing animals covered by any proposed restrictions should be grandfathered in under a regulatory scheme and the appropriate means of grandfathering those persons in, including consideration of whether certain animals are so threatening to the public safety that the grandfathering of untrained owners or possessors should not be allowed under any circumstances.

(5) A recommended list, as comprehensive as possible, of persons and entities that should be exempted from the proposed restrictions on ownership or possession of the animals covered by any proposed restrictions, such as zoos, veterinary hospitals, wildlife sanctuaries, research institutions, and the like.

SECTION 3. This act is effective when it becomes law.

SENATE BILL 1032:
Protection of Inherently Dangerous Animals

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 17, 2005
Introduced by:	Sen. Garwood	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	PCS to First Edition S1032-CSRC-46		

SUMMARY: ***The Proposed Committee Substitute to SB1032 completely re-writes the 1st Edition of the bill. It directs the Department of Environment and Natural Resources (DENR) to study the need to protect the public against the health and safety risks posed by inherently dangerous animals and propose a means of protecting both the public and the animals. DENR would be required to report its findings and recommendations to the 2006 Regular Session of the 2005 General Assembly.***

The act would be effective when the bill becomes law.

CURRENT LAW: North Carolina does not have a comprehensive regulatory program regulating the possession or control of dangerous animals. Cities and counties are specifically authorized to adopt ordinances regulating the possession of dangerous animals.[1] The Animal Welfare Act, Article 3, Chapter 19A of the General Statutes regulates kennels, dealers, and shelters, etc., however, the act applies only to dogs and cats. Article 2 of Chapter 19A prohibits the possession of black bears unless they are kept as part of a bona fide zoo operated by the federal, State or local government agency, or as part of an educational institution, or without caging in conditions simulating natural habitat in accordance with plans approved by the Wildlife Resources Commission. The Wildlife Resources Commission regulates the possession of wildlife through captivity licenses and other permits[2], but they do not regulate the possession of exotics such as lions and tigers. Finally, the United State Department of Agriculture licenses private zoos, including caging and management requirements.

BILL ANALYSIS: The Proposed Committee Substitute for S1032 directs DENR, in consultation with the Wildlife Resources Commission and the North Carolina Zoological Park to study the need to protect the public against the health and safety risks posed by inherently dangerous animals and propose a means of protecting both the public and the animals. As part of the study, DENR would consult with the North Carolina Department of Agriculture, the North Carolina School of Veterinary Medicine, the State Animal Response Team, local law enforcement and animal control officers, wild animal breeders, exotic pet hobbyists, commercial pet retailers, small zoo owners, humane organizations, and any other groups or entities that may be affected by the proposed regulations.

DENR would be required to report its findings and recommendations to the 2006 Regular Session of the 2005 General Assembly. The report must include the following:

- A list of the types of animals that possess such inherently dangerous characteristics that only persons with special training should be allowed to own them.
- A suggested means of regulating the ownership of certain animals, include a means of enforcing the regulations.
- A review of other states' laws on this matter.

[1] G.S. 153A-131 and G.S, 160A-187, respectively.
[2] Article 21 of Chapter 113 of the General Statues.

- A recommendation regarding whether to grandfather current owners under any proposed regulatory scheme.
- A recommended list of any persons who should be exempted from the proposed restrictions.

EFFECTIVE DATE: The act would be effective when it becomes law.

S1032e1-SMRC-CSRC-46

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 574

Short Title:	Amend Post-Release Supervision Laws.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 16, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE STRUCTURED SENTENCING LAWS WITH REGARD TO POST-RELEASE SUPERVISION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1340.11 is amended by adding a new subdivision to read:

"(6a) Post-release supervision. – The time for which a sentenced prisoner is supervised in the community following the termination of the prisoner's maximum prison term, controlled by the rules and conditions of Article 84A of this Chapter."

SECTION 2. G.S. 15A-1340.13(b) reads as rewritten:

"(b) Procedure Generally; Requirements of Judgment; Kinds of Sentences. – Before imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14. The sentence shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified for the class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment. For Class B1, B2, C, D, and E felony offenses, the sentence shall include a period of post-release supervision pursuant to G.S. 15A-1340.18. The kinds of sentence dispositions are active punishment, intermediate punishment, and community punishment."

SECTION 3. G.S. 15A-1340.17 reads as rewritten:

"**§ 15A-1340.17. Punishment limits for each class of offense and prior record level.**

(a) Offense Classification; Default Classifications. – The offense classification is as specified in the offense for which the sentence is being imposed. If the offense is a felony for which there is no classification, it is a Class I felony.

(b) Fines. – Any judgment that includes a sentence of imprisonment may also include a fine. If a community punishment is authorized, the judgment may consist of a fine only. Additionally, when the defendant is other than an individual, the judgment

may consist of a fine only. Unless otherwise provided, the amount of the fine is in the discretion of the court.

(c) Punishments for Each Class of Offense and Prior Record Level; Punishment Chart Described. – The authorized punishment for each class of offense and prior record level is as specified in the chart ~~below.~~ below and under G.S. 15A-1340.18. Prior record levels are indicated by the Roman numerals placed horizontally on the top of the chart. Classes of offense are indicated by the letters placed vertically on the left side of the chart. Each cell on the chart contains the following components:

(1) A sentence disposition or dispositions: "C" indicates that a community punishment is authorized; "I" indicates that an intermediate punishment is authorized; "A" indicates that an active punishment is authorized; and "Life Imprisonment Without Parole" indicates that the defendant shall be imprisoned for the remainder of the prisoner's natural life.

(2) A presumptive range of minimum durations, if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in that range is permitted unless the court finds pursuant to G.S. 15A-1340.16 that an aggravated or mitigated sentence is appropriate. The presumptive range is the middle of the three ranges in the cell.

(3) A mitigated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that a mitigated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the mitigated range is permitted. The mitigated range is the lower of the three ranges in the cell.

(4) An aggravated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that an aggravated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the aggravated range is permitted. The aggravated range is the higher of the three ranges in the cell.

PRIOR RECORD LEVEL

	I 0 Pts	II 1-4 Pts	III 5-8 Pts	IV 9-14 Pts	V 15-18 Pts	VI 19+ Pts	
A	Life Imprisonment Without Parole or Death as Established by Statute						
	A 240-300	A 288-360	A 336-420	A 384-480	A Life Imprisonment Without Parole	A	DISPOSITION Aggravated
B1	192-240 144-192	230-288 173-230	269-336 202-269	307-384 230-307	346-433 260-346	384-480 288-384	PRESUMPTIVE Mitigated
	A 157-196	A 189-237	A 220-276	A 251-313	A 282-353	A 313-392	DISPOSITION Aggravated
B2	125-157	151-189	176-220	201-251	225-282	251-313	PRESUMPTIVE

	94-125	114-151	132-176	151-201	169-225	188-251	Mitigated
	A	A	A	A	A	A	DISPOSITION
	73-92	100-125	116-145	133-167	151-188	168-210	Aggravated
C	58-73	80-100	93-116	107-133	121-151	135-168	PRESUMPTIVE
	44-58	60-80	70-93	80-107	90-121	101-135	Mitigated
	A	A	A	A	A	A	DISPOSITION
	64-80	77-95	103-129	117-146	133-167	146-183	Aggravated
D	51-64	61-77	82-103	94-117	107-133	117-146	PRESUMPTIVE
	38-51	46-61	61-82	71-94	80-107	88-117	Mitigated
	I/A	I/A	A	A	A	A	DISPOSITION
	25-31	29-36	34-42	46-58	53-66	59-74	Aggravated
E	20-25	23-29	27-34	37-46	42-53	47-59	PRESUMPTIVE
	15-20	17-23	20-27	28-37	32-42	35-47	Mitigated
	I/A	I/A	I/A	A	A	A	DISPOSITION
	16-20	19-24	21-26	25-31	34-42	39-49	Aggravated
F	13-16	15-19	17-21	20-25	27-34	31-39	PRESUMPTIVE
	10-13	11-15	13-17	15-20	20-27	23-31	Mitigated
	I/A	I/A	I/A	I/A	A	A	DISPOSITION
	13-16	15-19	16-20	20-25	21-26	29-36	Aggravated
G	10-13	12-15	13-16	16-20	17-21	23-29	PRESUMPTIVE
	8-10	9-12	10-13	12-16	13-17	17-23	Mitigated
	C/I/A	I/A	I/A	I/A	I/A	A	DISPOSITION
	6-8	8-10	10-12	11-14	15-19	20-25	Aggravated
H	5-6	6-8	8-10	9-11	12-15	16-20	PRESUMPTIVE
	4-5	4-6	6-8	7-9	9-12	12-16	Mitigated
	C	C/I	I	I/A	I/A	I/A	DISPOSITION
	6-8	6-8	6-8	8-10	9-11	10-12	Aggravated
I	4-6	4-6	5-6	6-8	7-9	8-10	PRESUMPTIVE
	3-4	3-4	4-5	4-6	5-7	6-8	Mitigated

(d) Maximum Sentences Specified for ~~Class F through Class I Felonies.~~ Class B1 Felonies Through Class I Felonies for Minimum Terms up to 346 Months. – Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class ~~F~~ B1 through Class I felonies. The first figure in each cell in the table is the minimum term and the second is the maximum term.

3-4	4-5	5-6	6-8	7-9	8-10	9-11	10-12
11-14	12-15	13-16	14-17	15-18	16-20	17-21	18-22
19-23	20-24	21-26	22-27	23-28	24-29	25-30	26-32
27-33	28-34	29-35	30-36	31-38	32-39	33-40	34-41
35-42	36-44	37-45	38-46	39-47	40-48	41-50	42-51

43-52	44-53	45-54	46-56	47-57	48-58	49-59	50-60
51-61	52-62	53-64	54-65	55-66	56-67	57-68	58-70
59-71	60-72	61-73	62-74	63-76	64-77	65-78	66-79
67-80	68-82	69-83	70-84	71-85	72-86	73-88	74-89
75-90	76-91	77-92	78-94	79-95	80-96	81-97	82-98
83-100	84-101	85-102	86-103	87-104	88-106	89-107	90-108
91-109	92-110	93-112	94-113	95-114	96-115	97-116	98-118
99-119	100-120	101-121	102-122	103-124	104-125	105-126	106-127
107-128	108-130	109-131	110-132	111-133	112-134	113-136	114-137
115-138	116-139	117-140	118-142	119-143	120-144	121-145	122-146
123-148	124-149	125-150	126-151	127-152	128-154	129-155	130-156
131-157	132-158	133-160	134-161	135-162	136-163	137-164	138-166
139-167	140-168	141-169	142-170	143-172	144-173	145-174	146-175
147-176	148-178	149-179	150-180	151-181	152-182	153-184	154-185
155-186	156-187	157-188	158-190	159-191	160-192	161-193	162-194
163-196	164-197	165-198	166-199	167-200	168-202	169-203	170-204
171-205	172-206	173-208	174-209	175-210	176-211	177-212	178-214
179-215	180-216	181-217	182-218	183-220	184-221	185-222	186-223
187-224	188-226	189-227	190-228	191-229	192-230	193-232	194-233
195-234	196-235	197-236	198-238	199-239	200-240	201-241	202-242
203-244	204-245	205-246	206-247	207-248	208-250	209-251	210-252
211-253	212-254	213-256	214-257	215-258	216-259	217-260	218-262
219-263	220-264	221-265	222-266	223-268	224-269	225-270	226-271
227-272	228-274	229-275	230-276	231-277	232-278	233-280	234-281
235-282	236-283	237-284	238-286	239-287	240-288	241-289	242-290
243-292	244-293	245-294	246-295	247-296	248-298	249-299	250-300
251-301	252-302	253-304	254-305	255-306	256-307	257-308	258-310
259-311	260-312	261-313	262-314	263-316	264-317	265-318	266-319
267-320	268-322	269-323	270-324	271-325	272-326	273-328	274-329
275-330	276-331	277-332	278-334	279-335	280-336	281-337	282-338
283-340	284-341	285-342	286-343	287-344	288-346	289-347	290-348
291-349	292-350	293-352	294-353	295-354	296-355	297-356	298-358
299-359	300-360	301-361	302-362	303-364	304-365	305-366	306-367
307-368	308-370	309-371	310-372	311-373	312-374	313-376	314-377
315-378	316-379	317-380	318-382	319-383	320-384	321-385	322-386
323-388	324-389	325-390	326-391	327-392	328-394	329-395	330-396
331-397	332-398	333-400	334-401	335-402	336-403	337-404	338-406
339-407	340-408	341-409	342-410	343-412	344-413	345-414	346-415

~~(e) Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms up to 339 Months. Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table~~

~~below for Class B1 through Class E felonies. The first figure in each cell of the table is the minimum term and the second is the maximum term.~~

~~15-27~~	~~16-29~~	~~17-30~~	~~18-31~~	~~19-32~~	~~20-33~~	~~21-35~~	~~22-36~~
~~23-37~~	~~24-38~~	~~25-39~~	~~26-41~~	~~27-42~~	~~28-43~~	~~29-44~~	~~30-45~~
~~31-47~~	~~32-48~~	~~33-49~~	~~34-50~~	~~35-51~~	~~36-53~~	~~37-54~~	~~38-55~~
~~39-56~~	~~40-57~~	~~41-59~~	~~42-60~~	~~43-61~~	~~44-62~~	~~45-63~~	~~46-65~~
~~47-66~~	~~48-67~~	~~49-68~~	~~50-69~~	~~51-71~~	~~52-72~~	~~53-73~~	~~54-74~~
~~55-75~~	~~56-77~~	~~57-78~~	~~58-79~~	~~59-80~~	~~60-81~~	~~61-83~~	~~62-84~~
~~63-85~~	~~64-86~~	~~65-87~~	~~66-89~~	~~67-90~~	~~68-91~~	~~69-92~~	~~70-93~~
~~71-95~~	~~72-96~~	~~73-97~~	~~74-98~~	~~75-99~~	~~76-101~~	~~77-102~~	~~78-103~~
~~79-104~~	~~80-105~~	~~81-107~~	~~82-108~~	~~83-109~~	~~84-110~~	~~85-111~~	~~86-113~~
~~87-114~~	~~88-115~~	~~89-116~~	~~90-117~~	~~91-119~~	~~92-120~~	~~93-121~~	~~94-122~~
~~95-123~~	~~96-125~~	~~97-126~~	~~98-127~~	~~99-128~~	~~100-129~~	~~101-131~~	~~102-132~~
~~103-133~~	~~104-134~~	~~105-135~~	~~106-137~~	~~107-138~~	~~108-139~~	~~109-140~~	~~110-141~~
~~111-143~~	~~112-144~~	~~113-145~~	~~114-146~~	~~115-147~~	~~116-149~~	~~117-150~~	~~118-151~~
~~119-152~~	~~120-153~~	~~121-155~~	~~122-156~~	~~123-157~~	~~124-158~~	~~125-159~~	~~126-161~~
~~127-162~~	~~128-163~~	~~129-164~~	~~130-165~~	~~131-167~~	~~132-168~~	~~133-169~~	~~134-170~~
~~135-171~~	~~136-173~~	~~137-174~~	~~138-175~~	~~139-176~~	~~140-177~~	~~141-179~~	~~142-180~~
~~143-181~~	~~144-182~~	~~145-183~~	~~146-185~~	~~147-186~~	~~148-187~~	~~149-188~~	~~150-189~~
~~151-191~~	~~152-192~~	~~153-193~~	~~154-194~~	~~155-195~~	~~156-197~~	~~157-198~~	~~158-199~~
~~159-200~~	~~160-201~~	~~161-203~~	~~162-204~~	~~163-205~~	~~164-206~~	~~165-207~~	~~166-209~~
~~167-210~~	~~168-211~~	~~169-212~~	~~170-213~~	~~171-215~~	~~172-216~~	~~173-217~~	~~174-218~~
~~175-219~~	~~176-221~~	~~177-222~~	~~178-223~~	~~179-224~~	~~180-225~~	~~181-227~~	~~182-228~~
~~183-229~~	~~184-230~~	~~185-231~~	~~186-233~~	~~187-234~~	~~188-235~~	~~189-236~~	~~190-237~~
~~191-239~~	~~192-240~~	~~193-241~~	~~194-242~~	~~195-243~~	~~196-245~~	~~197-246~~	~~198-247~~
~~199-248~~	~~200-249~~	~~201-251~~	~~202-252~~	~~203-253~~	~~204-254~~	~~205-255~~	~~206-257~~
~~207-258~~	~~208-259~~	~~209-260~~	~~210-261~~	~~211-263~~	~~212-264~~	~~213-265~~	~~214-266~~
~~215-267~~	~~216-269~~	~~217-270~~	~~218-271~~	~~219-272~~	~~220-273~~	~~221-275~~	~~222-276~~
~~223-277~~	~~224-278~~	~~225-279~~	~~226-281~~	~~227-282~~	~~228-283~~	~~229-284~~	~~230-285~~
~~231-287~~	~~232-288~~	~~233-289~~	~~234-290~~	~~235-291~~	~~236-293~~	~~237-294~~	~~238-295~~
~~239-296~~	~~240-297~~	~~241-299~~	~~242-300~~	~~243-301~~	~~244-302~~	~~245-303~~	~~246-305~~
~~247-306~~	~~248-307~~	~~249-308~~	~~250-309~~	~~251-311~~	~~252-312~~	~~253-313~~	~~254-314~~
~~255-315~~	~~256-317~~	~~257-318~~	~~258-319~~	~~259-320~~	~~260-321~~	~~261-323~~	~~262-324~~
~~263-325~~	~~264-326~~	~~265-327~~	~~266-329~~	~~267-330~~	~~268-331~~	~~269-332~~	~~270-333~~
~~271-335~~	~~272-336~~	~~273-337~~	~~274-338~~	~~275-339~~	~~276-341~~	~~277-342~~	~~278-343~~
~~279-344~~	~~280-345~~	~~281-347~~	~~282-348~~	~~283-349~~	~~284-350~~	~~285-351~~	~~286-353~~
~~287-354~~	~~288-355~~	~~289-356~~	~~290-357~~	~~291-359~~	~~292-360~~	~~293-361~~	~~294-362~~
~~295-363~~	~~296-365~~	~~297-366~~	~~298-367~~	~~299-368~~	~~300-369~~	~~301-371~~	~~302-372~~
~~303-373~~	~~304-374~~	~~305-375~~	~~306-377~~	~~307-378~~	~~308-379~~	~~309-380~~	~~310-381~~
~~311-383~~	~~312-384~~	~~313-385~~	~~314-386~~	~~315-387~~	~~316-389~~	~~317-390~~	~~318-391~~
~~319-392~~	~~320-393~~	~~321-395~~	~~322-396~~	~~323-397~~	~~324-398~~	~~325-399~~	~~326-401~~
~~327-402~~	~~328-403~~	~~329-404~~	~~330-405~~	~~331-407~~	~~332-408~~	~~333-409~~	~~334-410~~
~~335-411~~	~~336-413~~	~~337-414~~	~~338-415~~	~~339-416~~			

(e1) Maximum Sentences Specified for Class B1 ~~through~~ through Class ~~E~~ I Felonies for Minimum Terms of ~~340~~347 Months or More. – Unless provided otherwise in a statute establishing a punishment for a specific crime, when the minimum sentence is ~~340~~347 months or more, the corresponding maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest ~~month, plus nine additional months.~~ month."

SECTION 4. Article 81B of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-1340.18. Post-release supervision.**

(a) Except as provided in subsection (b) of this section, the court must also impose a period of post-release supervision to follow the term of imprisonment and an additional term of imprisonment to be served upon revocation of the period of post-release supervision on all offenders convicted of a Class B1, B2, C, D, or E felony offense. The period of supervision and the term of imprisonment are as follows:

(1) Period of supervision. – The period of post-release supervision shall be nine months, unless the offense is a Class B1 through E offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years.

(2) Term of imprisonment. – The term of imprisonment upon revocation of post-release supervision shall be for a minimum term of seven months and a maximum term of nine months.

(b) If an offender is convicted of a Class B1, B2, C, D, or E felony offense and receives a sentence of imprisonment, then the court may decline to impose post-release supervision if it makes a finding of facts which indicates post-release supervision would not be necessary in that case. If an offender is convicted of a Class B1 felony offense and receives a sentence of life imprisonment without parole, then post-release supervision shall not be imposed.

(c) If the court imposes an intermediate punishment on an offender who is required to receive post-release supervision under subsection (a) of this section, then the period of post-release supervision is suspended.

(d) Provisions of Article 84A of this Chapter apply to judgments entered pursuant to this section."

SECTION 5. G.S. 15A-1342(c) reads as rewritten:

"(c) Conditions; Suspended Sentence. – When the court places a convicted offender on probation, it must determine conditions of probation as provided in G.S. 15A-1343. In addition, it must impose a suspended sentence of imprisonment, determined as provided in Article 83, Imprisonment, which may be activated upon violation of conditions of probation. Suspension of a term of imprisonment also suspends any period of post-release supervision that may be imposed for that offense."

SECTION 6. G.S. 15A-1344(d) reads as rewritten:

"(d) Extension and Modification; Response to Violations. – At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation. The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence and any period of post-release supervision imposed at the time of initial sentencing, if any, or may order that charges as to which prosecution has been deferred be brought to trial; provided that probation may not be revoked solely for conviction of a Class 3 misdemeanor. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence, but the reduction shall be consistent with subsection (d1) of this section. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period."

SECTION 7. G.S. 15A-1354 reads as rewritten:

"**§ 15A-1354. Concurrent and consecutive terms of imprisonment.**

(a) Authority of Court. – When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

(b) Effect of Consecutive Terms. – In determining the effect of consecutive sentences imposed under authority of this Article and the manner in which they will be served, the Department of Correction must treat the defendant as though he has been committed for a single term with the following incidents:

(1) The maximum prison sentence consists of the total of the maximum terms of the consecutive ~~sentences, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies; and~~ sentences; and

(2) The minimum term consists of the total of the minimum terms of the consecutive sentences.

(c) Post-Release Supervision. – When multiple periods of post-release supervision are imposed on a person, either at the same time or in addition to existing

periods of supervision, the periods of post-release supervision are consolidated to run as a single period and begin at the conclusion of all terms of imprisonment."

SECTION 8. G.S. 15A-1368(a) reads as rewritten:

"(a) The following words have the listed meaning in this Article:

(1) Post-release supervision or supervision. – The time for which a sentenced prisoner is ~~released from prison before~~ supervised in the community following the termination of ~~his~~ the prisoner's maximum prison term, controlled by the rules and conditions of this Article. Purposes of post-release supervision include all or any of the following: to monitor and control the prisoner in the community, to assist the prisoner in reintegrating into society, to collect restitution and other court indebtedness from the prisoner, and to continue the prisoner's treatment or education.

(2) Supervisee. – A person released from incarceration and in the custody of the Department of Correction and Post-Release Supervision and Parole Commission on post-release supervision.

(3) Commission. – The Post-Release Supervision and Parole Commission, whose general authority is described in G.S. 143B-266.

(4) Minimum imposed term. – The minimum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive imprisonment terms, the minimum imposed term, for purposes of this Article, is the sum of all minimum terms imposed in the court judgment.

(5) Maximum imposed term. – The maximum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive prison terms, the maximum imposed term, for purposes of this Article, is the sum of all maximum terms imposed in the court judgment or ~~judgments, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies.~~ judgments."

SECTION 9. G.S. 15A-1368.1 reads as rewritten:

"**§ 15A-1368.1. Applicability of Article 84A.**

This Article applies to all felons in Class B1 through Class E sentenced to an active punishment under Article 81B of this ~~Chapter,~~ Chapter or G.S. 90-95(h), but does not apply to felons in Class B1 sentenced to life imprisonment without parole. Prisoners subject to Articles 85 and 85A of this Chapter are excluded from this Article's coverage."

SECTION 10. G.S. 15A-1368.2 reads as rewritten:

"**§ 15A-1368.2. Post-release supervision eligibility and procedure.**

(a) A prisoner to whom this Article applies shall be released from prison for post-release supervision on the date equivalent to his maximum imposed prison term ~~less nine months,~~ less any earned time awarded by the Department of Correction or the custodian of a local confinement facility under G.S. 15A-1340.13(d). If a prisoner has

not been awarded any earned time, the prisoner shall be released for post-release supervision on the date equivalent to his maximum prison ~~term less nine months.~~term.

(b) A prisoner shall not refuse post-release supervision.

(c) A supervisee's period of post-release supervision shall be for a period of nine months, unless the offense is ~~an~~ a Class B1 through E offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years. The conditions of post-release supervision are as authorized in G.S. ~~15A-1368.5.~~15A-1368.4.

~~(d) A supervisee's period of post-release supervision may be reduced while the supervisee is under supervision by earned time awarded by the Department of Correction, pursuant to rules adopted in accordance with law. A supervisee is eligible to receive earned time credit toward the period of supervision for compliance with reintegrative conditions described in G.S. 15A-1368.5.~~

(e) Repealed by Session Laws 1997-237, s. 7.

(f) When a supervisee completes the period of post-release supervision, the sentence or sentences from which the supervisee was placed on post-release supervision are terminated."

SECTION 11. G.S. 15A-1368.3 reads as rewritten:

"**§ 15A-1368.3. Incidents of post-release supervision.**

(a) Conditionality. – Post-release supervision is conditional and subject to revocation.

(b) Modification. – The Commission may for good cause shown modify the conditions of post-release supervision at any time before the termination of the supervision period.

(c) Effect of Violation. – If the supervisee violates a condition, described in G.S. 15A-1368.4, at any time before the termination of the supervision period, the Commission may continue the supervisee on the existing supervision, with or without modifying the ~~conditions, or~~ conditions. If the supervisee violates a controlling condition described in G.S. 15A-1368.4(b), (b1), (e), or (e2), and if continuation or modification is not appropriate, the Commission may revoke post-release supervision as provided in G.S. 15A-1368.6 and reimprison the supervisee for a term consistent with the following requirements:

(1) The supervisee will be returned to prison ~~up to the time remaining on his maximum imposed term.~~ for a minimum term of seven months and a maximum term of nine months.

(2) The supervisee shall not receive any credit for days on post-release supervision against the maximum term of imprisonment imposed by the court under G.S. 15A-1340.13.

(3) Pursuant to Article 19A of Chapter 15, the Department of Correction shall award a prisoner credit against any term of reimprisonment for all time spent in custody as a result of revocation proceedings under G.S. 15A-1368.6.

(4) The prisoner is eligible to receive earned time credit against the maximum prison term as provided in G.S. 15A-1340.13(d) for time served in prison after the revocation.

(d) No Re-Release After Revocation of Post-Release Supervision. – A prisoner who has been reimprisoned prior to completing a post-release supervision period may ~~again~~ not be released again on post-release supervision by the ~~Commission subject to the provisions which govern initial release.~~Commission.

(e) Timing of Revocation. – The Commission may revoke post-release supervision for violation of a controlling condition during the period of supervision. The Commission may also revoke post-release supervision following a period of supervision if:

(1) Before the expiration of the period of post-release supervision, the Commission has recorded its intent to conduct a revocation hearing; and

(2) The Commission finds that every reasonable effort has been made to notify the supervisee and conduct the hearing earlier. Prima facie evidence of reasonable effort to notify is the issuance of a temporary or conditional revocation order, as provided in G.S. 15A-1376, that goes unserved."

SECTION 12. G.S. 15A-1368.4 reads as rewritten:

"**§ 15A-1368.4. Conditions of post-release supervision.**

(a) In General. – Conditions of post-release supervision may be reintegrative in nature or designed to control the supervisee's behavior and to enforce compliance with law or judicial order. A supervisee may have his supervision period revoked for any violation of a controlling ~~condition or for repeated violation of a reintegrative condition. Compliance with reintegrative conditions may entitle a supervisee to earned time credits as described in G.S. 15A-1368.2(d).~~condition.

(b) Required Condition. – The Commission shall provide as an express condition of every release that the supervisee not commit another crime during the period for which the supervisee remains subject to revocation. A supervisee's failure to comply with this controlling condition is a supervision violation for which the supervisee may face revocation as provided in G.S. 15A-1368.3.

(b1) Additional Required Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. – In addition to the required condition set forth in subsection (b) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, controlling conditions, violations of which may result in revocation of post-release supervision, are:

(1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).

(2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the Commission.

(3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.

(4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.

(5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless ~~a court of competent jurisdiction~~ the Post-Release Supervision and Parole Commission expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the child's best interest to allow the supervisee to reside in the same household with a minor child.

(c) Discretionary Conditions. – The Commission, in consultation with the Division of Community Corrections, may impose reintegrative or controlling conditions on a supervisee it believes reasonably necessary to ensure that the supervisee will lead a law-abiding life or to assist the supervisee to do so.

(d) Reintegrative Conditions. – Appropriate reintegrative ~~conditions, for which a supervisee may receive earned time credits against the length of the supervision period, and repeated violation that may result in revocation of post-release supervision, are:~~conditions are:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip the supervisee for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on post-release supervision.

(4) Support the supervisee's dependents and meet other family responsibilities.

(5) In the case of a supervisee who attended a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(6) Satisfy other conditions reasonably related to reintegration into society.

(e) Controlling Conditions. – Appropriate controlling conditions, violation of which may result in revocation of post-release supervision, are:

(1) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the supervisee by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

(2) Comply with a court order to pay the costs of reintegrative treatment for a minor and a minor's parents or custodians where the offense involved evidence of physical, mental, or sexual abuse of a minor.

(3) Comply with a court order to pay court costs and costs for appointed counsel or public defender in the case for which the supervisee was convicted.

(4) Not possess a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or a post-release supervision officer.

(5) Report to a post-release supervision officer at reasonable times and in a reasonable manner, as directed by the Commission or a post-release supervision officer.

(6) Permit a post-release supervision officer to visit at reasonable times at the supervisee's home or elsewhere.

(7) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the post-release supervision officer.

(8) Answer all reasonable inquiries by the post-release supervision officer and obtain prior approval from the post-release supervision officer for any change in address or employment.

(9) Promptly notify the post-release supervision officer of any change in address or employment.

(10) Submit at reasonable times to searches of the supervisee's person by a post-release supervision officer for purposes reasonably related to the post-release supervision. The Commission shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the supervisee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(12) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the supervisee in connection with any judgment rendered by the court.

(13) Remain in one or more specified places for a specified period or periods each day, and wear a device that permits the defendant's compliance with the condition to be monitored electronically.

(14) Submit to supervision by officers assigned to the Intensive Post-Release Supervision Program established pursuant to G.S. 143B-262(c), and abide by the rules adopted for that Program.

(e1) Prohibited Conditions. – The Commission shall not impose community service as a condition of post-release supervision.

(e2) Additional Discretionary Controlling Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. – In addition to the discretionary conditions set forth in subsections (d) and (e) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, appropriate discretionary controlling conditions, violations of which may result in revocation of post-release supervision, are that the offender:

(1) Reside at a residence to be approved by the supervising officer.

(2) Not have contact with the victim including, but not limited to, letters, phone calls, tapes, videos, computer, Internet, or visits. This includes any form of direct contact, or any form of contact through a third party.

(3) Not socialize or communicate with individuals under the age of 18 in work or social activities unless accompanied by a responsible adult who is aware of the abusive patterns and is approved in writing by the supervising officer.

(4) Submit to psychological and psychophysiological assessment at the direction of the supervising officer to assist in treatment planning and case monitoring.

(5) Participate in a sexual abuse treatment program approved by the supervising officer and complete the same to the full satisfaction of the treatment provider. Comply with all programs, including the polygraph examinations, to be used as a tool in conjunction with the treatment plan developed by the treatment provider. Program participation is defined as attendance at all meetings, prompt payment of fees, admission of responsibility for his or her offense, and progress toward reasonable treatment goals.

(6) Pay for the victims' mental health counseling expenses that are incurred as a result of the crime or offense as ordered by the court.

(7) Not possess any sexually stimulating or sexually oriented materials as deemed inappropriate by the supervising officer, nor patronize any place where such material or entertainment is the primary business.

(8) Not use, possess, control, distribute, sell, exchange, or collect pornography or child erotica, including any obtained through Internet access or telephonic communications.

(9) Submit at reasonable times to warrantless searches and seizures by the supervising officer of his person, vehicle, premises, computer equipment, and telephone records while he is present for the purposes of detecting or discovering pornography and/or erotica, which are reasonably related to his supervision.

(10) Not linger, loiter, nor spend time at locations where unsupervised persons under 18 years of age are present, including, but not limited to, parks, playgrounds, school yards, arcades, or places frequented by

children, activities, and such similar places whose purpose is the care, entertainment, or education of such persons under 18 years of age.

(11) Not work or volunteer for any business or organization that provides services to or employs persons under 18 years of age. This includes, but is not limited to, arcades, babysitting, daycare agencies, schools, churches, playgrounds, and youth sporting activities or groups. The supervising officer must approve employment.

(12) Not associate with or have any contact with convicted sex offenders unless in a counseling group.

(13) When given authorization to visit another jurisdiction, present a travel letter to the local police department, have it signed, and return it to the supervising officer.

(14) Not purchase, possess, or consume alcoholic beverages or controlled substances. Submit to blood, breath, and urine testing for analysis for the presence of prohibited drugs or alcohol as requested by the supervising officer and pay any fees associated with testing.

(15) Not be alone with any minor child below the age of 18 years unless approved by his or her supervising officer in writing.

(16) Not engage in any sexual behavior with any minor child below the age of 18 years of age.

(17) Abide by a curfew at the discretion of the supervising officer.

(f) Required Supervision Fee. – The Commission shall require as a condition of post-release supervision that the supervisee pay a supervision fee of thirty dollars ($30.00) per month. The Commission may exempt a supervisee from this condition only if it finds that requiring payment of the fee is an undue economic burden. The fee shall be paid to the clerk of superior court of the county in which the supervisee was convicted. The clerk shall transmit any money collected pursuant to this subsection to the State to be deposited in the State's General Fund. In no event shall a supervisee be required to pay more than one supervision fee per month."

SECTION 13. G.S. 90-95(h) reads as rewritten:

"(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 50 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42

months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of

a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(3a) Repealed by Session Laws 1999-370, s. 1, effective December 1, 1999.

(3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or amphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine or amphetamine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of ~~117~~108 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of ~~279~~270 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium

or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of ~~117~~108 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of ~~279~~270 months in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethylamide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more dosage units, or equivalent quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(4b) Any person who sells, manufactures, delivers, transports, or possesses 100 or more tablets, capsules, or other dosage units, or 28 grams or more of 3,4-methylenedioxyamphetamine (MDA), including its salts, isomers, and salts of isomers, or 3,4-methylenedioxymethamphetamine

(MDMA), including its salts, isomers, and salts of isomers, or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in MDA/MDMA." If the quantity of the substance or mixture involved:

a. Is 100 or more tablets, capsules, or other dosage units, but less than 500 tablets, capsules, or other dosage units, or 28 grams or more, but less than 200 grams, the person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more tablets, capsules, or other dosage units, but less than 1,000 tablets, capsules, or other dosage units, or 200 grams or more, but less than 400 grams, the person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more tablets, capsules, or other dosage units, or 400 grams or more, the person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined not less than two hundred fifty thousand dollars ($250,000).

(5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section."

SECTION 14. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 574
PROPOSED COMMITTEE SUBSTITUTE S574-CSRH-13 [v.6]

5/16/2005 5:20:45 PM

Short Title: Amend Post-Release Supervision Laws. (Public)

Sponsors:

Referred to:

March 16, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE STRUCTURED SENTENCING LAWS WITH REGARD TO POST-RELEASE SUPERVISION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 5-11(a)(9a) reads as rewritten:

"(a) Except as provided in subsection ~~(b),~~ (b) of this section, each of the following is criminal contempt:

...

(9a) Willful refusal by a defendant to comply with a condition of post-release supervision or probation.

..."

SECTION 2. G.S. 15A-1340.11 is amended by adding a new subdivision to read:

"(6a) Post-release supervision. – The time for which a sentenced prisoner is supervised in the community following the termination of the prisoner's maximum prison term, controlled by the rules and conditions of Article 84A of this Chapter."

SECTION 3. G.S. 15A-1340.13(b) reads as rewritten:

"(b) Procedure Generally; Requirements of Judgment; Kinds of Sentences. – Before imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14. The sentence shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified for the class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment. For Class B1, B2, C, D, and E felony offenses, the sentence shall include a term of post-release supervision under G.S. 15A-1340.18. The kinds of sentence dispositions are active punishment, intermediate punishment, and community punishment."

SECTION 4. G.S. 15A-1340.17 reads as rewritten:

"**§ 15A-1340.17. Punishment limits for each class of offense and prior record level.**

(a) Offense Classification; Default Classifications. – The offense classification is as specified in the offense for which the sentence is being imposed. If the offense is a felony for which there is no classification, it is a Class I felony.

(b) Fines. – Any judgment that includes a sentence of imprisonment may also include a fine. If a community punishment is authorized, the judgment may consist of a fine only. Additionally, when the defendant is other than an individual, the judgment may consist of a fine only. Unless otherwise provided, the amount of the fine is in the discretion of the court.

(c) Punishments for Each Class of Offense and Prior Record Level; Punishment Chart Described. – The authorized punishment for each class of offense and prior record level is as specified in the chart ~~below.~~ below and under G.S. 15A-1340.18. Prior record levels are indicated by the Roman numerals placed horizontally on the top of the chart. Classes of offense are indicated by the letters placed vertically on the left side of the chart. Each cell on the chart contains the following components:

(1) A sentence disposition or dispositions: "C" indicates that a community punishment is authorized; "I" indicates that an intermediate punishment is authorized; "A" indicates that an active punishment is authorized; and "Life Imprisonment Without Parole" indicates that the defendant shall be imprisoned for the remainder of the prisoner's natural life.

(2) A presumptive range of minimum durations, if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in that range is permitted unless the court finds pursuant to G.S. 15A-1340.16 that an aggravated or mitigated sentence is appropriate. The presumptive range is the middle of the three ranges in the cell.

(3) A mitigated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that a mitigated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the mitigated range is permitted. The mitigated range is the lower of the three ranges in the cell.

(4) An aggravated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that an aggravated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the aggravated range is permitted. The aggravated range is the higher of the three ranges in the cell.

PRIOR RECORD LEVEL

	I	II	III	IV	V	VI
	0 Pts	1-4 Pts	5-8 Pts	9-14 Pts	15-18 Pts	19+ Pts
A	Life Imprisonment Without Parole or Death as Established by Statute					

	A	A	A	A	A	A	DISPOSITION
	240-300	288-360	336-420	384-480	Life Imprisonment Without Parole		Aggravated
B1	192-240	230-288	269-336	307-384	346-433	384-480	PRESUMPTIVE
	144-192	173-230	202-269	230-307	260-346	288-384	Mitigated
	A	A	A	A	A	A	DISPOSITION
	157-196	189-237	220-276	251-313	282-353	313-392	Aggravated
B2	125-157	151-189	176-220	201-251	225-282	251-313	PRESUMPTIVE
	94-125	114-151	132-176	151-201	169-225	188-251	Mitigated
	A	A	A	A	A	A	DISPOSITION
	73-92	100-125	116-145	133-167	151-188	168-210	Aggravated
C	58-73	80-100	93-116	107-133	121-151	135-168	PRESUMPTIVE
	44-58	60-80	70-93	80-107	90-121	101-135	Mitigated
	A	A	A	A	A	A	DISPOSITION
	64-80	77-95	103-129	117-146	133-167	146-183	Aggravated
D	51-64	61-77	82-103	94-117	107-133	117-146	PRESUMPTIVE
	38-51	46-61	61-82	71-94	80-107	88-117	Mitigated
	I/A	I/A	A	A	A	A	DISPOSITION
	25-31	29-36	34-42	46-58	53-66	59-74	Aggravated
E	20-25	23-29	27-34	37-46	42-53	47-59	PRESUMPTIVE
	15-20	17-23	20-27	28-37	32-42	35-47	Mitigated
	I/A	I/A	I/A	A	A	A	DISPOSITION
	16-20	19-24	21-26	25-31	34-42	39-49	Aggravated
F	13-16	15-19	17-21	20-25	27-34	31-39	PRESUMPTIVE
	10-13	11-15	13-17	15-20	20-27	23-31	Mitigated
	I/A	I/A	I/A	I/A	A	A	DISPOSITION
	13-16	15-19	16-20	20-25	21-26	29-36	Aggravated
G	10-13	12-15	13-16	16-20	17-21	23-29	PRESUMPTIVE
	8-10	9-12	10-13	12-16	13-17	17-23	Mitigated
	C/I/A	I/A	I/A	I/A	I/A	A	DISPOSITION
	6-8	8-10	10-12	11-14	15-19	20-25	Aggravated
H	5-6	6-8	8-10	9-11	12-15	16-20	PRESUMPTIVE
	4-5	4-6	6-8	7-9	9-12	12-16	Mitigated
	C	C/I	I	I/A	I/A	I/A	DISPOSITION
	6-8	6-8	6-8	8-10	9-11	10-12	Aggravated
I	4-6	4-6	5-6	6-8	7-9	8-10	PRESUMPTIVE
	3-4	3-4	4-5	4-6	5-7	6-8	Mitigated

(d) Maximum Sentences Specified for ~~Class F through Class I Felonies.~~ Class B1 Felonies Through Class I Felonies for Minimum Terms up to 346 Months. – Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class ~~F~~ B1 through Class I felonies. The

first figure in each cell in the table is the minimum term and the second is the maximum term.

3-4	4-5	5-6	6-8	7-9	8-10	9-11	10-12
11-14	12-15	13-16	14-17	15-18	16-20	17-21	18-22
19-23	20-24	21-26	22-27	23-28	24-29	25-30	26-32
27-33	28-34	29-35	30-36	31-38	32-39	33-40	34-41
35-42	36-44	37-45	38-46	39-47	40-48	41-50	42-51
43-52	44-53	45-54	46-56	47-57	48-58	49-59	50-60
51-61	52-62	53-64	54-65	55-66	56-67	57-68	58-70
59-71	60-72	61-73	62-74	63-76	64-77	65-78	66-79
67-80	68-82	69-83	70-84	71-85	72-86	73-88	74-89
75-90	76-91	77-92	78-94	79-95	80-96	81-97	82-98
83-100	84-101	85-102	86-103	87-104	88-106	89-107	90-108
91-109	92-110	93-112	94-113	95-114	96-115	97-116	98-118
99-119	100-120	101-121	102-122	103-124	104-125	105-126	106-127
107-128	108-130	109-131	110-132	111-133	112-134	113-136	114-137
115-138	116-139	117-140	118-142	119-143	120-144	121-145	122-146
123-148	124-149	125-150	126-151	127-152	128-154	129-155	130-156
131-157	132-158	133-160	134-161	135-162	136-163	137-164	138-166
139-167	140-168	141-169	142-170	143-172	144-173	145-174	146-175
147-176	148-178	149-179	150-180	151-181	152-182	153-184	154-185
155-186	156-187	157-188	158-190	159-191	160-192	161-193	162-194
163-196	164-197	165-198	166-199	167-200	168-202	169-203	170-204
171-205	172-206	173-208	174-209	175-210	176-211	177-212	178-214
179-215	180-216	181-217	182-218	183-220	184-221	185-222	186-223
187-224	188-226	189-227	190-228	191-229	192-230	193-232	194-233
195-234	196-235	197-236	198-238	199-239	200-240	201-241	202-242
203-244	204-245	205-246	206-247	207-248	208-250	209-251	210-252
211-253	212-254	213-256	214-257	215-258	216-259	217-260	218-262
219-263	220-264	221-265	222-266	223-268	224-269	225-270	226-271
227-272	228-274	229-275	230-276	231-277	232-278	233-280	234-281
235-282	236-283	237-284	238-286	239-287	240-288	241-289	242-290
243-292	244-293	245-294	246-295	247-296	248-298	249-299	250-300
251-301	252-302	253-304	254-305	255-306	256-307	257-308	258-310
259-311	260-312	261-313	262-314	263-316	264-317	265-318	266-319
267-320	268-322	269-323	270-324	271-325	272-326	273-328	274-329
275-330	276-331	277-332	278-334	279-335	280-336	281-337	282-338
283-340	284-341	285-342	286-343	287-344	288-346	289-347	290-348
291-349	292-350	293-352	294-353	295-354	296-355	297-356	298-358
299-359	300-360	301-361	302-362	303-364	304-365	305-366	306-367
307-368	308-370	309-371	310-372	311-373	312-374	313-376	314-377
315-378	316-379	317-380	318-382	319-383	320-384	321-385	322-386
323-388	324-389	325-390	326-391	327-392	328-394	329-395	330-396

331-397	332-398	333-400	334-401	335-402	336-403	337-404	338-406
339-407	340-408	341-409	342-410	343-412	344-413	345-414	346-415

~~(e) Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms up to 339 Months. Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class B1 through Class E felonies. The first figure in each cell of the table is the minimum term and the second is the maximum term.~~

~~15-27~~	~~16-29~~	~~17-30~~	~~18-31~~	~~19-32~~	~~20-33~~	~~21-35~~	~~22-36~~
~~23-37~~	~~24-38~~	~~25-39~~	~~26-41~~	~~27-42~~	~~28-43~~	~~29-44~~	~~30-45~~
~~31-47~~	~~32-48~~	~~33-49~~	~~34-50~~	~~35-51~~	~~36-53~~	~~37-54~~	~~38-55~~
~~39-56~~	~~40-57~~	~~41-59~~	~~42-60~~	~~43-61~~	~~44-62~~	~~45-63~~	~~46-65~~
~~47-66~~	~~48-67~~	~~49-68~~	~~50-69~~	~~51-71~~	~~52-72~~	~~53-73~~	~~54-74~~
~~55-75~~	~~56-77~~	~~57-78~~	~~58-79~~	~~59-80~~	~~60-81~~	~~61-83~~	~~62-84~~
~~63-85~~	~~64-86~~	~~65-87~~	~~66-89~~	~~67-90~~	~~68-91~~	~~69-92~~	~~70-93~~
~~71-95~~	~~72-96~~	~~73-97~~	~~74-98~~	~~75-99~~	~~76-101~~	~~77-102~~	~~78-103~~
~~79-104~~	~~80-105~~	~~81-107~~	~~82-108~~	~~83-109~~	~~84-110~~	~~85-111~~	~~86-113~~
~~87-114~~	~~88-115~~	~~89-116~~	~~90-117~~	~~91-119~~	~~92-120~~	~~93-121~~	~~94-122~~
~~95-123~~	~~96-125~~	~~97-126~~	~~98-127~~	~~99-128~~	~~100-129~~	~~101-131~~	~~102-132~~
~~103-133~~	~~104-134~~	~~105-135~~	~~106-137~~	~~107-138~~	~~108-139~~	~~109-140~~	~~110-141~~
~~111-143~~	~~112-144~~	~~113-145~~	~~114-146~~	~~115-147~~	~~116-149~~	~~117-150~~	~~118-151~~
~~119-152~~	~~120-153~~	~~121-155~~	~~122-156~~	~~123-157~~	~~124-158~~	~~125-159~~	~~126-161~~
~~127-162~~	~~128-163~~	~~129-164~~	~~130-165~~	~~131-167~~	~~132-168~~	~~133-169~~	~~134-170~~
~~135-171~~	~~136-173~~	~~137-174~~	~~138-175~~	~~139-176~~	~~140-177~~	~~141-179~~	~~142-180~~
~~143-181~~	~~144-182~~	~~145-183~~	~~146-185~~	~~147-186~~	~~148-187~~	~~149-188~~	~~150-189~~
~~151-191~~	~~152-192~~	~~153-193~~	~~154-194~~	~~155-195~~	~~156-197~~	~~157-198~~	~~158-199~~
~~159-200~~	~~160-201~~	~~161-203~~	~~162-204~~	~~163-205~~	~~164-206~~	~~165-207~~	~~166-209~~
~~167-210~~	~~168-211~~	~~169-212~~	~~170-213~~	~~171-215~~	~~172-216~~	~~173-217~~	~~174-218~~
~~175-219~~	~~176-221~~	~~177-222~~	~~178-223~~	~~179-224~~	~~180-225~~	~~181-227~~	~~182-228~~
~~183-229~~	~~184-230~~	~~185-231~~	~~186-233~~	~~187-234~~	~~188-235~~	~~189-236~~	~~190-237~~
~~191-239~~	~~192-240~~	~~193-241~~	~~194-242~~	~~195-243~~	~~196-245~~	~~197-246~~	~~198-247~~
~~199-248~~	~~200-249~~	~~201-251~~	~~202-252~~	~~203-253~~	~~204-254~~	~~205-255~~	~~206-257~~
~~207-258~~	~~208-259~~	~~209-260~~	~~210-261~~	~~211-263~~	~~212-264~~	~~213-265~~	~~214-266~~
~~215-267~~	~~216-269~~	~~217-270~~	~~218-271~~	~~219-272~~	~~220-273~~	~~221-275~~	~~222-276~~
~~223-277~~	~~224-278~~	~~225-279~~	~~226-281~~	~~227-282~~	~~228-283~~	~~229-284~~	~~230-285~~
~~231-287~~	~~232-288~~	~~233-289~~	~~234-290~~	~~235-291~~	~~236-293~~	~~237-294~~	~~238-295~~
~~239-296~~	~~240-297~~	~~241-299~~	~~242-300~~	~~243-301~~	~~244-302~~	~~245-303~~	~~246-305~~
~~247-306~~	~~248-307~~	~~249-308~~	~~250-309~~	~~251-311~~	~~252-312~~	~~253-313~~	~~254-314~~
~~255-315~~	~~256-317~~	~~257-318~~	~~258-319~~	~~259-320~~	~~260-321~~	~~261-323~~	~~262-324~~
~~263-325~~	~~264-326~~	~~265-327~~	~~266-329~~	~~267-330~~	~~268-331~~	~~269-332~~	~~270-333~~
~~271-335~~	~~272-336~~	~~273-337~~	~~274-338~~	~~275-339~~	~~276-341~~	~~277-342~~	~~278-343~~

~~279-344 280-345 281-347 282-348 283-349 284-350 285-351 286-353~~
~~287-354 288-355 289-356 290-357 291-359 292-360 293-361 294-362~~
~~295-363 296-365 297-366 298-367 299-368 300-369 301-371 302-372~~
~~303-373 304-374 305-375 306-377 307-378 308-379 309-380 310-381~~
~~311-383 312-384 313-385 314-386 315-387 316-389 317-390 318-391~~
~~319-392 320-393 321-395 322-396 323-397 324-398 325-399 326-401~~
~~327-402 328-403 329-404 330-405 331-407 332-408 333-409 334-410~~
~~335-411 336-413 337-414 338-415 339-416~~

(e1) Maximum Sentences Specified for Class B1 ~~through~~ through Class ~~E~~ I Felonies for Minimum Terms of ~~340~~347 Months or More. – Unless provided otherwise in a statute establishing a punishment for a specific crime, when the minimum sentence is ~~340~~347 months or more, the corresponding maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest ~~month, plus nine additional months.~~ month."

SECTION 5. Article 81B of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-1340.18. Post-release supervision.**

(a) Except as provided in subsection (b) of this section, the court also must impose a term of post-release supervision to follow the term of imprisonment and an additional term of imprisonment to be served upon an initial revocation of the term of post-release supervision on all offenders convicted of a Class B1, B2, C, D, or E felony offense. The term of supervision and the term of imprisonment are as follows:

(1) Term of supervision. – The term of post-release supervision is nine months, unless the offense is a Class B1 through E offense for which registration is required under Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the term of post-release supervision is five years.

(2) Term of imprisonment. –The term of imprisonment upon an initial revocation of post-release supervision is for a minimum term of seven months and a maximum term of nine months.

(b) If an offender is convicted of a Class B1, B2, C, D, or E felony offense and receives a sentence of imprisonment, then the court may decline to impose post-release supervision if it makes a finding of facts that indicates post-release supervision would not be necessary in that case. If an offender is convicted of a Class B1 felony offense and receives a sentence of life imprisonment without parole, then post-release supervision shall not be imposed.

(c) If the court imposes an intermediate punishment on an offender who is required to receive post-release supervision under subsection (a) of this section, then the term of post-release supervision is suspended.

(d) Article 84A of this Chapter applies to judgments entered under this section."

SECTION 6. G.S. 15A-1342(c) reads as rewritten:

"(c) Conditions; Suspended Sentence. – When the court places a convicted offender on probation, it must determine conditions of probation as provided in G.S. 15A-1343. In addition, it must impose a suspended sentence of imprisonment, determined as provided in Article ~~83, Imprisonment,~~ 83 of this Chapter, which may be activated upon violation of conditions of probation. Suspension of a term of imprisonment also suspends any term of post-release supervision that may be imposed for that offense."

SECTION 7. G.S. 15A-1344(d) reads as rewritten:

"(d) Extension and Modification; Response to Violations. – At any time ~~prior to~~ before the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The probation period shall be tolled if there is pending against the probationer ~~shall have pending against him~~ criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against ~~him~~ the probationer for violation of the terms of this probation. The hearing may be held in the absence of the defendant, if ~~he~~ the defendant fails to appear for the hearing after a reasonable effort to notify ~~him.~~ the defendant. If a convicted defendant violates a condition of probation at any time ~~prior to~~ before the expiration or termination of the period of probation, the court, in accordance with ~~the provisions of~~ G.S. 15A-1345, may continue ~~him~~ the defendant on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection ~~(e),~~ (e) of this section, or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence and any term of post-release supervision imposed at the time of initial sentencing, if any, or may order that charges as to which prosecution has been deferred be brought to trial; provided that probation may not be revoked solely for conviction of a Class 3 misdemeanor. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence, but the reduction shall be consistent with subsection (d1) of this section. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period."

SECTION 8. G.S. 15A-1354 reads as rewritten:

"**§ 15A-1354. Concurrent and consecutive terms of imprisonment.**

(a) Authority of Court. – When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

(b) Effect of Consecutive Terms. – In determining the effect of consecutive sentences imposed under authority of this Article and the manner in which they will be

served, the Department of Correction must treat the defendant as though ~~he~~ the defendant has been committed for a single term with the following incidents:

(1) The maximum prison sentence consists of the total of the maximum terms of the consecutive ~~sentences, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies; and~~ sentences; and

(2) The minimum term consists of the total of the minimum terms of the consecutive sentences.

(c) Post-Release Supervision. – When multiple terms of post-release supervision are imposed on a person, either at the same time or in addition to existing terms of supervision, the terms of post-release supervision are consolidated to run as a single term and begin at the conclusion of all terms of imprisonment."

SECTION 9. G.S. 15A-1368(a) reads as rewritten:

"(a) The following words have the listed meaning in this Article:

(1) Post-release supervision or supervision. – The time for which a sentenced prisoner is ~~released from prison before~~ supervised in the community following the termination of ~~his~~ the prisoner's maximum prison term, controlled by the rules and conditions of this Article. Purposes of post-release supervision include all or any of the following: to monitor and control the prisoner in the community, to assist the prisoner in reintegrating into society, to collect restitution and other court indebtedness from the prisoner, and to continue the prisoner's treatment or education.

(2) Supervisee. – A person released from incarceration and in the custody of the Department of Correction and Post-Release Supervision and Parole Commission on post-release supervision.

(3) Commission. – The Post-Release Supervision and Parole Commission, whose general authority is described in G.S. 143B-266.

(4) Minimum imposed term. – The minimum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive imprisonment terms, the minimum imposed term, for purposes of this Article, is the sum of all minimum terms imposed in the court judgment.

(5) Maximum imposed term. – The maximum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive prison terms, the maximum imposed term, for purposes of this Article, is the sum of all maximum terms imposed in the court judgment or ~~judgments, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies.~~ judgments."

SECTION 10. G.S. 15A-1368.1 reads as rewritten:

"**§ 15A-1368.1. Applicability of Article 84A.**

This Article applies to all felons in Class B1 through Class E sentenced to an active punishment under Article 81B of this ~~Chapter,~~ Chapter or G.S. 90-95(h), but does not apply to felons in Class B1 sentenced to life imprisonment without parole. Prisoners subject to Articles 85 and 85A of this Chapter are excluded from this Article's coverage."

SECTION 11. G.S. 15A-1368.2 reads as rewritten:

"**§ 15A-1368.2. Post-release supervision eligibility and procedure.**

(a) A prisoner to whom this Article applies shall be released from prison for post-release supervision on the date equivalent to ~~his~~ that prisoner's maximum imposed prison term ~~less nine months,~~ less any earned time awarded by the Department of Correction or the custodian of a local confinement facility under G.S. 15A-1340.13(d). If a prisoner has not been awarded any earned time, the prisoner shall be released for post-release supervision on the date equivalent to ~~his~~ the prisoner's maximum prison ~~term less nine months.~~term.

(b) A prisoner shall not refuse post-release supervision.

(c) A supervisee's ~~period~~ term of post-release supervision shall be for ~~a period of~~ nine months, unless the offense is ~~an~~ a Class B1 through E offense for which registration is required ~~pursuant to~~ under Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the ~~period~~ term of post-release supervision is five years. The conditions of post-release supervision are as authorized in G.S. ~~15A-1368.5.~~15A-1368.4.

~~(d) A supervisee's period of post-release supervision may be reduced while the supervisee is under supervision by earned time awarded by the Department of Correction, pursuant to rules adopted in accordance with law. A supervisee is eligible to receive earned time credit toward the period of supervision for compliance with reintegrative conditions described in G.S. 15A-1368.5.~~

(e) Repealed by Session Laws 1997-237, s. 7.

(f) When a supervisee completes the ~~period~~ term of post-release supervision, the sentence or sentences from which the supervisee was placed on post-release supervision are terminated."

SECTION 12. G.S. 15A-1368.3(d) is amended by adding the following new subsection to read:

"(d) Re-Release After Initial Revocation of Post-Release Supervision. – A prisoner who ~~has been~~ is reimprisoned ~~prior to~~ before completing a post-release supervision period ~~may~~ of nine months shall not be released again on post-release supervision by the Commission. A prisoner who is reimprisoned under this subsection before completing a post-release supervision period of five years shall again be released on post release supervision by the Commission subject to subsection (d1) of this section and the provisions ~~which~~ that govern initial release.

(d1) Re-Release After Second or Subsequent Revocation of Post-Release Supervision. – A supervisee who is re-imprisoned following the first revocation of a five-year period of post-release supervision before completing that period of five years shall again be released on post-release supervision for the remainder of that period. If a

supervisee who is re-released willfully violates a condition of post-release supervision for a second or subsequent time, the superior court in the county where the supervisee resides may hold the supervisee in criminal contempt as provided in Article 1 of Chapter 5A of the General Statutes. A finding of criminal contempt by the court shall suspend the unserved period of post-release supervision during any period of confinement resulting from the finding of criminal contempt. If the supervisee serves a sentence for contempt in a local confinement facility, the Department of Correction shall pay for the confinement at the standard rate set by the General Assembly under G.S. 148-32.1(a) regardless of whether the supervisee would be eligible under the terms of G.S. 148-32.1(a)."

SECTION 13. G.S. 15A-1368.3, as amended by Section 12 of this act, reads as rewritten:

"**§ 15A-1368.3. Incidents of post-release supervision.**

(a) Conditionality. – Post-release supervision is conditional and subject to revocation.

(b) Modification. – The Commission may for good cause shown modify the conditions of post-release supervision at any time before the termination of the supervision ~~period.~~term.

(c) Effect of Violation. – If the supervisee violates a condition, described in G.S. 15A-1368.4, at any time before the termination of the supervision ~~period,~~ term, the Commission may continue the supervisee on the existing supervision, with or without modifying the ~~conditions, or~~ conditions. If the supervisee violates a controlling condition described in G.S. 15A-1368.4(b), (b1), (e), or (e2), and if continuation or modification is not appropriate, the Commission may revoke post-release supervision as provided in G.S. 15A-1368.6 and reimprison the supervisee for a term consistent with the following requirements:

(1) The supervisee will be returned to prison ~~up to the time remaining on his maximum imposed term.~~ for a minimum term of seven months and a maximum term of nine months.

(2) The supervisee shall not receive any credit for days on post-release supervision against the maximum term of imprisonment imposed by the court under G.S. 15A-1340.13.

(3) ~~Pursuant to~~ Under Article 19A of Chapter ~~15,~~ 15 of the General Statutes, the Department of Correction shall award a prisoner credit against any term of reimprisonment for all time spent in custody as a result of revocation proceedings under G.S. 15A-1368.6.

(4) The prisoner is eligible to receive earned time credit against the maximum prison term as provided in G.S. 15A-1340.13(d) for time served in prison after the revocation.

"(d) Re-Release After Initial Revocation of Post-Release Supervision. – A prisoner who is reimprisoned before completing a post-release supervision ~~period~~ term of nine months shall not be released again on post-release supervision by the Commission. A prisoner who is reimprisoned under this subsection before completing a post-release supervision ~~period~~ term of five years shall again be released on post release

supervision by the Commission subject to subsection (d1) of this section and the provisions that govern initial release.

(d1) Re-Release After Second or Subsequent Revocation of Post-Release Supervision. – A supervisee who is re-imprisoned following the first revocation of a five-year ~~period~~ term of post-release supervision before completing that ~~period~~ term of five years shall again be released on post-release supervision for the remainder of that ~~period.~~term. If a supervisee who is re-released willfully violates a condition of post-release supervision for a second or subsequent time, the superior court in the county where the supervisee resides may hold the supervisee in criminal contempt as provided in Article 1 of Chapter 5A of the General Statutes. A finding of criminal contempt by the court shall suspend the unserved ~~period~~ term of post-release supervision during any period of confinement resulting from the finding of criminal contempt. If the supervisee serves a sentence for contempt in a local confinement facility, the Department of Correction shall pay for the confinement at the standard rate set by the General Assembly under G.S. 148-32.1(a) regardless of whether the supervisee would be eligible under the terms of G.S. 148-32.1(a)."

(e) Timing of Revocation. – The Commission may revoke post-release supervision for violation of a controlling condition during the ~~period~~ term of supervision. The Commission may also revoke post-release supervision following a ~~period~~ term of supervision if:

(1) Before the expiration of the ~~period~~ term of post-release supervision, the Commission has recorded its intent to conduct a revocation hearing; and

(2) The Commission finds that every reasonable effort has been made to notify the supervisee and conduct the hearing earlier. Prima facie evidence of reasonable effort to notify is the issuance of a temporary or conditional revocation order, as provided in G.S. 15A-1376, that goes unserved."

SECTION 14. G.S. 15A-1368.4 reads as rewritten:

"**§ 15A-1368.4. Conditions of post-release supervision.**

(a) In General. – Conditions of post-release supervision may be reintegrative in nature or designed to control the supervisee's behavior and to enforce compliance with law or judicial order. A supervisee may have his supervision ~~period~~ term revoked for any violation of a controlling ~~condition or for repeated violation of a reintegrative condition. Compliance with reintegrative conditions may entitle a supervisee to earned time credits as described in G.S. 15A-1368.2(d).~~condition.

(b) Required Condition. – The Commission shall provide as an express condition of every release that the supervisee not commit another crime during the period for which the supervisee remains subject to revocation. A supervisee's failure to comply with this controlling condition is a supervision violation for which the supervisee may face revocation as provided in G.S. 15A-1368.3.

(b1) Additional Required Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. – In addition to the required condition set forth in subsection (b) of this section, for a supervisee who has

been convicted of an offense ~~which~~ that is a reportable conviction as defined in G.S. 14-208.6(4), or ~~which~~ that involves the physical, mental, or sexual abuse of a minor, controlling conditions, violations of which may result in revocation of post-release supervision, are:

(1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).

(2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the Commission.

(3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.

(4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.

(5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless ~~a court of competent jurisdiction~~ the Post-Release Supervision and Parole Commission expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the child's best interest to allow the supervisee to reside in the same household with a minor child.

(c) Discretionary Conditions. – The Commission, in consultation with the Division of Community Corrections, may impose reintegrative or controlling conditions on a supervisee it believes reasonably necessary to ensure that the supervisee will lead a law-abiding life or to assist the supervisee to do so.

(d) Reintegrative Conditions. – Appropriate reintegrative ~~conditions, for which a supervisee may receive earned time credits against the length of the supervision period, and repeated violation that may result in revocation of post-release supervision, are:~~conditions are:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip the supervisee for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on post-release supervision.

(4) Support the supervisee's dependents and meet other family responsibilities.

(5) In the case of a supervisee who attended a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(6) Satisfy other conditions reasonably related to reintegration into society.

(e) Controlling Conditions. – Appropriate controlling conditions, violation of which may result in revocation of post-release supervision, are:

(1) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the supervisee by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

(2) Comply with a court order to pay the costs of reintegrative treatment for a minor and a minor's parents or custodians where the offense involved evidence of physical, mental, or sexual abuse of a minor.

(3) Comply with a court order to pay court costs and costs for appointed counsel or public defender in the case for which the supervisee was convicted.

(4) Not possess a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or a post-release supervision officer.

(5) Report to a post-release supervision officer at reasonable times and in a reasonable manner, as directed by the Commission or a post-release supervision officer.

(6) Permit a post-release supervision officer to visit at reasonable times at the supervisee's home or elsewhere.

(7) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the post-release supervision officer.

(8) Answer all reasonable inquiries by the post-release supervision officer and obtain prior approval from the post-release supervision officer for any change in address or employment.

(9) Promptly notify the post-release supervision officer of any change in address or employment.

(10) Submit at reasonable times to searches of the supervisee's person by a post-release supervision officer for purposes reasonably related to the post-release supervision. The Commission shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the supervisee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(12) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the supervisee in connection with any judgment rendered by the court.

(13) Remain in one or more specified places for a specified period or periods each day, and wear a device that permits the defendant's compliance with the condition to be monitored electronically.

(14) Submit to supervision by officers assigned to the Intensive Post-Release Supervision Program established pursuant to G.S. 143B-262(c), and abide by the rules adopted for that Program.

(e1) Prohibited Conditions. – The Commission shall not impose community service as a condition of post-release supervision.

(e2) Additional Discretionary Controlling Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. – In addition to the discretionary conditions set forth in subsections (d) and (e) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, appropriate discretionary controlling conditions, violations of which may result in revocation of post-release supervision, are that the offender:

(1) Reside at a residence to be approved by the supervising officer.

(2) Not have contact with the victim including, but not limited to, letters, phone calls, tapes, videos, computer, Internet, or visits. This includes any form of direct contact, or any form of contact through a third party.

(3) Not socialize or communicate with individuals under the age of 18 in work or social activities unless accompanied by a responsible adult who is aware of the abusive patterns and is approved in writing by the supervising officer.

(4) Submit to psychological and psychophysiological assessment at the direction of the supervising officer to assist in treatment planning and case monitoring.

(5) Participate in a sexual abuse treatment program approved by the supervising officer and complete the same to the full satisfaction of the treatment provider. Comply with all programs, including the polygraph examinations, to be used as a tool in conjunction with the treatment plan developed by the treatment provider. Program participation is defined as attendance at all meetings, prompt payment of fees, admission of responsibility for his or her offense, and progress toward reasonable treatment goals.

(6) Pay for the victims' mental health counseling expenses that are incurred as a result of the crime or offense as ordered by the court.

(7) Not possess any sexually stimulating or sexually oriented materials as deemed inappropriate by the supervising officer, nor patronize any place where such material or entertainment is the primary business.

(8) Not use, possess, control, distribute, sell, exchange, or collect pornography or child erotica, including any obtained through Internet access or telephonic communications.

(9) Submit at reasonable times to warrantless searches and seizures by the supervising officer of the offender's person, vehicle, premises, computer equipment, and telephone records while the offender is present for the purposes of detecting or discovering pornography or erotica, or both, which are reasonably related to the offender's supervision.

(10) Not linger, loiter, nor spend time at locations where unsupervised persons under 18 years of age are present, including, but not limited to, parks, playgrounds, school yards, arcades, or places frequented by children, activities, and similar places whose purpose is the care, entertainment, or education of persons under 18 years of age.

(11) Not work or volunteer for any business or organization that provides services to or employs persons under 18 years of age. This includes, but is not limited to, arcades, babysitting, daycare agencies, schools, churches, playgrounds, and youth sporting activities or groups. The supervising officer must approve employment.

(12) Not associate with or have any contact with convicted sex offenders unless in a counseling group.

(13) When given authorization to visit another jurisdiction, present a travel letter to the local police department, have it signed, and return it to the supervising officer.

(14) Not purchase, possess, or consume alcoholic beverages or controlled substances. Submit to blood, breath, and urine testing for analysis for the presence of prohibited drugs or alcohol as requested by the supervising officer and pay any fees associated with testing.

(15) Not be alone with any minor child below the age of 18 years unless approved by his or her supervising officer in writing.

(16) Not engage in any sexual behavior with any minor child below the age of 18 years of age.

(17) Abide by a curfew at the discretion of the supervising officer.

(f) Required Supervision Fee. – The Commission shall require as a condition of post-release supervision that the supervisee pay a supervision fee of thirty dollars ($30.00) per month. The Commission may exempt a supervisee from this condition only if it finds that requiring payment of the fee is an undue economic burden. The fee shall be paid to the clerk of superior court of the county in which the supervisee was convicted. The clerk shall transmit any money collected pursuant to this subsection to the State to be deposited in the State's General Fund. In no event shall a supervisee be required to pay more than one supervision fee per month."

SECTION 15. G.S. 90-95(h) reads as rewritten:

"(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a

felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 50 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum

term of ~~219~~210 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(3a) Repealed by Session Laws 1999-370, s. 1, effective December 1, 1999.

(3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or amphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine or amphetamine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of ~~117~~108 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of ~~279~~270 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of ~~117~~108 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of ~~279~~270 months in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethylamide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more dosage units, or equivalent quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84

months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(4b) Any person who sells, manufactures, delivers, transports, or possesses 100 or more tablets, capsules, or other dosage units, or 28 grams or more of 3,4-methylenedioxyamphetamine (MDA), including its salts, isomers, and salts of isomers, or 3,4-methylenedioxymethamphetamine (MDMA), including its salts, isomers, and salts of isomers, or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in MDA/MDMA." If the quantity of the substance or mixture involved:

a. Is 100 or more tablets, capsules, or other dosage units, but less than 500 tablets, capsules, or other dosage units, or 28 grams or more, but less than 200 grams, the person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more tablets, capsules, or other dosage units, but less than 1,000 tablets, capsules, or other dosage units, or 200 grams or more, but less than 400 grams, the person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more tablets, capsules, or other dosage units, or 400 grams or more, the person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~210 months in the State's prison and shall be fined not less than two hundred fifty thousand dollars ($250,000).

(5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or

principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section."

SECTION 16. This section and sections 1 and 12 of this act become effective July 1, 2005, and apply to (i) violations of post-release supervision occurring on or after that date and (ii) sentences imposed on or after that date. The remainder of this act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

SENATE BILL 574:
Amend Post-Release Supervision Laws

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 16, 2005
Introduced by:	Sen. Hartsell	**Summary by:**	Robin Johnson
Version:	PCS to First Edition S574-CSRH-13[v.6]		Committee Counsel

SUMMARY: ***Senate Bill 574 would amend the laws related to Post-Release Supervision (PRS). The bill would delete from the Structured Sentencing charts the nine months of PRS included within the maximum sentences and would create PRS as a sanction that may be imposed at the judge's discretion and that is separate from the prison term.***

The Proposed Committee Substitute makes technical changes and would add provisions to clarify that registered sex offenders can be returned to post-release supervision following re-imprisonment resulting from revocation of their PRS. For subsequent violations of PRS, these offenders may be found in contempt of court.

CURRENT LAW:

Structured Sentencing – The maximum sentences for Class B1 through Class E felonies include nine months of PRS. The purpose of PRS is to monitor and control the offender in the community, to assist the offender's reintegration into society, to collect restitution and indebtedness owed by the offender, and to continue the offender's treatment and education.

Post-Release Supervision - Individuals convicted of a Class B1 through Class E felony are released from prison nine months prior to the maximum sentence imposed, less any earned time awarded. PRS lasts for nine months. It is possible for the period of PRS to be reduced by earned time during the period of supervision, but generally this does not happen.

PRS is conditional and subject to revocation. Violation of any condition may result in the modification or revocation of PRS. Upon a revocation of PRS, no matter when it occurs during the nine months, the supervisee is returned to prison to serve the remainder of the maximum sentence (nine months). This period may be reduced by earned time.

Certain Drug Trafficking Offenses – The maximum sentences for the following drug trafficking offenses include nine months of PRS: Marijuana (10,000 or more pounds); Methaqualone (10,000 or more dosage units); Cocaine (400 grams or more); Methamphetamine (200 grams or more); Opium or heroin (14 grams or more); LSD (1,000 or more dosage units); and MDA/MDMA (1,000 or more tablets).

Felony Sex Offenders – The maximum sentences for Class B1 through Class E felonies for sex offenders also includes nine months of PRS. These individuals also are released from prison nine months before the maximum sentence imposed, less any earned time awarded. However, if the individual is convicted of a sex offense that requires registration under the Sex Offender Registration Act, the actual period of PRS is five years. If PRS is revoked, then the offender is returned to prison to serve the remainder of the maximum sentence (i.e., nine months), at which time the offender is released and is no longer on PRS. (The law provides for a return to PRS, but is unclear how to address a subsequent violation of PRS.)

Criminal Contempt. – G.S. 5A-11 sets out the grounds for criminal contempt. Generally, a person who commits criminal contempt is subject to censure, imprisonment up to 30 days, a maximum fine of $500, or any combination of these.

BILL ANALYSIS:

Section 1 would amend G.S. 5-11(a)(9a) to add a willful violation of PRS as a grounds for criminal contempt.

Section 2 would amend the definitions of Article 81B of Chapter 15A (Structured Sentencing) to include "Post-release supervision". It would be defined as the time a prisoner is supervised in the community following the termination of the prisoner's maximum prison term.

Section 3 would amend G.S. 15A-1340.13(b) to require that when a judge is imposing a sentence under structured sentencing, the judge shall also include a period of post-release supervision if the offense is a Class B1 through Class E felony.

Section 4 would amend G.S. 15A-1340.17 (the structured sentencing chart) to make PRS a separate punishment, and to create a single table for calculating the maximum sentences for Class B1 through Class I felonies where the minimum term is less than 347 months.

Section 5 would create a new section (G.S. 15A-1340.18) relating to PRS under structured sentencing. Any person convicted of a Class B1, B2, C, D, or E felony could be required to participate in PRS. The minimum period of PRS would be seven months and the maximum period would be nine months, unless the offense is subject to the registration requirements of Article 27A of Chapter 14 (Sex Offenders Registration Program). If the period of PRS is revoked, the term of re-imprisonment would be a minimum term of seven months and a maximum of nine months. A court may decline to impose PRS if it makes a finding of facts that indicate that PRS would not be necessary in that case. PRS would not be imposed for an offender convicted of a Class B1 felony offense who receives a life sentence.

Section 6 would amend G.S. 15A-1342(c) to provide that if a court places an offender on probation, the period of PRS is also suspended.

Section 7 would amend G.S. 15A-1344(d) to provide that if an offender violates a condition of probation under a suspended sentence, the Post-Release Supervision and Parole Commission ("Commission") may activate the offender's prison sentence and any period of PRS.

Section 8 would amend G.S. 15A-1354 to provide that where a court imposes consecutive terms, the periods of PRS are consolidated to run as a single period and run at the conclusion of the term of imprisonment.

Section 9 would amend the definitions in Article 84A (Post-Release Supervision) to reflect that PRS is the time an offender is supervised in the community after the termination of the maximum prison term.

Section 10 would amend G.S. 15A-1368.1 to reflect that it applies to certain drug trafficking offenses under G.S. 90-95.

Section 11 would amend G.S. 15A-1368.2 to provide that earned time is inapplicable to the period of PRS.

Section 12 would amend G.S. 15A-1368.3(d) to clarify that supervisee whose PRS is revoked and who is re-imprisoned for the remainder of the maximum sentence, must be released again on PRS if the supervisee was a registered sex offender who had not completed his or her five-year period of PRS. A subsequent violation of PRS for that supervisee would be grounds for criminal contempt.

Section 13 would amend G.S. 15A-1368.3, as amended by Section 12 of the act, to provide that PRS would be revoked if a supervisee violates a controlling condition of PRS and the supervisee would return to prison for a minimum of seven months and a maximum of nine months.

Section 14 would amend G.S. 15A-1368.4 to (i) remove the authority to revoke PRS for a repeated violation of a reintegrative condition *(see page 12, lines 25-42)*; (ii) clarify that a supervisee may not receive earned time credit during PRS; and (iii) codify certain discretionary controlling conditions for sex offenders that currently are imposed under the Commission's general authority.

Section 15 would amend G.S. 90-95(h) regarding the sentences for certain drug trafficking offenses to remove the period of PRS from the maximum sentence and require that it be imposed as a separate sanction.

BACKGROUND: Post-Release Supervision was not developed as part of the original structured sentencing proposals of 1993. It was added to the structured sentencing legislation during the legislative process. The five-year period of post-release supervision for registered sex offenders was added in 1996.

The Structured Sentencing Commission has repeatedly recommended changes to PRS to make it more consistent with the way structured sentencing functions and to also clarify certain details regarding how PRS functions.

EFFECTIVE DATE: Sections 1 and 12, which clarify that subsequent PRS revocations for registered sex offenders are grounds for criminal contempt, would take effect July 1, 2005, and apply to violations of post-release supervision occurring on or after that date and to sentences imposed on or after that date. The remainder of the act would become effective December 1, 2005 and apply to offenses committed on or after that date.

Ms. Kory Goldsmith, co-counsel to this committee, contributed to this summary.

S0574e1-SMRH-CSRH-13v6

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	May 19, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 797	Bail Bonds/Forfeitures & Remittances.	Senator Thomas
SB 846	Modernize Bail Bondsman Registration.	Senator Swindell IV
SB 933	Immunity/Certain Public Officers/Individuals.	Senator Hartsell
SB 1143	Immunity for Certain City/County Officers.	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, May 19, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 797	Bail Bonds/Forfeitures & Remittances.	Senator Thomas
SB 846	Modernize Bail Bondsman Registration.	Senator Swindell IV
SB 933	Immunity/Certain Public Officers/Individuals.	Senator Hartsell
SB 1143	Immunity for Certain City/County Officers.	Senator Hartsell

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Meeting

May 19, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on May 19, 2005, with eighteen members present. Senator Hartsell introduced pages Christopher Garcia and Jonathan Stutts and thanked them for serving.

SB 846 (Modernize Bail Bondsman.) Senator Dannelly moved to accept the Proposed Committee Substitute for purposes of discussion. All voted and the motion carried. Senator Swindell was recognized to explain the bill. Senator Swindell presented an amendment and moved that it be accepted. All voted and the amendment was accepted. He asked Ben Popkin, Staff Attorney, to explain the changes the amendment would make to the proposed committee substitute. Questions from Senators Webster, Bingham and Goodall were answered by Professor Tom Andrews, representing the Administrative Office of the Courts and Senator Swindell. Senator Allran moved to adopt the amendment. All voted and the motion carried. Senator Webster moved for a favorable report to the proposed committee substitute as amended and rolled into a new Committee Substitute. All voted and the motion carried.

SB 797 (Bail Bonds/Forfeitures & Remittances.) Senator Forrester moved to accept the Proposed Committee Substitute for purposes of discussion. All voted and the motion carried. Senator Thomas was recognized to explain the bill and then introduced Mr. Rodney Roseman. Mr. Roseman, representing the Bail Bondsmen Association, explained the bail bonding process. Questions from Senators Bingham, Snow, Webster, Dannelly and Allran were answered by Mr. Roseman, Mr. Tom Andrews, Senator Thomas and Senator Hartsell. Senator Hartsell recognized District Attorney Colon Willoughby, representing the Conference of District Attorneys, who spoke in opposition to the bill. Also speaking in opposition were Leanne Winner and Mr. Ken Soo, representing the North Carolina School Boards Association. The bill will be heard again.

There being no further business, the meeting adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Chairman

VISITOR REGISTRATION SHEET

Senate S 11 — May 19, 2005

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Tom Andrews	AOC
Courtney Crowder	NCDOT
Jo McCants	AOC
Carlyle Poindexter	919-859-5294
Mark Black	NCBAA
RD Rosman	NCBAA
Mike Mann	NCBAA
Fulton	Bone & Asso.
Steve Shell	NCBAA
Joe Shaw	NCBAA
Howard Davis	NCBAA

VISITOR REGISTRATION SHEET

Name of Committee _____ Date _____

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Amanda Swangler	NCBAA
Tony Woods	NCBAA
Justin Burr	NCBAA
Phillip Burr	NCBAA
Doug Cozart	NCBAA
Larry Mackins	NCBAA
Gwen MacKins	NCBAA
Chris Nails	NCBAA
Cola Willoughby	10th Dist - DA
Leanne Winer	NCCOSA
Yolanda Smith	Tharrington Smith, LLP

VISITOR REGISTRATION SHEET

Name of Committee _____ Date _____

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Kenneth Soo	Tharrington Smith LLP
Renita M. Felton	Office of Minority Health
John Snow	Staff
Lisa Martin	NC Home Builders Assoc.
Claudia McClinton	Hall York
ELLIS HANKINS	NCLM

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, May 24, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **846** Modernize Bail Bondsman Registration.

Draft Number:	PCS75315
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 797

Short Title:	Bail Bonds/Forfeitures & Remittances.	(Public)
Sponsors:	Senators Thomas; and Hoyle.	
Referred to:	Judiciary II.	

March 23, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT FORFEITURE OF A BAIL BOND SHALL BE SET ASIDE IF THE DEFENDANT FOR WHOM THE BOND WAS POSTED WAS INCARCERATED ANYWHERE AT THE TIME OF THE FAILURE TO APPEAR, TO PROVIDE THAT BOND SHALL NOT BE FORFEITED UNLESS THE SURETY OR BAIL AGENT HAD ACTUAL KNOWLEDGE THAT THE DEFENDANT HAD FAILED TO APPEAR ON TWO OR MORE OCCASIONS ON THE SAME CHARGE, AND TO PROVIDE THAT BOND SHALL BE REMITTED IF THE DEFENDANT RECEIVES A PRAYER FOR JUDGMENT CONTINUED OR DEFERRED PROSECUTION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-544.5 reads as rewritten:

"**§ 15A-544.5. Setting aside forfeiture.**

(a) Relief Exclusive. – There shall be no relief from a forfeiture except as provided in this section. The reasons for relief are those specified in subsection (b) of this section. The procedures for obtaining relief are those specified in subsections (c) and (d) of this section. Subsections (f), (g), (h), and (i) of this section apply regardless of the reason for relief given or the procedure followed.

(b) Reasons for Set Aside. – A forfeiture shall be set aside for any one of the following reasons, and none other:

(1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.

(2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.

(3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.

(4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question.

(5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.

(6) The defendant was incarcerated ~~in a unit of the Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State~~anywhere at the time of the failure to appear.

(c) Procedure When Failure to Appear Is Stricken. – If the court before which a defendant's appearance was secured by a bail bond enters an order striking the defendant's failure to appear and recalling any order for arrest issued for that failure to appear, that court may simultaneously enter an order setting aside any forfeiture of that bail bond. When an order setting aside a forfeiture is entered, the defendant's further appearances shall continue to be secured by that bail bond unless the court orders otherwise.

(d) Motion Procedure. – If a forfeiture is not set aside under subsection (c) of this section, the only procedure for setting it aside is as follows:

(1) At any time before the expiration of 150 days after the date on which notice was given under G.S. 15A-544.4, the defendant or any surety on a bail bond may make a written motion that the forfeiture be set aside, stating the reason and attaching the evidence specified in subsection (a) of this section.

(2) The motion is filed in the office of the clerk of superior court of the county in which the forfeiture was entered, and a copy is served, under G.S. 1A-1, Rule 5, on the district attorney for that county and the county board of education.

(3) Either the district attorney or the county board of education may object to the motion by filing a written objection in the office of the clerk and serving a copy on the moving party.

(4) If neither the district attorney nor the board of education has filed a written objection to the motion by the tenth day after the motion is served, the clerk shall enter an order setting aside the forfeiture.

(5) If either the district attorney or the county board of education files a written objection to the motion, then not more than 30 days after the objection is filed a hearing on the motion and objection shall be held in the county, in the trial division in which the defendant was bonded to appear.

(6) If at the hearing the court allows the motion, the court shall enter an order setting aside the forfeiture.

(7) If at the hearing the court does not enter an order setting aside the forfeiture, the forfeiture shall become a final judgment of forfeiture on the later of:

a. The date of the hearing.

b. The date of final judgment specified in G.S. 15A-544.6.

(e) Only One Motion Per Forfeiture. – No more than one motion to set aside a specific forfeiture may be considered by the court.

(f) No More Than Two Forfeitures May Be Set Aside Per Case. – In any case in which the State proves that the surety or the bail agent had ~~notice or~~ actual knowledge, before executing a bail bond, that the defendant had already failed to appear on two or more prior ~~occasions,~~ occasions on the same charge, no forfeiture of that bond may be set aside for any reason. Actual knowledge exists only when the State indicates on both the release order and the bond form provided by the State that the defendant has failed to appear on two or more occasions on the same charge.

(g) No Final Judgment After Forfeiture Is Set Aside. – If a forfeiture is set aside under this section, the forfeiture shall not thereafter ever become a final judgment of forfeiture or be enforced or reported to the Department of Insurance.

(h) Appeal. – An order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions. When notice of appeal is properly filed, the court may stay the effectiveness of the order on any conditions the court considers appropriate."

SECTION 2. G.S. 15A-547.1 reads as rewritten:

"**§ 15A-547.1. Remit bail bond ~~if defendant sentenced to community or intermediate punishment.~~in certain circumstances.**

~~If a defendant is convicted and sentenced to community punishment or intermediate punishment and no appeal is pending, then the~~ The court shall remit the bail bond to the obligor in accordance with the provisions of this Article and shall not require that the bail bond continue to be posted while the defendant serves his or her ~~sentence.~~sentence if any of the following circumstances exist:

(1) The defendant is convicted and sentenced to community punishment or intermediate punishment, and no appeal is pending.

(2) The defendant receives a prayer for judgment continued.

(3) The disposition of the defendant's case is by deferred prosecution."

SECTION 3. This act becomes effective December 1, 2005, and applies to bail bonds posted for offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

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SENATE BILL 797
PROPOSED COMMITTEE SUBSTITUTE S797-CSRC-38 [v.9]

5/19/2005 8:28:18 AM

Short Title: Bail Bonds/Forfeitures & Remittances. (Public)

Sponsors:

Referred to:

March 23, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT FORFEITURE OF A BAIL BOND SHALL BE SET ASIDE IF THE DEFENDANT FOR WHOM THE BOND WAS POSTED WAS INCARCERATED ANYWHERE AT THE TIME OF THE FAILURE TO APPEAR, TO PROVIDE THAT BOND SHALL NOT BE FORFEITED UNLESS THE SURETY OR BAIL AGENT HAD ACTUAL KNOWLEDGE THAT THE DEFENDANT HAD FAILED TO APPEAR ON TWO OR MORE OCCASIONS ON THE SAME CHARGE, AND TO PROVIDE THAT BOND SHALL BE REMITTED IF THE DEFENDANT RECEIVES A PRAYER FOR JUDGMENT CONTINUED OR DEFERRED PROSECUTION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-544.5 reads as rewritten:

"**§ 15A-544.5. Setting aside forfeiture.**

(a) Relief Exclusive. – There shall be no relief from a forfeiture except as provided in this section. The reasons for relief are those specified in subsection (b) of this section. The procedures for obtaining relief are those specified in subsections (c) and (d) of this section. Subsections (f), (g), (h), and (i) of this section apply regardless of the reason for relief given or the procedure followed.

(b) Reasons for Set Aside. – A forfeiture shall be set aside for any one of the following reasons, and none other:

(1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.

(2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.

(3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.

(4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question.

(5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.

(6) The defendant was ~~incarcerated~~ incarcerated, arrested, sentenced or confined in a unit of the Department of Correction or a detention facility and is serving a sentence or confinement or was incarcerated, arrested, sentenced or confined in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear.

(7) No final judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the court that the principal on the bond was prevented from attending because the principal was detained by reason of arrest, sentence, or confinement in a penal institution or jail in this State, or in another jurisdiction, or because the principal was confined or detained under a court order in a medical or mental institution in this State or in another jurisdiction. An official written notice of the holding institution in which the principal is being detained or confined shall be considered proof of the principal's detention or confinement and the notice may be sent from the holding institution by mail, delivered by hand, or sent by facsimile machine. The surety shall present the written notice and a letter of intent to transport the defendant to the clerk of the proper court, the district attorney having jurisdiction over the case, and the county board of education, and the notice and letter of intent shall serve as the surety's request for a detainer or hold to be placed on the principal. Should there be a failure to place a detainer or hold on the detainee within 15 days and after the presentation of the notice, the surety shall then be relieved of the liability for the appearance bond without further order of the court. In no event shall the letter of intent to transport the defendant be construed to require the surety to pay transportation costs that exceed the face amount of the bond. The surety shall not be liable for transportation costs if the defendant is in custody due to the actions of any district attorney, judge, clerk or magistrate in that judicial district. A final judgment may be rendered if the State has exhausted all remedies available to the State in regards to the extradition of the defendant, but has not been able to effectuate the extradition.

(8) No final judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the court that prior to the entry of final judgment on the forfeiture the principal on the bond is in the custody of any law

enforcement agency. An official written notice of the holding institution in which the principal is being detained or confined shall be considered proof of the principal's detention or confinement and the notice may be sent from the holding institution by mail, delivered by hand, or sent by facsimile machine. The surety shall present the written notice and a letter of intent to transport the defendant to the clerk of the proper court, the district attorney having jurisdiction over the case and the county board of education and the notice and letter of intent shall serve as the surety's request for a detainer or hold to be placed on the principal. Should there be a failure to place a detainer or hold on the detainee within 15 days and after the presentation of the notice, the surety shall then be relieved of the liability for the appearance bond without further order of the court. In no event shall the letter of intent to transport the defendant be construed to require the surety to pay transportation costs that exceed the face amount of the bond. The surety shall not be liable for transportation costs if the defendant is in custody due to the actions of any district attorney, judge, clerk or magistrate in that judicial district. A final judgment may be rendered if the State has exhausted all remedies available to the State in regards to the extradition of the defendant, but has not been able to effectuate the extradition.

(c) Procedure When Failure to Appear Is Stricken. – If the court before which a defendant's appearance was secured by a bail bond enters an order striking the defendant's failure to appear and recalling any order for arrest issued for that failure to appear, that court may simultaneously enter an order setting aside any forfeiture of that bail bond. When an order setting aside a forfeiture is entered, the defendant's further appearances shall continue to be secured by that bail bond unless the court orders otherwise.

(d) Motion Procedure. – If a forfeiture is not set aside under subsection (c) of this section, the only procedure for setting it aside is as follows:

(1) At any time before the expiration of 150 days after the date on which notice was given under G.S. 15A-544.4, the defendant or any surety on a bail bond may make a written motion that the forfeiture be set aside, stating the reason and attaching the evidence specified in subsection (a) of this section.

(2) The motion is filed in the office of the clerk of superior court of the county in which the forfeiture was entered, and a copy is served, under G.S. 1A-1, Rule 5, on the district attorney for that county and the county board of education.

(3) Either the district attorney or the county board of education may object to the motion by filing a written objection in the office of the clerk and serving a copy on the moving party.

(4) If neither the district attorney nor the board of education has filed a written objection to the motion by the tenth day after the motion is served, the clerk shall enter an order setting aside the forfeiture.

(5) If either the district attorney or the county board of education files a written objection to the motion, then not more than 30 days after the objection is filed a hearing on the motion and objection shall be held in the county, in the trial division in which the defendant was bonded to appear.

(6) If at the hearing the court allows the motion, the court shall enter an order setting aside the forfeiture.

(7) If at the hearing the court does not enter an order setting aside the forfeiture, the forfeiture shall become a final judgment of forfeiture on the later of:

a. The date of the hearing.

b. The date of final judgment specified in G.S. 15A-544.6.

(e) Only One Motion Per Forfeiture. – No more than one motion to set aside a specific forfeiture may be considered by the court.

(f) No More Than Two Forfeitures May Be Set Aside Per Case. – In any case in which the State proves that the surety or the bail agent had ~~notice or~~ actual knowledge, before executing a bail bond, that the defendant had already failed to appear on two or more prior ~~occasions,~~ occasions on the same charge, no forfeiture of that bond may be set aside for any reason. Actual knowledge exists only when the State indicates on the release order provided by the State that the defendant has failed to appear on two or more occasions on the same charge and the release order is subsequently signed by the surety.

(g) No Final Judgment After Forfeiture Is Set Aside. – If a forfeiture is set aside under this section, the forfeiture shall not thereafter ever become a final judgment of forfeiture or be enforced or reported to the Department of Insurance.

(h) Appeal. – An order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions. When notice of appeal is properly filed, the court may stay the effectiveness of the order on any conditions the court considers appropriate."

SECTION 2. G.S. 15A-547.1 reads as rewritten:

"**§ 15A-547.1. Remit bail bond ~~if defendant sentenced to community or intermediate punishment.~~in certain circumstances.**

~~If a defendant is convicted and sentenced to community punishment or intermediate punishment and no appeal is pending, then the~~ The court shall remit the bail bond to the obligor in accordance with the provisions of this Article and shall not require that the bail bond continue to be posted while the defendant serves his or her ~~sentence.~~sentence if any of the following circumstances exist:

(1) The defendant is sentenced to community punishment or intermediate punishment, including domestic violence program or drug treatment courts.~~:~~

(2) The defendant receives a prayer for judgment continued.

(3) The defendant receives a deferred prosecution."

SECTION 3. This act becomes effective December 1, 2005, and applies to bail bonds posted for offenses committed on or after that date.

SENATE BILL 797:
Bail Bonds/Forfeitures & Remittances

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 19, 2005
Introduced by:	Sen. Thomas	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	PCS to First Edition S797-CSRC-38		

SUMMARY: ***Senate Bill 797 would provide two additional circumstances the forfeiture of a bail bond would be set aside even though the defendant failed to appear before the court when required to do so. It also narrows the situations where forfeiture may not be set aside to those where the surety had actual knowledge that the defendant had failed to appear on two previous occasions on for the same offense. Finally, it would prohibit a court from keeping a defendant's bond in place while a defendant serves certain intermediate punishments, obtains a PJC or there is a deferred prosecution.***

The act would become effective December 1, 2005 and apply to bail bonds posted for offenses committed on or after that date.

CURRENT LAW: G.S. 15A-544.5 sets out 6grounds for setting aside the forfeiture of a bail bond. These include situations where the defendant's failure to appear has been set aside by the court, the charges have been finally disposed by the court, the defendant was surrendered to the court by the surety, the defendant died within the period of the forfeiture, or the defendant was incarcerated by the State or the federal government. In cases where the State proves that the surety had notice or actual knowledge before executing the bond that the defendant had already failed to appear on two or more occasions for the same offense, the forfeiture of the bond may not be set aside for any reason.

G.S. 15A-547.1 requires the court to remit the bond if a defendant is convicted and sentenced to community punishment or intermediate punishment and no appeal is pending.

BILL ANALYSIS:

Section 1 of the bill amends G.S. 15a-544.5 to add two new additional grounds for setting aside forfeiture. The first is a situation where the defendant was prevented from appearing before the court because the defendant was detained by reason of arrest, sentence, or confinement in a penal institution or jail in North Carolina or another jurisdiction, or because the defendant was confined or detained under a court order in a medical or mental health institution. An official written notice by the institution that the defendant is being detained shall be considered proof of the detention. The surety may submit that notice and a letter of intent to pay for the cost of transporting the defendant to the court. The notice and the letter will constitute a request for a detainer to be placed on the defendant. If the detainer is not placed on the defendant within 15 days, the surety would be relieved of the liability for the appearance bond. In no event would the surety be liable for transportation costs in excess of the face amount of the bond, and the surety would not be liable for transportation costs if the defendant is detained as a result of actions by any district attorney, judge, clerk or magistrate in that judicial district. If the State cannot obtain an extradition after pursuing all remedies, a final judgment may be rendered. A similar exception with similar procedures would apply in situations where the principal is shown to be in the custody of law enforcement officials.

The bill also expands the existing law to include situations where a defendant does not appear because the defendant has been arrested, sentenced, or confined in a detention facility.

The changes would also narrow the circumstances where forfeiture could not be set aside where the defendant has failed to appear on two or more occasions. It would require that the surety have actual knowledge of the defendant's multiple failures to appear. Actual knowledge would only apply if the State indicates on the release order that the defendant has failed to appear on two or more occasions on the same charge and the surety subsequently signs the release order.

Section 2 amends G.S. 15A-547.1 to provide additional specificity to situations where the court is prohibited from requiring that a surety continue to post bond. It would provide that the court must remit the bail bond while the defendant serves his or her sentence if the defendant is sentenced to community punishment or intermediate punishment, the defendant has received a prayer for judgment continued or deferred prosecution.

S0797e1-SMRC-CSRC-38

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 846

Short Title:	Modernize Bail Bondsman Registration.	(Public)
Sponsors:	Senators Swindell; Bingham and Thomas.	
Referred to:	Judiciary II.	

March 23, 2005

A BILL TO BE ENTITLED

AN ACT MODERNIZING THE MANNER IN WHICH BAIL BONDSMEN REGISTER THEIR LICENSES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 58-71-140 reads as rewritten:

"**§ 58-71-140. Registration of licenses and power of appointments by insurers.**

(a) ~~No~~ Before the date of the notice provided for in subsection (e) of this section, no professional bail bondsman shall become a surety on an undertaking unless he or she has registered his or her current license in the office of the clerk of superior court in the county in which he or she resides and a certified copy of the same with the clerk of superior court in any other county in which he or she shall write bail bonds.

(b) ~~A~~ Before the date of the notice provided for in subsection (e) of this section, a surety bondsman shall register his or her current surety bondsman's license and a certified copy of his or her power of appointment with the clerk of superior court in the county in which the surety bondsman resides and with the clerk of superior court in any other county in which the surety bondsman writes bail bonds on behalf of an insurer.

(c) ~~No~~ Before the date of the notice provided for in subsection (e) of this section, no runner shall become surety on an undertaking on behalf of a professional bondsman unless that runner has registered his or her current license and a certified copy of his or her power of attorney in the office of the clerk of superior court in the county in which the runner resides and with the clerk of superior court in any other county in which the runner writes bail bonds on behalf of the professional bondsman.

(c1) On or after the date of the notice provided for in subsection (e) of this section, all licensed professional bail bondsmen, surety bondsmen, and runners shall register in the statewide Electronic Bondsman Registry in accordance with subsection (e) of this section.

(d) Professional bondsmen, surety bondsmen, and runners shall file with the clerk of court having jurisdiction over the principal an affidavit on a form furnished by the Administrative Office of the Courts. The affidavit shall include, but not be limited to:

(1) If applicable, a statement that the bondsman has not, nor has anyone for the bondsman's use, been promised or received any collateral, security, or premium for executing this appearance bond.
(2) If promised a premium, the amount of the premium promised and the due date.
(3) If the bondsman has received a premium, the amount of premium received.
(4) If given collateral security, the name of the person from whom it is received and the nature and amount of the collateral security listed in detail.

(e) The Commissioner and the Administrative Office of the Courts shall establish a statewide Electronic Bondsmen Registry (Registry) for all licenses, powers of appointment, and powers of attorney requiring registration under this section. When the Registry is established, the Commissioner shall notify all licensed professional bondsmen, surety bondsmen, runners, and qualified insurance companies of the Registry. On or after the date of that notice, a person may register as required under this section by maintaining a record of each required license, power of appointment, or power of attorney in the Registry. After a bondsman, surety bondsman, or runner has completed registration in the Registry, he or she is authorized to execute bail bonds pursuant to his or her registered license, power of appointment, or power of attorney in all counties so long as the registered license, power of appointment, or power of attorney remains in effect."

SECTION 2. G.S. 15A-544.7 reads as rewritten:

"**§ 15A-544.7. Docketing and enforcement of final judgment of forfeiture.**

(a) Final Judgment Docketed As Civil Judgment. – When a forfeiture has become a final judgment under this Part, the clerk of superior court, under G.S. 1-234, shall docket the judgment as a civil judgment against the defendant and against each surety named in the judgment.

(b) Judgment Lien. – When a final judgment of forfeiture is docketed, the judgment shall become a lien on the real property of the defendant and of each surety named in the judgment, as provided in G.S. 1-234.

(c) Execution; Copy to Commissioner of Insurance. – After docketing a final judgment under this section, the clerk shall:

(1) Issue execution on the judgment against the defendant and against each accommodation bondsman and professional bondsman named in the judgment and shall remit the clear proceeds to the county finance officer as provided in G.S. 115C-452.
(2) If an insurance company or professional bondsman is named in the judgment, send the Commissioner of Insurance a ~~copy~~ notice of the judgment, showing the date on which the judgment was docketed.

(d) Sureties May Not Execute Bonds in County. – ~~After~~ Before the date of notice of the establishment of the statewide Electronic Bondsman Registry under G.S. 58-71-140(e) and after a final judgment is docketed as provided in this section, no

surety named in the judgment shall become a surety on any bail bond in the county in which the judgment is docketed until the judgment is satisfied in full.

(e) Consequences For Sureties and Agents. – On or after the date of notice of the establishment of the statewide Electronic Bondsman Registry under G.S. 58-71-140(e) and after a final judgment is docketed pursuant to this section, the following consequences become effective and remain in effect until the judgment is satisified:

(1) No accommodation bondsman named in the judgment shall become a surety on any bail bond in the county where the judgment is docketed.

(2) No licensed professional bondsman named in the judgment shall become a surety, in person or through any runner, on any bail bond in any county in the State.

(3) No bail agent who executed the forfeited bail bond on behalf of an insurance company shall execute a bail bond on behalf of any insurance company in any county in the State.

(4) No runner who executed the forfeited bail bond on behalf of a licensed professional bondsman shall execute a bail bond on behalf of any licensed professional bondsman in any county of the State."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 846
PROPOSED COMMITTEE SUBSTITUTE S846-CSSS-8 [v.1]

4/20/2005 2:54:10 PM

Short Title: Modernize Bail Bondsman Registration. (Public)

Sponsors:

Referred to:

March 23, 2005

A BILL TO BE ENTITLED

AN ACT MODERNIZING THE MANNER IN WHICH BAIL BONDSMEN REGISTER THEIR LICENSES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 58-71-140 reads as rewritten:

"**§ 58-71-140. Registration of licenses and power of appointments by insurers.**

(a) ~~No~~ Before the date of the notice provided for in subsection (e) of this section, no professional bail bondsman shall become a surety on an undertaking unless he or she has registered his or her current license in the office of the clerk of superior court in the county in which he or she resides and a certified copy of the same with the clerk of superior court in any other county in which he or she shall write bail bonds.

(b) ~~A~~ Before the date of the notice provided for in subsection (e) of this section, a surety bondsman shall register his or her current surety bondsman's license and a certified copy of his or her power of appointment with the clerk of superior court in the county in which the surety bondsman resides and with the clerk of superior court in any other county in which the surety bondsman writes bail bonds on behalf of an insurer.

(c) ~~No~~ Before the date of the notice provided for in subsection (e) of this section, no runner shall become surety on an undertaking on behalf of a professional bondsman unless that runner has registered his or her current license and a certified copy of his or her power of attorney in the office of the clerk of superior court in the county in which the runner resides and with the clerk of superior court in any other county in which the runner writes bail bonds on behalf of the professional bondsman.

(c1) On or after the date of the notice provided for in subsection (e) of this section, all licensed professional bail bondsmen, surety bondsmen, and runners shall register in the statewide Electronic Bondsman Registry in accordance with subsection (e) of this section.

(d) Professional bondsmen, surety bondsmen, and runners shall file with the clerk of court having jurisdiction over the principal an affidavit on a form furnished by the Administrative Office of the Courts. The affidavit shall include, but not be limited to:

(1) If applicable, a statement that the bondsman has not, nor has anyone for the bondsman's use, been promised or received any collateral, security, or premium for executing this appearance bond.

(2) If promised a premium, the amount of the premium promised and the due date.

(3) If the bondsman has received a premium, the amount of premium received.

(4) If given collateral security, the name of the person from whom it is received and the nature and amount of the collateral security listed in detail.

(e) On or before July 1, 2006 the Commissioner and the Administrative Office of the Courts shall establish a statewide Electronic Bondsmen Registry (Registry) for all licenses, powers of appointment, and powers of attorney requiring registration under this section. When the Registry is established, the Commissioner shall notify all licensed professional bondsmen, surety bondsmen, runners, and qualified insurance companies of the Registry. On or after the date of that notice, a person may register as required under this section by maintaining a record of each required license, power of appointment, or power of attorney in the Registry. After a bondsman, surety bondsman, or runner has completed registration in the Registry, he or she is authorized to execute bail bonds pursuant to his or her registered license, power of appointment, or power of attorney in all counties so long as the registered license, power of appointment, or power of attorney remains in effect."

SECTION 2. This act is effective when it becomes law.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 846

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S846-ARD-17 [v.2]

Date _____,2005

Comm. Sub. [YES]
Amends Title [NO]
S846-CSSS-8 [v.1]

Senator _____

moves to amend the bill on page 2, line 14, by deleting the following words:

" Commissioner and the ";

and further amends the bill on page 2, line 17 by rewriting the line to read as follows:

"this section. When the Registry is established, the Administrative Office of the Courts shall notify the Commissioner and the Commissioner shall notify all";

and further amends the bill on page 2, lines 25 and 26, by inserting between the lines the following:

"**SECTION 2.** G.S. 15A-544.7(c) reads as rewritten:

'(c) Execution; Copy to Commissioner of Insurance. – After docketing a final judgment under this section, the clerk shall:

(1) Issue execution on the judgment against the defendant and against each accommodation bondsman and professional bondsman named in the judgment and shall remit the clear proceeds to the county finance officer as provided in G.S. 115C-452.

(2) If an insurance company or professional bondsman is named in the judgment, send the Commissioner of Insurance a ~~copy~~ notice of the judgment, showing the date on which the judgment was docketed.'";

and further amends the bill by renumbering the remaining Section.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 846

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S846-ARD-17 [v.2]

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

SENATE BILL 846:
Modernize Bail Bondsman Registration

BILL ANALYSIS

Committee:		**Date:**	May 18, 2005
Introduced by:		**Summary by:**	Ben Popkin
Version:	PCS to First Edition S846-CSRD		Committee Counsel

SUMMARY: ***Senate Bill 846 would require that the Commissioner of Insurance and the Administrative Office of the Courts establish a statewide Electronic Bondsmen Registry for all licenses, powers of appointment, and powers of attorney as required by this section[1] and would require that all licensed professional bail bondsmen, surety bondsmen and runners register with the Registry. Registration with the statewide registry would replace the current county-level registration with the clerks of court and would allow all licensed professional bail bondsmen, surety bondsmen and runners to operate statewide rather than only in the counties in which they are registered.***

The PCS calls for the Registry to be established on or before July 1, 2006. The PCS also removes Section 2 of the original bill, proposing changes to existing bond forfeiture practices[2] (which would have enabled a statewide bar against the writing of bonds by anyone against whom a final judgment of forfeiture of a bond has been docketed).

CURRENT LAW: General Statutes require that the following individuals writing bail bonds register with the clerk of superior court in the county in which they reside and with the clerk of superior court in the county in which they would like to write bail bonds: licensed professional bail bondsmen, surety bondsmen, and runners[3]. Surety bondsmen and runners must also register certified copies of their power of appointment or power of attorney with both counties' clerks of superior court as well. Licensed professional bail bondsmen, surety bondsmen, and runners may not write bonds in any county in which they have not filed the appropriate paperwork with the clerk of court.

BILL ANALYSIS: Registration with the statewide registry would replace the current county-level registration with the clerks of court and would allow all licensed professional bail bondsmen, surety bondsmen and runners to operate statewide rather than only in the counties in which they are registered.

Senate Bill 846 would add a subsection to the existing statute, requiring that the Commissioner of Insurance and the Administrative Office of the Courts establish a statewide Electronic Bondsmen Registry for all licenses, powers of appointment, and powers of attorney as required by G.S. 58-71-140. The bill would require that the Registry be established on or before July 1, 2006 and would direct the Commissioner to notify all licensed professional bail bondsmen, surety bondsmen, runners, and qualified insurance companies of the Registry. The bill includes an additional subsection that would require all licensed professional bail bondsmen, surety bondsmen, or runners to register with the Registry on or after the date of notice by the Commissioner.

EFFECTIVE DATE: The act would be effective when it becomes law.

BACKGROUND: Currently, licensed professional bail bondsmen, surety bondsmen, and runners are limited to operate only in counties in which they have filed the required paperwork. Verification of their

[1] G.S. 58-71-140. "Registration of licenses and power of appointments by insurers."
[2] G.S. 15A-544.7. "Docketing and enforcement of final judgment of forfeiture."
[3] G.S. 58-71-140(a), (b) and (c).

registration with the clerk of superior court is often evidenced only by a printed list kept in either the county jail or the local magistrate's office, which may or may not be accurate and updated. No centralized readily accessible, verifiable list of validly registered individuals is presently available.

S0846e1-SMRD-CSRD

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	May 26, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 797	Bail Bonds/Forfeitures & Remittances.	Senator Thomas
SB 217	Med Malpractice Prelitigation Mediation./ Drivers License Revocation for ABC Violation.	Senator Dalton
SB 669	State Land Not Subject to Municipal Control.	Senator Hartsell
SB 1031	Additional Condemnation Authority.	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk ____
Reading Clerk ____

Corrected Notice: Bills 477 and 778 added
Committee will meet at 10:00 am and again at 10 minutes after Session

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	May 26, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 797	Bail Bonds/Forfeitures & Remittances.	Senator Thomas
SB 217	Med Malpractice Prelitigation Mediation.	Senator Dalton
SB 669	State Land Not Subject to Municipal Control.	Senator Hartsell
SB 1031	Additional Condemnation Authority.	Senator Hartsell
SB 477	Master Keys/Lock-Picking Devices Regulated.	Senator Graham
SB 778	Amend Private Protective Services Laws.	Senator Snow, Jr.

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, May 26, 2005, 10:00 AM
Meet again at 10 minutes after Session
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 797	Bail Bonds/Forfeitures & Remittances.	Senator Thomas
SB 217	Med Malpractice Prelitigation Mediation.	Senator Dalton
SB 669	State Land Not Subject to Municipal Control.	Senator Hartsell
SB 1031	Additional Condemnation Authority.	Senator Hartsell
SB 477	Master Keys/Lock-Picking Devices Regulated.	Senator Graham
SB 778	Amend Private Protective Services Laws.	Senator Snow, Jr.

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Meeting

May 26, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on May 26, 2005, with nineteen members present. Senator Hartsell introduced pages Sara Fender, Turner Vaughn, Stephen Rankin and Derek Breakfield and thanked them for serving.

SB 217 (Drivers License Revocation for ABC Violation.) Senator Forrester moved to accept the Proposed Committee Substitute for purposes of discussion. Senator Dalton explained the bill. Questions from Senators Berger, Forrester, Bingham, Kerr, Dorsett, Kinnaird, Snow, Dannelly, Goodall, Allran, Webster and Swindell were answered by Senator Dalton and Senator Hartsell. Senator Berger submitted an amendment which was accepted by Senator Dalton who moved that it be accepted. All voted and the motion carried. Mr. Joe Parker, who formerly represented the Governor's Highway Safety Program, spoke on the bill. Senator Apodaca moved for a favorable report as amended, rolled into a new Proposed Committee Substitute, unfavorable as to the original bill, favorable to the new Proposed Committee Substitute.

SB 797 (Bail Bonds/Forfeitures & Remittances.) Senator Hartsell recognized Senator Thomas to explain the bill. Senator Forrester moved to accept the Proposed Committee Substitute. All voted and the motion carried. Mr. Bryan Shipwash, Clerk of Superior Court of Davidson County spoke in opposition to the bill. Questions from Senators Webster, Berger and Dannelly were answered by Mr. Bryan Shipwash. District Attorney Colon Willoughby, representing the Conference on District Attorneys, spoke in opposition to the bill and answered the question by Senator Berger. Senator Swindell moved for a favorable report. All voted and the motion carried.

SB 669 (State Land Not Subject to Municipal Control.) Senator Thomas chaired and asked Senator Hartsell to explain the bill. Mr. John Phelps, representing the League of Municipalities, spoke in opposition. Senator Jacumin moved for a favorable report. All voted and the motion carried.

SB 778 (Amend Private Protective Services Laws.) Senator Holloman moved to accept the Proposed Committee Substitute for purposes of discussion. Senator Hartsell invited Senator Snow to explain the bill. Mr. Charles McDarris spoke on the bill. Senator Dalton moved for a favorable report. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, May 31, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **217** Med Malpractice Prelitigation Mediation.

Draft Number:	PCS55241
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

S.B. **797** Bail Bonds/Forfeitures & Remittances.

Draft Number:	PCS65328
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 2

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, May 26, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **669** State Land Not Subject to Municipal Control.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **778** Amend Private Protective Services Laws.
Draft Number: PCS 75320
Sequential Referral: None
Recommended Referral: None
Long Title Amended: Yes

TOTAL REPORTED: 2

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

May 26, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John Phelps	NCLM
Tay Woods	NCBBA
Tom Andrews	ADC
Rod Malone	Tharrington Smith, LLP NC Council of School Attorneys
MARK Black	NCBAA
Joe Shaw	NCBAA
Mark Fleming	University
Amanda Spangler	NCBAA
Yolanda Smith	Tharrington Smith, LLP
Molly Ryan	NCSBA
BRIAN Shipwash	Clerk of Superior Court Davidson County

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — May 26, 2005

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Alissa Dolan	NC Conservation Network
BENN BREWINGTON	SA - PPAB
John McMillan	MFAS
Joe Parker	Gov's Hsrep
Glen Willoughby	DA 10th District
Donnie Harrison	Wake County Sheriff
Phyllis Stephens	Wake Co. Sheriff's Office
Russ Dubay	CCPS
Jon P. Mayo	GPM + Associates
Steve Shell	NCBAA
Kelly Daniels	Capitol Comp

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — May 26, 2005

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Anna Wu	UNC-Chapel Hill
David Harris	NCGA
M. Lewis	NCSA
D. Simpson	NCSA
K. Lowry	LRC
C. Philip Robertson	LRC Bonding
RB Sloan	EnergyUnited
[illegible]	DOC
Margaret Bryan	Conference of District Attorneys
Charles McDarris	Private Protection Services Bd.
Kathleen Edwards	UNC-CH Legis. Rep. Service

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

May 26, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Dirk Burleson	Rutherford Electric Membership Corp. Forest City, N.C.
Jeff Brittain	"
Jack Cogswell	Parker Poe

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 217
PROPOSED COMMITTEE SUBSTITUTE S217-CSRC-52 [v.2]

5/19/2005 3:45:51 PM

Short Title: Drivers License Revocation for ABC Violation. (Public)

Sponsors:

Referred to:

February 24, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR THE REVOCATION OF THE DRIVERS LICENSE OF ANY PERSON CONVICTED OF GIVING ALCOHOLIC BEVERAGES TO, OR AIDING AND ABETTING THE PURCHASE OR POSSESSION OF ALCOHOLIC BEVERAGES BY, AN UNDERAGE PERSON.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 18B-302(g) reads as rewritten:

"(g) Conviction Report Sent to Division of Motor Vehicles. – The court shall file a conviction report with the Division of Motor Vehicles indicating the name of the person convicted and any other information requested by the Division if the person is convicted ~~of:~~ of any of the following:

(1) A violation of subsection (e) or (f) of this ~~section; or~~ section.

(2) A violation of ~~subdivision (e)(1)~~ subsection (c) of this section; or

(3) A violation of subsection (b) of this section, if the violation occurred while the person was purchasing or attempting to purchase an alcoholic beverage.

(4) A violation of subsection (a) of this section, if the violation occurred while the person was giving an alcoholic beverage to an underage person.

Upon receipt of a conviction report, the Division shall revoke the person's license as required by G.S. 20-17.3."

SECTION 2. G.S. 20-17.3 reads as rewritten:

"**§ 20-17.3. Revocation for underage purchasers of alcohol.**

The Division shall revoke for one year the driver's license of any person who has been convicted of violating any of the following:

(1) ~~G.S. 18B-302(c)(1),~~G.S. 18B-302(c), (e), or (f); or

(2) G.S. 18B–302(b), if the violation occurred while the person was purchasing or attempting to purchase an alcoholic beverage.

(3) G.S. 18B-302(a), except that this subdivision shall only apply if the violation occurred while the person was giving an alcoholic beverage to an underage person.

If the person's license is currently suspended or revoked, then the revocation under this section shall begin at the termination of that revocation."

SECTION 3. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

SENATE BILL 217:
Drivers License Revocation for ABC Violation.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 25, 2005
Introduced by:	Sen. Dalton	**Summary by:**	Ben Popkin
Version:	PCS to First Edition S217-CSRD		Committee Counsel

SUMMARY: Senate Bill 217 would expand the application of current law calling for the revocation of the driver's license of any person convicted of violating certain subsections of General Statute 18B-302 – "Sale to or purchase by underage persons". The bill would expand the revocation of driver's licenses to apply to those of legal age who aid or abet in the violation of this section.

CURRENT LAW: G.S. 18B-302 makes the following range of activities relating to the sale of alcohol to underage persons criminal offenses:

1. Selling or giving alcoholic beverages to anyone under 21 years of age[1];
2. Purchase or possession of alcoholic beverages by anyone under 21 years of age[2];
3. Aiding or abetting an underage person in violating one of the above two offenses[3];
4. Fraudulent use of identification to enter a place where alcoholic beverages are sold or consumed, or to obtain or attempt to obtain alcoholic beverages[4]; or
5. Allowing the use of any form of identification to by any person who violates or attempts to violate G.S. 18B-302(2) (point number two, above).

The court is directed to send a conviction report to the Division of Motor Vehicles, which is then directed to revoke the convicted person's driver's license for a period of one year, when the person is convicted of violating points 4 or 5, above, or an underage person aiding or abetting another underage person (point 3), or purchasing or attempting to purchase alcohol by an underage person (point 2).

BILL ANALYSIS: Senate Bill 217 would expand the breadth of current law by applying the revocation procedure to G.S. 18B-302(c)(2). This would direct the Division to revoke the driver's licenses of persons "over lawful age" aiding or abetting an underage person in violation of points 1 or 2, above. The bill would also add giving alcohol to underage persons[5] (point 1, above) to subsection (g) of G.S. 18B-302, ordering the court to send conviction reports for persons convicted of this offense to the Division and in turn ordering the Division to revoke the person's driver's license.

The bill would amend G.S. 20-17.3, which orders the Division to revoke the driver's license of any person convicted of violating certain subsections of G.S. 18B-302, to conform with the changes described above.

EFFECTIVE DATE: The act would be effective December 1, 2205 and would apply to offenses committed on or after that date.

S0217e1-SMRD-CSRD

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[1] G.S. 18B-302(a).
[2] G.S. 18B-302(b).
[3] G.S. 18B-302(c).
[4] G.S. 18B-302(e).
[5] G.S. 18B-302(a).

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____ DATE 5/29/05

S. B. No. 217 Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE X

Rep.)
Sen.) Berger

moves to amend the bill on page 1, lines 5

(X) WHICH CHANGES THE TITLE

by rewriting the line to read:

" ALCOHOLIC BEVERAGES BY AN UNDERAGE PERSON AND TO ALLOW FOR A LIMITED DRIVING PRIVILEGE.";

and on page 2, by inserting ~~between~~ after the ~~last~~ period the following:

"~~SECTION 2. G.S.~~

" A person whose licence is revoked ~~for~~ under this section for a violation of G.S. 18B-302(a) or 18B-302(c) shall be eligible for a limited driving privilege under G.S. 20-179.3.".

SIGNED _____

ADOPTED _____ FAILED _____ TABLED _____

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 669

Short Title:	State Land Not Subject to Municipal Control.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO REPEAL LEGISLATION THAT MADE STATE LAND SUBJECT TO MUNICIPAL PLANNING JURISDICTION AND PERMITTED THE IMPOSITION OF OVERLAY AND SPECIAL USE DISTRICTS ON STATE LAND WITHOUT THE APPROVAL OF THE COUNCIL OF STATE.

The General Assembly of North Carolina enacts:

SECTION 1. Section 41(e) of S.L. 2004-199 is repealed.

SECTION 2. This act becomes effective July 1, 2005.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 778

Short Title:	Amend Private Protective Services Laws.	(Public)
Sponsors:	Senator Snow.	
Referred to:	Judiciary II.	

March 22, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND CERTAIN LAWS REGULATING LICENSURE FOR PRIVATE PROTECTIVE SERVICES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 74C-11(f) reads as rewritten:

"(f) Notwithstanding the provisions of this section, a licensee may employ a person as an unarmed security guard for a period not to exceed 30 days in any given calendar year without registering that employee in accordance with this section; provided that the licensee submits to the Director a quarterly report, within 30 days after the end of the quarter in which the temporary employee worked, which provides the Director with the name, address, social security number, and dates of employment of ~~such employee.~~the employee, along with evidence of completion of any training requirement imposed by the Board."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 778
PROPOSED COMMITTEE SUBSTITUTE S778-CSRC-53 [v.1]

5/26/2005 12:08:30 PM

Short Title: Amend Private Protective Services Laws. (Public)

Sponsors:

Referred to:

March 22, 2005

A BILL TO BE ENTITLED

AN ACT AMENDING CERTAIN LAWS REGULATING PERSONS ENGAGED IN PROVIDING PRIVATE PROTECTIVE SERVICES TO ALLOW FOR PROBATIONARY EMPLOYEES AND THE REGISTRATION OF REGULAR EMPLOYEES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 74C-11 reads as rewritten:

"**§ 74C-11. ~~Registration of permanent and temporary~~Probationary employees and registration of regular employees; unarmed security guard required to have registration card.**

(a) All licensees may employ unarmed security guards as probationary employees for 20 calendar days. Upon completion of the probationary period and the desire of the licensee to hire an unarmed security guard as a regular employee, the licensee shall register ~~their employees~~the employee who will be engaged in providing private protective services covered by this Chapter with the Board within ~~20~~ 30 days after the probationary employment ~~begins,~~period ends, unless the Director, in ~~his~~ the Director's discretion, extends the time period, for good cause. Before a probationary employee engages in private protective services, the employee shall complete any training requirements and the licensee shall conduct a criminal record check on the employee, as the Board deems appropriate. The licensee shall submit a list of the probationary employees to the Director on a monthly basis. The list shall include the name, address, social security number, and dates of employment of the employees.

To register an ~~employee,~~employee after the probationary period ends, a licensee must give the Board the following:

(1) Set(s) of classifiable fingerprints on standard F.B.I. applicant cards; recent photograph(s) of acceptable quality for identification; and

(2) Statements of any criminal records obtained from the appropriate authority in each area where the employee has resided within the immediately preceding 48 months.

(b) A security guard and patrol company may not employ an unarmed security guard in a regular position unless the guard has a registration card issued under subsection (d) of this section. A person engaged in a private protective services profession may not employ an armed security guard unless the guard has a firearm registration permit issued under G.S. 74C-13.

(c) The Director shall be notified in writing of the termination of any regular employee registered under subsection (a) of this section within 10 days after ~~said~~ the termination.

(d) An unarmed security guard shall make application to the Director for an unarmed registration card which the Director shall issue to said applicant after receipt of the information required to be submitted by his employer pursuant to subsection (a), and after meeting any additional requirements which the Board, in its discretion, deems to be necessary. The unarmed security guard registration card shall be in the form of a pocket card designed by the Board, shall be issued in the name of the applicant, and may have the applicant's photograph affixed thereto. The unarmed security guard registration card shall expire one year after its date of issuance and shall be renewed every year. If an unarmed registered security guard is terminated by a licensee and changes employment to another security guard and patrol company, the security guard's registration card shall remain valid, provided the security guard pays the unarmed guard registration transfer fee to the Board and a new unarmed security guard registration card is issued. An unarmed security guard whose transfer registration application and transfer fee have been sent to the Board may work with a copy of the transfer application until the registration card is issued.

(e) Notwithstanding the provisions of this section, a licensee may employ a person properly registered or licensed as an unarmed security guard in another state for a period not to exceed 10 days in any given month; provided the licensee, prior to employing the unarmed security guard, submits to the Director the name, address, and social security number of the unarmed guard and the name of the state of current registration or licensing, and the Director approves the employment of the unarmed guard in this State.

~~(f) Notwithstanding the provisions of this section, a licensee may employ a person as an unarmed security guard for a period not to exceed 30 days in any given calendar year without registering that employee in accordance with this section; provided that the licensee submits to the Director a quarterly report, within 30 days after the end of the quarter in which the temporary employee worked, which provides the Director with the name, address, social security number, and dates of employment of such employee.~~"

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 797

Short Title:	Bail Bonds/Forfeitures & Remittances.	(Public)
Sponsors:	Senators Thomas; and Hoyle.	
Referred to:	Judiciary II.	

March 23, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT FORFEITURE OF A BAIL BOND SHALL BE SET ASIDE IF THE DEFENDANT FOR WHOM THE BOND WAS POSTED WAS INCARCERATED ANYWHERE AT THE TIME OF THE FAILURE TO APPEAR, TO PROVIDE THAT BOND SHALL NOT BE FORFEITED UNLESS THE SURETY OR BAIL AGENT HAD ACTUAL KNOWLEDGE THAT THE DEFENDANT HAD FAILED TO APPEAR ON TWO OR MORE OCCASIONS ON THE SAME CHARGE, AND TO PROVIDE THAT BOND SHALL BE REMITTED IF THE DEFENDANT RECEIVES A PRAYER FOR JUDGMENT CONTINUED OR DEFERRED PROSECUTION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-544.5 reads as rewritten:

"**§ 15A-544.5. Setting aside forfeiture.**

(a) Relief Exclusive. – There shall be no relief from a forfeiture except as provided in this section. The reasons for relief are those specified in subsection (b) of this section. The procedures for obtaining relief are those specified in subsections (c) and (d) of this section. Subsections (f), (g), (h), and (i) of this section apply regardless of the reason for relief given or the procedure followed.

(b) Reasons for Set Aside. – A forfeiture shall be set aside for any one of the following reasons, and none other:

(1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.

(2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.

(3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.

(4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question.

(5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.

(6) The defendant was incarcerated ~~in a unit of the Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State~~anywhere at the time of the failure to appear.

(c) Procedure When Failure to Appear Is Stricken. – If the court before which a defendant's appearance was secured by a bail bond enters an order striking the defendant's failure to appear and recalling any order for arrest issued for that failure to appear, that court may simultaneously enter an order setting aside any forfeiture of that bail bond. When an order setting aside a forfeiture is entered, the defendant's further appearances shall continue to be secured by that bail bond unless the court orders otherwise.

(d) Motion Procedure. – If a forfeiture is not set aside under subsection (c) of this section, the only procedure for setting it aside is as follows:

(1) At any time before the expiration of 150 days after the date on which notice was given under G.S. 15A-544.4, the defendant or any surety on a bail bond may make a written motion that the forfeiture be set aside, stating the reason and attaching the evidence specified in subsection (a) of this section.

(2) The motion is filed in the office of the clerk of superior court of the county in which the forfeiture was entered, and a copy is served, under G.S. 1A-1, Rule 5, on the district attorney for that county and the county board of education.

(3) Either the district attorney or the county board of education may object to the motion by filing a written objection in the office of the clerk and serving a copy on the moving party.

(4) If neither the district attorney nor the board of education has filed a written objection to the motion by the tenth day after the motion is served, the clerk shall enter an order setting aside the forfeiture.

(5) If either the district attorney or the county board of education files a written objection to the motion, then not more than 30 days after the objection is filed a hearing on the motion and objection shall be held in the county, in the trial division in which the defendant was bonded to appear.

(6) If at the hearing the court allows the motion, the court shall enter an order setting aside the forfeiture.

(7) If at the hearing the court does not enter an order setting aside the forfeiture, the forfeiture shall become a final judgment of forfeiture on the later of:

a. The date of the hearing.

b. The date of final judgment specified in G.S. 15A-544.6.

(e) Only One Motion Per Forfeiture. – No more than one motion to set aside a specific forfeiture may be considered by the court.

(f) No More Than Two Forfeitures May Be Set Aside Per Case. – In any case in which the State proves that the surety or the bail agent had ~~notice or~~ actual knowledge, before executing a bail bond, that the defendant had already failed to appear on two or more prior ~~occasions,~~ occasions on the same charge, no forfeiture of that bond may be set aside for any reason. Actual knowledge exists only when the State indicates on both the release order and the bond form provided by the State that the defendant has failed to appear on two or more occasions on the same charge.

(g) No Final Judgment After Forfeiture Is Set Aside. – If a forfeiture is set aside under this section, the forfeiture shall not thereafter ever become a final judgment of forfeiture or be enforced or reported to the Department of Insurance.

(h) Appeal. – An order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions. When notice of appeal is properly filed, the court may stay the effectiveness of the order on any conditions the court considers appropriate."

SECTION 2. G.S. 15A-547.1 reads as rewritten:

"**§ 15A-547.1. Remit bail bond ~~if defendant sentenced to community or intermediate punishment.~~in certain circumstances.**

~~If a defendant is convicted and sentenced to community punishment or intermediate punishment and no appeal is pending, then the~~ The court shall remit the bail bond to the obligor in accordance with the provisions of this Article and shall not require that the bail bond continue to be posted while the defendant serves his or her ~~sentence.~~sentence if any of the following circumstances exist:

(1) The defendant is convicted and sentenced to community punishment or intermediate punishment, and no appeal is pending.

(2) The defendant receives a prayer for judgment continued.

(3) The disposition of the defendant's case is by deferred prosecution."

SECTION 3. This act becomes effective December 1, 2005, and applies to bail bonds posted for offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 797
PROPOSED COMMITTEE SUBSTITUTE S797-CSRC-38 [v.9]

5/19/2005 8:28:18 AM

Short Title: Bail Bonds/Forfeitures & Remittances. (Public)

Sponsors:

Referred to:

March 23, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT FORFEITURE OF A BAIL BOND SHALL BE SET ASIDE IF THE DEFENDANT FOR WHOM THE BOND WAS POSTED WAS INCARCERATED ANYWHERE AT THE TIME OF THE FAILURE TO APPEAR, TO PROVIDE THAT BOND SHALL NOT BE FORFEITED UNLESS THE SURETY OR BAIL AGENT HAD ACTUAL KNOWLEDGE THAT THE DEFENDANT HAD FAIL~~ED~~ TO APPEAR ON TWO OR MORE OCCASIONS ON THE SAME CHARGE, AND TO PROVIDE THAT BOND SHALL BE REMITTED IF THE DEFENDANT RECEIVES A PRAYER FOR JUDGMENT CONTINUED OR DEFERRED PROSECUTION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-544.5 reads as rewritten:

"**§ 15A-544.5. Setting aside forfeiture.**

(a) Relief Exclusive. – There shall be no relief from a forfeiture except as provided in this section. The reasons for relief are those specified in subsection (b) of this section. The procedures for obtaining relief are those specified in subsections (c) and (d) of this section. Subsections (f), (g), (h), and (i) of this section apply regardless of the reason for relief given or the procedure followed.

(b) Reasons for Set Aside. – A forfeiture shall be set aside for any one of the following reasons, and none other:

(1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.

(2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.

(3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.

(4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question.

(5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.

(6) The defendant was ~~incarcerated~~ incarcerated, arrested, sentenced or confined in a unit of the Department of Correction or a detention facility and is serving a sentence or confinement or was incarcerated, arrested, sentenced or confined in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear.

(7) No final judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the court that the principal on the bond was prevented from attending because the principal was detained by reason of arrest, sentence, or confinement in a penal institution or jail in this State, or in another jurisdiction, or because the principal was confined or detained under a court order in a medical or mental institution in this State or in another jurisdiction. An official written notice of the holding institution in which the principal is being detained or confined shall be considered proof of the principal's detention or confinement and the notice may be sent from the holding institution by mail, delivered by hand, or sent by facsimile machine. The surety shall present the written notice and a letter of intent to transport the defendant to the clerk of the proper court, the district attorney having jurisdiction over the case, and the county board of education, and the notice and letter of intent shall serve as the surety's request for a detainer or hold to be placed on the principal. Should there be a failure to place a detainer or hold on the detainee within 15 days and after the presentation of the notice, the surety shall then be relieved of the liability for the appearance bond without further order of the court. In no event shall the letter of intent to transport the defendant be construed to require the surety to pay transportation costs that exceed the face amount of the bond. The surety shall not be liable for transportation costs if the defendant is in custody due to the actions of any district attorney, judge, clerk or magistrate in that judicial district. A final judgment may be rendered if the State has exhausted all remedies available to the State in regards to the extradition of the defendant, but has not been able to effectuate the extradition.

(8) No final judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the court that prior to the entry of final judgment on the forfeiture the principal on the bond is in the custody of any law

enforcement agency. An official written notice of the holding institution in which the principal is being detained or confined shall be considered proof of the principal's detention or confinement and the notice may be sent from the holding institution by mail, delivered by hand, or sent by facsimile machine. The surety shall present the written notice and a letter of intent to transport the defendant to the clerk of the proper court, the district attorney having jurisdiction over the case and the county board of education and the notice and letter of intent shall serve as the surety's request for a detainer or hold to be placed on the principal. Should there be a failure to place a detainer or hold on the detainee within 15 days and after the presentation of the notice, the surety shall then be relieved of the liability for the appearance bond without further order of the court. In no event shall the letter of intent to transport the defendant be construed to require the surety to pay transportation costs that exceed the face amount of the bond. The surety shall not be liable for transportation costs if the defendant is in custody due to the actions of any district attorney, judge, clerk or magistrate in that judicial district. A final judgment may be rendered if the State has exhausted all remedies available to the State in regards to the extradition of the defendant, but has not been able to effectuate the extradition.

(c) Procedure When Failure to Appear Is Stricken. – If the court before which a defendant's appearance was secured by a bail bond enters an order striking the defendant's failure to appear and recalling any order for arrest issued for that failure to appear, that court may simultaneously enter an order setting aside any forfeiture of that bail bond. When an order setting aside a forfeiture is entered, the defendant's further appearances shall continue to be secured by that bail bond unless the court orders otherwise.

(d) Motion Procedure. – If a forfeiture is not set aside under subsection (c) of this section, the only procedure for setting it aside is as follows:

(1) At any time before the expiration of 150 days after the date on which notice was given under G.S. 15A-544.4, the defendant or any surety on a bail bond may make a written motion that the forfeiture be set aside, stating the reason and attaching the evidence specified in subsection (a) of this section.

(2) The motion is filed in the office of the clerk of superior court of the county in which the forfeiture was entered, and a copy is served, under G.S. 1A-1, Rule 5, on the district attorney for that county and the county board of education.

(3) Either the district attorney or the county board of education may object to the motion by filing a written objection in the office of the clerk and serving a copy on the moving party.

(4) If neither the district attorney nor the board of education has filed a written objection to the motion by the tenth day after the motion is served, the clerk shall enter an order setting aside the forfeiture.

(5) If either the district attorney or the county board of education files a written objection to the motion, then not more than 30 days after the objection is filed a hearing on the motion and objection shall be held in the county, in the trial division in which the defendant was bonded to appear.

(6) If at the hearing the court allows the motion, the court shall enter an order setting aside the forfeiture.

(7) If at the hearing the court does not enter an order setting aside the forfeiture, the forfeiture shall become a final judgment of forfeiture on the later of:

a. The date of the hearing.

b. The date of final judgment specified in G.S. 15A-544.6.

(e) Only One Motion Per Forfeiture. – No more than one motion to set aside a specific forfeiture may be considered by the court.

(f) No More Than Two Forfeitures May Be Set Aside Per Case. – In any case in which the State proves that the surety or the bail agent had ~~notice or~~ actual knowledge, before executing a bail bond, that the defendant had already failed to appear on two or more prior ~~occasions,~~ occasions on the same charge, no forfeiture of that bond may be set aside for any reason. Actual knowledge exists only when the State indicates on the release order provided by the State that the defendant has failed to appear on two or more occasions on the same charge and the release order is subsequently signed by the surety.

(g) No Final Judgment After Forfeiture Is Set Aside. – If a forfeiture is set aside under this section, the forfeiture shall not thereafter ever become a final judgment of forfeiture or be enforced or reported to the Department of Insurance.

(h) Appeal. – An order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions. When notice of appeal is properly filed, the court may stay the effectiveness of the order on any conditions the court considers appropriate."

SECTION 2. G.S. 15A-547.1 reads as rewritten:

"**§ 15A-547.1. Remit bail bond ~~if defendant sentenced to community or intermediate punishment.~~in certain circumstances.**

~~If a defendant is convicted and sentenced to community punishment or intermediate punishment and no appeal is pending, then the~~ The court shall remit the bail bond to the obligor in accordance with the provisions of this Article and shall not require that the bail bond continue to be posted while the defendant serves his or her ~~sentence.~~sentence if any of the following circumstances exist:

(1) The defendant is sentenced to community punishment or intermediate punishment, including domestic violence program or drug treatment courts.~~:~~

(2) The defendant receives a prayer for judgment continued.

(3) The defendant receives a deferred prosecution."

SECTION 3. This act becomes effective December 1, 2005, and applies to bail bonds posted for offenses committed on or after that date.

Robin Johnson (Research)

From: Robin Johnson (Research)
Sent: Wednesday, May 25, 2005 4:26 PM
To: @Senate/Judiciary II
Cc: Kory Goldsmith (Research); Ben Popkin (Research)
Subject: Summary for S797

S0797e1-SMRC-CS
RC-38-Bail Bond...

Here's a summary for the PCS for SB 797 for tomorrow's Senate J2 meeting. Robin

Robin Johnson (Research)

From: Robin Johnson (Research)
Sent: Wednesday, May 25, 2005 4:24 PM
To: @Senate/Judiciary II
Cc: Kory Goldsmith (Research); Ben Popkin (Research)
Subject: S797 PCS for tomorrow's Senate JII

mso2C0_.doc

Here is the PCS for SB 797 for tomorrow's Senate JII meeting. A summary will follow. Robin

SENATE BILL 797:
Bail Bonds/Forfeitures & Remittances

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 19, 2005
Introduced by:	Sen. Thomas	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	PCS to First Edition S797-CSRC-38		

SUMMARY: ***Senate Bill 797 would provide two additional circumstances the forfeiture of a bail bond would be set aside even though the defendant failed to appear before the court when required to do so. It also narrows the situations where forfeiture may not be set aside to those where the surety had actual knowledge that the defendant had failed to appear on two previous occasions on for the same offense. Finally, it would prohibit a court from keeping a defendant's bond in place while a defendant serves certain intermediate punishments, obtains a PJC or there is a deferred prosecution.***

The act would become effective December 1, 2005 and apply to bail bonds posted for offenses committed on or after that date.

CURRENT LAW: G.S. 15A-544.5 sets out 6grounds for setting aside the forfeiture of a bail bond. These include situations where the defendant's failure to appear has been set aside by the court, the charges have been finally disposed by the court, the defendant was surrendered to the court by the surety, the defendant died within the period of the forfeiture, or the defendant was incarcerated by the State or the federal government. In cases where the State proves that the surety had notice or actual knowledge before executing the bond that the defendant had already failed to appear on two or more occasions for the same offense, the forfeiture of the bond may not be set aside for any reason.

G.S. 15A-547.1 requires the court to remit the bond if a defendant is convicted and sentenced to community punishment or intermediate punishment and no appeal is pending.

BILL ANALYSIS:

Section 1 of the bill amends G.S. 15a-544.5 to add two new additional grounds for setting aside forfeiture. The first is a situation where the defendant was prevented from appearing before the court because the defendant was detained by reason of arrest, sentence, or confinement in a penal institution or jail in North Carolina or another jurisdiction, or because the defendant was confined or detained under a court order in a medical or mental health institution. An official written notice by the institution that the defendant is being detained shall be considered proof of the detention. The surety may submit that notice and a letter of intent to pay for the cost of transporting the defendant to the court. The notice and the letter will constitute a request for a detainer to be placed on the defendant. If the detainer is not placed on the defendant within 15 days, the surety would be relieved of the liability for the appearance bond. In no event would the surety be liable for transportation costs in excess of the face amount of the bond, and the surety would not be liable for transportation costs if the defendant is detained as a result of actions by any district attorney, judge, clerk or magistrate in that judicial district. If the State cannot obtain an extradition after pursuing all remedies, a final judgment may be rendered. A similar exception with similar procedures would apply in situations where the principal is shown to be in the custody of law enforcement officials.

The bill also expands the existing law to include situations where a defendant does not appear because the defendant has been arrested, sentenced, or confined in a detention facility.

The changes would also narrow the circumstances where forfeiture could not be set aside where the defendant has failed to appear on two or more occasions. It would require that the surety have actual knowledge of the defendant's multiple failures to appear. Actual knowledge would only apply if the State indicates on the release order that the defendant has failed to appear on two or more occasions on the same charge and the surety subsequently signs the release order.

Section 2 amends G.S. 15A-547.1 to provide additional specificity to situations where the court is prohibited from requiring that a surety continue to post bond. It would provide that the court must remit the bail bond while the defendant serves his or her sentence if the defendant is sentenced to community punishment or intermediate punishment, the defendant has received a prayer for judgment continued or deferred prosecution.

S0797e1-SMRC-CSRC-38

Principal Clerk ____
Reading Clerk ____

NOTE: J II WILL MEET TWICE ON TUESDAY 10:00am AND AGAIN AT 12:00 NOON

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	May 31, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 629	DuPont State Forest Capital Funds.	Senator Snow, Jr.
SB 1143	Immunity for Certain City/County Officers.	Senator Hartsell
SB 782	Fair Housing Act Amendment.	Senator Kinnaird
SB 209	Post-Adoption Privileges.	Senator Kinnaird

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, May 31, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 629	DuPont State Forest Capital Funds.	Senator Snow, Jr.
SB 1143	Immunity for Certain City/County Officers.	Senator Hartsell
SB 782	Fair Housing Act Amendment.	Senator Kinnaird
SB 209	Post-Adoption Privileges.	Senator Kinnaird

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

May 31, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on May 31, 2005, with nineteen members present.

SB 209 (Post-Adoption Privileges.) Senator Forrester moved to accept the proposed committee substitute for purposes of discussion. All voted and the motion carried. Senator Hartsell invited Senator Kinnaird to explain the bill. Senator Kinnaird recognized Mr. James T. Bryan, attorney, to speak on the bill. Questions from Senators Bingham, Goodall, Dalton, Berger and Thomas were answered by Senators Kinnaird and Hartsell and Mr. James T. Bryan. After much discussion, Senator Kinnaird withdrew the bill due to lack of support.

SB 1143 (Immunity for Certain City/County Officers.) Senator Thomas chaired the meeting. Senator Goodall moved to accept the proposed committee substitute for purposes of discussion. All voted and the motion carried. Senator Hartsell explained the bill. Paul Wilms, representing the Home Builders Association, Fred Bone, representing the Council of Code Officials, Paul Meyer, representing North Carolina Association of County Commissioners and John Phelps, representing North Carolina League of Municipalities all spoke for the bill. Questions from Senators Apodaca, Webster, Kerr, Berger and Goodall were answered by Senator Hartsell. Senator Berger submitted and amendment which was read by Ms. Kory Goldsmith, Staff Attorney. Senator Hartsell opposed the amendment. Senator Dalton also spoke in opposition to the amendment. Senator Berger later withdrew his amendment. Senator Hartsell moved to adopt the revised proposed committee substitute. Senator Apodaca moved for a favorable report, unfavorable to the original bill, favorable to the proposed committee substitute. All voted and the motion carried.

SB 782 (Fair Housing Act Amendment.) Senator Hartsell recognized Senator Kinnaird to explain the bill. Senator Kinnaird moved to accept the proposed committee substitute for purposes of discussion. All voted and the motion carried. Senator Kinnaird introduced Ms. Ginnie Wilkins, a constituent of Senator Kinnaird, and asked her to tell of her experiences which the bill addressed. Senator Kinnaird noted that the bill will go to a study committee. Questions from Senators Webster, Berger, Bingham and Goodall were answered by Senator Kinnaird, Ms. Wilkins and Senator Hartsell. Senator Kinnaird moved for a favorable report, unfavorable to the original bill, favorable to the committee substitute. All voted and the motion carried.

SB 629 (DuPont State Forest Capital Funds.) Senator Hartsell asked for a motion to suspend the rules in order to accept the second proposed committee substitute for purposes of discussion. Senator Apodaca so moved, all voted and the motion carried.

Senator Snow explained the bill. Senator Snow introduced a number of visitors representing the area in question. Mr. Bruce Thompson and Mr. Tom Griffin, both Attorneys, representing Ilford Corporation, spoke in favor of the bill. Mr. Richard Rogers, representing the North Carolina Department of Economic and Natural Resources, spoke in opposition. Questions from Senators Apodaca, Forrester, Webster, Dorsett, Berger, Jacumin, Allran, Dalton, Holloman, Bingham and Kerr were answered by Senator Snow, Senator Hartsell, Mr. Thompson, Mr. Griffin and Mr. Rogers. Senator Apodaca moved for a favorable report, unfavorable to the original bill, favorable to the committee substitute. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, May 31, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **629** DuPont State Forest Capital Funds.

Draft Number:	PCS 35230
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

TOTAL REPORTED: 1

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, May 31, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **782** Fair Housing Act Amendment.

Draft Number:	PCS 15249
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

TOTAL REPORTED: 1

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, May 31, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **1143** Immunity for Certain City/County Officers.

Draft Number:	PCS15250
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

TOTAL REPORTED: 1

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — May 31, 2005

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John Phelps	NCLM
John Rust	NCFPC
R. Paul Wilms	NCAJ/BA
John Snow	Staff
Robb Leandro	Parker Poe
Tom Griffin	Parker Poe
BRUCE THOMPSON	PARKER POE
W. DAVIS GUICH	TRANSYLVANIA COUNTY COMMISSIONER
Jeff Duvall	Transylvania County Commissioner
Ray Miller	" " "
Jason Chappell	" " "

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — Name of Committee

5/31/05 — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Mark R. Burrows	Transylvania County
Dale Carroll	Advantage West
Artie Wilson	Transylvania County
Michael Geouge	Sanford Holshouser Business Dev. Group
Carl Mooney, Jr.	Former Agfa Employee, Brevard, NC
RON PADGETT	FORMER AG FA EMPLOYEE, BREVARD, N.C.
Jim Kisner	Henderson county - Agfa (Former)
John McKay	Gov ops 'cg
Johanna Reese	DENR
Ken Waleud	former DuPont employee
Nancy Thompson	VMC IC

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jamie VanBuskirk	DuPont Charlotte, NC
A. T. Hahn	Dupont Richmond, VA
William Whaley	NC Building Inspectors Assoc.
Bucky FRYE	NC BUILDING INSPECTIONS Assc.
Susan Mellott	NC Building Inspectors Assoc.
Jim Blackburn	NC Association of County Commissioners
Robin Smith	DENR
Jessica Sage	NCAPC
Fred Bone	Bone & Asso.
Roger Bone	Bone and Assoc.
Dan Hartzog	ENR- Waste Management

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Ken Hardy	Gov's office
Doug Fox	NCAFB

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 629*

Short Title:	DuPont State Forest Capital Funds.	(Public)
Sponsors:	Senators Snow; and Apodaca.	
Referred to:	Appropriations/Base Budget.	

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO APPROPRIATE FUNDS TO BE USED TOWARD THE CAPITAL COSTS OF CONVERTING AN EXISTING LOG BUILDING LOCATED IN DUPONT STATE FOREST INTO A VISITORS' CENTER FOR DUPONT STATE FOREST.

The General Assembly of North Carolina enacts:

SECTION 1. There is appropriated from the General Fund to the Division of Forest Resources, Department of Environment and Natural Resources, the sum of one hundred fifty thousand dollars ($150,000) for the 2005-2006 fiscal year and the sum of one hundred fifty thousand dollars ($150,000) for the 2006-2007 fiscal year to be used toward the capital costs of converting an existing log building located in DuPont State Forest into a visitors' center for DuPont State Forest.

SECTION 2. This act becomes effective July 1, 2005.

RESPONSE TO ISSUES RAISED IN BILL ANALYSIS
SB 629 ("Manufacturing Redevelopment Districts")

(1) Is the bill an unconstitutional local act abating a nuisance or regulating manufacturing or trade? If so, what would be the consequences of the act being held void?

No. First, this bill is not a local act as it applies statewide. The project that DuPont and Ilford are contemplating fits within the parameters of the legislation. However, the legislation is not limited to this project.

Second, the purpose of the bill is to create economic development in distressed counties, not to abate a nuisance. The Ilford project entails some environmental remediation that in no way would be considered to be the abatement of a nuisance. Likewise, the general requirements in the legislation do not require a nuisance in order for any other projects to go forward.

Finally, the bill does not regulate manufacturing. It merely provides a vehicle for restarting production in facilities that meet the general requirements in the legislation. It is clear from the language and intent of the proposed bill that if passed the legislature will be creating a special privilege for former owners of manufacturing redevelopment districts. However, under the court's current analysis, the proposed legislation would survive constitutional scrutiny. The text and purpose of the legislation clearly satisfy the public purpose requirement of the court's two-part test. Similarly, the state's belief that limiting liability encourages redevelopment satisfies the reasonable basis aspect of the court's two-part test.

(2) Is there any State oversight regarding whether the joint certification filed by the former owners and the new operator is accurate at the time of filing?

Yes, there is oversight in the sense that the certification is simply prima facie evidence. The certification can be challenged by the State of North Carolina.

(3) Is the new operator's liability for assessment and remediation limited to $5 million?

No. Liability is not limited to $5 million. The legislation requires the new operator to accept liability for all environmental claims at the facility **to the same extent** as the prior owner, and also specifically requires the new owner to accept responsibility for assessment and remediation as part of the preconditions to the designation of the district.

(4) Could the State be held liable by third parties for the environmental conditions on the property? Who would have standing in such an action?

No. The State of North Carolina would not be held liable for environmental claims for any number of reasons. First, the State has sovereign immunity for third-party claims in general.

The few instances where the State does not have immunity impose liability for clean up. On this topic, the guaranteed remediation product outlined in the legislation will perform the cleanup, leaving absolutely no liability for the State.

Finally, under applicable law, former owners are liable for cleanup only to the extent that disposal took place during their ownership. Here, the State will only hold a full interest for a few minutes and thus, there will be no basis for liability.

However, this is really a moot point because the bill requires the cleanup will be performed and be guaranteed, leaving nothing for the state. The remediation product also includes insurance that will benefit the state, if all else fails (which it won't).

(5) Does federal law allow the State to waive immunity from State environmental laws for former owners?

Legislative grants of immunity are not without precedent. One example of such legislative limits on liability is statutes of repose. See G.S. 1-50(5) & 1-50(6). Statutes of repose shield specific parties from "open-ended" liability by limiting the number of years those parties are liable for their actions. For example, G.S. 1-50(6) provides a six year window of liability on durable goods sold by manufacturers. The courts have repeatedly upheld statutes of repose as constitutional in the face of an art. I § 32 challenge. See Lamb 308 N.C. at 438, 302 S.E. 2d at 879 (holding that the state had a reasonable basis for limiting the liability of architects and contractors under G.S. 1-50(5)); Tetterton v. Long 314 N.C. 44, 53, 332 S.E. 2d 67, 72 (1985) (upholding court's rational in Lamb).

Statutes of repose differ slightly from the proposed act in that our legislation ends liability for the former owner at the moment the property is donated to the State. However, unlike a statute of repose, **this legislation does not extinguish liability for any claims**. Instead, it transfers all liability for third party claims to the new operator of the facility.

(6) Notwithstanding the last sentence of Section 4, could the waiver of immunity cause the federal government to remove the State's authority to enforce environmental laws, and/or could the State loose federal funds?

No. Governmental entities, including states, routinely settle out liability for environmental matters for appropriate consideration. Here, the consideration could not be more appropriate. Instead of some cut deal, the immunity is offered only if ALL of the former owner's liability is covered. This is the same issue that DENR addressed and decided was not an impediment to the covenant not to sue, and it is handled the exact same way here, even employing DENR's own language. This issue is a red herring.

(7) What will be the cost to the State if/when the property becomes part of the State forest? Will the State be liable for additional remediation and clean-up based upon the property's new use as part of a State forest?

This hypothetical type of issue should not be an impediment to the current and very real economic opportunity that the bill presents. The cleanup will be complete now, and may well result in conditions that allow virtually unrestricted use. With the remediation product, the engineers will have to work with the State to reach the appropriate cleanup goals.

Mark Burrows

Friends of
DuPont Forest

March 7, 2005

Mr. Ray Miller
Chairman, County Commissioners
Transylvania County
Brevard, NC 28712

Dear Mr. Miller,

Friends of DuPont Forest is a volunteer, non-profit corporation whose mission is to enhance the use and enjoyment of the DuPont State Forest while protecting its natural resources. We regularly work to assist the NC Forest Service staff to maintain the environment in the forest to allow present and future generations to enjoy its spectacular beauty.

We understand that efforts are ongoing to allow Ilford to purchase a portion of the existing Agfa property and operate a coated paper operation. This project would bring approximately 90 needed skilled jobs to Transylvania County.

This letter is to affirm that Friends of DuPont Forest supports Transylvania County in this effort to improve the community by attracting these jobs.

While there are undoubtedly many complex legal and technical issues involved, we trust that the Division of Environment and Natural Resources will work to assure the thorough clean-up of hazardous wastes and groundwater contamination, regardless of the owner.

Assuming that these complex issues can be properly addressed to DENR's satisfaction, we do feel that such a facility can be compatible with the mission of the neighboring State Forest. We also support the proposals that would transition portions of the remaining Agfa acres into the State Forest at the appropriate time.

Sincerely,

Chuck McGrady
President

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 629*
PROPOSED COMMITTEE SUBSTITUTE S629-PCS35230-RT-26

Short Title: Manufacturing Redevelopment Districts. (Public)

Sponsors:

Referred to:

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR THE REDEVELOPMENT OF CERTAIN MANUFACTURING DISTRICTS.

The General Assembly of North Carolina enacts:

SECTION 1. Manufacturing redevelopment districts: legislative findings.

The General Assembly of North Carolina makes the following findings regarding the need for manufacturing redevelopment districts:

(1) Economic development in the State will be served by providing an opportunity to restart production in manufacturing facilities designed for targeted industries such as photographic materials, digital inkjet products, digital photographic applications, and other photographic printing technology, thereby providing employment opportunities for the residents of North Carolina.

(2) When an existing facility can be modified to meet the needs of the new industry and thereby preserve and create jobs, it is in the public interest to provide a mechanism for these modifications to occur.

(3) Economically distressed counties continue to lose manufacturing jobs, and the General Assembly must act to create new jobs for citizens residing in those counties.

(4) The health and safety of the citizens of North Carolina will be served through the assessment and remediation of known and unknown environmental conditions at manufacturing facilities.

(5) The public interest of the State will be served by securing a property interest in real property located within significant State property holdings to the State and by providing a property interest in the real property to a new operator that is sufficient to enable the new operator to restart manufacturing at existing facilities on the real property in

consideration for the preservation and creation by the new operator of jobs and economic opportunities.

(6) The public interest of the State will be served by encouraging owners of manufacturing facilities to transfer ownership in property in order to make it possible for new operators to restart production at these facilities.

SECTION 2. Manufacturing redevelopment districts: purpose.

A manufacturing redevelopment district shall exist to provide manufacturing, research and development, and related service and support jobs to citizens of the State while ensuring the remediation of known and unknown environmental conditions at manufacturing facilities.

SECTION 3. Manufacturing redevelopment districts: establishment.

A manufacturing redevelopment district may be established on any parcel or tract of land or on any combination of contiguous parcels or tracts of land as provided in this section. To establish a manufacturing redevelopment district, the new operator of the manufacturing facilities located within the boundaries of the district shall certify to the Secretary of State that the district meets all of the criteria set out in this section. The certification shall describe the boundaries of the district by metes and bounds and shall set out the specific financial mechanism that guarantees completion of the assessment and remediation program as required under subdivision (8) of this section. This certification shall constitute prima facie evidence that these criteria have been met. The district shall be considered to be established as a manufacturing redevelopment district on the date the certification is filed. Once established, a manufacturing development district shall continue to exist unless the real property comprising the district reverts to the State pursuant to Section 6 of this act. A manufacturing redevelopment district may be established only if all of the following criteria are met at the time the district is established:

(1) The real property is located in a county that is economically distressed. For purposes of this section, a county shall be considered economically distressed if all of the following apply:

a. The average weekly wage in the county is less than five hundred twenty-five dollars ($525.00) per person.

b. The percentage of unemployed workers is greater than six percent (6%).

c. The percentage of citizens who are at or below the federal poverty level, as determined by the most recent federal decennial census, is greater than nine percent (9%).

(2) All of the real property comprising the district is a privately owned in-holding of 50 acres or more within a State forest of 10,000 acres or more.

(3) The district contains a manufacturing facility that has been out of production for two years or more.

(4) Failure to restart the manufacturing facility would result in a permanent lost opportunity to create 50 or more jobs.

(5) The manufacturing facility has a total square footage of 500 square feet or more.

(6) The new operator of the manufacturing facility intends to employ more than 50 employees. For purposes of this act, a new operator is an entity that restarts operations at a manufacturing facility located within a manufacturing redevelopment district.

(7) The new operator of the facility has accepted responsibility for the assessment and remediation of known and unknown environmental conditions in accordance with applicable State law and rules.

(8) The new operator of the facility has prefunded an assessment and remediation program in an amount of at least five million dollars ($5,000,000) to assess and remediate known environmental conditions in accordance with applicable environmental laws and in light of the intended use of the facility by that new operator. In order to guarantee completion of the assessment and remediation program, the new operator shall prefund the program by means of an escrow account or other financing mechanism that runs in favor of the State in the event of a default.

(9) The owner donates the real property comprising the manufacturing redevelopment district to the State of North Carolina.

SECTION 4. Manufacturing redevelopment districts: immunity.

No person who owned or had an interest in any real property within a manufacturing redevelopment district at any time prior to the establishment of the district in accordance with this act shall be liable to the State, to any governmental unit or subdivision of the State, or to any private or third party, for the cleanup of environmental damage or restoration of natural resources on any of the real property comprising the district, or for any other claims arising out of the presence of oil, hazardous substances, or hazardous waste, as defined under any applicable State statute or rule, in any media at the real property. The immunity provided by this section shall attach at the time that the real property comprising the manufacturing redevelopment district is donated to the State. The immunity provided by this section is with respect to any theory of legal liability, including, but not limited to, any claim of negligence, nuisance, or trespass, or arising under other common law principles, or arising under any State statute or rule, including, but not limited to, Article 9 of Chapter 130A of the General Statutes, Articles 21 and 21A of Chapter 143 of the General Statutes, and rules adopted pursuant to those Articles. Notwithstanding the foregoing, this act shall not be construed to prevent the State from enforcing remediation standards, monitoring, or compliance requirements specifically required by the United States Environmental Protection Agency to be enforced by the State as a condition to receiving and retaining federal funds or program approval, authorization, or delegation.

SECTION 5. Manufacturing redevelopment districts: claims.

The new operator of the manufacturing redevelopment district shall be liable for all claims subject to the immunity provided by Section 4 of this act to the same extent as any prior owner of the property that comprises the manufacturing

redevelopment district. The new operator shall have all rights, claims, and defenses that are or would have been available to any prior owner with respect to those immunized claims.

SECTION 6. Manufacturing redevelopment districts: donation and transfer of the district; reversionary interest.

Notwithstanding any other provision of Chapter 146 of the General Statutes, the State Property Office shall accept the donation by the owner of the real property comprising the manufacturing redevelopment district on behalf of the State of North Carolina. The State Property Office shall then, in the name of the State of North Carolina, immediately transfer to the new operator a fee simple determinable interest in the real property. The event that will terminate the fee simple determinable interest in the real property is the permanent cessation of manufacturing operations at the real property. The consideration for the transfer by the State of the property interest to the new operator shall be the creation of jobs and economic opportunities that will result from restarting manufacturing operations on the real property. If the fee simple determinable interest is terminated and the real property reverts to the State, the State Property Office shall allocate the property to the contiguous State forest.

SECTION 7. Effective date. This act is effective when it becomes law.

SENATE BILL 629:
Manufacturing Redevelopment Districts.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 31, 2005
Introduced by:	Sen. Snow	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	PCS to First Edition S629-PCS75319-RT-26		

SUMMARY: ***The Proposed Committee Substitute for SB629 completely rewrites the 1st Edition. The PCS:***

- ***Establishes a process for the creation of manufacturing redevelopment districts (redevelopment districts);***
- ***Grants immunity from State environmental laws for any person who held an interest in the land and facilities contained within a redevelopment district prior to the creation of the district;***
- ***Provides for the donation of the land that contains the redevelopment district to the State and for the State to re-convey the land to a new operator of the manufacturing facility subject to a reversionary interest;***
- ***Provides for the new operator to open a manufacturing facility that will employ more than 50 employees;***
- ***Provides for the new operator to provide at least $5 million to fund an assessment and remediation program for environmental conditions at the district; and***
- ***Provides that upon the permanent cessation of the new operator's manufacturing operations, the land shall revert to the State and shall be allocated to the contiguous State forest.***

BILL ANALYSIS:

Section 1 contains legislative findings regarding the need for manufacturing redevelopment districts (redevelopment districts). These include that the economic development of the State will be served by providing an opportunity to restart production in manufacturing facilities to meet the needs of a new industry thereby creating and preserving jobs, that economically distressed counties continue to lose jobs and the General Assembly must act to create new jobs for citizens in those counties, that the health and safety of North Carolina citizens will be served through the assessment and remediation of known and unknown environmental conditions at manufacturing factilities, that the public interest will be served by the State securing an interest in property located within significant State property and by providing an interest sufficient to allow the new operator to restart a manufacturing facility and provide new jobs, and that the public interest will be served by encouraging a former owner to transfer ownership in order to make it possible for new operators to restart production at the facilities.

Section 2 provides that a redevelopment district shall exist to provide manufacturing, research and development, and related service and support jobs to citizens of the State while ensuring the remediation of known and unknown environmental conditions at manufacturing facilities.

Section 3 set-outs the process for establishing a redevelopment district. The district is created when the new operator certifies to the Secretary of State that the district meets all of the criteria specified in this section. The criteria includes:

- The real property is located in a county that is economically distressed, meaning the average weekly wage in the county is less than$525/week, the unemployment rate is greater than 6%, and more than 9% of the citizens are at or below the federal poverty level.
- All of the real property of the district is privately owned in-holding of 50 acres or more within a State forest of 10,000 acres or more.
- The district contains a manufacturing facility that has been out of production for two years or more.
- Failure to restart the facility would result in a permanent lost opportunity to create 50 or more jobs.
- The manufacturing facility has a total of 500 square feet or more.
- The new operator intends to employ 50 or more workers.
- The new operator accepts responsibility for the assessment of known and unknown environmental conditions under applicable State laws and rules.
- The new operator has pre-funded an assessment and remediation program in an amount of at least $5 million by means of an esrow account or other financing mechanism that runs in favor of the State in the event of a default.
- The former owner donates the real property comprising the redevelopment district to the State of North Carolina.

The redevelopment district is created on the date the certification is filed. Once established, the district will exist until the real property reverts to the State.

Section 4 grants immunity to any person who owned or had an interest in any real property within a redevelopment district at any time prior to the establishment of the district. The immunity is for liability to the State, any political subdivision of the State, or to any private or third party for the cleanup of environmental damage or restoration of natural resources on any of the real property comprising the district or for other claims arising out of the presence of oil or any other hazardous substance arising under any State statute or rule. The immunity would be with regard to any theory of liability including negligence, nuisance or trespass arising under any common law theory or State statutes such as Article 9 of Chapter 130A (Solid Waste Management), or Articles 21 (Clean Air and Water) and 21A (Oil and Hazardous Substances) of Chapter 143. The act would not be construed to prevent the State from enforcing remediation standards, monitoring, or compliance requirements required by the EPA to be enforced by the State as a condition to receiving or retaining federal funds or program approval.

Section 5 makes the new operator liable for all claims that the former owner would have been liable for and to the same extent as the former owner of the redevelopment district.

Section 6 directs the State Property Office to accept the donation by the former owner of the real property comprising the redevelopment district on behalf of the State. It also directs the State Property Office to immediately transfer the property to the new operator in fee simple determinable. The permanent cessation of the new operator's manufacturing operations shall be the event that will terminate the new operator's ownership of the property. The property would then revert to the State, which in turn would allocate the property to the contiguous State forest.

EFFECTIVE DATE: The act would be effective when it becomes law.

ISSUES: Is the bill an unconstitutional local act abating a nuisance or regulating manufacturing or trade? If so, what would be the consequences of the act being held void?

Is there any State oversight regarding whether the joint certification filed by the former owners and the new operator is accurate at the time of filing?

Is the new operator's liability for assessment and remediation limited to $5 million?

Could the State be held liable by third parties for the environmental conditions on the property? Who would have standing in such an action?

Does federal law allow the State to waive immunity from State environmental laws for former owners?

Notwithstanding the last sentence of Section 4, could the waiver of immunity cause the federal government to remove the State's authority to enforce environmental laws, and/or could the State loose federal funds?

What will be the cost to the State if/when the property becomes part of the State forest? Will the State be liable for additional remediation and clean-up based upon the property's new use as part of a State forest?

S0629e1-SMRC-PCS75319-RT-26

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 1143

Short Title:	Immunity for Certain City/County Officers.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO RESTORE IMMUNITY PROTECTION TO MUNICIPALITIES AND COUNTIES AND THEIR OFFICERS AND EMPLOYEES WHEN PERFORMING DUTIES IN FURTHERANCE OF PUBLIC SAFETY AND WHEN PERFORMING ACTIVITIES RELATED TO BUILDING INSPECTIONS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 8 of Chapter 160A of the General Statutes is amended by adding the following new section:

"**§ 160A-200. Immunity for public safety.**

No municipality or any officer or employee thereof charged with performing duties in furtherance of the exercise of public safety, including, but not limited to, law enforcement, fire protection, 911 services, rescue squad services, and ambulance services, pursuant to this Article or other provision of general law shall be held to answer in any civil action or proceeding for acts or omissions in performing, or failing to perform, such duties in a particular instance unless such acts or omissions amount to gross negligence or intentional wrongdoing. This section shall not apply to actions arising out of the operation of a motor vehicle."

SECTION 2. Part 5 of Article 19 of Chapter 160A of the General Statutes is amended by adding the following new section:

"**§ 160A-439. Immunity for building inspections.**

No municipality or any officer or employee thereof charged with performing activities related to building inspections pursuant to this Part or other provision of general law shall be held to answer in any civil action or proceeding for acts or omissions in performing, or failing to perform, such activities in a particular instance unless such acts or omissions amount to gross negligence or intentional wrongdoing. This section shall not apply to actions arising out of the operation of a motor vehicle."

SECTION 3. Article 6 of Chapter 153A of the General Statutes is amended by adding the following new section:

"**§ 153A-144. Immunity for public safety.**

No county or any officer or employee thereof charged with performing duties in furtherance of the exercise of public safety, including, but not limited to, law enforcement, fire protection, 911 services, rescue squad services, and ambulance services, pursuant to this Article or other provision of general law shall be held to answer in any civil action or proceeding for acts or omissions in performing, or failing to perform, such duties in a particular instance unless such acts or omissions amount to gross negligence or intentional wrongdoing. This section shall not apply to actions arising out of the operation of a motor vehicle."

SECTION 4. Part 4 of Article 18 of Chapter 153A of the General Statutes is amended by adding the following new section:

"**§ 153A-375.1. Immunity for building inspections.**

No county or any officer or employee thereof charged with performing activities related to building inspections pursuant to this Part or other provision of general law shall be held to answer in any civil action or proceeding for acts or omissions in performing, or failing to perform, such activities in a particular instance unless such acts or omissions amount to gross negligence or intentional wrongdoing. This section shall not apply to actions arising out of the operation of a motor vehicle."

SECTION 5. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 1143
PROPOSED COMMITTEE SUBSTITUTE S1143-PCS65330-RC-55

Short Title: Immunity for Building Inspectors. (Public)

Sponsors:

Referred to:

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO RESTORE IMMUNITY PROTECTION TO MUNICIPALITIES AND COUNTIES AND BUILDING INSPECTORS EMPLOYED BY MUNICIPALITIES AND COUNTIES WHEN PERFORMING DUTIES IN FURTHERANCE OF PUBLIC SAFETY AND WHEN PERFORMING ACTIVITIES RELATED TO BUILDING INSPECTIONS.

The General Assembly of North Carolina enacts:

SECTION 1. Part 5 of Article 19 of Chapter 160A of the General Statutes is amended by adding the following new section:

"**§ 160A-439. Immunity for building inspections.**

No municipality or any officer or employee of a municipality charged with performing activities related to building inspections under this Part or other provision of general law shall be held to answer in any civil action or proceeding for acts or omissions in performing or failing to perform building inspection activities in a particular instance unless the acts or omissions amount to gross negligence or intentional wrongdoing. This section shall not apply to actions arising out of the operation of a motor vehicle."

SECTION 2. Part 4 of Article 18 of Chapter 153A of the General Statutes is amended by adding the following new section:

"**§ 153A-375.1. Immunity for building inspections.**

No county or any officer or employee of the county charged with performing activities related to building inspections under this Part or other provision of general law shall be held to answer in any civil action or proceeding for acts or omissions in performing or failing to perform the activities in a particular instance unless such acts or omissions amount to gross negligence or intentional wrongdoing. This section shall not apply to actions arising out of the operation of a motor vehicle."

SECTION 3. This act is effective when it becomes law.

SENATE BILL 1143:
Immunity for Building Inspectors

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 31, 2005
Introduced by:	Sen. Hartsell	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	PCS to First Edition S1143-PCS65330-RC-55		

SUMMARY: ***SB1143 would create civil immunity for cities and counties, and the employees of cities and counties for activities related to the performance of building inspections. The immunity would not apply for acts of gross negligence, intentional wrongdoing, or actions arising out of the operation of a motor vehicle.***

The Propose Committee Substitute removes broader language that would have provided immunity for cities and counties, and their employees charged with performing duties related to public safety.

The act would be effective when it becomes law.

CURRENT LAW: Chapter 160A (Cities and Towns) and Chapter 153A (Counties) both require the creation of a building inspection department to enforce the State and local laws regarding the construction of buildings, the instillation of mechanical systems like plumbing and HVAC, and the maintenance of already constructed buildings. Persons who wish to undertake the construction, additional or renovation of a building must obtain a building permit and the property is periodically inspected to be sure the work complies with the applicable codes and laws. When the project is finished, the property is subject to a final inspection, and if it complies with all applicable law and with the terms of the building permit, it is issued a certificate of compliance. A city or county building inspector or member of the building inspection department who fails to perform their duties, who willfully or improperly issues a permit, or who give a certificate of compliance without first making an inspection is guilty of a Class 1 misdemeanor.[1]

The "public duty doctrine" is a common law rule that generally provides that governmental entities and the agents or employees of governmental entities owe duties only to the general public, not to individual members of the public, unless there is a special relationship or special duty between the parties. Based upon this general duty, a member of the public cannot hold the entity or the employee liable for damages or injuries that arise by the negligent failure of the entity or employee to take certain actions. However, the North Carolina Supreme Court has held that the public duty doctrine only applies to law enforcement officers, and does not bar a claim against a county for negligent inspection of a private residence.[2] The North Carolina Court of Appeals has held that county building inspectors are not law enforcement officers.[3]

BILL ANALYSIS: The PCS provides that no city or county, or officer or employee of a city or county may be held civilly liable for any acts or omissions in performing or failing to perform a building inspection. The immunity would not extend to acts amounting to gross negligence or intentional wrongdoing. The immunity would not apply to actions arising out of the operation of a motor vehicle.

EFFECTIVE DATE: The act would be effective when the bill becomes law.

S1143e1-SMRC-PCS65330-RC-55

[1] G. S. 160A-416 and G.S. 153A-356 respectively.
[2] Thompson v. Waters, 526 S.E.2d 650 (2000).
[3] Kennedy v. Haywood County, 581 S.E.2d 119 (2003).

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

S D

SENATE BILL 1143
PROPOSED COMMITTEE SUBSTITUTE S1143-CSRC-58 [v.1]

Short Title: Protect Building Inspectors. (Public)

Sponsors:

Referred to:

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO RESTORE PROTECTION TO MUNICIPALITIES AND COUNTIES AND BUILDING INSPECTORS EMPLOYED BY MUNICIPALITIES AND COUNTIES WHEN PERFORMING ACTIVITIES RELATED TO BUILDING INSPECTIONS.

The General Assembly of North Carolina enacts:

SECTION 1. Part 5 of Article 19 of Chapter 160A of the General Statutes is amended by adding the following new section:

"**§ 160A-439. Immunity for building inspections.**

No municipality or any officer or employee of a municipality charged with performing activities related to building inspections under this Part or other provision of general law shall be held to answer in any civil action or proceeding for acts or omissions in performing or failing to perform building inspection activities in a particular instance unless the acts or omissions were material to the value of the structure and demonstrated by clear and convincing evidence. This section shall not apply to actions arising out of the operation of a motor vehicle."

SECTION 2. Part 4 of Article 18 of Chapter 153A of the General Statutes is amended by adding the following new section:

"**§ 153A-375.1. Immunity for building inspections.**

No county or any officer or employee of the county charged with performing activities related to building inspections under this Part or other provision of general law shall be held to answer in any civil action or proceeding for acts or omissions in performing or failing to perform building inspection activities in a particular instance unless the acts or omissions were material to the value of the structure and demonstrated by clear and convincing evidence. This section shall not apply to actions arising out of the operation of a motor vehicle."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 782

Short Title:	Fair Housing Act Amendment.	(Public)
Sponsors:	Senator Kinnaird.	
Referred to:	Judiciary II.	

March 22, 2005

A BILL TO BE ENTITLED

AN ACT AMENDING THE STATE FAIR HOUSING ACT TO PROHIBIT DISCRIMINATION ON THE BASIS OF LAWFUL SOURCE OF INCOME.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 41A-3 is amended by adding a new subdivision to read:

"(4a) "Lawful source of income" means income derived from social security, supplemental security income, housing assistance, child support, alimony, or public or general assistance."

SECTION 2. G.S. 41A-4 reads as rewritten:

"**§ 41A-4. Unlawful discriminatory housing practices.**

(a) It is an unlawful discriminatory housing practice for any person in a real estate transaction, because of race, color, religion, sex, national origin, handicapping condition, lawful source of income, or familial status to:

(1) Refuse to engage in a real estate transaction;

(2) Discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith;

(2a) Refuse to permit, at the expense of a handicapped person, reasonable modifications of existing premises occupied or to be occupied by the person if the modifications are necessary to the handicapped person's full enjoyment of the premises; except that, in the case of a rental unit, the landlord may, where it is reasonable to do so, condition permission for modifications on agreement by the renter to restore the interior of the premises to the condition that existed before the modifications, reasonable wear and tear excepted;

(2b) Refuse to make reasonable accommodations in rules, policies, practices, or services, when these accommodations may be necessary to a handicapped person's equal use and enjoyment of a dwelling;

(2c) Fail to design and construct covered multifamily dwellings available for first occupancy after March 13, 1991, so that:
a. The dwellings have at least one building entrance on an accessible route, unless it is impractical to do so because of terrain or unusual site characteristics; or
b. With respect to dwellings with a building entrance on an accessible route:
1. The public and common use portions are readily accessible to and usable by handicapped persons;
2. There is an accessible route into and through all dwellings and units;
3. All doors designed to allow passage into, within, and through these dwellings and individual units are wide enough for wheelchairs;
4. Light switches, electrical switches, electrical outlets, thermostats, and other environmental controls are in accessible locations;
5. Bathroom walls are reinforced to allow later installation of grab bars; and
6. Kitchens and bathrooms have space for an individual in a wheelchair to maneuver;

(3) Refuse to receive or fail to transmit a bona fide offer to engage in a real estate transaction;
(4) Refuse to negotiate for a real estate transaction;
(5) Represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or fail to bring a property listing to his attention, or refuse to permit him to inspect real property;
(6) Make, print, circulate, post, or mail or cause to be so published a statement, advertisement, or sign, or use a form or application for a real estate transaction, or make a record or inquiry in connection with a prospective real estate transaction, which indicates directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto;
(7) Offer, solicit, accept, use, or retain a listing of real property with the understanding that any person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith; or
(8) Otherwise make unavailable or deny housing.

(b) Repealed by Session Laws 1989, c. 507, s. 2.

(b1) It is an unlawful discriminatory housing practice for any person or other entity whose business includes engaging in residential real estate related transactions to discriminate against any person in making available such a transaction, or in the terms and conditions of such a transaction, because of race, color, religion, sex, national

origin, handicapping condition, lawful source of income, or familial status. As used in this subsection, "residential real estate related transaction" means:

(1) The making or purchasing of loans or providing financial assistance (i) for purchasing, constructing, improving, repairing, or maintaining a dwelling, or (ii) where the security is residential real estate; or

(2) The selling, brokering, or appraising of residential real estate.

The provisions of this subsection shall not prohibit any financial institution from using a loan application which inquires into a person's financial and dependent obligations or from basing its actions on the income or financial abilities of any person.

(c) It is an unlawful discriminatory housing practice for a person to induce or attempt to induce another to enter into a real estate transaction from which such person may profit:

(1) By representing that a change has occurred, or may or will occur in the composition of the residents of the block, neighborhood, or area in which the real property is located with respect to race, color, religion, sex, national origin, handicapping condition, lawful source of income, or familial status of the owners or occupants; or

(2) By representing that a change has resulted, or may or will result in the lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools in the block, neighborhood, or area in which the real property is located.

(d) It is an unlawful discriminatory housing practice to deny any person who is otherwise qualified by State law access to or membership or participation in any real estate brokers' organization, multiple listing service, or other service, organization, or facility relating to the business of engaging in real estate transactions, or to discriminate in the terms or conditions of such access, membership, or participation because of race, color, religion, sex, national origin, handicapping condition, lawful source of income, or familial status.

(e) It is an unlawful discriminatory housing practice to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by this Chapter."

SECTION 3. G.S. 41A-5 reads as rewritten:

"**§ 41A-5. Proof of violation.**

(a) It is a violation of this Chapter if:

(1) A person by his act or failure to act intends to discriminate against a person. A person intends to discriminate if, in committing an unlawful discriminatory housing practice described in G.S. 41A-4 he was motivated in full, or in any part at all, by race, color, religion, sex, national origin, handicapping condition, lawful source of income, or familial status. An intent to discriminate may be established by direct or circumstantial evidence; or

(2) A person's act or failure to act has the effect, regardless of intent, of discriminating, as set forth in G.S. 41A-4, against a person of a

particular race, color, religion, sex, national origin, handicapping condition, lawful source of income, or familial status. However, it is not a violation of this Chapter if a person whose action or inaction has an unintended discriminatory effect, proves that his action or inaction was motivated and justified by business necessity.

(b) It shall be no defense to a violation of this Chapter that the violation was requested, sought, or otherwise procured by another person."

SECTION 4. G.S. 41A-6(a) reads as rewritten:

(a) The provisions of G.S. 41A-4, except for subdivision (a)(6), do not apply to the following:

(1) The rental of a housing accommodation in a building which contains housing accommodations for not more than four families living independently of each other, if the lessor or a member of his family resides in one of the housing accommodations;

(2) The rental of a room or rooms in a private house, not a boarding house, if the lessor or a member of his family resides in the house;

(3) Religious institutions or organizations or charitable or educational organizations operated, supervised, or controlled by religious institutions or organizations which give preference to members of the same religion in a real estate transaction, as long as membership in such religion is not restricted by race, color, sex, national origin, handicapping condition, lawful source of income, or familial status;

(4) Private clubs, not in fact open to the public, which incident to their primary purpose or purposes provide lodging, which they own or operate for other than a commercial purpose, to their members or give preference to their members;

(5) With respect to discrimination based on sex, the rental or leasing of housing accommodations in single-sex dormitory property; and

(6) Repealed by Session Laws 1989 (Reg. Sess., 1990), c. 979, s. 4.

(7) The sale, rental, exchange, or lease of commercial real estate. For the purposes of this Chapter, commercial real estate means real property which is not intended for residential use."

SECTION 5. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 782
PROPOSED COMMITTEE SUBSTITUTE S782-PCS15249-RC-57

Short Title: Study Amendment to Fair Housing Act. (Public)

Sponsors:

Referred to:

March 22, 2005

A BILL TO BE ENTITLED

AN ACT DIRECTING THE NORTH CAROLINA HUMAN RELATIONS COMMISSION TO STUDY ISSUES RELATED TO THE STATE FAIR HOUSING ACT AND TO REPORT TO THE GENERAL ASSEMBLY.

Whereas, the North Carolina Fair Housing Act makes it unlawful to discriminate against a person in a real estate transaction based upon the person's race, color, religion, sex, national origin, handicapping condition, or familial status; and

Whereas, the North Carolina Human Relations Commission is charged with the investigation of complaints alleging violations of the Fair Housing Act; and

Whereas, some individuals must rely upon income derived from public sources in order to obtain and pay for housing; and

Whereas, a person's lawful source of income is not currently protected under the Fair Housing Act; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. The North Carolina Human Relations Commission ("Commission") shall study whether the State Fair Housing Act should be amended to make it an unlawful discriminatory housing practice to refuse to enter into a residential real estate transaction with a person based upon the fact that the person receives public assistance due to age or physical or mental disability. In studying this issue, the Commission shall review the laws of other states related to housing discrimination and determine the extent to which certain forms of public assistance are protected under those laws. While conducting the study, the Commission shall consult with representatives from the residential real estate and residential rental community. The Commission shall report its findings and any recommendations to the 2006 Regular Session of the 2005 General Assembly.

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 209

Short Title:	Post-Adoption Privileges.	(Public)
Sponsors:	Senators Kinnaird; Bingham, Dorsett, and Weinstein.	
Referred to:	Judiciary II.	

February 24, 2005

A BILL TO BE ENTITLED

AN ACT TO ALLOW AN ADOPTIVE PARENT AND A BIRTH RELATIVE TO ENTER INTO A WRITTEN AGREEMENT TO PROVIDE FOR POST-ADOPTION CONTACT AND COMMUNICATION.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 48 of the General Statutes is amended by adding a new Article to read:

"Article 11.

"Post-Adoption Privileges.

"**§ 48-11-100. Definitions.**

For purposes of this Article, the following definitions apply:

(1) Birth relative. – The biological parent, grandparent, sibling, or any other member of an adoptee's biological family related to the adoptee by blood or marriage.

(2) Post-adoption privileges agreement. – A written agreement that allows specifically described post-adoption privileges.

(3) Post-adoption privileges. – Visitation, communication, or any other contact or conveyance of information regarding an adoptee.

"**§ 48-11-101. Post-adoption privileges agreement; terms; conditions.**

(a) An adoptive parent and a birth relative may enter into a post-adoption privileges agreement before or at the time a decree of adoption is granted.

(b) A post-adoption privileges agreement may include the following:

(1) Provisions for visitation between the adoptee and a birth relative.

(2) Provisions for other forms of communication including the exchange of letters and telephone contact between the adoptee and a birth relative.

(3) Provisions for sharing information about the adoptee by parties to the agreement.

(4) The following warnings in bold type:

a. After the court grants the adoption petition, the adoption shall not be set aside due to the failure of an adoptive parent, birth relative, or the adoptee to follow the terms of this agreement or modifications to the agreement.

b. A disagreement between the parties or litigation brought to enforce, modify, or terminate this agreement shall not affect the validity of the adoption or serve as a basis for orders affecting the custody of the adoptee.

c. A court will not act on a petition to modify, enforce, or terminate this agreement unless the petitioner has participated or attempted to participate in good faith in mediation or other appropriate dispute resolution proceedings to resolve any dispute.

(c) The court may approve a post-adoption privileges agreement only if all of the following conditions are satisfied:

(1) The court finds that there is a significant emotional attachment between the adoptee and the birth relative to whom the agreement gives post-adoption privileges.

(2) The adoptee, if the adoptee is 12 years of age or older, consents to the post-adoption privileges agreement. However, the court may waive the requirement for the adoptee's consent if the court finds that the adoptee is not capable of consenting or that the adoptee should not be required to consent because consenting would not be in the adoptee's best interest.

(3) The county department of social services or the licensed agency placing the adoptee for adoption, or in the case of a direct placement adoption, the agency making the report to the court under G.S. 48-2-501 recommends the granting of post-adoption privileges.

(4) The adoptee is represented by a court-appointed guardian ad litem and the guardian recommends the granting of post-adoption privileges unless the court finds that the appointment of a guardian ad litem is not necessary to protect the adoptee's best interest.

(5) Each adoptive parent consents to the granting of post-adoption privileges.

(6) The adoptive parent and the birth relative execute a post-adoption privileges agreement and file the agreement with the court.

(7) The post-adoption privileges agreement includes an acknowledgment by the birth relative that the adoption is irrevocable regardless of whether the adoptive parent fails to abide by the post-adoption privileges agreement.

(8) The post-adoption privileges agreement includes an acknowledgment by the adoptive parent that the agreement, when approved by the court, grants the birth relative the right to seek enforcement in court of the post-adoption privileges specified in the agreement.

(9) Any other factors the court deems appropriate in determining whether the adoptee's best interests would be served by granting post-adoption privileges.

(d) A post-adoption privileges agreement is enforceable only if it is approved by the court and signed by a district court judge.

"**§ 48-11-102. Modification, enforcement, and termination.**

(a) A birth relative or an adoptive parent may file a new civil action in district court for the purpose of modifying, enforcing, or terminating a post-adoption privileges agreement.

(b) In an action under this section, the court may modify, enforce, or terminate a post-adoption privileges agreement if the court finds that the party seeking relief has participated or attempted to participate in good faith in mediating the dispute giving rise to the action, or the court determines that the modification or termination is necessary to serve the best interests of the adoptee.

(c) The court shall not award monetary damages.

"**§ 48-11-103. Effect of failure to comply.**

The court shall not set aside a decree of adoption, revoke a written consent to an adoption, rescind a relinquishment, or modify an order to terminate parental rights or any other prior court order for failure of a birth relative, an adoptive parent, or an adoptee to comply with any or all of the original terms of or subsequent modifications to the post-adoption privileges agreement."

SECTION 2. G.S. 48-1-100 reads as rewritten:

"**§ 48-1-100. Legislative findings and intent; construction of Chapter.**

(a) The General Assembly finds that it is in the public interest to establish a clear judicial process for adoptions, to promote the integrity and finality of adoptions, to encourage prompt, conclusive disposition of adoption proceedings, and to structure services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.

(b) With special regard for the adoption of minors, the General Assembly declares as a matter of legislative policy that:

(1) The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents, (ii) facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support, (iii) protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing, and (iv) assuring the finality of the adoption; and

(2) Secondary purposes of this Chapter are (i) to protect biological parents from ill-advised decisions to relinquish a child or consent to the child's adoption, (ii) to protect adoptive parents from assuming responsibility for a child about whose heredity or mental or physical condition they know nothing, (iii) to protect the privacy of the parties to the adoption,

and (iv) to discourage unlawful trafficking in minors and other unlawful placement activities.

(c) In construing this Chapter, the needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor.

(d) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(e) Nothing in this Chapter shall be construed to prevent an adoptive parent and a birth relative from entering into a post-adoption privileges agreement as provided in Article 11 of this Chapter."

SECTION 3. G.S. 7B-1100 reads as rewritten:

"**§ 7B-1100. Legislative intent; construction of Article.**

(a) The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile.

(2) It is the further purpose of this Article to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents.

(3) Action which is in the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile's parents or other persons are in conflict.

(4) This Article shall not be used to circumvent the provisions of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act.

(b) Nothing in this Article shall be construed to prevent the court in a proceeding under this Article for termination of parental rights from approving a post-adoption privileges agreement as provided in Article 11 of Chapter 48 of the General Statutes."

SECTION 4. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 209
PROPOSED COMMITTEE SUBSTITUTE S209-CSLU-8 [v.2]

5/27/2005 10:40:21 AM

Short Title: Post-Adoption Contacts. (Public)

Sponsors:

Referred to:

February 24, 2005

A BILL TO BE ENTITLED

AN ACT TO ALLOW AN ADOPTIVE PARENT AND A BIRTH RELATIVE TO ENTER INTO A WRITTEN AGREEMENT TO PROVIDE FOR POST-ADOPTION CONTACT AND COMMUNICATION.

The General Assembly of North Carolina enacts:

SECTION 1. Article 3 of Chapter 48 of the General Statutes is amended by adding a new Part to read:

"Part 8. Post-Adoption Contacts.

"**§ 48-3-800. Definitions.**

For purposes of this Article, the following definitions apply:

(1) Birth relative. – The biological parent, grandparent, sibling, or any other member of an adoptee's biological family related to the adoptee by blood or marriage.

(2) Post-adoption contacts agreement. – A written agreement that allows specifically described post-adoption contact.

(3) Post-adoption contacts. – Visitation, communication, or any other contact or conveyance of information regarding an adoptee.

"**§ 48-3-801. Post-adoption contacts agreement; terms; conditions.**

(a) In cases involving juveniles who immediately before adoption are in the custody of the department of social services, an adoptive parent and a birth relative may enter into a post-adoption contacts agreement before or at the time a decree of adoption is granted.

(b) A post-adoption contacts agreement may include the following:

(1) Provisions for visitation between the adoptee and a birth relative.

(2) Provisions for other forms of communication including the exchange of letters and telephone contact between the adoptee and a birth relative.

(3) Provisions for sharing information about the adoptee by parties to the agreement.

(4) The following warnings in bold type:

a. 'After the court grants the adoption petition, the adoption shall not be set aside due to the failure of an adoptive parent, birth relative, or the adoptee to follow the terms of this agreement or modifications to the agreement.'

b. 'A disagreement between the parties or litigation brought to enforce, modify, or terminate this agreement shall not affect the validity of the adoption or serve as a basis for orders affecting the custody of the adoptee.'

c. 'A court will not act on a petition to modify, enforce, or terminate this agreement unless the petitioner has participated or attempted to participate in good faith in mediation or other appropriate dispute resolution proceedings to resolve any dispute.'

(c) The court may approve a post-adoption contacts agreement only if all of the following conditions are satisfied:

(1) The court finds that there is a significant emotional attachment between the adoptee and the birth relative to whom the agreement gives post-adoption contacts.

(2) The adoptee, if the adoptee is 12 years of age or older, consents to the post-adoption contacts agreement. However, the court may waive the requirement for the adoptee's consent if the court finds that the adoptee is not capable of consenting or that the adoptee should not be required to consent because consenting would not be in the adoptee's best interest.

(3) The county department of social services recommends the granting of post-adoption contacts.

(4) The adoptee is represented by a court-appointed guardian ad litem and the guardian recommends the granting of post-adoption contacts unless the court finds that the appointment of a guardian ad litem is not necessary to protect the adoptee's best interest.

(5) Each adoptive parent consents to the granting of post-adoption contacts.

(6) The adoptive parent and the birth relative execute a post-adoption contacts agreement and file the agreement with the court.

(7) The post-adoption contacts agreement includes an acknowledgment by the birth relative that the adoption is irrevocable regardless of whether the adoptive parent fails to abide by the post-adoption contacts agreement.

(8) The post-adoption contacts agreement includes an acknowledgment by the adoptive parent that the agreement, when approved by the court,

grants the birth relative the right to seek enforcement in court of the post-adoption contacts specified in the agreement.

(9) The adoptee is at least two years of age.

(10) Any other factors the court deems appropriate in determining whether the adoptee's best interests would be served by granting post-adoption contacts.

(d) A post-adoption contacts agreement is enforceable only if it is approved by the court and signed by a district court judge.

"**§ 48-3-802. Modification, enforcement, and termination.**

(a) An adoptive parent may file a new civil action in district court for the purpose of modifying, enforcing, or terminating a post-adoption contacts agreement.

(b) A birth relative may file a new civil action in district court to enforce a post-adoption contacts agreement.

(c) In an action under this section, the court may modify, enforce, or terminate a post-adoption contacts agreement if the court finds that the party seeking relief has participated or attempted to participate in good faith in mediating the dispute giving rise to the action or the court determines that the modification or termination is necessary to serve the best interests of the adoptee.

(d) The court shall not award monetary damages.

"**§ 48-3-803. Effect of failure to comply.**

The court shall not set aside a decree of adoption, revoke a written consent to an adoption, rescind a relinquishment, or modify an order to terminate parental rights or any other prior court order for failure of a birth relative, an adoptive parent, or an adoptee to comply with any or all of the original terms of or subsequent modifications to the post-adoption contacts agreement."

SECTION 2. G.S. 48-1-100 reads as rewritten:

"**§ 48-1-100. Legislative findings and intent; construction of Chapter.**

(a) The General Assembly finds that it is in the public interest to establish a clear judicial process for adoptions, to promote the integrity and finality of adoptions, to encourage prompt, conclusive disposition of adoption proceedings, and to structure services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.

(b) With special regard for the adoption of minors, the General Assembly declares as a matter of legislative policy that:

(1) The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents, (ii) facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support, (iii) protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing, and (iv) assuring the finality of the adoption; and

(2) Secondary purposes of this Chapter are (i) to protect biological parents from ill-advised decisions to relinquish a child or consent to the child's

adoption, (ii) to protect adoptive parents from assuming responsibility for a child about whose heredity or mental or physical condition they know nothing, (iii) to protect the privacy of the parties to the adoption, and (iv) to discourage unlawful trafficking in minors and other unlawful placement activities.

(c) In construing this Chapter, the needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor.

(d) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(e) Nothing in this Chapter shall be construed to prevent an adoptive parent and a birth relative from entering into a post-adoption contacts agreement as provided in Part 8 of Article 3 of this Chapter."

SECTION 3. G.S. 7B-1100 reads as rewritten:

"**§ 7B-1100. Legislative intent; construction of Article.**

(a) The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile.

(2) It is the further purpose of this Article to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents.

(3) Action which is in the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile's parents or other persons are in conflict.

(4) This Article shall not be used to circumvent the provisions of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act.

(b) Nothing in this Article shall be construed to prevent the court in a proceeding under this Article for termination of parental rights from approving a post-adoption contacts agreement as provided in Part 8 of Article 3 of Chapter 48 of the General Statutes."

SECTION 4. This act is effective when it becomes law.

SENATE BILL 209:
Post-Adoption Contacts.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 30, 2005
Introduced by:	Sen. Kinnaird	**Summary by:**	Robin Johnson
Version:	PCS to First Edition S209-CSLU-8[v.2]		Committee Counsel

SUMMARY: ***The PCS for Senate Bill 209 would allow adoptive parents and members of an adoptee's biological family to enter into an enforceable written agreement that allows specifically authorized post-adoption contacts, including visitation, communication, or other contact regarding the adoptee. The parties must enter into the agreement before or at the time the decree of adoption is granted, and the agreement must satisfy enumerated conditions and be approved by the court.***

The PCS would change "post-adoption privileges" to "post-adoption contacts", would change where this provision would appear in Chapter 48 (Adoptions) of the General Statutes ("Chapter 48"), would apply only to adoptions where the child is at least two years old at the time of the adoption and has been in the custody of the department of social services before the adoption, and would authorize the birth relative to file a new action only to enforce the agreement.

CURRENT LAW: Currently, identifying information may be shared between birth parents and adopting parents only if the parties agree to do so before the adoption. There is nothing that authorizes or prohibits an agreement between adoptive parents and members of the adoptee's birth family. However, it is questionable as to whether an agreement would be enforceable.

BILL ANALYSIS: Senate Bill 209 would add a new Part 8 to Article 3 (*Adoption of Minors*) to Chapter 48. The bill would allow an adoptive parent and a birth relative to enter into a written post-adoption contacts agreement before or at the time the adoption decree is granted. This would apply only to adoptees who are at least two years old and who have been in the custody of the department of social services immediately before the adoption. The agreement would be enforceable if it is approved by the court and signed by a district court judge.

A birth relative would include the adoptee's biological parent, grandparent, sibling, or other member of the adoptee's birth family related by blood or marriage. The agreement may include provisions for visitation, other forms of contact, and the sharing of information about the adoptee. It also must meet all of the following conditions:

- The court must find a significant emotional attachment between the adoptee and the birth relative.
- Both adoptive parents must consent.
- If the adoptee is at least 12, the adoptee must consent – unless the court waives this requirement.
- The county department of social services must recommend the granting of post-adoption contacts.
- If a guardian ad litem is appointed, the guardian must recommend the granting of post-adoption contacts.
- The adoptive parent and birth relative must execute the agreement and file it with the court.

- The agreement must include the birth relative's acknowledgment that the adoption is irrevocable regardless of whether the adoptive parent abides by the agreement.
- The agreement also must include the adoptive parent's acknowledgement that the agreement grants the birth relative the right to seek enforcement in court.
- Any other factors the court considers to be in the adoptee's best interests.

If a dispute arises subsequent to entering into the agreement, the parties must participate or attempt to participate in good faith in mediation or other appropriate dispute resolution proceedings. The adoptive parent may file an action in district court for the purpose of modifying, enforcing, or terminating the agreement. The birth relative may file an action in district court to enforce the agreement. The court may modify, enforce, or terminate the agreement if the court finds (i) the petitioning party had participated or attempted to participate in good faith in mediating the dispute or (ii) it would be in the adoptee's best interests.

The court shall not award monetary damages. Nor shall the court set aside an adoption decree, revoke a written consent to adoption, rescind a relinquishment, or modify an order to terminate parental rights for any party's failure to comply with the agreement.

EFFECTIVE DATE: The act is effective when it becomes law.

BACKGROUND: The Senate passed similar legislation in 2003.

S0209e1-SMRH-CSLU-8v2

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Chapel Hill, North Carolina 27514

Telephone (919) 933-1200
Facsimile (919) 933-1207

May 31, 2005

Fletcher Hartsell, Jr., Chair
and Members of Judiciary Committee

Dear Senator Hartsell:

I am an attorney who has had a general practice in Orange and Chatham Counties for nearly 27 years. I tried my first Termination of Parental Rights case in the early 1980's. In the last four to five years, I have represented more than 160 parents who have been accused of abuse, neglect or dependency or whose rights have been petitioned to be terminated. I also serve as a civil guardian ad litem for children in custody cases, I am a parent coordinator helping parents in civil custody cases to reduce the effects of anger on their children, and I am a mediator in Civil Superior Court cases.

Cases involving the termination of parental rights are very emotional, painful and difficult, for biological parents, their children and potential adoptive parents, Parents, no mater how neglectful their actions, deeply love their children, and almost never want to relinquish their rights. Children, while wanting stability in a home, feel ambivalence toward not being able to see not only their parents but also their siblings, grandparents and other relatives who were never involved in the parent's negligence. Adoptive parents are worried about the future.

This bill being considered by you today addresses a need that has exited for many years, the need to legally allow biological and adoptive parents to reach an agreement to allow contact between biological parents and their children. This bill allows this arrangement to be an option that is only possible with the approval of the Court.

My understanding is that adopted children can spend their entire lives wondering about their biological parents and at some point, usually try to find them. They experience unnecessary feelings of abandonment and thinking they are unwanted and unworthy. They want to see their brothers and sisters but can't because once a termination is entered, the adoptive parent has every legal right to prevent any such contract. This bill can reduce these feelings by allowing ongoing contact.

Currently it is my understanding that a significant number of Termination of Parental Rights cases are being appealed. Several of mine have been appealed in the last two years. Parents rarely give up their rights voluntarily and if there is a chance that the trial court was wrong, they will appeal. These appeals keep the lives of children and the adoptive parents on hold for years, tie up the district and appellate court system and end up costing the State significantly in terms of time and m monies.

This bill allows parents to give their rights in return for the contact they so desperately desire to have. It eliminates the painful and wrenching trials in these matters and reduces the anger that biological parents can carry with them and which can affect their own lives adversely.

Post-adoption contacts are an option - they are not mandatory. There is a fair and effective mechanism within the bill that protects the biological and adoptive parents and the children, and no agreement can be approved by the Court without the consent of the Department of Social Services, the adoptive parents and the Court. The original adoption consented to by the biological parents cannot be undone.

Several states, including Indiana, Minnesota, Nebraska, New Mexico, Ohio, Oregon, Florida, California, New York, Rhode Island, and Washington. have approved similar legislation. A study of national post-adoption contact legislation conducted for the State of Nevada in 2002 revealed no litigation surrounding such legislation, general support for its value to families, and a lack of foundation for the concerns of opponents.

It is time for North Carolina to have this option for these children and families. I appreciate your support.

Sincerely yours,

James T. Bryan III

Meeting **CANCELLED**

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	June 7, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 796	Criminal Record Checks/Archeological Ops.	Senator Thomas
HB 217	Driving From/Leaving Scene of Accident.	Representative Bordsen Representative Luebke Representative Harrison Representative Insko
HB 345	Winston-Salem Police.	Representative Womble

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

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Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, June 7, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 796	Criminal Record Checks/Archeological Ops.	Senator Thomas
HB 217	Driving From/Leaving Scene of Accident.	Representative Bordsen Representative Luebke Representative Harrison Representative Insko
HB 345	Winston-Salem Police.	Representative Womble

Presentations

Other Business

Adjournment

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 796

Short Title:	Criminal Record Checks/Archaeological Ops.	(Public)
Sponsors:	Senator Thomas.	
Referred to:	Judiciary II.	

March 23, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR CRIMINAL RECORD CHECKS OF APPLICANTS FOR PERMITS AND LICENSES TO CONDUCT ARCHAEOLOGICAL OPERATIONS AND INVESTIGATIONS.

The General Assembly of North Carolina enacts:

SECTION 1. Part 2 of Article 4 of Chapter 114 of the General Statutes is amended by adding a new section to read:

"**§ 114-19.16. Criminal record checks of applicants for permit or licensure to conduct exploration, recovery, or salvage operations and archaeological investigations.**

(a) The Department of Justice may provide to the Department of Cultural Resources from the State and National Repositories of Criminal Histories the criminal history of any applicant for a permit or license under Article 3 of Chapter 121 of the General Statutes or Article 2 of Chapter 70 of the General Statutes, upon the request of the Department of Cultural Resources. Along with the request, the Department of Cultural Resources shall provide to the Department of Justice the fingerprints of the applicant, a form signed by the applicant consenting to the criminal history record check and use of fingerprints and other identifying information required by the State and National Repositories, and any additional information required by the Department of Justice. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The Department of Cultural Resources shall keep all information obtained pursuant to this section confidential, and the information shall be maintained in compliance with rules governing the dissemination of criminal history record checks adopted by the North Carolina Division of Criminal Information. The information obtained pursuant to this section is privileged and shall be for the exclusive use of the Department of Cultural Resources. The Department of Justice may charge a reasonable fee to offset the cost incurred by it to conduct a

criminal record check under this section. The fee shall not exceed the actual cost of locating, editing, researching, and retrieving the information.

(b) As used in this section, the term "criminal history" means a State or federal history of conviction of a crime, whether a misdemeanor or felony, that bears upon an applicant's fitness for surveillance, protection, preservation, survey, and archaeological recovery of property subject to the exclusive dominion and control of the State pursuant to G.S. 121-22 and an applicant's fitness for archaeological investigations pursuant to G.S. 70-13."

SECTION 2. G.S. 121-25 reads as rewritten:

"**§ 121-25. License to conduct exploration, recovery or salvage operations.**

(a) Any qualified person, firm or corporation desiring to conduct any type of exploration, recovery or salvage operations, in the course of which any part of a derelict vessel or its contents or other archaeological site may be removed, displaced or destroyed, shall first make application to the Department of Cultural Resources ~~for~~ and obtain a permit or license to conduct such operations.

(b) If the Department requires a criminal history record check of the applicant for a permit or license, the applicant shall furnish the Department a complete set of fingerprints and a recent photograph in a form prescribed by the Department. In the case of an applicant who is not an individual, fingerprints shall be provided for the principals, officers, directors, and controlling persons of the entities. Each set of fingerprints shall be certified by an authorized law enforcement officer.

Applicants for whom criminal history record checks are conducted shall consent to a criminal history record check pursuant to G.S. 114-19.16. If the verified criminal history record check reveals one or more convictions, then the conviction or convictions shall constitute just cause for not approving the permit or license. The conviction shall not automatically prohibit approval of the application, but the following factors shall be considered by the Department of Cultural Resources in determining whether the permit or license shall be denied:

(1) The level and seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the person's responsibilities pursuant to the application.
(6) The incarceration, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed.
(7) The subsequent commission by the person of a crime.

(c) The Department of Cultural Resources may deny the application for permit or license of any applicant for refusal to consent to a criminal history record check or to the use of fingerprints or other identifying information required by either the State or National Repositories of Criminal Histories. The refusal shall constitute just cause for the denial of the permit or license.

(d) If the Department of Cultural Resources shall find that the granting of such permit or license is in the best interest of the State, it may grant such applicant a permit

or license for such a period of time and under such conditions as the Department may deem to be in the best interest of the State. Such permit or license may include but need not be limited to the following:

(1) Payment of monetary fee to be set by the Department;
(2) That a portion or all of the historic material or artifacts be delivered to custody and possession of the Department;
(3) That a portion of all of such relics or artifacts may be sold or retained by the licensee;
(4) That a portion or all of such relics or artifacts may be sold or traded by the Department.

Permits or licenses may be renewed upon or prior to expiration upon such terms as the applicant and the Department may mutually agree. Holders of permits or licenses shall be responsible for obtaining permission of any federal agencies having jurisdiction, including the United States Coast Guard, the United States Department of the Navy and the United States Army Corps of Engineers prior to conducting any salvaging operations."

SECTION 3. G.S. 70-13 is amended by adding the following new subsections to read:

"(a1) If the Department requires a criminal history record check of the applicant for a permit or license, the applicant shall furnish the Department a complete set of fingerprints and a recent photograph in a form prescribed by the Department. In the case of an applicant who is not an individual, fingerprints shall be provided for the principals, officers, directors, and controlling persons of the entities. Each set of fingerprints shall be certified by an authorized law enforcement officer.

Applicants for whom criminal history record checks are conducted shall consent to a criminal history record check pursuant to G.S. 114-19.16. If the verified criminal history record check reveals one or more convictions, then the conviction or convictions shall constitute just cause for not approving the permit or license. The conviction shall not automatically prohibit approval of the application, but the following factors shall be considered by the Department of Cultural Resources in determining whether the permit or license shall be denied:

(1) The level and seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the person's responsibilities pursuant to the application.
(6) The incarceration, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed.
(7) The subsequent commission by the person of a crime.

(a2) The Department of Cultural Resources may deny the application for permit or license of any applicant for refusal to consent to a criminal history record check or to the use of fingerprints or other identifying information required by either the State or

National Repositories of Criminal Histories. The refusal shall constitute just cause for the denial of the permit or license."

SECTION 4. This act becomes effective October 1, 2005, and applies to applications for permits or licenses submitted to the Department of Cultural Resources on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 345

Committee Substitute Favorable 3/2/05

Short Title: Winston-Salem Police. (Local)

Sponsors:

Referred to:

February 22, 2005

A BILL TO BE ENTITLED

AN ACT REQUIRING COMPANY POLICE AGENCIES TO NOTIFY THE CITY OF WINSTON-SALEM POLICE DEPARTMENT WHEN THEY ARE PROVIDING ON-SITE POLICE SECURITY PERSONNEL SERVICES WITHIN THE DEPARTMENT'S JURISDICTION AND TO PROVIDE THE DEPARTMENT WITH CERTAIN INFORMATION ON ARRESTS MADE BY THE AGENCIES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 74E-13 is amended by adding the following new subsection to read:

"(d) Prior to the provision of services, a company police agency certified under this Chapter shall notify the Winston-Salem Police Department that it is providing on-site police security personnel services for persons or property within the Police Department's territorial jurisdiction. The notification shall be in writing and shall include the names of the companies or individuals receiving services, the physical locations where services will be provided, and the beginning and ending dates for the contracts for each location.

Within 48 hours of any arrest made by a company police officer within the Winston-Salem Police Department's territorial jurisdiction, the agency shall provide to the Police Department the following information:

(1) The name and address of the individual arrested;

(2) The offense for which the individual was arrested; and

(3) The date and location of the offense.

As used in this act, the term 'territorial jurisdiction' includes the Winston-Salem Police Department's jurisdiction as defined in G.S. 160A-286."

SECTION 2. This act applies only to the City of Winston-Salem and company police agencies providing on-site police security personnel services for persons or property within the territorial jurisdiction of the Winston-Salem Police Department.

SECTION 3. This act becomes effective July 1, 2005. It applies to all contracts for services existing on or commencing after the effective date and to arrests made on or after the effective date.

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	June 9, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 796	Criminal Record Checks/Archeological Ops.	Senator Thomas
HB 862	Prohibit Removal of Electronic Collars.	Representative Wilson
HB 1199	Involuntary Commitment Affidavit.	Representative Holliman

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, June 9, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 796	Criminal Record Checks/Archeological Ops.	Senator Thomas
HB 862	Prohibit Removal of Electronic Collars.	Representative Wilson
HB 1199	Involuntary Commitment Affidavit.	Representative Holliman

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

June 9, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on June 9, 2005, with fourteen members present. Senator Hartsell introduced pages Akeem Perez, Victoria Revelle, Meme Summerell, Riley Driver and Jaime Gresalfi and thanked them for serving.

SB 796 (Criminal Record Checks/Archeological Ops.) Senator Forrester moved to accept the Proposed Committee Substitute for purposes of discussion. Senator Thomas was recognized to explain the bill. Senators Kinnaird, Apodaca, and Jacumin gave comments on the bill. Senator Thomas sent forth an amendment and moved that it be adopted. All voted and the motion carried. Mr. Stephen Claggett, representing the Office of State Archaeology spoke on the bill. Senator Apodaca moved for a favorable report to the original bill as amended, rolled into a new Committee Substitute, and referred to Finance. All voted and the motion carried.

HB 862 (Prohibit Removal of Electronic Collars.) Senator Jacumin was recognized to explain the bill for Representative Wilson. Questions from Sentors Allran, Dorsett, Swindell, Thomas, Dannelly and Goodall were answered by Senator Jacumin and Senator Hartsell. Mrs. Henri McClees, representing the North Carolina Sporting Dog Association, Inc., and Mr. Dick Hamilton, representing North Carolina Wildlife, spoke in favor of the bill. Senator Bingham moved for a favorable report. All voted and the motion carried.

HB 1199 (Involuntary Commitment Affidavit.) Representative Holliman was recognized to explain the bill. Questions from Senators Dorsett, Kinnaird, Dannelly, Goodall and Forrester were answered by Representative Holliman, Senator Hartsell and Ben Popkin, Staff Attorney. Senator Dorsett moved to amend the bill. The amendment was accepted by Representative Holliman. Senator Bingham noted that the change to allow Psychologists to make involuntary commitments was dealt with in committee in 2004. Senator Goodall moved the bill be adopted as amended and rolled into a new Committee Substitute. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, June 09, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B. **862** Prohibit Removal of Electronic Collars.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — June 16, 2005

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Su-Ann Coe	NCPA
Kate Loetzer	Duke Univ. student
Jamar Planter	Charlotte, N.C.
STEVE CLAGGETT	DCR, Raleigh, NC
Donna Rosefield	DCR
David Brook	DCR
Joe McClees	McClees Consulting, Inc.
Henri McClees	" " "
DICK HAMILTON	NC WRC
Patrick O'Connor	HMW
John McKay	GOV OFFICE
Gary McLamb	NC AFO

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Rob Lamme	HHS

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 796

Short Title:	Criminal Record Checks/Archaeological Ops.	(Public)
Sponsors:	Senator Thomas.	
Referred to:	Judiciary II.	

March 23, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR CRIMINAL RECORD CHECKS OF APPLICANTS FOR PERMITS AND LICENSES TO CONDUCT ARCHAEOLOGICAL OPERATIONS AND INVESTIGATIONS.

The General Assembly of North Carolina enacts:

SECTION 1. Part 2 of Article 4 of Chapter 114 of the General Statutes is amended by adding a new section to read:

"**§ 114-19.16. Criminal record checks of applicants for permit or licensure to conduct exploration, recovery, or salvage operations and archaeological investigations.**

(a) The Department of Justice may provide to the Department of Cultural Resources from the State and National Repositories of Criminal Histories the criminal history of any applicant for a permit or license under Article 3 of Chapter 121 of the General Statutes or Article 2 of Chapter 70 of the General Statutes, upon the request of the Department of Cultural Resources. Along with the request, the Department of Cultural Resources shall provide to the Department of Justice the fingerprints of the applicant, a form signed by the applicant consenting to the criminal history record check and use of fingerprints and other identifying information required by the State and National Repositories, and any additional information required by the Department of Justice. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The Department of Cultural Resources shall keep all information obtained pursuant to this section confidential, and the information shall be maintained in compliance with rules governing the dissemination of criminal history record checks adopted by the North Carolina Division of Criminal Information. The information obtained pursuant to this section is privileged and shall be for the exclusive use of the Department of Cultural Resources. The Department of Justice may charge a reasonable fee to offset the cost incurred by it to conduct a

criminal record check under this section. The fee shall not exceed the actual cost of locating, editing, researching, and retrieving the information.

(b) As used in this section, the term "criminal history" means a State or federal history of conviction of a crime, whether a misdemeanor or felony, that bears upon an applicant's fitness for surveillance, protection, preservation, survey, and archaeological recovery of property subject to the exclusive dominion and control of the State pursuant to G.S. 121-22 and an applicant's fitness for archaeological investigations pursuant to G.S. 70-13."

SECTION 2. G.S. 121-25 reads as rewritten:

"**§ 121-25. License to conduct exploration, recovery or salvage operations.**

(a) Any qualified person, firm or corporation desiring to conduct any type of exploration, recovery or salvage operations, in the course of which any part of a derelict vessel or its contents or other archaeological site may be removed, displaced or destroyed, shall first make application to the Department of Cultural Resources ~~for~~ and obtain a permit or license to conduct such operations.

(b) If the Department requires a criminal history record check of the applicant for a permit or license, the applicant shall furnish the Department a complete set of fingerprints and a recent photograph in a form prescribed by the Department. In the case of an applicant who is not an individual, fingerprints shall be provided for the principals, officers, directors, and controlling persons of the entities. Each set of fingerprints shall be certified by an authorized law enforcement officer.

Applicants for whom criminal history record checks are conducted shall consent to a criminal history record check pursuant to G.S. 114-19.16. If the verified criminal history record check reveals one or more convictions, then the conviction or convictions shall constitute just cause for not approving the permit or license. The conviction shall not automatically prohibit approval of the application, but the following factors shall be considered by the Department of Cultural Resources in determining whether the permit or license shall be denied:

(1) The level and seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the person's responsibilities pursuant to the application.
(6) The incarceration, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed.
(7) The subsequent commission by the person of a crime.

(c) The Department of Cultural Resources may deny the application for permit or license of any applicant for refusal to consent to a criminal history record check or to the use of fingerprints or other identifying information required by either the State or National Repositories of Criminal Histories. The refusal shall constitute just cause for the denial of the permit or license.

(d) If the Department of Cultural Resources shall find that the granting of such permit or license is in the best interest of the State, it may grant such applicant a permit

or license for such a period of time and under such conditions as the Department may deem to be in the best interest of the State. Such permit or license may include but need not be limited to the following:

(1) Payment of monetary fee to be set by the Department;
(2) That a portion or all of the historic material or artifacts be delivered to custody and possession of the Department;
(3) That a portion of all of such relics or artifacts may be sold or retained by the licensee;
(4) That a portion or all of such relics or artifacts may be sold or traded by the Department.

Permits or licenses may be renewed upon or prior to expiration upon such terms as the applicant and the Department may mutually agree. Holders of permits or licenses shall be responsible for obtaining permission of any federal agencies having jurisdiction, including the United States Coast Guard, the United States Department of the Navy and the United States Army Corps of Engineers prior to conducting any salvaging operations."

SECTION 3. G.S. 70-13 is amended by adding the following new subsections to read:

"(a1) If the Department requires a criminal history record check of the applicant for a permit or license, the applicant shall furnish the Department a complete set of fingerprints and a recent photograph in a form prescribed by the Department. In the case of an applicant who is not an individual, fingerprints shall be provided for the principals, officers, directors, and controlling persons of the entities. Each set of fingerprints shall be certified by an authorized law enforcement officer.

Applicants for whom criminal history record checks are conducted shall consent to a criminal history record check pursuant to G.S. 114-19.16. If the verified criminal history record check reveals one or more convictions, then the conviction or convictions shall constitute just cause for not approving the permit or license. The conviction shall not automatically prohibit approval of the application, but the following factors shall be considered by the Department of Cultural Resources in determining whether the permit or license shall be denied:

(1) The level and seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the person's responsibilities pursuant to the application.
(6) The incarceration, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed.
(7) The subsequent commission by the person of a crime.

(a2) The Department of Cultural Resources may deny the application for permit or license of any applicant for refusal to consent to a criminal history record check or to the use of fingerprints or other identifying information required by either the State or

National Repositories of Criminal Histories. The refusal shall constitute just cause for the denial of the permit or license."

SECTION 4. This act becomes effective October 1, 2005, and applies to applications for permits or licenses submitted to the Department of Cultural Resources on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 796
PROPOSED COMMITTEE SUBSTITUTE S796-CSRC-63 [v.7]

6/8/2005 6:06:24 PM

Short Title: Crim Record Checks/Archaeological Ops/DHHS. (Public)

Sponsors:

Referred to:

March 23, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR CRIMINAL RECORD CHECKS OF APPLICANTS FOR PERMITS AND LICENSES TO CONDUCT ARCHAEOLOGICAL OPERATIONS AND INVESTIGATIONS, AND TO EXPAND THE PERSONS WHO ARE SUBJECT TO A CRIMINAL RECORDS CHECK BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES.

The General Assembly of North Carolina enacts:

SECTION 1. Part 2 of Article 4 of Chapter 114 of the General Statutes is amended by adding a new section to read:

"**§ 114-19.16. Criminal record checks of applicants for permit or license to conduct exploration, recovery, or salvage operations and archaeological investigations.**

The Department of Justice may provide to the Department of Cultural Resources from the State and National Repositories of Criminal Histories the criminal history of any applicant for a permit or license under Article 3 of Chapter 121 of the General Statutes or Article 2 of Chapter 70 of the General Statutes. Along with the request, the Department of Cultural Resources shall provide to the Department of Justice the fingerprints of the applicant, a form signed by the applicant consenting to the criminal history record check and use of fingerprints and other identifying information required by the State and National Repositories, and any additional information required by the Department of Justice. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The Department of Cultural Resources shall keep all information obtained under this section confidential. The Department of Justice may charge a fee to offset the cost incurred by it to conduct a criminal record check under this section. The fee shall not exceed the actual cost of locating, editing, researching, and retrieving the information."

SECTION 2. Article 3 of Chapter 121 of the General Statutes is amended by adding a new section to read:

"**§ 121-25.1. Criminal record checks of applicants for permit or license.**

(a) The following definitions apply to this section:

(1) Applicant. – A person or entity applying for a permit or license under G.S. 121-25 to conduct any type of exploration, recovery or salvage operations of any part of a derelict vessel or its contents or other archaeological site.

(2) Criminal history. – A history of conviction of a state or federal crime, whether a misdemeanor or felony, that bears upon an applicant's fitness to conduct activities related to the surveillance, protection, preservation, and archaeological recovery of property subject to the exclusive dominion and control of the State under G.S. 121-22. The crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers and Court Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 19C, Financial Identity Fraud; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302, or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

(b) All applicants shall consent to a criminal history record check. Refusal to consent to a criminal history record check or to the use of fingerprints or other identifying information may constitute grounds for the Department of Cultural Resources to deny a permit or a license to an applicant. The Department of Cultural Resources shall be responsible for providing to the North Carolina Department of

Justice the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories of Criminal Histories, and any additional information required by the Department of Justice. If the applicant is not an individual, the applicant shall provide fingerprints for the principals, officers, directors, and controlling persons of the applicant. Each set of fingerprints shall be certified by an authorized law enforcement officer. The Department of Cultural Resources shall keep all information obtained under this section confidential.

(c) If an applicant's criminal history record check reveals one or more convictions listed under subdivision (a)(2) of this section, the conviction shall not automatically bar the issuance of a permit or a license. When determining whether to issue a permit or license to an applicant, the Department of Cultural resources shall consider all of the following factors regarding the conviction:

(1) The level and seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the person's responsibilities pursuant to the application.
(6) The incarceration, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed.
(7) The subsequent commission by the person of a crime."

SECTION 3. Article 2 of Chapter 70 of the General Statutes is amended by adding a new section to read:

"**§ 70-13.1. Criminal record checks of applicants for permit or license.**

(a) The following definitions apply to this section:

(1) Applicant. – A person or entity applying for a permit or license under G.S. 70-13 to conduct any type of archaeological investigation on State lands.
(2) Criminal history. – A history of conviction of a state or federal crime, whether a misdemeanor or felony, that bears upon an applicant's fitness to conduct archaeological investigations under G.S. 70-13. The crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers and Court Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B,

Financial Transaction Card Crime Act; Article 19C, Financial Identity Fraud; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302, or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

(b) All applicants shall consent to a criminal history record check. Refusal to consent to a criminal history record check or to the use of fingerprints or other identifying information may constitute grounds for the Department of Cultural Resources to deny a permit or a license to an applicant. The Department of Cultural Resources shall be responsible for providing to the North Carolina Department of Justice the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories of Criminal Histories, and any additional information required by the Department of Justice. If the applicant is not an individual, the applicant shall provide fingerprints for the principals, officers, directors, and controlling persons of the applicant. Each set of fingerprints shall be certified by an authorized law enforcement officer. The Department of Cultural Resources shall keep all information obtained under this section confidential.

(c) If an applicant's criminal history record check reveals one or more convictions listed under subdivision (a)(2) of this section, the conviction shall not automatically bar the issuance of a permit or a license. When determining whether to issue a permit or license to an applicant, the Department of Cultural resources shall consider all of the following factors regarding the conviction:

(1) The level and seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the person's responsibilities pursuant to the application.
(6) The incarceration, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed.
(7) The subsequent commission by the person of a crime."

SECTION 4. G.S. 19.6(a)(1) reads as rewritten:

"(a) Definitions. – As used in this section, the term:

(1) "Covered person" means:

a. An applicant for employment or a current employee in a position in the Department of Health and Human Services or the Department of Juvenile Justice and Delinquency Prevention who provides direct care for a client, patient, student, resident or ward of the ~~Department; or~~Department.

b. A person who ~~Supervises~~ supervises positions providing direct care as outlined in sub subdivision a. of this subdivision.

c. An applicant for employment or a current employee in a position in the Department of Health and Human Services who is not covered under sub subdivisions a. or b. of this subdivision, an independent contractor or employee of an independent contractor that has contracted to provide services to the Department or Health and Human Services, or a person who has been approved to perform volunteer services for the Department of Health and Human Services.

..."

SECTION 5. This act becomes effective October 1, 2005. Sections 1, 2, and 3 apply to applications for permits or licenses submitted to the Department of Cultural Resources on or after that date.

SENATE BILL 796:
Crim Record Checks/Archaeological Ops/DHHS

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 9, 2005
Introduced by:	Sen. Thomas	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	PCS to First Edition S796-CSRC-63		

SUMMARY: ***Senate Bill 796 would require all persons who apply to the Department of Cultural Resources for a permit to conduct underwater archeological activities and archeological activities on State land to submit to a criminal background check. It would also allow the Department of Justice to conduct those State and National checks upon the request of the Department of Cultural Resources.***

The Proposed Committee Substitute also expand the authority of the Department of Health and Human Services to conduct criminal background checks for all applicants for positions of employment, current employees, independent contractors and volunteers.

The bill must be re-referred to Senate Finance because it authorizes the Department of Justice to charge a fee for the criminal background checks.

CURRENT LAW:

Salvage and recovery of shipwrecks. G.S. 121-25 requires any person who wants to engage in salvage operations to obtain a permit from the Department of Cultural Resources. The Department may grant the permit or license if it finds it is in the best interest of the State. The permit may be for a period of time and under conditions specified by the Department. The permit may require the payment of a fee to the Department, that a portion of the artifacts are delivered to the Department, that a portion of the artifacts are sold or retained by the licensee, or that a portion of the artifacts may be sold or traded by the Department.

Archaeological investigations on State land. G.S. 70-13 requires that persons who want to conduct archaeological investigations on State lands must first obtain a permit from the Department of Cultural Resources. An "archaeological investigation" means any surface collection, subsurface test, excavation, or other activity that results in the disturbance or removal of archaeological resources. The term "archaeological resource" means any material remains of past human life or activities which are at least 50 years old and which are of archaeological interest. These include pieces of pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, rock paintings, rock carvings, graves or human skeletal materials. The term does not include fossils unless found in an archaeological context.

The Department shall issue a permit if it finds that the applicant is qualified to under take the activity, the activity is undertaken to further archaeological knowledge, the applicant has the funds and technology to retrieve the archaeological resource, the resources will remain the property of the State and attendant data will be preserved by a university or museum, the permit is not inconsistent with a management plan for the State land, and the applicant will bear the cost of reinterment of any human remains. The Department must also notify and consult with the appropriate local religious or cultural group prior to issuing the permit.

Criminal record checks by DHHS and DJJDP of certain applicants and employees. G.S. 114-19.6 authorizes the Department of Justice to conduct criminal background checks for the Department of Health and Human Services (DHHS) and the Department of Juvenile Justice and Delinquency Prevention (DJJDP). The background checks are for applicants for employment and current employees who provide direct care for a client, patient, student, resident or ward of the Department, and also for persons who supervise individuals who provide that care. If the person has resided in North Carolina for the past 5 years, the check is only regarding North Carolina convictions and the person is not required to submit their fingerprints. If the person has not lived in North Carolina for the past 5 years, the Department is authorized to conduct a national search and to require fingerprints. Information obtained from the search is confidential. Evidence of a conviction does not automatically make a person ineligible for employment. DHHS and DJJDP must take into consideration a number of factors, such as the seriousness of the crime, the age of the person at the time of conviction, the nexus between the nature of the crime and the job duties, the period of punishment, and whether the person has committed any subsequent offenses.

BILL ANALYSIS:

Section 1 authorizes the North Carolina Department of Justice (DOJ) to conduct State and national criminal background checks on applicants for permits or licenses from the Department of Cultural Resources to conduct salvage operations or archeological investigations. DOJ may charge a fee to cover the actual cost of locating, editing, researching and retrieving the information.

Sections 2 and 3 are identical, but apply to different permitting processes (Article 3 of Chapter 121 and Article 2 of Chapter 70 respectively). They both require an applicant for a permit or license to conduct salvage operations or archaeological investigations to submit to a criminal background check. The applicant must provide a written consent to the background check, a set of fingerprints, and any other identifying information required by the State or National Repositories of Criminal Histories. The Department of Cultural Resources must keep the information confidential. Evidence of a conviction will not necessarily disqualify an applicant from receiving a permit or license. The Department must consider a number of factors, such as the seriousness of the crime, the age of the person at the time of conviction, the nexus between the nature of the crime and the purpose of the permit, the period of punishment, and whether the person has committed any subsequent offenses.

Section 4 amends G.S. 114-19.6 to allow DHHS to conduct criminal background checks on all applicants for employment, all current employees, all independent contractors and their employees who contract with the Department, and all persons who provide volunteer services for the Department. All the provisions of existing law would apply regarding when the check would only apply to State records and when it would involve a national check.

EFFECTIVE DATE: The act becomes effective October 1, 2005. Sections 1, 2 and 3 would apply to applications for permits submitted to the Department of Cultural Resources on or after that date.

BACKGROUND: The Federal Bureau of Investigation (FBI) has certain criteria that must be met before it will comply with a statute authorizing criminal background checks for employment or licensure. Those criteria include that the statute must: specify who is subject to the statute, require the applicant to provide a fingerprint card, specify the agency responsible for the licensure/employment decision, and clearly indicate that the criminal history access is authorized and identify the criteria by which a person would be denied employment or licensure. In addition, the FBI has a process for providing preliminary approval of proposed legislation and final approval for enacted legislation.

S0796e1-SMRC-CSRC-63

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H

1

HOUSE BILL 862*

Short Title:	Prohibit Removal of Electronic Collars.	(Public)
Sponsors:	Representative Wilson.	
Referred to:	Judiciary III.	

March 23, 2005

A BILL TO BE ENTITLED

AN ACT TO MAKE THE LAW PROHIBITING THE REMOVAL OF ELECTRONIC COLLARS FROM DOGS APPLY STATEWIDE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-401.17(d) is repealed.

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: House Bill 862 (First Edition)

SHORT TITLE: Prohibit Removal of Electronic Collars.

SPONSOR(S): Representative Wilson

FISCAL IMPACT

Yes (X) No ( ) No Estimate Available ( )

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
GENERAL FUND					
Correction	Exact amount cannot be determined; no substantial impact anticipated.				
Judicial	Exact amount cannot be determined; no substantial impact anticipated.				
LOCAL GOVERNMENTS	Exact amount cannot be determined; no substantial impact anticipated.				
ADDITIONAL PRISON BEDS*	It is likely that offenders receiving active sentences under this bill would be housed in county jails at county expense. The exception would be Class 2 misdemeanants with sentences exceeding thirty days, which would also be served in county jails but at a cost to the state of $18 per day.				
POSITIONS: (cumulative)	Exact amount cannot be determined; no additional positions anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch; Local Governments

EFFECTIVE DATE: December 1, 2005

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: Current G.S. 14-401.17 prohibits the removal of electronic collars from dogs in 38 counties. This bill would amend G.S. 14-401.17 to make the offense applicable statewide. A first conviction for this offense is a Class 3 misdemeanor; the second, and any subsequent conviction, is a Class 2 misdemeanor.

ASSUMPTIONS AND METHODOLOGY:

General

Because this bill would extend the offense under G.S. 14-401.17 for removing an electronic collar from a dog to the entire state, additional charges and convictions would be expected to result from this legislation. However, the Administrative Office of the Courts (AOC) does not maintain a specific offense code for current violations of G.S. 14-401.17, which is some indication that the existing offense is infrequently charged and rarely result in convictions. As such, few additional charges and convictions are anticipated to result from this bill, and the associated fiscal impact is not expected to be substantial.

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2005 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory group, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.*

Due to the lack of an offense code for current violations of G.S. 14-401.17 (some indication that convictions are presently infrequent), the Sentencing Commission has no historical data from which to estimate the number of additional convictions that might result from applying the offense statewide.

- In FY 2003-04, 15 percent of Class 2 and 23 percent of Class 3 misdemeanors resulted in active sentences and the average active sentence lengths were 23 and 8 days, respectively.
- Offenders with active sentences of less than thirty days are housed in county jails at county expense.
- The remaining 85 and 77 percent of Class 2 and 3 misdemeanants, respectively, received non-active sentences. For those offenders sentenced to supervised probation, the Division of Community Correction (DCC) would incur costs of $1.87 per offender per day. Offenders sentenced to community service would cost $0.67 per offender per day, and offenders given unsupervised probation would not impact DCC.

Because Class 2 and 3 misdemeanants serving active time as a result of this bill would be housed in county jails, this legislation would not impact prison population.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

Data regarding the number of charges for unlawfully removing an electronic collar from a dog is unavailable because AOC does not maintain a specific offense code for this violation. As a result, we cannot estimate the number of additional charges that the Court system would handle due to this bill. Based on the costs of time in court, attorney preparation time, and indigent defense, the average estimated cost to process one Class 2 or Class 3 misdemeanor via trial is $2,322. This cost includes an estimated $1,373 in jury fees, costs of time in court, and attorney costs and an additional $949 in indigent defense. However, based on prior-year data, the majority of any new Class 2 or 3 misdemeanor charges that are not dismissed are likely to be settled by guilty plea at an estimated cost of $272 or $268, respectively.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Aaron Paul and Jim Mills

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

Official
Fiscal Research Division
Publication

DATE: April 5, 2005

Signed Copy Located in the NCGA Principal Clerk's Offices

HOUSE BILL 862:
Prohibit Removal of Electronic Collars

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 8, 2005
Introduced by:	Rep. Wilson	**Summary by:**	Robin Johnson
Version:	First Edition		Committee Counsel

SUMMARY: ***House Bill 862 would extend statewide the applicability of the law prohibiting the removal of electronic collars from dogs.***

CURRENT LAW: G.S. 14-401.17[1] makes it unlawful to intentionally remove or destroy an electronic collar or other electronic device placed on a dog by its owner to maintain control of the dog. A first conviction for a violation of this section is a Class 3 misdemeanor, punishable by 1-10 days of community punishment. A second or subsequent conviction for a violation of this section is a Class 2 misdemeanor. The minimum punishment for subsequent convictions is 1-45 days of intermediate or community punishment.

The law is enforceable by officers of the Wildlife Resources Commission, by sheriffs and deputy sheriffs, and by peace officers with general subject matter jurisdiction. The law currently applies in only 38 of the State's 100 counties: *Alamance, Anson, Avery, Beaufort, Brunswick, Buncombe, Burke, Caldwell, Camden, Caswell, Cherokee, Chowan, Clay, Columbus, Craven, Cumberland, Davidson, Graham, Haywood, Henderson, Hyde, Jackson, Macon, Madison, McDowell, Mecklenburg, Mitchell, New Hanover, Orange, Pasquotank, Pitt, Robeson, Rockingham, Swain, Transylvania, Union, Wilkes, and Yancey.*

BILL ANALYSIS: House Bill 862, if enacted, would repeal G.S. 14-401.17(d), which would have the effect of making the statute applicable statewide.

Note: There is an incarceration note.

EFFECTIVE DATE: The bill would become effective December 1, 2005, and apply to offenses committed on or after that date.

Brenda Carter, counsel to House Judiciary III, substantially prepared this summary.

H0862e1-SMRH

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[i] **§ 14-401.17. Unlawful removal or destruction of electronic dog collars.**

(a) It is unlawful to intentionally remove or destroy an electronic collar or other electronic device placed on a dog by its owner to maintain control of the dog.

(b) A first conviction for a violation of this section is a Class 3 misdemeanor. A second or subsequent conviction for a violation of this section is a Class 2 misdemeanor.

(c) This act is enforceable by officers of the Wildlife Resources Commission, by sheriffs and deputy sheriffs, and peace officers with general subject matter jurisdiction.

(d) This act applies only to Alamance, Anson, Avery, Beaufort, Brunswick, Buncombe, Burke, Caldwell, Camden, Caswell, Cherokee, Chowan, Clay, Columbus, Craven, Cumberland, Davidson, Graham, Haywood, Henderson, Hyde, Jackson, Macon, Madison, McDowell, Mecklenburg, Mitchell, New Hanover, Orange, Pasquotank, Pitt, Robeson, Rockingham, Swain, Transylvania, Union, Wilkes, and Yancey Counties.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1199

Committee Substitute Favorable 5/16/05

Short Title: Involuntary Commitment Affidavit. (Public)

Sponsors:

Referred to:

April 13, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A PHYSICIAN OR ELIGIBLE PSYCHOLOGIST MAY FILE AN AFFIDAVIT FOR INVOLUNTARY COMMITMENT WITH THE CLERK OR MAGISTRATE EITHER BY HAND DELIVERY OF THE ORIGINAL AFFIDAVIT OR BY FACSIMILE TRANSMISSION OF A PAPER COPY OF THE AFFIDAVIT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 122C-261(d) reads as rewritten:

"**§ 122C-261. Affidavit and petition before clerk or magistrate when immediate hospitalization is not necessary; custody order.**

...

(d) If the affiant is a physician or eligible psychologist, the affiant may execute the affidavit before any official authorized to administer oaths. This affiant is not required to appear before the clerk or magistrate for this purpose. This affiant shall file the affidavit with the clerk or magistrate by delivering to the clerk or magistrate the original affidavit or a copy in paper form that is printed through the facsimile transmission of the affidavit. If the affidavit is filed through facsimile transmission, the affiant shall mail the original affidavit to the clerk or magistrate to be filed by the clerk or magistrate with the facsimile copy of the affidavit. This affiant's examination shall comply with the requirements of the initial examination as provided in G.S. 122C-263(c). If the physician or eligible psychologist recommends outpatient commitment and the clerk or magistrate finds probable cause to believe that the respondent meets the criteria for outpatient commitment, the clerk or magistrate shall issue an order that a hearing before a district court judge be held to determine whether the respondent will be involuntarily committed. The physician or eligible psychologist shall provide the respondent with written notice of any scheduled appointment and the name, address, and telephone number of the proposed outpatient treatment physician or center. If the physician or eligible psychologist recommends inpatient commitment and the clerk or magistrate finds probable cause to believe that the respondent meets the

criteria for inpatient commitment, the clerk or magistrate shall issue an order for transportation to or custody at a 24-hour facility described in G.S. 122C-252. However, if the clerk or magistrate finds probable cause to believe that the respondent, in addition to being mentally ill, is also mentally retarded, the clerk or magistrate shall contact the area authority before issuing the order and the area authority shall designate the facility to which the respondent is to be transported. If a physician or eligible psychologist executes an affidavit for inpatient commitment of a respondent, a second physician shall be required to perform the examination required by G.S. 122C-266."

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 1199:
Involuntary Commitment Affidavit

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 9, 2005
Introduced by:	Rep. Holliman	**Summary by:**	Ben Popkin
Version:	Second Edition		Committee Counsel

SUMMARY: ***House Bill 1199 would allow physicians or eligible psychologists who execute an affidavit in support of a petition for issuance of a transportation and custody order for involuntary commitment of an individual to file the affidavit with the clerk or magistrate by either of the following methods:***

- ***Delivering the affidavit to the clerk or magistrate; or***
- ***Delivering a copy in paper form by facsimile transmission bearing the physician or psychologist's original signature.***

The Proposed Committee Substitute added the stipulation that affidavits submitted by facsimile transmission be filed with the original copy of the affidavit. To accomplish this, the affiant would be required to mail the original affidavit to the clerk or magistrate to be filed with the received facsimile copy.

CURRENT LAW: G.S. 122C-261 governs the procedure and requirements for involuntary commitment of the mentally ill. Specifically, anyone who has knowledge of an individual who is mentally ill and either dangerous to self, dangerous to others, or in need of treatment to prevent further deterioration that would result in dangerousness may appear before a clerk or magistrate and execute an affidavit to this effect. The affiant may then petition the clerk or magistrate for a custody order authorizing law enforcement officials to to taking the respondent into custody. If the clerk or magistrate finds reasonable grounds to believe the facts as stated in the affidavit, the clerk may then issue the appropriate order taking the individual into custody.

This statute includes a special provision allowing a physician or eligible psychologist to execute an affidavit before any official authorized to administer oaths. The physician or psychologist is not required to appear before the clerk or magistrate to execute the affidavit. The relevant statute is appended to the bottom of this document.

BILL ANALYSIS: House Bill 1199 would amend G.S. 122C-261(d) to authorize physicians or eligible psychologists to be able to file affidavits in support of petitions for issuance of custody orders for examination and possible involuntary commitment by either delivering the original affidavit to the clerk or magistrate or by sending the affidavit by facsimile transmission. The Proposed Committee Substitute would require that the original affidavit corresponding to the facsimile transmission to the clerk or magistrate be mailed to the clerk or magistrate for filing with the facsimile copy.

EFFECTIVE DATE: House Bill 1199 would be effective when it becomes law.

§ 122C-261. Affidavit and petition before clerk or magistrate when immediate hospitalization is not necessary; custody order.

(a) Anyone who has knowledge of an individual who is mentally ill and either (i) dangerous to self, as defined in G.S. 122C-3(11)a., or dangerous to others, as defined in G.S. 122C-3(11)b., or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness, may appear before a clerk or assistant or deputy clerk of superior court or a magistrate

and execute an affidavit to this effect, and petition the clerk or magistrate for issuance of an order to take the respondent into custody for examination by a physician or eligible psychologist. The affidavit shall include the facts on which the affiant's opinion is based. If the affiant has knowledge or reasonably believes that the respondent, in addition to being mentally ill, is also mentally retarded, this fact shall be stated in the affidavit. Jurisdiction under this subsection is in the clerk or magistrate in the county where the respondent resides or is found.

(b) If the clerk or magistrate finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably mentally ill and either (i) dangerous to self, as defined in G.S. 122C-3(11)a., or dangerous to others, as defined in G.S. 122C-3(11)b., or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness, the clerk or magistrate shall issue an order to a law enforcement officer or any other person authorized under G.S. 122C-251 to take the respondent into custody for examination by a physician or eligible psychologist. If the clerk or magistrate finds that, in addition to probably being mentally ill, the respondent is also probably mentally retarded, the clerk or magistrate shall contact the area authority before issuing a custody order and the area authority shall designate the facility to which the respondent is to be taken for examination by a physician or eligible psychologist. The clerk or magistrate shall provide the petitioner and the respondent, if present, with specific information regarding the next steps that will occur for the respondent.

(c) If the clerk or magistrate issues a custody order, the clerk or magistrate shall also make inquiry in any reliable way as to whether the respondent is indigent within the meaning of G.S. 7A-450. A magistrate shall report the result of this inquiry to the clerk.

(d) If the affiant is a physician or eligible psychologist, the affiant may execute the affidavit before any official authorized to administer oaths. This affiant is not required to appear before the clerk or magistrate for this purpose. This affiant's examination shall comply with the requirements of the initial examination as provided in G.S. 122C-263(c). If the physician or eligible psychologist recommends outpatient commitment and the clerk or magistrate finds probable cause to believe that the respondent meets the criteria for outpatient commitment, the clerk or magistrate shall issue an order that a hearing before a district court judge be held to determine whether the respondent will be involuntarily committed. The physician or eligible psychologist shall provide the respondent with written notice of any scheduled appointment and the name, address, and telephone number of the proposed outpatient treatment physician or center. If the physician or eligible psychologist recommends inpatient commitment and the clerk or magistrate finds probable cause to believe that the respondent meets the criteria for inpatient commitment, the clerk or magistrate shall issue an order for transportation to or custody at a 24-hour facility described in G.S. 122C-252. However, if the clerk or magistrate finds probable cause to believe that the respondent, in addition to being mentally ill, is also mentally retarded, the clerk or magistrate shall contact the area authority before issuing the order and the area authority shall designate the facility to which the respondent is to be transported. If a physician or eligible psychologist executes an affidavit for inpatient commitment of a respondent, a second physician shall be required to perform the examination required by G.S. 122C-266.

(e) Upon receipt of the custody order of the clerk or magistrate or a custody order issued by the court pursuant to G.S. 15A-1003, a law enforcement officer or other person designated in the order shall take the respondent into custody within 24 hours after the order is signed, and proceed according to G.S. 122C-263. The custody order is valid throughout the State.

(f) When a petition is filed for an individual who is a resident of a single portal area, the procedures for examination by a physician or eligible psychologist as set forth in G.S. 122C-263 shall be carried out in accordance with the area plan. Prior to issuance of a custody order for a respondent who resides in an area authority with a single portal plan, the clerk or magistrate shall communicate with the

area authority to determine the appropriate 24-hour facility to which the respondent should be admitted according to the area plan or to determine if there are more appropriate resources available through the area authority to assist the petitioner or the respondent. When an individual from a single portal area is presented for commitment at a 24-hour area or State facility directly, the individual may not be accepted for admission until the facility notifies the area authority and the area authority agrees to the admission. If the area authority does not agree to the admission, it shall determine the appropriate 24-hour facility to which the individual should be admitted according to the area plan or determine if there are more appropriate resources available through the area authority to assist the individual. If the area authority agrees to the admission, further planning of treatment for the client is the joint responsibility of the area authority and the facility as prescribed in the area plan.

Notwithstanding the provisions of this section, in no event shall an individual known or reasonably believed to be mentally retarded be admitted to a State psychiatric hospital, except as follows:

(1) Persons described in G.S. 122C-266(b);
(2) Persons admitted pursuant to G.S. 15A-1321;
(3) Respondents who are so extremely dangerous as to pose a serious threat to the community and to other patients committed to non-State hospital psychiatric inpatient units, as determined by the Director of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services or his designee; and
(4) Respondents who are so gravely disabled by both multiple disorders and medical fragility or multiple disorders and deafness that alternative care is inappropriate, as determined by the Director of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services or his designee.

Individuals transported to a State facility for the mentally ill who are not admitted by the facility may be transported by law enforcement officers or designated staff of the State facility in State-owned vehicles to an appropriate 24-hour facility that provides psychiatric inpatient care.

No later than 24 hours after the transfer, the responsible professional at the original facility shall notify the petitioner, the clerk of court, and, if consent is granted by the respondent, the next of kin, that the transfer has been completed.

Staff Attorney Tim Hovis contributed significantly to this Bill Summary.

H1199e2-SMRD

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. 2

H. B. No. 1199 DATE 6-9-05

S. B. No. _____ Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.)
Sen.) DORSETT

moves to amend the bill on page 1, line 18

( ) WHICH CHANGES THE TITLE

by rewriting the line to read as follows:

"affiant shall mail the original affidavit no later than five days after the facsimile transmission of the affidavit to the clerk or magistrate to be filed by the clerk".

SIGNED _____

ADOPTED X FAILED _____ TABLED _____

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	June 14, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 217	Driving From/Leaving Scene of Accident.	Representative Bordsen Representative Luebke Representative Harrison Representative Insko
HB 878	Conference of Clerks of Superior Court.	Representative Justus
HB 514	Multicounty Superior Court District/Motions.	Representative Faison

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, June 14, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 217	Driving From/Leaving Scene of Accident.	Representative Bordsen Representative Luebke Representative Harrison Representative Insko
HB 878	Conference of Clerks of Superior Court.	Representative Justus
HB 514	Multicounty Superior Court District/Motions.	Representative Faison

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

June 14, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on June 14, 2005, with ten members present. Senator Hartsell introduced pages Igor Pediaditakis, Stephen Kent, Jonathan Noble and Allen Stanton and thanked them for serving.

HB 217 (Driving From/Leaving Scene of Accident.) Senator Hartsell recognized Representative Harrison to explain the bill. Questions from Senators Jacumin, Forrester, and Apodaca were answered by Representative Harrison. Senator Hartsell presented a technical amendment and moved for adoption. All voted and the motion carried. Mr. and Mrs. George Gates, parents of reporter Stephen Gates, accident victim, spoke on the bill. Senator Apodaca moved for a favorable report as amended and rolled into a Committee Substitute. All voted and the motion carried.

HB 878 (Conference of Clerks of Superior Court.) Senator Apodaca, representing Representative Justus, was recognized to explain the bill. Senator Bingham's question was answered by Senator Apodaca. Senator Thomas moved for a favorable report. All voted and the motion carried.

HB 514 Senator Hartsell recognized Representative Faison to explain the bill. Senators Thomas and Swindell spoke on the bill. Senator Thomas moved for a favorable report. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

CORRECTED REPORT

Tuesday, June 14, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B. **514** Multicounty Superior Court District/Motions.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **878** Conference of Clerks of Superior Court.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **796** Criminal Record Checks/Archeological Ops.
Draft Number: PCS75330
Sequential Referral: None
Recommended Referral: Finance
Long Title Amended: No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1199** Involuntary Commitment Affidavit.
Draft Number: PCS50465
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

TOTAL REPORTED: 4

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, June 14, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **217** Driving From/Leaving Scene of Accident.

Draft Number:	PCS60496
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

June 14, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
George Gates	
Pat Gates	
Kim Gates	
Michelle Mayer	
E Vega	UNC-TV
S. Hartsoe	AP
Michelle Frazier	NC Bar Ass'n
Celie Richardson	"
Sierra Tindallman	CSC - Pitt Co
Nathan T. Smith	CSC Tyrrell Co.
M A Osborne	AOC

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

June 14, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
David Humphrey	intern
Russ Dubisky	CCPS
[signature]	AAA Carolinas
Kathleen Edwards	UNC-CH
[signature]	[illegible]

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 217
Committee Substitute Favorable 3/15/05

Short Title: Driving From/Leaving Scene of Accident. (Public)

Sponsors:

Referred to:

February 14, 2005

A BILL TO BE ENTITLED

AN ACT TO MAKE IT UNLAWFUL TO DRIVE AWAY FROM OR OTHERWISE LEAVE THE SCENE OF A MOTOR VEHICLE ACCIDENT IN CERTAIN CIRCUMSTANCES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-166 reads as rewritten:

"**§ 20-166. Duty to stop in event of accident or collision; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.**

(a) The driver of any vehicle who knows or reasonably should know:

(1) That the vehicle which he is operating is involved in an accident or collision; and

(2) That the accident or collision has resulted in injury or death to any person;

shall immediately stop his vehicle at the scene of the accident or collision. ~~He~~ The driver, and the passengers, if any, shall remain with the vehicle at the scene of the accident until a law-enforcement officer completes ~~his~~ the investigation of the accident or collision or authorizes ~~him~~ the driver or passengers to ~~leave~~;leave and the vehicle to be removed. ~~Provided, however, that he may leave~~ Prior to the completion of the investigation of the accident by a law enforcement officer, or the consent of the officer to leave, the driver may not facilitate, allow, or agree to the removal of the vehicle from the scene, nor may any passenger remove the vehicle, or facilitate the removal of the vehicle, from the scene, for any purpose other than to call for a law-enforcement officer or for medical assistance or medical treatment as set forth in ~~(b), but must~~ subsection (b) of this section. However, the driver and the passengers must return with the vehicle to the accident scene within a reasonable period of time. A willful violation of this subsection shall be punished as a Class H felony.

(b) In addition to complying with the requirement of (a), the driver as set forth in (a) shall give his name, address, driver's license number and the license plate number of

his vehicle to the person struck or the driver or occupants of any vehicle collided with, provided that such person or persons are physically and mentally capable of receiving such information, and shall render to any person injured in such accident or collision reasonable assistance, including the calling for medical assistance if it is apparent that such assistance is necessary or is requested by the injured person. A violation of this subsection is a Class 1 misdemeanor.

(c) The driver of any vehicle, when he knows or reasonably should know that the vehicle which he is operating is involved in an accident or collision, which accident or collision, results:

(1) Only in damage to property; or

(2) In injury or death to any person, but only if the operator of the vehicle did not know and did not have reason to know of the death or injury;

shall immediately stop his vehicle at the scene of the accident or collision. If the accident is a reportable accident, the driver, and the passengers, if any, shall remain with the vehicle at the scene of the accident until a law enforcement officer completes the investigation of the accident or authorizes the driver or passengers to leave and the vehicle to be removed. Prior to the completion of the investigation of the accident by a law enforcement officer, or the consent of the officer to leave, the driver may not facilitate, allow, or agree to the removal of the vehicle from the scene, nor may any passenger remove the vehicle, or facilitate the removal of the vehicle, from the scene, for any purpose other than to call for a law enforcement officer or for medical assistance or medical treatment. However, the driver and the passengers must return with the vehicle to the accident scene within a reasonable period of time. A willful violation of this subsection is a Class 1 misdemeanor.

(c1) In addition to complying with the requirement of (c), the driver as set forth in (c) shall give his name, address, driver's license number and the license plate number of his vehicle to the driver or occupants of any other vehicle involved in the accident or collision or to any person whose property is damaged in the accident or collision. If the damaged property is a parked and unattended vehicle and the name and location of the owner is not known to or readily ascertainable by the driver of the responsible vehicle, the said driver shall furnish the information required by this subsection to the nearest available peace officer, or, in the alternative, and provided he thereafter within 48 hours fully complies with G.S. 20-166.1(c), shall immediately place a paper-writing containing said information in a conspicuous place upon or in the damaged vehicle. If the damaged property is a guardrail, utility pole, or other fixed object owned by the Department of Transportation, a public utility, or other public service corporation to which report cannot readily be made at the scene, it shall be sufficient if the responsible driver shall furnish the information required to the nearest peace officer or make written report thereof containing said information by U.S. certified mail, return receipt requested, to the North Carolina Division of Motor Vehicles within five days following said collision. A violation of this subsection is a Class 1 misdemeanor.

(c2) Notwithstanding subsections (a) and (c) of this section, if ~~If~~ an accident or collision occurs on a main lane, ramp, shoulder, median, or adjacent area of a highway, each vehicle shall be moved as soon as possible out of the travel lane and onto the

shoulder or to a designated accident investigation site to complete the requirements of this section and minimize interference with traffic if all of the following apply:

(1) The accident or collision has not resulted in injury or death to any person or the drivers did not know or have reason to know of any injury or death.

(2) Each vehicle can be normally and safely driven. For purposes of this subsection, a vehicle can be normally and safely driven if it does not require towing and can be operated under its own power and in its usual manner, without additional damage or hazard to the vehicle, other traffic, or the roadway.

(d) Any person who renders first aid or emergency assistance at the scene of a motor vehicle accident on any street or highway to any person injured as a result of such accident, shall not be liable in civil damages for any acts or omissions relating to such services rendered, unless such acts or omissions amount to wanton conduct or intentional wrongdoing.

(e) The Division of Motor Vehicles shall revoke the drivers license of a person convicted of violating subsection (a) of this section for a period of one year, unless the court makes a finding that a longer period of revocation is appropriate under the circumstances of the case. If the court makes this finding, the Division of Motor Vehicles shall revoke that person's drivers license for two years. Upon a first conviction only for a violation of subsection (a) of this section, a trial judge may allow limited driving privileges in the manner set forth in G.S. 20-179.3(b)(2) during any period of time during which the drivers license is revoked."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 217

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

H217-ARC-24 [v.2]

Date _____,2005

Comm. Sub. [NO]
Amends Title [NO]
Second Edition

Senator _____

moves to amend the bill on page 1, line 26, by inserting the following after the word "time.":

"As used in this subsection and in subsection (c) of this section, the term "passenger" does not include any child who is less than 12 years of age.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

HOUSE BILL 217:
Driving From/Leaving Scene of Accident

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 14, 2005
Introduced by:	Reps. Harrison, Bordsen, Insko, Luebke	**Summary by:**	Kory Goldsmith
Version:	Second Edition		Committee Counsel

SUMMARY: House Bill 217 would require that passengers in a vehicle that has been involved in an accident remain at the scene of the accident with the vehicle until a law enforcement officer authorizes the vehicle to be removed and the passengers to leave. It also prohibits the driver from authorizing another to remove the vehicle, and prohibits the passenger from removing the vehicle.

The act would become effective December 1, 2005, and apply to offenses committed on or after that date.

CURRENT LAW: G.S. 20-166(a) requires a driver whose vehicle has been involved in an accident that causes injury or death to stop his or her car and remain at the scene of the accident until a law enforcement officer completes the investigation or authorizes the driver to leave the scene. Violation of this provision is a Class H felony[1] and also results in the mandatory revocation of the person's drivers license for 1 to 2 years.[2] The driver may leave the scene or remove the vehicle in order to call law enforcement or obtain medical assistance. The driver must return to the scene within a reasonable period of time.

G.S. 20-166(c) requires a driver whose vehicle is involved in an accident to stop at the scene if the accident causes only property damage or results in injury or death that is not apparent. Violation of this provision is a Class 1 misdemeanor.[3]

BILL ANALYSIS: House Bill 217 would expand the duties of both drivers and passengers who are in vehicles that are involved in an accident as follows:

- Make it a Class H felony for the driver to facilitate, allow or agree to the removal of the vehicle from the scene of an accident that results in injury or death prior to law enforcement completing the investigation or consenting to the removal. A person convicted of this crime would lose their drivers license for 1 to 2 years. A judge may order a limited driving privilege during this period.
- Make it a Class H felony for a passenger of a vehicle that has been involved in an accident that results in injury or death to leave the scene or remove the vehicle from the scene prior to law enforcement completing the investigation or consenting to the removal. The passenger would also have their drivers license revoked for 1 to 2 years. A judge may order a limited driving privilege during this period.
- Require that both the driver and any passenger of a vehicle must remain at the scene of a "reportable" accident[4] where only property damage occurs and the injury or death is not apparent. It would be a Class 1 misdemeanor for either the driver or the passenger to leave the scene or otherwise remove the vehicle prior to law enforcement completing the investigation or consenting to the removal. The driver or passenger could leave the scene or remove the vehicle in order to call law enforcement or obtain medical assistance. They would have to return to the scene within a reasonable period of time.

H0217e2-SMRC

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[1] The presumptive minimum sentence for a Class H felony for a person with no prior convictions is 5-6 months of community, intermediate or active punishment.

[2] G.S. 20-166(e). The judge may grant a limited driving privilege.

[3] The presumptive minimum sentence for a Class 1 misdemeanor for a person with no prior convictions is 1-45 days of community punishment.

[4] A reportable accident is an accident that results death or injury to a human being, $1000 or more worth of property damage, or seizure of a vehicle because of a DWI violation.

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Incarceration Fiscal Note

BILL NUMBER: House Bill 217 (Second Edition)

SHORT TITLE: Driving From/Leaving Scene of Accident.

SPONSOR(S): Representatives Insko, Luebke, Bordsen, and Harrison

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10
GENERAL FUND					
Correction	Exact amount cannot be determined; no substantial impact anticipated.				
Judicial	Exact amount cannot be determined; no substantial impact anticipated.				
ADDITIONAL PRISON BEDS*	Exact amount cannot be determined; no substantial impact anticipated.				
POSITIONS: (cumulative)	Exact amount cannot be determined; no substantial impact anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch

EFFECTIVE DATE: December 1, 2005

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY:

Current G.S. 20-166 subsection (a) requires a driver of any vehicle involved in a collision, when the driver knows or reasonably should know that the vehicle has been involved in an accident that has resulted in death or injury, to remain at the scene of that accident, except for the purpose of calling a law enforcement officer or seeking medical attention, until law enforcement completes the investigation or authorizes the driver to leave. A willful violation of this subsection currently constitutes a Class H felony. Current G.S. 20-166 subsection (c) provides that a driver involved in

an accident that has caused only property damage immediately stop his vehicle at the scene of the accident. A violation of G.S. 20-166 (c) is a Class 1 misdemeanor.

This bill would amend G.S. 20-166 subsection (a), and subsection (c) for a reportable accident, to require that any *passengers* (in addition to the driver) remain at the scene of an accident *with the vehicle* until law enforcement authorizes *the vehicle to be removed* and the driver *and any passengers* to leave. Subsections (a) and (c) are furthermore amended to prohibit the driver from *facilitating, allowing, or agreeing to the removal of the vehicle from the scene and any passenger from removing or facilitating the removal of the vehicle from the scene.* The penalties for violating subsections (a) and (c) would remain a Class H felony and Class 1 misdemeanor, respectively.

ASSUMPTIONS AND METHODOLOGY:

General

This bill would have a fiscal impact through two means:

1) *Expanding the requirements of drivers to prohibit facilitating, allowing, or agreeing to the removal of the vehicle involved in the accident from the scene.*

2) *Extending the current duty to remain at the scene of an accident to passengers and prohibiting passengers from removing or facilitating in the removal of the vehicle involved in the accident from the scene.*

Because these amendments expand the scope of existing offenses, there may be a greater number of charges and convictions for Class H felonies under subsection (a) of this bill and Class 1 misdemeanors under subsection (c). However, because this bill only refines present law and neither elevates existing penalties nor greatly expands the scope of behavior encompassed by existing offenses, the numbers of additional charges and convictions resulting from the bill are not expected to be significant. As such, any cost associated with this legislation is not expected to be substantial.

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2005 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory group, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.*

Because this bill expands the scope of existing offenses, the Sentencing Commission has no data from which to project the number of convictions that might result from this legislation. The following number of convictions occurred in fiscal year 2003-04 under current G.S. 20-166:

- 44 convictions under subsection (a), which prohibits drivers from leaving the scene of an accident that caused injury or death of which they are aware or should be aware.
- 791 convictions under subsection (c), which requires that drivers stop at the scene of an accident that causes only property damage.
- 288 convictions under subsection (c1), which requires that drivers provide identifying information to the Division of Motor Vehicles or to the occupants of any other vehicles involved in the accident.

Under this bill, any driver involved in such accidents would, additionally, be prohibited from facilitating, allowing, or agreeing to the removal of the vehicle from the scene. Any passenger involved in such accidents would be prohibited from removing or facilitating in the removal of the vehicle from the scene and be required to remain at the scene until law enforcement completes an investigation. Because no data exists regarding how often this conduct occurs at present, it is not possible to project the number of convictions that would result from these new provisions.

Class H Felonies: If, for example, there were three additional convictions for Class H felonies per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and two additional prison beds the second year. The average annual operating cost for one prison bed in FY 2006-07 will be an estimated $24,740.

Class 1 Misdemeanors: In FY 2003-04, 19 percent of Class 1 misdemeanants received active sentences, and the average estimated sentence length was 43 days. DOC reimburses the county for housing offenders sentenced to between thirty and ninety days at a rate of $18 per offender per day. Because active sentences of less than ninety days are served in county jails, Class 1 misdemeanor convictions resulting from this legislation are not expected to significantly impact prison population.

Non-Active Sentences: In FY 2003-04, 50 percent of Class H convictions resulted in intermediate sanctions and 13 percent in community sanctions; two percent of Class 1 misdemeanants received intermediate sanctions and 79 percent received community punishment. Probation officers in the Division of Community Correction (DCC) supervise offenders with intermediate sanctions at an estimated cost of $10.94 per day for the first six months and $1.87 per day thereafter. (This cost estimate is based on the average cost and duration of intensive probation, the most common intermediate sanction.) The estimated cost for a supervised community offender is $1.87 per day.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks, and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

For calendar year 2004, AOC data indicates the following number of charges under G.S. 20-166:

- 608 charges for felony hit-and-run under G.S. 20-166 (a).
- 8,085 charges for misdemeanor hit-and-run under G.S. 20-166 (c).

AOC cannot estimate the number of new charges that would result from this legislation because data regarding the prevalence of the conduct that would be criminalized by this bill is not available. The cost to the Courts to process one felony or misdemeanor charge varies depending upon the method of settlement and the severity of the charge. AOC estimates the following costs to process one Class H felony and one Class 1 misdemeanor:

Table 1: Per Charge Settlement Costs

	Settled via Trial			Settled via Guilty Plea
Offense Class	*Court/Attorney Costs*	*Indigent Defense*	*Total*	
Class H Felony	$4,511	$2,620	$7,131	$294
Class 1 Misdemeanor	$1,891	$1,333	$3,224	$284

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission.

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Aaron Paul and Jim Mills

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

Official
Fiscal Research Division
Publication

DATE: March 16, 2005

Signed Copy Located in the NCGA Principal Clerk's Offices

H 1

HOUSE BILL 514

Short Title:	Multicounty Superior Court District/Motions.	(Public)
Sponsors:	Representative Faison.	
Referred to:	Judiciary III.	

March 7, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT ANY MOTION FILED IN A CIVIL ACTION WHEN THE ACTION IS PENDING IN A SUPERIOR COURT OF A COUNTY THAT IS IN A SUPERIOR COURT DISTRICT CONSISTING OF MORE THAN ONE COUNTY MAY BE HEARD IN ANY SUPERIOR COURT IN THAT SUPERIOR COURT DISTRICT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1A-1, Rule 7, reads as rewritten:

"**Rule 7. Pleadings allowed; ~~form of~~ motions.**

(a) Pleadings. – There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a crossclaim, if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. If the answer alleges contributory negligence, a party may serve a reply alleging last clear chance. No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer.

(b) Motions and other papers. –

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) A motion to transfer under G.S. 7A-258 shall comply with the directives therein specified but the relief thereby obtainable may also be sought in a responsive pleading pursuant to Rule 12(b).

(4) A motion filed in a civil action when the action is pending in a superior court of a county that is in a superior court district consisting of more than one county may be heard in any superior court in that superior court district. The motion may be heard at a regular civil or civil priority session of court or, with the consent of the presiding judge, at a regular criminal or criminal priority session of court. A party shall not object to hearing the motion out of county so long as it is heard within that superior court district.

(c) Demurrers, pleas, etc., abolished. – Demurrers, pleas, and exceptions for insufficiency shall not be used.

(d) Pleadings not read to jury. – Unless otherwise ordered by the judge, pleadings shall not be read to the jury."

SECTION 2. G.S. 1A-1, Rule 58, reads as rewritten:

"**Rule 58. Entry of judgment.**

Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5. If service is by mail, three days shall be added to the time periods prescribed by Rule 50(b), Rule 52(b), and Rule 59. All time periods within which a party may further act pursuant to Rule 50(b), Rule 52(b), or Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement, provided however that no time period under Rule 50(b), Rule 52(b), or Rule 59 shall be tolled longer than 90 days from the date the judgment is entered. ~~Consent~~ Subject to the provisions of Rule 7(b)(4), consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard.

Notwithstanding any other law to the contrary, any judgment entered by a magistrate in a small claims action pursuant to Article 19 of Chapter 7A shall be entered in accordance with this Rule except judgments announced and signed in open court at the conclusion of a trial are considered to be served on the parties, and copies of any judgment not announced and signed in open court at the conclusion of a trial shall be served by the magistrate on all parties in accordance with this Rule, within three days after the judgment is entered. If service is by mail, three days shall be added to the time periods prescribed by G.S. 7A-228. All time periods within which a party may further act pursuant to G.S. 7A-228 shall be tolled for the duration of any period of noncompliance of this service requirement, provided that no time period shall be tolled longer than 90 days from the date judgment is entered."

SECTION 3. This act becomes effective October 1, 2005, and applies to motions filed on or after that date.

HOUSE BILL 514:
Multicounty Superior Court District/Motions

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 14, 2005
Introduced by:	Rep. Faison	**Summary by:**	Kory Goldsmith
Version:	First Edition		Committee Counsel

SUMMARY: House Bill 514 would allow motions in civil actions to be heard in any superior court within a multicounty superior court district.

CURRENT LAW: Most superior court districts in North Carolina are made up of more than one county. See attached map. Each county has a court where actions may be filed. This court is where the file for each case is housed. Motions are heard in the court where the action has been filed.

BILL ANALYSIS:

Section 1 of House Bill 514 would amend the Rules of Civil Procedure to allow motions in civil actions to be heard in any of the superior courts within a superior court district, even if the action is pending in another county within that district. Motions could be heard in civil or criminal court. A party would not be able to object because the hearing is out of county.

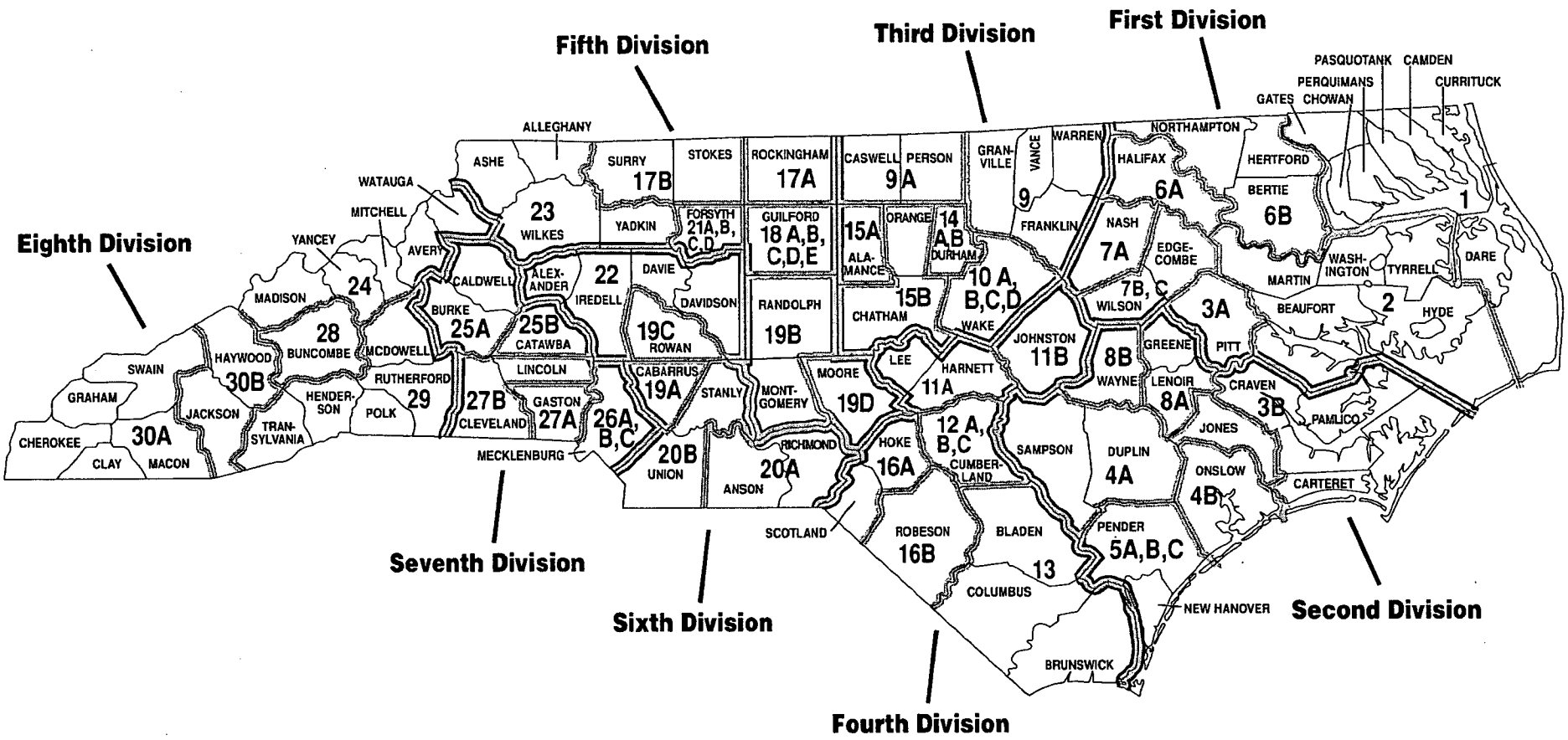
Section 2 makes a conforming change to Rule 58.

EFFECTIVE DATE: The act would become effective October 1, 2005, and apply to motions filed on or after that date.

H0514e1-SMRC

North Carolina Superior Court

Districts and Divisions as of June 30, 2004



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House Bill 514

Motions in

Multi-county Superior Court Districts

Representative Bill Faison

Fact Sheet

- There are 45 Judicial Districts in the State of North Carolina
- 20 are single-county districts
- 25 are multi-county districts
- 72% of the multi-county districts are made up of 3 or less counties
- A judge is assigned to a judicial district for six months. More than one judge can be assigned to a district for the six-month term. Regardless of whether it is a single county district or a multi-county district, for six months the same judge (or judges) hear the cases in the district.
- Currently motions filed in a civil case in multi-county districts must be heard in the county where filed absent agreement by all of the lawyers in the cases and the judges to do otherwise.

- Cases filed in multi-county districts generally proceed slower because there are fewer opportunities to resolve disputed matters.

- People whose cases are pending in multi-county districts should have similar timely access to the judges serving in the district as people whose cases are filed in a single county district.

- H514, which is attached, is sponsored by the North Carolina Bar Association and is recommended by a panel of lawyers from both multi-county and single-county districts. H514 will give the people in multi-county districts equal access to the judges as people in single county districts.

Multi-County Superior Court Districts

District 1—Camden, Chowan, Currituck, Dare, Gates, Pasquotank, and Perquimans

District 2—Beaufort, Hyde, Martin, Tyrrell, and Washington

District 3B—Carteret, Craven, and Pamlico

District 4A—Duplin, Jones, and Sampson

District 5A,B,C—New Hanover and Pender

District 6B—Bertie, Hertford, and Northampton

District 7B,C—Edgecombe and Wilson

District 8A—Greene and Lenoir

District 9—Franklin, Granville, Vance, and Warren

District 11A—Harnett and Lee

District 13—Bladen, Brunswick, and Columbus

District 15B—Chatham and Orange

District 16A—Hoke and Scotland

District 17B—Stokes and Surry

District 19B1,2—Montgomery, Moore, and Randolph

District 20A—Anson and Richmond

District 20B—Stanly and Union

District 22—Alexander, Davidson, Davie, and Iredell

District 23—Alleghany, Ashe, Wilkes, and Yadkin

District 24—Avery, Madison, Mitchell, Watauga, and Yancey

District 25A—Burke and Caldwell

District 27B—Cleveland and Lincoln

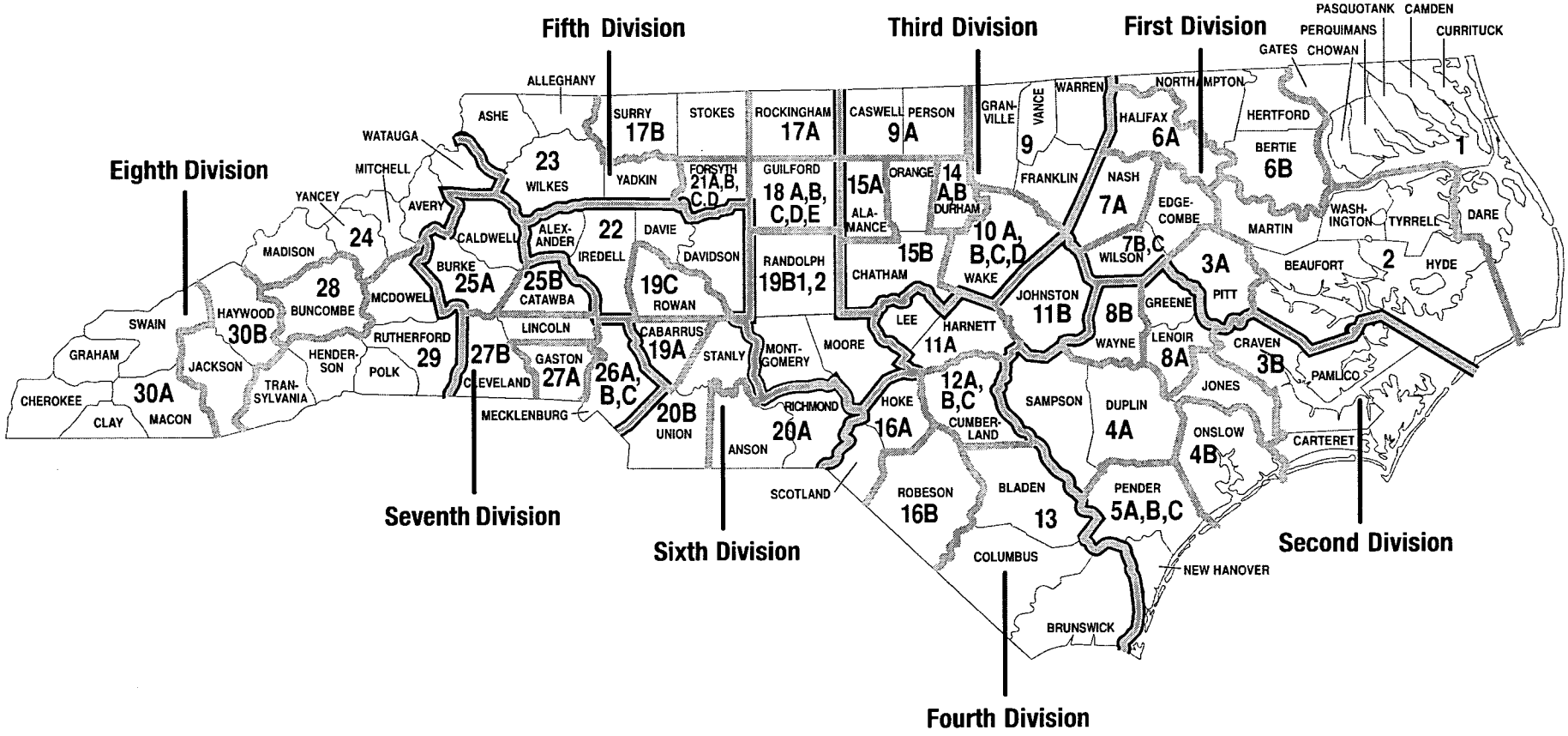
District 29—Henderson, McDowell, Polk, Rutherford, and Transylvania

District 30A—Clay, Cherokee, Graham, Macon, Swain

District 30B—Haywood and Jackson

North Carolina Superior Court

Districts and Divisions as of June 30, 2001



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GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 878*

Committee Substitute Favorable 4/13/05

Short Title: Conference of Clerks of Superior Court. (Public)

Sponsors:

Referred to:

March 24, 2005

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH THE CONFERENCE OF CLERKS OF SUPERIOR COURT.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 7A of the General Statutes is amended by adding a new Subchapter to read:

"**SUBCHAPTER XV. CONFERENCE OF CLERKS OF SUPERIOR COURT.**

"Article 63.

"Conference of Clerks of Superior Court.

"**§ 7A-805. Establishment and purpose.**

There is created the Conference of Clerks of Superior Court of North Carolina, of which each clerk of superior court is a member. The purpose of the Conference is to assist in improving the administration of justice in North Carolina by coordinating the efforts of the various clerks of superior court, by assisting them in the administration of their offices, and by exercising the powers and performing the duties provided for in this Article.

"**§ 7A-806. Annual meetings; organization; election of officers.**

(a) Annual Meetings. – The Conference shall meet each summer and winter at a time and place selected by the President of the Conference.

(b) Election of Officers. – Officers of the Conference are a President, two Vice Presidents, a Secretary, a Treasurer, and other officers from among its membership that the Conference may designate in its bylaws. Officers are elected for one-year terms at the annual summer conference and take office on July 1 immediately following their election.

(c) Executive Committee. – The Executive Committee of the Conference consists of the President, the two Vice Presidents, the Secretary, the Treasurer, and seven other members of the Conference. One of these seven members shall be the immediate past president if there is one and that past president continues to be a member.

(d) Organization and Functioning; Bylaws. – The bylaws may provide for the organization and functioning of the Conference, including the powers and duties of its officers and committees. The bylaws shall state the number of members required to constitute a quorum at any meeting of the Conference or the Executive Committee. The bylaws shall set out the procedure for amending the bylaws.

(e) Calling Meetings; Duty to Attend. – The President or the Executive Committee may call a meeting of the Conference upon 10 days' notice to the members, except upon written waiver of notice signed by at least three-fourths of the members. A member should attend each meeting of the Conference and the Executive Committee of which he is given notice. Members are entitled to reimbursement for travel and subsistence expenses at the rate applicable to State employees.

"**§ 7A-807. Powers of Conference.**

(a) The Conference may:

(1) Cooperate with citizens and other public and private agencies to promote the effective administration of justice.

(2) Develop advisory manuals to assist in the organization and administration of their offices, case management, calendaring, case tracking, filing, and office procedures.

(3) Work with the cooperation of the Administrative Office of the Courts and the Institute of Government of the School of Government at UNC-Chapel Hill to provide education and training programs for the clerks of superior court and their staff.

(b) The Conference may not adopt rules pursuant to Chapter 150B of the General Statutes.

"**§ 7A-808. Executive secretary; clerical support.**

The Conference may employ an executive secretary and any necessary supporting staff to assist it in carrying out its duties."

SECTION 2. The organizational meeting of the Conference of Clerks of Superior Court shall be convened by the Director of the Administrative Office of the Courts as soon as feasible. Officers elected at that organizational meeting shall serve until their successors take office July 1, 2006.

SECTION 3. This act becomes effective July 1, 2005.

HOUSE BILL 878:
Conference of Clerks of Superior Court

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 13, 2005
Introduced by:	Rep. Justus	**Summary by:**	Ben Popkin
Version:	Second Edition		Committee Counsel

SUMMARY: ***House Bill 878 would create the Conference of Clerks of Superior Court for the purpose of improving the administration of justice by coordinating the efforts of the various clerks, by assisting them in the administration of their offices, and by providing education and training programs for clerks and their staff. The bill is identical to a provision in Senate Bill 622, "2005 Appropriations Act"[1].***

CURRENT LAW: Clerks of superior court may elect to become members of the North Carolina Association of Clerks of Superior Court, which is a voluntary organization that offers educational and training opportunities for clerks.

BILL ANALYSIS: House Bill 878 would establish the Conference of Clerks of Superior Court, the framework of which is patterned after the legislation establishing the Conference of District Attorneys. Under this provision, all clerks would become members.

Purpose. – The purpose of the Conference would be to assist in improving the administration of justice by coordinating the efforts of the various clerks and by assisting them in the administration of their offices.

Annual meetings; election of officers. – The bill authorizes the Conference to elect officers and hold meetings twice a year, which the Association currently does.

Bylaws. – The bylaws would provide for the organization and functioning of the Conference, including the number of members required to constitute a quorum.

Calling Meetings. – The bill authorizes the President or the Executive Committee to call a meeting of the Conference upon 10 days' notice, absent a waiver signed by three-fourths of the members. Members would be entitled to reimbursement for travel and subsistence expenses at the rate applicable to State employees.

Powers of Conference. – The Conference may (1) cooperate with citizens and other agencies to promote the effective administration of justice; (2) develop advisory manuals to assist in the organization and administration of their offices, case management, calendaring, case tracking, filing, and office procedures; and (3) work with the AOC and the IOG to provide education and training programs for the clerks of superior court and their staff. The Conference would also have the authority to employ necessary support staff in order to carry out its duties.

The Conference would not have any rule-making authority.

EFFECTIVE DATE: The bill would become effective July 1, 2005.

Staff Attorney Trina Griffin contributed to this bill summary.

H0878e2-SMRD

[1] Senate Bill 622, Part XIV, Section 14.1.(a) and (b).

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	June 16, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 97	Term. Par. Rights/Murder of Parent by Parent.	Representative Moore
HB 451	Adoption/Crim. Checks/Prospective Families.	Representative Barnhart Representative Weiss Representative Glazier
HB 1319	Amend Family Law Arbitration Act.	Representative Hackney Representative Goodwin
HB 1417	Revise Judicial Standards Commission.	Representative Haire

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, June 16, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 97	Term. Par. Rights/Murder of Parent by Parent.	Representative Moore
HB 451	Adoption/Crim. Checks/Prospective Families.	Representative Barnhart Representative Weiss Representative Glazier
HB 1319	Amend Family Law Arbitration Act.	Representative Hackney Representative Goodwin
HB 1417	Revise Judicial Standards Commission.	Representative Haire

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on June 16, 2005, with fifteen members present. Senator Hartsell introduced pages Stephen Kent, Will Patterson, Charlie Martin, Caitlin Howell, Bridget Porowski, Cameron Lee, Aheem Perez, Nathan Glover and Alex Leonard.

HB 97 (Term. Par. Rights/Murder of Parent by Parent) Senator Hartsell recognized Representative Moore to explain the bill. The question by Senator Allran was answered by Representative Moore and Ben Popkin, Staff Attorney. Sentor Apodaca moved for a favorable report. All voted and the motion carried.

HB 1319 (Amend Family Law Arbitration) Senator Dannelly moved to accept the Proposed Committee Substitute for purposes of discussion. All voted and the motion carried. Senator Hartsell invited Representative Goodwin to explain the bill. Lynn Burleson, Attorney, representing Family Law Arbitration Act spoke on the bill. Mr. Burleson answered Senator Kinnaird's question. Senator Hartsell presented an amendment and Senator Snow moved that the amendment be accepted. All voted and the motion carried. Senator Snow moved for a favorable report as amended and rolled into a new committee substitute. All voted and the motion carried.

HB 451 (Adoption/Crim. Checks/Prospective Families) Senator Jacumin moved to adopt the Proposed Committee Substitute for purposes of discussion. All voted and the motion carried. Representative Glazier was recognized to explain the bill. Rob Lamme, representing the Department of Health and Human Services, spoke on the bill. Questions from Senators Allran and Kinnaird were answered by Esther High, representing the Department of Health and Human Services, and Representative Glazier. Senator Jacumin moved for a favorable report. All voted and the motion carried.

HB 1417 (Revise Judicial Standards Commission) Senator Hartsell recognized Representative Haire to explain the bill. Senator Forrester moved to accept the proposed committee substitute for purposes of discussion. Mr. Paul Ross, Executive Director of the Judicial Standards Commission, spoke on the bill. After much discussion, Senator Hartsell noted that the bill would be taken up again at the next Judiciary II meeting.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, June 16, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B.(CS #1) **97** Term. Par. Rights/Murder of Parent by Parent.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

June 16, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Suzanne Brefley	DOJ ATTY
Nancy Davis	LA - Rep. Tim Moore
Rachel Hughes	Intern - Rep. Tim Moore
Tony Caravano	Senator Basnight's Staff
Beverly Jeffries	PIP-Murphy
Phandra Thompson	PIP
Deborah A. Whitfield	Law Office of Deborah A. Whitfield
Esther Hyde	NCDSS
Kim Smith	NCDSS/NCAG
Rob Arnold	DOC
Rickye Collie	DHHS

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Kathy Gruer	Dept. of Health & Human Serv.
Rob Lummus	NCDHHS
Lynn P. Burleson	NCBA / Marmington Smith LLP
Doug Heron	NC Bar Association

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 97

Committee Substitute Favorable 3/29/05

Short Title: Term. Par. Rights/Murder of Parent by Parent. (Public)

Sponsors:

Referred to:

February 7, 2005

A BILL TO BE ENTITLED

AN ACT TERMINATING THE PARENTAL RIGHTS OF A PARENT WHO MURDERS THE OTHER PARENT OF THE CHILD.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7B-1111(a)(8) reads as rewritten:

"(a) The court may terminate the parental rights upon a finding of one or more of the following:

...

(8) The parent has committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child residing in the home; ~~or~~ has committed a felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the ~~home.~~home; or has committed murder or voluntary manslaughter of the other parent of the child. The petitioner has the burden of proving any of these offenses in the termination of parental rights hearing by (i) proving the elements of the offense or (ii) offering proof that a court of competent jurisdiction has convicted the parent of the offense, whether or not the conviction was by way of a jury verdict or any kind of ~~plea.~~ plea. If the parent has committed the murder or voluntary manslaughter of the other parent of the child, the court shall consider whether the murder or voluntary manslaughter was committed in self-defense or in the defense of others, or whether there was substantial evidence of other justification.

...."

SECTION 2. This act is effective when it becomes law and applies to termination of parental rights proceedings filed on or after that date.

HOUSE BILL 97:
Term. Par. Rights/Murder of Parent by Parent

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 15, 2005
Introduced by:	Rep. Moore	**Summary by:**	Ben Popkin
Version:	Second Edition		Committee Counsel

SUMMARY: ***House Bill 97 would allow a court to terminate the parental rights of a parent if the court finds that the parent has committed the murder or voluntary manslaughter of the other parent of the child. The bill would require the court to take into consideration during adjudication whether the murder or manslaughter of one parent by the other was committed in self-defense or in the defense of others or if there was substantial evidence of other justification.***

CURRENT LAW: A termination of parental rights proceeding consists of two steps: adjudication and disposition. A court may terminate the parental rights upon a finding of one or more of the grounds set forth in G.S. 7B-1111(a), which governs the adjudication process. One of the grounds for termination includes a finding that the parent has committed murder or voluntary manslaughter of another child of the parent or other child living in the home; aided or attempted to commit murder or manslaughter of the child or of another child of the parent, or other child living in the home; or has committed a felony assault that resulted in a serious bodily injury to the child, another child of the parent, or other child living in the home. G.S. 7B-1110 provides that during the disposition stage of a termination of parental rights proceeding, a court shall issue an order terminating parental rights if it determines that any one or more of the grounds in G.S.7B-1111 exists unless the court further determines that the best interests of the child require that the parental rights not be terminated.

BILL ANALYSIS: House Bill 97 would provide an additional ground upon which the court may terminate parental rights. The court could terminate parental rights if it finds that a parent has committed the murder or voluntary manslaughter of the other parent of the child and the petitioner proves the elements of the offense or offers proof that a court of competent jurisdiction has convicted the parent of the offense either by a jury verdict or some type of plea. However, the court would be required to consider whether the murder or manslaughter was committed in self-defense, defense of others or if there was substantial evidence of other justification.

EFFECTIVE DATE: The bill would become effective when it becomes law and would apply to termination of parental rights proceedings filed on or after that date.

Drupti Chauhan, counsel to House Judiciary II, substantially contributed to this summary.

H0097e2-SMRD

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 451

Committee Substitute Favorable 4/4/05

Short Title: Adoption/Crim. Checks/Prospective Families. (Public)

Sponsors:

Referred to:

March 3, 2005

A BILL TO BE ENTITLED

AN ACT TO REQUIRE CRIMINAL BACKGROUND CHECKS FOR ANY INDIVIDUAL EIGHTEEN YEARS OF AGE OR OLDER WHO RESIDES IN THE HOUSEHOLD OF A PROSPECTIVE ADOPTIVE PARENT, AND TO MAKE OTHER CONFORMING CHANGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 48-3-309 reads as rewritten:

"**§ 48-3-309. Mandatory preplacement criminal checks of prospective adoptive parents seeking to adopt a minor who is in the custody or placement responsibility of a county department of social ~~services.~~services and mandatory preplacement criminal checks of all individuals 18 years of age or older who reside in the prospective adoptive home.**

(a) The Department shall ensure that the criminal histories of all prospective adoptive parents seeking to adopt a minor who is in the custody or placement responsibility of a county department of social services and the criminal histories of all individuals 18 years of age or older who reside in the prospective adoptive home are checked prior to placement and, based on the criminal history, a determination is made as to ~~the individual's fitness to have responsibility for the safety and well-being of children.~~ the prospective adoptive parent's fitness to have responsibility for the safety and well-being of children and whether other individuals required to be checked are fit for an adoptive child to reside with them in the home. The Department shall ensure that all ~~prospective adoptive parents seeking to adopt a minor who is in the custody or placement responsibility of a county department of social services~~individuals required to be checked are checked prior to placement for county, state, and federal criminal histories.

(b) A county department of social services ~~may~~ shall issue an unfavorable preplacement assessment to a prospective adoptive parent if the county department of social services ~~determines~~ determines, pursuant to ~~G.S. 48-3-303(e)~~ G.S. 48-3-303(e), ~~that the individual is unfit to have responsibility for the safety and well-being of~~

~~children based on the criminal history.~~ that, based on the criminal histories, the prospective adoptive parent is unfit to have responsibility for the safety and well-being of children or other individuals required to be checked are unfit for an adoptive child to reside with them in the home.

(c) The Department of Justice shall provide to the Department of Health and Human Services the criminal history of ~~such a prospective adoptive parent~~any individual required to be checked under subsection (a) of this section as requested by the Department and obtained from the State and National Repositories of Criminal ~~Histories as requested by the Department.~~Histories. The Department shall provide to the Department of Justice, along with the request, the fingerprints of ~~the prospective adoptive parent~~any individual to be checked, any additional information required by the Department of Justice, and a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the State or National Repositories signed by the individual to be checked. The fingerprints of ~~the prospective adoptive parent~~any individual to be checked shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check.

(d) At the time of the request for a preplacement assessment or at a subsequent time prior to placement, ~~a prospective adoptive parent~~any individual whose criminal history is to be checked shall be furnished with a statement substantially similar to the following:

"NOTICE

MANDATORY CRIMINAL HISTORY CHECK: NORTH CAROLINA LAW REQUIRES THAT A CRIMINAL HISTORY CHECK BE CONDUCTED PRIOR TO PLACEMENT ON PROSPECTIVE ADOPTIVE PARENTS SEEKING TO ADOPT A MINOR WHO IS IN THE CUSTODY OR PLACEMENT RESPONSIBILITY OF A COUNTY DEPARTMENT OF SOCIAL ~~SERVICES.~~SERVICES AND ON ALL PERSONS 18 YEARS OF AGE OR OLDER WHO RESIDE IN THE PROSPECTIVE ADOPTIVE HOME.

"Criminal history" means a county, state, or federal criminal history of conviction or a pending indictment of a crime, whether a misdemeanor or a felony, that bears upon a prospective adoptive parent's fitness to have responsibility for the safety and well-being of children and whether other individuals required to be checked are fit for an adoptive child to reside with them in the home, ~~an individual's fitness to have responsibility for the safety and well-being of children,~~ including the following North Carolina crimes contained in any of the following Articles of Chapter 14 of the General Statutes: Article 6, Homicide; Article 7A, Rape and Kindred Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 26, Offenses Against Public Morality and Decency; Article 27, Prostitution; Article 39, Protection of Minors; Article 40, Protection of the Family; and Article 59, Public Intoxication; violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to

underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5; or similar crimes under federal law or under the laws of other states. Your fingerprints will be used to check the criminal history records of the State Bureau of Investigation (SBI) and the Federal Bureau of Investigation (FBI).

If it is determined, based on your criminal history, that you are unfit to have responsibility for the safety and well being of ~~children,~~children or have an adoptive child reside with you, you shall have the opportunity to complete, or challenge the accuracy of, the information contained in the SBI or FBI identification records.

If ~~you are~~the prospective adoptive parent is denied a favorable preplacement assessment by a county department of social services as a result of ~~the~~ a criminal history ~~check,~~check as required under G.S. 48-3-309(a), ~~you~~ the prospective adoptive parent may request a review of the assessment pursuant to G.S. 48-3-308(a).

Any ~~prospective adoptive parent~~person who intentionally falsifies any information required to be furnished to conduct the criminal history is guilty of a Class 2 misdemeanor."

Refusal to consent to a criminal history check by any individual required to be checked under G.S. 48-3-309(a) is grounds for the issuance by a county department of social services of an unfavorable preplacement assessment. Any ~~prospective adoptive parent~~person who intentionally falsifies any information required to be furnished to conduct the criminal history is guilty of a Class 2 misdemeanor.

(e) The Department shall notify the prospective adoptive parent's supervising county department of social services of the results of the criminal history ~~check in~~check. In accordance with the federal and State law regulating the dissemination of the contents of the criminal history ~~file. The~~file, the Department shall not release ~~nor~~ or disclose any portion of ~~the prospective adoptive parent's~~an individual's criminal history to the ~~prospective adoptive parent.~~prospective adoptive parent or any other individual required to be checked. The ~~Department~~ Department, however, shall ~~also~~ ensure that the ~~prospective adoptive parent~~ prospective adoptive parent or any other individual required to be checked is notified of the ~~prospective adoptive parent's~~individual's right to review the criminal history information, the procedure for completing or challenging the accuracy of the criminal history, and the prospective adoptive parent's right to contest the preplacement assessment of the county department of social services.

A prospective adoptive parent who disagrees with the preplacement assessment of the county department of social services may request a review of the assessment pursuant to G.S. 48-3-308(a).

(f) All the information that the Department receives through the checking of the criminal history is privileged information and is not a public record but is for the exclusive use of the Department and those persons authorized under this section to receive the information. The Department may destroy the information after it is used for the purposes authorized by this section after one calendar year.

(g) There is no liability for negligence on the part of a State or local agency, or the employees of a State or local agency, arising from any action taken or omission by

any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Article 31A of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes.

(h) The Department of Justice shall perform the State and national criminal history checks on prospective adoptive parents seeking to adopt a minor in the custody or placement responsibility of a county department of social services and all individuals 18 years of age or older who reside in the prospective adoptive home and shall charge the Department of Health and Human Services a reasonable fee only for conducting the checks of the national criminal history records authorized by this section. The Division of Social Services, Department of Health and Human Services, shall bear the costs of implementing this section."

SECTION 2. G.S. 48-3-303(d) reads as rewritten:

"(d) The agency shall conduct an investigation for any criminal record as permitted by law. If a prospective adoptive parent is seeking to adopt a minor who is in the custody or placement responsibility of a county department of social services, a county department of social services shall have the ~~individual's~~ prospective adoptive parent's criminal history and the criminal histories of all individuals 18 years of age or older who reside in the prospective adoptive home investigated pursuant to G.S. 48-3-309, and based on the criminal history, make a determination ~~pursuant to subsection (e) of this section as to the individual's fitness to have responsibility for the safety and well-being of children.~~ as to the prospective adoptive parent's fitness to have responsibility for the safety and well-being of children and as to whether other individuals required to be checked are fit for an adoptive child to reside with them in the home."

SECTION 3. G.S. 114-19.7 reads as rewritten:

"**§ 114-19.7. Criminal record checks required prior to placement ~~of prospective adoptive parents seeking to adopt~~ for adoption of a minor who is in the custody or placement responsibility of a county department of social services.**

The Department of Justice may provide to the Division of Social Services, Department of Health and Human Services, the criminal history from the State and National Repositories of Criminal Histories as defined in G.S. 48-1-101(5a). The Division shall provide to the Department of Justice, along with the request, the fingerprints of ~~the prospective adoptive parent seeking to adopt a minor who is in the custody or placement responsibility of a county department of social services,~~any individual to be checked, any additional information required by the Department of Justice, and a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the State or National Repositories signed by the individual to be checked. The fingerprints of the ~~prospective adoptive parent~~individual shall be forwarded to the State Bureau of Investigation for a

search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The Division shall keep all information pursuant to this section privileged, as provided in G.S. 48-3-309(f). The Department of Justice shall charge a reasonable fee only for conducting the checks of the national criminal history records authorized by this section."

SECTION 4. This act becomes effective June 24, 2005.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 451

Committee Substitute Favorable 4/4/05

PROPOSED SENATE COMMITTEE SUBSTITUTE H451-CSRH-43 [v.1]

6/15/2005 2:39:15 PM

Short Title: Adoptive Families/DHHS/Crim. Checks. (Public)

Sponsors:

Referred to:

March 3, 2005

A BILL TO BE ENTITLED

AN ACT TO REQUIRE CRIMINAL BACKGROUND CHECKS FOR ANY INDIVIDUAL EIGHTEEN YEARS OF AGE OR OLDER WHO RESIDES IN THE HOUSEHOLD OF A PROSPECTIVE ADOPTIVE PARENT, TO EXPAND THE PERSONS WHO ARE SUBJECT TO CRIMINAL RECORDS CHECKS BY DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND TO MAKE OTHER CONFORMING CHANGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 48-3-309 reads as rewritten:

"**§ 48-3-309. Mandatory preplacement criminal checks of prospective adoptive parents seeking to adopt a minor who is in the custody or placement responsibility of a county department of social ~~services.~~services and mandatory preplacement criminal checks of all individuals 18 years of age or older who reside in the prospective adoptive home.**

(a) The Department shall ensure that the criminal histories of all prospective adoptive parents seeking to adopt a minor who is in the custody or placement responsibility of a county department of social services and the criminal histories of all individuals 18 years of age or older who reside in the prospective adoptive home are checked prior to placement and, based on the criminal history, a determination is made as to ~~the individual's fitness to have responsibility for the safety and well-being of children.~~ the prospective adoptive parent's fitness to have responsibility for the safety and well-being of children and whether other individuals required to be checked are fit for an adoptive child to reside with them in the home. The Department shall ensure that all ~~prospective adoptive parents seeking to adopt a minor who is in the custody or placement responsibility of a county department of social services~~individuals required to be checked are checked prior to placement for county, state, and federal criminal histories.

(b) A county department of social services ~~may~~ shall issue an unfavorable preplacement assessment to a prospective adoptive parent if the county department of social services ~~determines~~ determines, pursuant to ~~G.S. 48-3-303(e)~~ G.S. 48-3-303(e), ~~that the individual is unfit to have responsibility for the safety and well-being of children based on the criminal history.~~ that, based on the criminal histories, the prospective adoptive parent is unfit to have responsibility for the safety and well-being of children or other individuals required to be checked are unfit for an adoptive child to reside with them in the home.

(c) The Department of Justice shall provide to the Department of Health and Human Services the criminal history of ~~such a prospective adoptive parent~~any individual required to be checked under subsection (a) of this section as requested by the Department and obtained from the State and National Repositories of Criminal ~~Histories as requested by the Department.~~Histories. The Department shall provide to the Department of Justice, along with the request, the fingerprints of ~~the prospective adoptive parent~~any individual to be checked, any additional information required by the Department of Justice, and a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the State or National Repositories signed by the individual to be checked. The fingerprints of ~~the prospective adoptive parent~~any individual to be checked shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check.

(d) At the time of the request for a preplacement assessment or at a subsequent time prior to placement, ~~a prospective adoptive parent~~any individual whose criminal history is to be checked shall be furnished with a statement substantially similar to the following:

"NOTICE

MANDATORY CRIMINAL HISTORY CHECK: NORTH CAROLINA LAW REQUIRES THAT A CRIMINAL HISTORY CHECK BE CONDUCTED PRIOR TO PLACEMENT ON PROSPECTIVE ADOPTIVE PARENTS SEEKING TO ADOPT A MINOR WHO IS IN THE CUSTODY OR PLACEMENT RESPONSIBILITY OF A COUNTY DEPARTMENT OF SOCIAL ~~SERVICES.~~SERVICES AND ON ALL PERSONS 18 YEARS OF AGE OR OLDER WHO RESIDE IN THE PROSPECTIVE ADOPTIVE HOME.

"Criminal history" means a county, state, or federal criminal history of conviction or a pending indictment of a crime, whether a misdemeanor or a felony, that bears upon a prospective adoptive parent's fitness to have responsibility for the safety and well-being of children and whether other individuals required to be checked are fit for an adoptive child to reside with them in the home, ~~an individual's fitness to have responsibility for the safety and well-being of children,~~ including the following North Carolina crimes contained in any of the following Articles of Chapter 14 of the General Statutes: Article 6, Homicide; Article 7A, Rape and Kindred Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 26,

Offenses Against Public Morality and Decency; Article 27, Prostitution; Article 39, Protection of Minors; Article 40, Protection of the Family; and Article 59, Public Intoxication; violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5; or similar crimes under federal law or under the laws of other states. Your fingerprints will be used to check the criminal history records of the State Bureau of Investigation (SBI) and the Federal Bureau of Investigation (FBI).

If it is determined, based on your criminal history, that you are unfit to have responsibility for the safety and well being of ~~children,~~children or have an adoptive child reside with you, you shall have the opportunity to complete, or challenge the accuracy of, the information contained in the SBI or FBI identification records.

If ~~you are~~the prospective adoptive parent is denied a favorable preplacement assessment by a county department of social services as a result of ~~the~~ a criminal history ~~check,~~check as required under G.S. 48-3-309(a), ~~you~~ the prospective adoptive parent may request a review of the assessment pursuant to G.S. 48-3-308(a).

Any ~~prospective adoptive parent~~person who intentionally falsifies any information required to be furnished to conduct the criminal history is guilty of a Class 2 misdemeanor."

Refusal to consent to a criminal history check by any individual required to be checked under G.S. 48-3-309(a) is grounds for the issuance by a county department of social services of an unfavorable preplacement assessment. Any ~~prospective adoptive parent~~person who intentionally falsifies any information required to be furnished to conduct the criminal history is guilty of a Class 2 misdemeanor.

(e) The Department shall notify the prospective adoptive parent's supervising county department of social services of the results of the criminal history ~~check in~~check. In accordance with the federal and State law regulating the dissemination of the contents of the criminal history ~~file. The~~file, the Department shall not release ~~nor~~ or disclose any portion of ~~the prospective adoptive parent's~~an individual's criminal history to the ~~prospective adoptive parent.~~prospective adoptive parent or any other individual required to be checked. The ~~Department~~ Department, however, shall ~~also~~ ensure that the ~~prospective adoptive parent~~ prospective adoptive parent or any other individual required to be checked is notified of the ~~prospective adoptive parent's~~individual's right to review the criminal history information, the procedure for completing or challenging the accuracy of the criminal history, and the prospective adoptive parent's right to contest the preplacement assessment of the county department of social services.

A prospective adoptive parent who disagrees with the preplacement assessment of the county department of social services may request a review of the assessment pursuant to G.S. 48-3-308(a).

(f) All the information that the Department receives through the checking of the criminal history is privileged information and is not a public record but is for the exclusive use of the Department and those persons authorized under this section to

receive the information. The Department may destroy the information after it is used for the purposes authorized by this section after one calendar year.

(g) There is no liability for negligence on the part of a State or local agency, or the employees of a State or local agency, arising from any action taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Article 31A of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes.

(h) The Department of Justice shall perform the State and national criminal history checks on prospective adoptive parents seeking to adopt a minor in the custody or placement responsibility of a county department of social services and all individuals 18 years of age or older who reside in the prospective adoptive home and shall charge the Department of Health and Human Services a reasonable fee only for conducting the checks of the national criminal history records authorized by this section. The Division of Social Services, Department of Health and Human Services, shall bear the costs of implementing this section."

SECTION 2. G.S. 48-3-303(d) reads as rewritten:

"(d) The agency shall conduct an investigation for any criminal record as permitted by law. If a prospective adoptive parent is seeking to adopt a minor who is in the custody or placement responsibility of a county department of social services, a county department of social services shall have the ~~individual's~~ prospective adoptive parent's criminal history and the criminal histories of all individuals 18 years of age or older who reside in the prospective adoptive home investigated pursuant to G.S. 48-3-309, and based on the criminal history, make a determination ~~pursuant to subsection (e) of this section as to the individual's fitness to have responsibility for the safety and well-being of children.~~ as to the prospective adoptive parent's fitness to have responsibility for the safety and well-being of children and as to whether other individuals required to be checked are fit for an adoptive child to reside with them in the home."

SECTION 3. G.S. 114-19.7 reads as rewritten:

"**§ 114-19.7. Criminal record checks required prior to placement ~~of prospective adoptive parents seeking to adopt~~ for adoption of a minor who is in the custody or placement responsibility of a county department of social services.**

The Department of Justice may provide to the Division of Social Services, Department of Health and Human Services, the criminal history from the State and National Repositories of Criminal Histories as defined in G.S. 48-1-101(5a). The Division shall provide to the Department of Justice, along with the request, the fingerprints of ~~the prospective adoptive parent seeking to adopt a minor who is in the custody or placement responsibility of a county department of social services,~~ any individual to be checked, any additional information required by the Department of

Justice, and a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the State or National Repositories signed by the individual to be checked. The fingerprints of the ~~prospective adoptive parent~~individual shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The Division shall keep all information pursuant to this section privileged, as provided in G.S. 48-3-309(f). The Department of Justice shall charge a reasonable fee only for conducting the checks of the national criminal history records authorized by this section."

SECTION 4. G.S. 114-19.6(a)(1) reads as rewritten:

"(a) Definitions. – As used in this section, the term:

(1) "Covered person" ~~means:~~means any of the following:

a. An applicant for employment or a current employee in a position in ~~the Department of Health and Human Services or~~ the Department of Juvenile Justice and Delinquency Prevention who provides direct care for a client, patient, student, resident or ward of the ~~Department; or~~ Department.

b. ~~Supervises.~~ A person who supervises positions in the Department of Juvenile Justice and Delinquency Prevention providing direct care ~~as outlined in sub-subdivision a. of this subdivision.~~ for a client, patient, student, resident or ward of the Department.

c. An applicant for employment or a current employee in a position in the Department of Health and Human Services.

d. An independent contractor or an employee of an independent contractor that has contracted to provide services to the Department of Health and Human Services.

e. A person who has been approved to perform volunteer services for the Department of Health and Human Services.

..."

SECTION 5. This act becomes effective June 24, 2005.

HOUSE BILL 451:
Adoptive Families/DHHS/Crim. Checks.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 16, 2005
Introduced by:	Reps. Glazier, Barnhart, Weiss	**Summary by:**	Robin Johnson
Version:	PCS to Second Edition H451-CSRH-43[v.1]		Committee Counsel

SUMMARY: ***House Bill 451 would amend the law that requires criminal history background checks for prospective adoptive parents to also require checks for any individual eighteen years of age or older who resides in the household of a prospective adoptive parent. The changes proposed in the bill are required in order for the State to continue to be eligible to receive federal funds to support child welfare.***

The PCS would add a new Section 4 in order to expand the employees of the Department of Health and Human Services (DHHS) and other persons who may be required to undergo a criminal history background check checks.

CURRENT LAW: Current law requires that DHHS ensure that prospective adoptive parents are checked for county, State, and federal criminal histories prior to placement of a child in the prospective adoptive home in order to determine the person's fitness to have responsibility for the safety and well-being of a child. A copy of the relevant offenses used to determine a person's fitness to have responsibility for the safety and well-being of a child is attached.

Since 1996 State law has required that DHHS ensure all foster parents, individuals applying for licensure as foster parents, **and individuals 18 years of age or older who reside in a family foster home**, are checked for county, State, and federal criminal histories.

Current law allows for criminal history record checks for DHHS employees and applicants for employment with DHHS if the positions provide direct care for a DHHS client, patient, student, resident or ward. Criminal history record checks also may be required for supervisors of these positions.

BILL ANALYSIS: The bill would modify the existing law to also require a criminal history check for any individual eighteen years of age or older who resides in the household of a prospective adoptive parent. The bill also would allow DHHS to require criminal history checks for DHHS employees, applicants for employment with DHHS, independent contractors of DHHS and employees of these contractors, and persons approved to provide volunteer services for DHHS.

BACKGROUND: The changes proposed in the first three sections of the bill are required in order for the State to continue to be eligible to receive federal funds under Title IV-B of the Social Security Act to support child welfare services. The federal Keeping Children and Families Safe Act enacted in 2003 amended the Child Abuse Prevention and Treatment Act of 1974 (CAPTA) to require that in order to continue to be eligible for federal funds, that a state must certify that no later than June 25, 2005, it has implemented provisions and procedures for requiring criminal background checks for prospective foster and adoptive parents **and other adult relatives and non-relatives residing in the household**. Department staff reported that the following funds were allocated to the State in fiscal year 2003-2004 under Title IV-B and CAPTA: $8,577,519 under IV-B-1 (25% match required); $10,193,782 under IV-B-2 (25% match required); and $559,540 under CAPTA (no match required).

EFFECTIVE DATE: The act would become effective June 25, 2005.

Relevant Criminal Offenses as included in G.S. 48-3-309:

"Criminal history" means a county, state, or federal criminal history of conviction or a pending indictment of a crime, whether a misdemeanor or a felony, that bears upon an individual's fitness to have responsibility for the safety and well-being of children, including the following North Carolina crimes contained in any of the following Articles of Chapter 14 of the General Statutes: Article 6, Homicide; Article 7A, Rape and Kindred Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 26, Offenses Against Public Morality and Decency; Article 27, Prostitution; Article 39, Protection of Minors; Article 40, Protection of the Family; and Article 59, Public Intoxication; violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5; or similar crimes under federal law or under the laws of other states. Your fingerprints will be used to check the criminal history records of the State Bureau of Investigation (SBI) and the Federal Bureau of Investigation (FBI).

Jennifer McGinnis, co-counsel to House Judiciary IV, substantially contributed to this summary.

H0451e2-SMRH-CSRH-43v1

Session 2005

FEDERAL REQUIREMENT CERTIFICATION

Authorized by G.S. 120-36.8

House Bill 451

Adoption/Crim. Checks/Prospective Families

Bill Primary Sponsor(s):	Glazier, Barnhart, Weiss	H451-PCS80184-RI-1
Relevant Federal Law:	*Keeping Children and Families Safe Act (P.L. 108-36)*	
☐ Required by or Necessary for Compliance with Federal Law		☐ Exceeds Federal Law
☒ Federal Funds Conditioned upon Passage of Law		☐ Implements Federal Law

SUMMARY OF BILL PROVISIONS ALLEGEDLY REQUIRED BY FEDERAL LEGISLATION

House Bill 451 would amend the law that requires criminal history background checks for prospective adoptive parents to also require checks for any individual eighteen years of age or older who resides in the household of a prospective adoptive parent.

COMPLIANCE CONSIDERATIONS

The federal Keeping Children and Families Safe Act (P.L. 108-36) enacted in 2003 amended the Child Abuse Prevention and Treatment Act of 1974 (42 U.S.C. 5106a(b)(xiii)) to require that in order to continue to be eligible for federal funds to support child welfare, a state must certify that no later than June 25, 2005, it has implemented provisions and procedures for requiring criminal background checks for prospective foster and adoptive parents and other adult relatives and non-relatives residing in the household.

TECHNICAL OR MECHANICAL CONSIDERATIONS

REVIEW AND APPROVAL

Prepared By: Jennifer L. McGinnis, Staff Attorney
Name of Preparer
Title of Preparer

Date: 4/1/05

Approved By: Terrence D. Sullivan
Director of Research

Date: 4/1/05

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Fiscal Note

BILL NUMBER: House Bill 451 (Second Edition)

SHORT TITLE: Adoption/Crim. Checks/Prospective Families.

SPONSOR(S): Representatives Weiss, Barnhart, and Glazier

FISCAL IMPACT

	Yes (X)	No ( )	No Estimate Available ( )		
	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10
REVENUES: (to DOJ from DHHS)	$8,808	$8,808	$8,808	$8,808	$8,808
EXPENDITURES:					
Dept. of Health and Human Services	$8,808	$8,808	$8,808	$8,808	$8,808
Dept. of Justice	$14,067	$14,067	$14,067	$14,067	$14,067
Dept. of Correction	Exact amount cannot be determined; no substantial impact anticipated.				
Judicial Branch	Exact amount cannot be determined; no substantial impact anticipated.				
POSITIONS (cumulative):					

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Health and Human Services; Department of Justice; Department of Correction; Judicial Branch

EFFECTIVE DATE: June 24, 2005

BILL SUMMARY: This bill would amend G.S. 48-3-309 and G.S. 48-3-303 (Chapter 48 Adoptions) and G.S. 114-19.7 (Chapter 114 Department of Justice) to require mandatory pre-placement criminal checks and related forms and fingerprinting for individuals eighteen years of age or older who reside in prospective adoptive homes. The bill would also make it a Class 2 misdemeanor for any person (previously, just prospective adoptive parents) to intentionally falsify information that must be furnished to conduct criminal histories. (Source: Adapted from Administrative Office of the Courts, Research and Planning, 3/28/2005)

ASSUMPTIONS AND METHODOLOGY:

General

Data regarding the number of offenders convicted of intentionally falsifying information furnished in relation to a criminal history check prior to adoption is unavailable because the Administrative Office of the Courts does not maintain a specific offense code for violations under G.S. 48-3-309. The lack of an offense code is some indication that the offense is infrequently charged and rarely results in convictions. Consequently, expanding the criminal penalty for falsifying information to new individuals is not expected to result in a substantial fiscal impact.

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

Department of Health and Human Services

The Department of Health and Human Services requires fingerprinting of adoptive parents for children adopted out of county Departments of Social Services custody. The fingerprints are used to conduct background checks on the prospective parents. During State fiscal year 2002-2003, 1,233 adoption applicants were fingerprinted. The Division of Social Services, Department of Health and Human Services, estimates that the prospective applicants made up 733 households (500 couples and 233 individuals) and that potentially half of these households included one adult relative or non-relative. This would require fingerprinting for an additional 367 people. Based on an established contract, the Department of Justice charges the Division of Social Services $24 each time an adoptive parent is fingerprinted for a background check. The requirement for 367 additional background checks with fingerprinting creates an additional cost for the Division of Social Services of $8,808.

Department of Justice

The Department of Justice (DOJ) provides state and national criminal background checks to non-criminal justice agencies and charges a fee to cover its costs. For a state and national check, DOJ charges $38, of which $22 is remitted to the Federal Bureau of Investigation (FBI). For adoptive and foster parents, the fee for the state background check ($14) is waived, and the General Fund supports these background checks.

This bill would increase the number of background checks conducted by DOJ for which it is not fully reimbursed. For each background check conducted, DOJ would incur costs, on average, of $16.33.[1] In FY 2003-04, there were 1,233 background checks conducted on prospective adoptive parents. If, for example, 367 additional background checks were required (see DHHS section for methodology), the internal cost to DOJ would be $5,993, and payments from DHHS would total $734. In addition, DOJ would collect $8,074 to remit to the FBI.

Each employee can process an average of nearly 10,000 background checks (criminal justice and non-criminal justice) per year. DOJ currently has the capacity to perform some additional

[1] In 2003, 75 percent of fee-exempt background checks were submitted via hard copy, and 25 percent were submitted electronically. This figure is a weighted average assuming the same distribution will apply to the new population.

background checks without increasing the number of positions. However, DOJ has stated that increased workload may affect turnaround time.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2005 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory group, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.*

Because AOC does not maintain a specific offense code for violations under G.S. 48-3-309, no data is available on the number of convictions in the past for intentionally falsifying information necessary to conduct a criminal history check prior to adoption. Due also to lack of historical data, the number of additional convictions that might occur as a result of the new background checks required by this bill cannot be estimated.

- In FY 2003-04, 15 percent of Class 2 misdemeanors resulted in active sentences and the average active sentence length was 23 days. Offenders with active sentences of less than thirty days are housed in county jails at county expense.
- The remaining 85 percent of Class 2 misdemeanants received non-active sentences. For those offenders sentenced to supervised probation, the Division of Community Correction (DCC) would incur costs of $1.87 per offender per day. Offenders sentenced to community service would cost $0.67 per offender per day, and offenders given unsupervised probation would not impact DCC.

Because Class 2 misdemeanants serving active time as a result of this bill would be housed in county jails, this legislation would not impact prison population.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

Because AOC does not maintain a specific offense code for violations under G.S. 38-3-309, no data is available regarding the number of charges currently processed by the Courts for falsifying information furnished in relation to a criminal history check prior to adoption. Of the additional background checks that would occur under this bill, it is not possible to estimate the number that would result in charges for intentionally falsifying information provided to conduct the criminal history check.

Based on the costs of time in court, attorney preparation time, and indigent defense, the average estimated cost to process one Class 2 misdemeanor is $2,314 per trial and $271 per guilty plea. The trial cost includes an estimated $1,365 in jury fees, costs of time in court, and attorney costs and an additional $949 in indigent defense. Based on prior-year data, the majority of any new Class 2 misdemeanor charges that are not dismissed are likely to be settled by plea.

SOURCES OF DATA: Office of State Budget and Management, Department of Justice, Department of Correction, Judicial Branch, North Carolina Sentencing and Policy Advisory Commission, Department of Health and Human Services

TECHNICAL CONSIDERATIONS: This bill would become effective June 24, 2005. Traditionally, most bills with criminal penalties become effective on December 1. This date has been used to give the criminal justice system time to change their operating systems to accommodate criminal penalty changes and to inform and train attorneys and judges of those changes. There is typically a delay of six months between charging and sentencing an offender. The NC Sentencing and Policy Advisory Commission population projections assume a December 1 effective date, and thus are based on changes in population starting the second year. The expenditures and savings calculated by Fiscal Research use these projections and, thus, assume that the legislation will not impact the prison system until the beginning of 2006-07. If the bill becomes effective prior to December 1, there could be an impact on local jails or the prison system in the 2004-05 fiscal year.

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Chloe Gossage, Aaron Paul, Karlynn O'Shaughnessy

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

Official
Fiscal Research Division
Publication

DATE: April 5, 2005

Signed Copy Located in the NCGA Principal Clerk's Offices

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1319

Committee Substitute Favorable 5/4/05

Short Title: Amend Family Law Arbitration Act. (Public)

Sponsors:

Referred to:

April 20, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND VARIOUS PROVISIONS UNDER THE FAMILY LAW ARBITRATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 50-41 reads as rewritten:

"**§ 50-41. Purpose; short ~~title.~~title; rules on waivers.**

(a) It is the policy of this State to allow, by agreement of all parties, the arbitration of all issues arising from a marital separation or divorce, except for the divorce itself, while preserving a right of modification based on substantial change of circumstances related to alimony, child custody, and child support. Pursuant to this policy, the purpose of this Article is to provide for arbitration as an efficient and speedy means of resolving these disputes, consistent with Chapters 50, 50A, 50B, 51, 52, 52B, and 52C of the General Statutes and similar legislation, to provide default rules for the conduct of arbitration proceedings, and to assure access to the courts of this State for proceedings ancillary to this arbitration.

(b) This Article may be cited as the North Carolina Family Law Arbitration Act.

(c) Except as otherwise provided in subsections (d) and (e) of this section or in this Article, a party to an agreement to arbitrate or an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this Article, in writing, to the extent provided by law.

(d) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of G.S. 50-42(a) or (b), 50-49(a), (b), or (c), 50-58, or 50-59.

(2) Agree to unreasonably restrict the right to notice of the initiation of an arbitration proceeding under G.S. 50-42(c) or (d).

(3) Agree to unreasonably restrict the right to disclosure of any facts by a neutral arbitrator under G.S. 50-45(h) through (m).

(e) Except as otherwise provided in this Article, a party to an agreement to arbitrate or an arbitration proceeding may not waive, or the parties shall not vary the effect of, the requirements of this section or G.S. 50-43, 50-45(f), 50-52 through 50-57, or 50-60 through 50-62.

(f) Any waiver contrary to this section shall not be effective but shall not have the effect of voiding the agreement to arbitrate."

SECTION 2. G.S. 50-42 reads as rewritten:

"**§ 50-42. Arbitration agreements made valid, irrevocable, and ~~enforceable.~~enforceable; notice standards.**

(a) During, or after marriage, parties may agree in writing to submit to arbitration any controversy, except for the divorce itself, arising out of the marital relationship. Before marriage, parties may agree in writing to submit to arbitration any controversy, except for child support, child custody, or the divorce itself, arising out of the marital relationship. This agreement is valid, enforceable, and irrevocable except with both parties' consent, without regard to the justiciable character of the controversy and without regard to whether litigation is pending as to the controversy.

(b) This Article does not apply to an agreement to arbitrate in which a provision stipulates that this Article does not apply or to any arbitration or award under an agreement in which a provision stipulates that this Article does not apply.

(c) A person initiates an arbitration proceeding by giving written notice to the other parties to the agreement to arbitrate in the manner in which the parties have agreed or, in the absence of agreement, by certified or registered mail, return receipt requested, or by service as authorized for the commencement of a civil action pursuant to the North Carolina Rules of Civil Procedure.

(d) Unless a person objects for lack of sufficiency of notice in accordance with G.S. 50-47(1) no later than the beginning of the arbitration hearing, the person, by appearing at the hearing, waives any objection to lack or insufficiency of notice.

(e) Except as otherwise provided in this Article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in the ordinary course of business, regardless of whether the person acquires knowledge of the notice.

(f) A person is given notice if the person has knowledge of the notice or has received notice.

(g) A person gives actual notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of communications."

SECTION 3. G.S. 50-43(b) reads as rewritten:

"(b) Upon the application of a party, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. This issue, when in substantial and bona fide dispute, shall be immediately and summarily tried and the court shall order a stay if it finds for the moving party. If the court finds for the opposing party, the court shall order the parties to go to arbitration. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable. If a party to a judicial

proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court unless the court otherwise orders."

SECTION 4. G.S. 50-44 is amended by adding the following new subsection to read:

"(j) A party does not waive the right to arbitrate by proceeding under this section."

SECTION 5. G.S. 50-45 reads as rewritten:

"**§ 50-45. Appointment of arbitrators; rules for conducting the ~~arbitration.~~arbitration; disclosure.**

(a) Unless the parties ~~agree otherwise,~~otherwise agree in writing, a single arbitrator shall be chosen by the parties to arbitrate all matters in dispute.

(b) If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. The agreement may provide for appointing one or more arbitrators. Upon the application of a party, the court shall appoint arbitrators in any of the following situations:

(1) The method agreed upon by the parties in the arbitration agreement fails or for any reason cannot be followed.

(2) An arbitrator who has already been appointed fails or is unable to act, and a successor has not been chosen by the parties.

(3) The parties cannot agree on an arbitrator.

(c) Arbitrators appointed by the court have all the powers of those arbitrators specifically named in the agreement. In appointing arbitrators, a court shall consult with prospective arbitrators as to their availability and shall refer to each of the following:

(1) The positions and desires of the parties.

(2) The issues in dispute.

(3) The skill, substantive training, and experience of prospective arbitrators in those issues, including their skill, substantive training, and experience in family law issues.

(4) The availability of prospective arbitrators.

(d) The parties may agree in writing to employ an established arbitration institution to conduct the arbitration. If the agreement does not provide a method for appointment of arbitrators and the parties cannot agree on an arbitrator, the court may appoint an established arbitration institution the court considers qualified in family law arbitration to conduct the arbitration.

(e) The parties may agree in writing on rules for conducting the arbitration. If the parties cannot agree on rules for conducting the arbitration, the arbitrators shall select the rules for conducting the arbitration after hearing all parties and taking particular reference to model rules developed by arbitration institutions or similar sources. If the arbitrators cannot decide on rules for conducting the arbitration, upon application by a party, the court may order use of rules for conducting the arbitration, taking particular reference to model rules developed by arbitration institutions or similar sources.

(f) Arbitrators and established arbitration institutions, whether chosen by the parties or appointed by the court, have the same immunity as judges from civil liability for their conduct in the arbitration.

(g) "Arbitration institution" means any neutral, independent organization, association, agency, board, or commission that initiates, sponsors, or administers arbitration proceedings, including involvement in appointment of arbitrators.

(g1) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding.

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or to the arbitration proceeding, their counsel or representatives, a witness, or other arbitrators.

(g2) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment that a reasonable person would consider likely to affect the impartiality of the arbitrator.

(g3) If an arbitrator discloses a fact required by subsection (g1) or (g2) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be grounds for vacating an award made by the arbitrator under G.S. 50-54(a)(2).

(g4) If the arbitrator did not disclose a fact as required by subsection (g1) or (g2) of this section, upon timely objection by a party, the court may vacate an award pursuant to G.S. 50-54(a)(2).

(g5) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under G.S. 50-54(a)(2).

(g6) If the parties to an arbitration proceeding agree to the procedures of an arbitration institution or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on those grounds pursuant to G.S. 50-54(a)(2).

(h) The court may award costs, as provided in G.S. 50-51(f), in connection with applications and other proceedings under this section."

SECTION 6. G.S. 50-46 reads as rewritten:

"**§ 50-46. Majority action by arbitrators.**

The arbitrators' powers shall be exercised by a majority unless otherwise provided by the parties' written arbitration agreement or this Article."

SECTION 7. G.S. 50-47 reads as rewritten:

"**§ 50-47. Hearing.**

Unless otherwise provided by the parties' written agreement:

(1) The arbitrators shall appoint a time and place for the hearing and notify the parties or their counsel by personal service or by registered or certified mail, return receipt requested, not less than five days before the hearing. Appearance at the hearing waives any claim of deficiency of notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause shown, or upon their own motion, may postpone the hearing to a time not later than the date fixed by the written agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. Upon application of a party, the court may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(2) The parties are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(3) All the arbitrators shall conduct the hearing, but a majority may determine any question and may render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

(4) Upon request of any party or at the election of any arbitrator, the arbitrators shall cause to be made a record of testimony and evidence introduced at the hearing. The arbitrators shall decide how the cost of the record will be apportioned."

SECTION 8. G.S. 50-50 is repealed.

SECTION 9. Article 3 of Chapter 50 of the General Statutes is amended by adding the following new section to read:

"**§ 50-50.1. Consolidation.**

(a) Except as otherwise provided in subsection (c) of this section, upon motion of a party to an agreement or arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if all of the following apply:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same parties or one of them is a party to a separate agreement to arbitrate or a separate arbitration with a third party.

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions.

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings.

(4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court shall not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation."

SECTION 10. G.S. 50-51 reads as rewritten:

"**§ 50-51. Award; costs.**

(a) The award shall be in writing, dated and signed by the arbitrators joining in the award, with a statement of the place where the arbitration was conducted and the place where the award was made. Where there is more than one arbitrator, the signatures of a majority of the arbitrators suffice, but the reason for any omitted signature shall be stated. The arbitrators shall deliver a copy of the award to each party personally or by registered or certified mail, return receipt requested, or as provided in the parties' written agreement. Time of delivery shall be computed from the date of personal delivery or date of mailing.

(b) Unless the parties ~~agree otherwise,~~otherwise agree in writing, the award shall state the reasons upon which it is based.

(c) Unless the parties ~~agree otherwise,~~otherwise agree in writing, the arbitrators may award interest as provided by law.

(d) The arbitrators in their discretion may award specific performance to a party requesting an award of specific performance when that would be an appropriate remedy.

(e) Unless the parties ~~agree otherwise,~~otherwise agree in writing, the arbitrators may not award punitive damages. If arbitrators award punitive damages, they shall state the award in a record and shall specify facts justifying the award and the amount of the award attributable to punitive damages.

(f) Costs:

(1) Unless the parties ~~otherwise agree,~~otherwise agree in writing, awarding of costs of an arbitration shall be in the arbitrators' discretion.

(2) In making an award of costs, the arbitrators may include any or all of the following as costs:

a. Fees and expenses of the arbitrators, expert witnesses, and translators;

b. Fees and expenses of ~~counsel~~ counsel, to the extent allowed by law unless the parties otherwise agree in writing, and of an institution supervising the arbitration, if any;

c. Any other expenses incurred in connection with the arbitration proceedings;

d. Sanctions awarded by the arbitrators or the court, including those provided by N.C.R. Civ. P. 11 and 37; and

e. Costs allowed by Chapters 6 and 7A of the General Statutes.

(3) In making an award of costs, the arbitrators shall specify each of the following:

a. The party entitled to costs;

b. The party who shall pay costs;

c. The amount of costs or method of determining that amount; and
d. The manner in which costs shall be paid.

(g) An award shall be made within the time fixed by the agreement. If no time is fixed by the agreement, the award shall be made within the time the court orders on a party's application. The parties may extend the time in writing either before or after the expiration of this time. A party waives objection that an award was not made within the time required unless that party notifies the arbitrators of his or her objection prior to delivery of the award to that party."

SECTION 11. G.S. 50-52 reads as rewritten:

"**§ 50-52. Change of award by arbitrators.**

On a party's application to the arbitrators or, if an application to the court is pending under G.S. 50-53 through G.S. 50-56, on submission to the arbitrators by the court under the conditions ordered by the court, the arbitrators may modify or correct the award upon grounds stated in subdivisions (1) and (3) of subsection (a) of G.S. 50-55, if the arbitrators had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding, or to clarify the award. The application shall be made within 20 days after delivery of the award to the opposing party, stating that the opposing party must serve objections to the application, if any, within 10 days from notice. An award modified or corrected under this section is subject to the provisions of G.S. 50-51(a) through G.S. 50-51(f) and G.S. 50-53 through G.S. 50-56."

SECTION 12. G.S. 50-53 reads as rewritten:

"**§ 50-53. Confirmation of award.**

(a) Unless the parties ~~agree otherwise,~~otherwise agree in writing that part or all of an award shall not be confirmed by the court, upon a party's application, the court shall confirm an award, ~~unless~~ except when within time limits imposed under G.S. 50-54 through G.S. 50-56 grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in G.S. 50-54 through G.S. 50-56.

(b) The court may award costs, as provided in G.S. 50-51(f), of the application and subsequent proceedings."

SECTION 13. G.S. 50-54(d) reads as rewritten:

"(d) If an application to vacate is ~~denied and~~denied, no motion to modify or correct the award is pending, and the parties have not agreed in writing that the award shall not be confirmed as provided in G.S. 50-53, the court shall confirm the award and may award costs, as provided in G.S. 50-51(f), of the application and subsequent proceedings."

SECTION 14. G.S. 50-56 reads as rewritten:

"**§ 50-56. Modification of award for alimony, postseparation support, child support, or child custody based on substantial change of circumstances.**

(a) A court or the arbitrators may modify an award for postseparation support, alimony, child support, or child custody under conditions stated in G.S. 50-13.7 and G.S. 50-16.9 in accordance with procedures stated in subsections (b) through (f) of this section.

(b) Unless the parties have agreed in writing that an award for postseparation support or alimony shall be nonmodifiable, an award by arbitrators for postseparation support or alimony under G.S. 50-16.2A, 50-16.3A, 50-16.4, or 50-16.7 may be modified if a court order for alimony or postseparation support could be modified pursuant to G.S. 50-16.9.

(c) An award by arbitrators for child support or child custody may be modified if a court order for child support or child custody could be modified pursuant to G.S. 50-13.7.

(d) If an award for modifiable postseparation support or alimony, or an award for child support or child custody, has not been confirmed pursuant to G.S. 50-53, upon the parties' agreement in writing these matters may be submitted to arbitrators chosen by the parties as provided in G.S. 50-45, in which case G.S. 50-52 through G.S. 50-56 apply to this modified award.

(e) If an award for modifiable postseparation support or alimony, or an award for child support or child custody has been confirmed pursuant to G.S. 50-53, upon the parties' agreement in writing and joint motion, the court may remit these matters to arbitrators chosen by the parties as provided in G.S. 50-45, in which case G.S. 50-52 through G.S. 50-56 apply to this modified award.

(f) Except as otherwise provided in this section, the provisions of G.S. 50-55 apply to modifications or corrections of awards for postseparation support, alimony, child support, or child custody."

SECTION 15. G.S. 50-57 reads as rewritten:

"**§ 50-57. Orders or judgments on award.**

(a) Upon granting an order confirming, modifying, or correcting an award, an order or judgment shall be entered in conformity with the order and docketed and enforced as any other order or judgment. The court may award costs, as provided in G.S. 50-51(f), of the application and of proceedings subsequent to the application and disbursements.

(b) Notwithstanding G.S. 7A-109, 7A-276.1, or 132-1 or similar law, the court, in its discretion, may order that any arbitration award or order or any judgment or court order entered as a court order or judgment pursuant to this Article, or any part of the arbitration award or order or judgment or court order, be sealed, to be opened only upon order of the court upon good cause shown. Upon good cause shown, the court may order resealing of the opened arbitration awards or orders or judgments or court orders. The court, in its discretion, may order that any arbitration award or order or any judgment or court order entered as a court order or judgment pursuant to this Article, or any part of the arbitration award or order or judgment or court order, be redacted, the redactions to be opened only upon order of the court upon good cause shown. Upon good cause shown, the court may order redaction of the previously redacted arbitration awards or orders or judgments or court orders opened pursuant to the court's order."

SECTION 16. G.S. 50-58 reads as rewritten:

"**§ 50-58. Applications to the court.**

Except as otherwise provided, an application to a court under this Article shall be by motion and shall be heard in the manner and upon notice provided by law or rule of

court for making and hearing motions in civil actions. Unless the parties ~~agree otherwise,~~otherwise agree in writing, notice of an initial application for an order shall be served in the manner provided by law for service of summons in civil actions."

SECTION 17. G.S. 50-59 reads as rewritten:

"**§ 50-59. Court; ~~jurisdiction.~~jurisdiction; other definitions.**

(a) The term "court" means a court of competent jurisdiction of this State. Making an agreement in this State described in G.S. 50-42 or any agreement providing for arbitration in this State or under its laws confers jurisdiction on the court to enforce the agreement under this Article and to enter judgment on an award under the agreement.

(b) The term 'person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation, or any other legal or commercial entity."

SECTION 18. G.S. 50-61 reads as rewritten:

"**§ 50-61. Article not retroactive.**

This Article applies to agreements made on or after October 1, 1999, unless parties by separate written agreement after that date state that this Article shall apply to agreements dated before October 1, 1999."

SECTION 19. G.S. 50-62 reads as rewritten:

"**§ 50-62. Construction; uniformity of interpretation.**

(a) Certain provisions of this Article have been adapted from the Uniform Arbitration Act formerly in force in this State, the Revised Uniform Arbitration Act in force in this State, the North Carolina International Commercial Arbitration and Conciliation Act, and Chapters 50, 50A, 50B, 51, 52, and 52C of the General Statutes. This Article shall be construed to effect its general purpose to make uniform provisions of these Acts and Chapters 50, 50A, 50B, 51, 52, 52B, and 52C of the General Statutes.

(b) The provisions of this Article governing the legal effect, validity, or enforceability of electronic records or electronic signatures, or of contracts performed with the use of these records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., or as otherwise authorized by federal or State law governing these electronic records or electronic signatures."

SECTION 20. This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 1319

Committee Substitute Favorable 5/4/05

PROPOSED SENATE COMMITTEE SUBSTITUTE H1319-CSRC-64 [v.1]

6/15/2005 6:31:25 PM

Short Title: Amend Family Law Arbitration Act. (Public)

Sponsors:

Referred to:

April 20, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND VARIOUS PROVISIONS UNDER THE FAMILY LAW ARBITRATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 3 of Chapter 50 of the General Statutes is amended by adding two new sections to read:

"**§ 50-42.1 Nonwaivable provisions.**

(a) Except as otherwise provided in subsections (b) and (c) of this section or in this Article, a party to an agreement to arbitrate or an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this Article to the extent provided by law. Any waiver or agreement must be in writing.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of G.S. 50-42, 50-49(a), (b), or (c), 50-58, or 50-59.

(2) Agree to unreasonably restrict the right to notice of the initiation of an arbitration proceeding under G.S. 50-42.2(a) or (b).

(3) Agree to unreasonably restrict the right to disclosure of any facts by a neutral arbitrator under G.S. 50-45.1.

(c) Except as otherwise provided in this Article, a party to an agreement to arbitrate or an arbitration proceeding may not waive, or the parties shall not vary the effect of, the requirements of this section or G.S. 50-43, 50-45(f), 50-52 through 50-57, or 50-60 through 50-62.

(d) Any waiver contrary to this section shall not be effective but shall not have the effect of voiding the agreement to arbitrate.

"**§ 50-42.2 Notice.**

(a) A person initiates an arbitration proceeding by giving written notice to the other parties to the agreement to arbitrate in the manner in which the parties have agreed or, in the absence of agreement, by certified or registered mail, return receipt requested, or by service as authorized for the commencement of a civil action under the North Carolina Rules of Civil Procedure.

(b) A person waives any objection to lack or insufficiency of notice if the person appears at the arbitration hearing, unless the person objects no later than the beginning of the arbitration hearing.

(c) Except as otherwise provided in this Article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in the ordinary course of business, regardless of whether the person acquires knowledge of the notice.

(d) A person is given notice if the person has knowledge of the notice or has received notice.

(e) A person gives actual notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of communications."

SECTION 2. G.S. 50-43(b) reads as rewritten:

"(b) Upon the application of a party, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. This issue, when in substantial and bona fide dispute, shall be immediately and summarily tried and the court shall order a stay if it finds for the moving party. If the court finds for the opposing party, the court shall order the parties to go to arbitration. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court unless the court otherwise orders."

SECTION 3. G.S. 50-44 is amended by adding the following new subsection to read:

"(j) A party does not waive the right to arbitrate by proceeding under this section."

SECTION 4. G.S. 50-45 reads as rewritten:

"**§ 50-45. Appointment of arbitrators; rules for conducting the arbitration.**

(a) Unless the parties ~~agree otherwise,~~otherwise agree in writing, a single arbitrator shall be chosen by the parties to arbitrate all matters in dispute.

(b) If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. The agreement may provide for appointing one or more arbitrators. Upon the application of a party, the court shall appoint arbitrators in any of the following situations:

(1) The method agreed upon by the parties in the arbitration agreement fails or for any reason cannot be followed.

(2) An arbitrator who has already been appointed fails or is unable to act, and a successor has not been chosen by the parties.

(3) The parties cannot agree on an arbitrator.

(c) Arbitrators appointed by the court have all the powers of those arbitrators specifically named in the agreement. In appointing arbitrators, a court shall consult with prospective arbitrators as to their availability and shall refer to each of the following:

(1) The positions and desires of the parties.

(2) The issues in dispute.

(3) The skill, substantive training, and experience of prospective arbitrators in those issues, including their skill, substantive training, and experience in family law issues.

(4) The availability of prospective arbitrators.

(d) The parties may agree in writing to employ an established arbitration institution to conduct the arbitration. If the agreement does not provide a method for appointment of arbitrators and the parties cannot agree on an arbitrator, the court may appoint an established arbitration institution the court considers qualified in family law arbitration to conduct the arbitration.

(e) The parties may agree in writing on rules for conducting the arbitration. If the parties cannot agree on rules for conducting the arbitration, the arbitrators shall select the rules for conducting the arbitration after hearing all parties and taking particular reference to model rules developed by arbitration institutions or similar sources. If the arbitrators cannot decide on rules for conducting the arbitration, upon application by a party, the court may order use of rules for conducting the arbitration, taking particular reference to model rules developed by arbitration institutions or similar sources.

(f) Arbitrators and established arbitration institutions, whether chosen by the parties or appointed by the court, have the same immunity as judges from civil liability for their conduct in the arbitration.

(g) "Arbitration institution" means any neutral, independent organization, association, agency, board, or commission that initiates, sponsors, or administers arbitration proceedings, including involvement in appointment of arbitrators.

(h) The court may award ~~costs, as provided in G.S. 50-51(f),~~ costs under G.S. 50-51(f) in connection with applications and other proceedings under this section."

SECTION 5. Article 3 of Chapter 50 of the General Statutes is amended by adding a new section to read:

"**§ 50-45.1 Disclosure by arbitrator.**

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding.

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or to the arbitration proceeding, their counsel or representatives, a witness, or other arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment that a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be grounds for vacating an award made by the arbitrator under G.S. 50-54(a)(2).

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b) of this section, upon timely objection by a party, the court may vacate an award pursuant to G.S. 50-54(a)(2).

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under G.S. 50-54(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration institution or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on those grounds pursuant to G.S. 50-54(a)(2)."

SECTION 6. G.S. 50-46 reads as rewritten:

"**§ 50-46. Majority action by arbitrators.**

The arbitrators' powers shall be exercised by a majority unless otherwise provided by the parties' written arbitration agreement or this Article."

SECTION 7. G.S. 50-47 reads as rewritten:

"**§ 50-47. Hearing.**

Unless otherwise provided by the parties' written agreement:

(1) The arbitrators shall appoint a time and place for the hearing and notify the parties or their counsel by personal service or by registered or certified mail, return receipt requested, not less than five days before the hearing. Subject to G.S. 50-42.2(b), appearance ~~Appearance~~ at the hearing waives any claim of deficiency of notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause shown, or upon their own motion, may postpone the hearing to a time not later than the date fixed by the written agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. Upon application of a party, the court may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(2) The parties are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(3) All the arbitrators shall conduct the hearing, but a majority may determine any question and may render a final award. If, during the

course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

(4) Upon request of any party or at the election of any arbitrator, the arbitrators shall cause to be made a record of testimony and evidence introduced at the hearing. The arbitrators shall decide how the cost of the record will be apportioned."

SECTION 8. G.S. 50-50 is repealed.

SECTION 9. Article 3 of Chapter 50 of the General Statutes is amended by adding the following new section to read:

"**§ 50-50.1. Consolidation.**

(a) Except as otherwise provided in subsection (c) of this section, upon motion of a party to an agreement or arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if all of the following apply:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same parties or one of them is a party to a separate agreement to arbitrate or a separate arbitration with a third party.

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions.

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings.

(4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court shall not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation."

SECTION 10. G.S. 50-51 reads as rewritten:

"**§ 50-51. Award; costs.**

(a) The award shall be in writing, dated and signed by the arbitrators joining in the award, with a statement of the place where the arbitration was conducted and the place where the award was made. Where there is more than one arbitrator, the signatures of a majority of the arbitrators suffice, but the reason for any omitted signature shall be stated. The arbitrators shall deliver a copy of the award to each party personally or by registered or certified mail, return receipt requested, or as provided in the parties' written agreement. Time of delivery shall be computed from the date of personal delivery or date of mailing.

(b) Unless the parties ~~agree otherwise,~~otherwise agree in writing, the award shall state the reasons upon which it is based.

(c) Unless the parties ~~agree otherwise,~~otherwise agree in writing, the arbitrators may award interest as provided by law.

(d) The arbitrators in their discretion may award specific performance to a party requesting an award of specific performance when that would be an appropriate remedy.

(e) Unless the parties ~~agree otherwise,~~otherwise agree in writing, the arbitrators may not award punitive damages. If arbitrators award punitive damages, they shall state the award in a record and shall specify facts justifying the award and the amount of the award attributable to punitive damages.

(f) Costs:

(1) Unless the parties ~~otherwise agree,~~otherwise agree in writing, awarding of costs of an arbitration shall be in the arbitrators' discretion.

(2) In making an award of costs, the arbitrators may include any or all of the following as costs:

a. Fees and expenses of the arbitrators, expert witnesses, and translators;

b. Fees and expenses of ~~counsel~~ counsel, to the extent allowed by law unless the parties otherwise agree in writing, and of an institution supervising the arbitration, if any;

c. Any other expenses incurred in connection with the arbitration proceedings;

d. Sanctions awarded by the arbitrators or the court, including those provided by N.C.R. Civ. P. 11 and 37; and

e. Costs allowed by Chapters 6 and 7A of the General Statutes.

(3) In making an award of costs, the arbitrators shall specify each of the following:

a. The party entitled to costs;

b. The party who shall pay costs;

c. The amount of costs or method of determining that amount; and

d. The manner in which costs shall be paid.

(g) An award shall be made within the time fixed by the agreement. If no time is fixed by the agreement, the award shall be made within the time the court orders on a party's application. The parties may extend the time in writing either before or after the expiration of this time. A party waives objection that an award was not made within the time required unless that party notifies the arbitrators of his or her objection prior to delivery of the award to that party."

SECTION 11. G.S. 50-52 reads as rewritten:

"**§ 50-52. Change of award by arbitrators.**

(a) On a party's application to the arbitrators or, if an application to the court is pending under G.S. 50-53 through G.S. 50-56, on submission to the arbitrators by the court under the conditions ordered by the court, the arbitrators may modify or correct the award for any of the following reasons:

(1) ~~upon~~ Upon grounds stated in G.S. 50-55(a)(1) and (a)(3).~~subdivisions (1) and (3) of subsection (a) of G.S. 50-55,~~

(2) If the arbitrators have not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding.

(3) ~~or~~ To clarify the award.

(b) The application shall be made within 20 days after delivery of the award to the opposing ~~party, stating~~ party. The application must include a statement that the opposing party must serve any objections to the ~~application, if any,~~ application within 10 days from notice. An award modified or corrected under this section is subject to the provisions of G.S. 50-51(a) through G.S. 50-51(f) and G.S. 50-53 through G.S. 50-56."

SECTION 12. G.S. 50-53 reads as rewritten:

"**§ 50-53. Confirmation of award.**

(a) Unless the parties ~~agree otherwise,~~otherwise agree in writing that part or all of an award shall not be confirmed by the court, upon a party's application, the court shall confirm an award, ~~unless~~ except when within time limits imposed under G.S. 50-54 through G.S. 50-56 grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in G.S. 50-54 through G.S. 50-56.

(b) The court may award costs, as provided in G.S. 50-51(f), of the application and subsequent proceedings."

SECTION 13. G.S. 50-54(d) reads as rewritten:

"(d) The court shall confirm the award and may award costs of the application and subsequent proceedings under G.S. 50-51(f) if ~~If~~ an application to vacate is ~~denied and~~denied, no motion to modify or correct the award is pending, and the parties have not agreed in writing that the award shall not be confirmed under G.S. 50-53. ~~the court shall confirm the award and may award costs, as provided in G.S. 50-51(f), of the application and subsequent proceedings.~~"

SECTION 14. G.S. 50-56 reads as rewritten:

"**§ 50-56. Modification of award for alimony, postseparation support, child support, or child custody based on substantial change of circumstances.**

(a) A court or the arbitrators may modify an award for postseparation support, alimony, child support, or child custody under conditions stated in G.S. 50-13.7 and G.S. 50-16.9 ~~in accordance with procedures stated~~ as provided in subsections (b) through (f) of this section.

(b) Unless the parties have agreed in writing that an award for postseparation support or alimony shall be nonmodifiable, an award by arbitrators for postseparation support or alimony under G.S. 50-16.2A, 50-16.3A, 50-16.4, or 50-16.7 may be modified if a court order for alimony or postseparation support could be modified ~~pursuant to~~ under G.S. 50-16.9.

(c) An award by arbitrators for child support or child custody may be modified if a court order for child support or child custody could be modified ~~pursuant to~~ under G.S. 50-13.7.

(d) If an award for modifiable postseparation support or alimony, or an award for child support or child custody, has not been confirmed ~~pursuant to~~ under G.S. 50-53, upon the parties' written agreement these matters may be submitted to arbitrators chosen by the parties ~~as provided in G.S. 50-45, in which case~~ under G.S. 50-45. G.S. 50-52 through G.S. 50-56 shall apply to this modified award.

(e) If an award for modifiable postseparation support or alimony, or an award for child support or child custody has been confirmed pursuant to G.S. 50-53, upon the parties' agreement in writing and joint motion, the court may remit these matters to arbitrators chosen by the parties as provided in G.S. 50-45, in which case G.S. 50-52 through G.S. 50-56 apply to this modified award.

(f) Except as otherwise provided in this section, the provisions of G.S. 50-55 apply to modifications or corrections of awards for postseparation support, alimony, child support, or child custody."

SECTION 15. G.S. 50-57 reads as rewritten:

"**§ 50-57. Orders or judgments on award.**

(a) Upon granting an order confirming, modifying, or correcting an award, an order or judgment shall be entered in conformity with the order and docketed and enforced as any other order or judgment. The court may award costs, as provided in G.S. 50-51(f), of the application and of proceedings subsequent to the application and disbursements.

(b) Notwithstanding G.S. 7A-109, 7A-276.1, or 132-1 or similar law, the court, in its discretion, may order that any arbitration award or order or any judgment or court order entered as a court order or judgment under this Article, or any part of the arbitration award or order or judgment or court order, be sealed, to be opened only upon order of the court upon good cause shown. Upon good cause shown, the court may order resealing of the opened arbitration awards or orders or judgments or court orders. The court, in its discretion, may order that any arbitration award or order or any judgment or court order entered as a court order or judgment under this Article, or any part of the arbitration award or order or judgment or court order, be redacted, the redactions to be opened only upon order of the court upon good cause shown. Upon good cause shown, the court may order redaction of the previously redacted arbitration awards or orders or judgments or court orders opened under the court's order."

SECTION 16. G.S. 50-58 reads as rewritten:

"**§ 50-58. Applications to the court.**

Except as otherwise provided, an application to a court under this Article shall be by motion and shall be heard in the manner and upon notice provided by law or rule of court for making and hearing motions in civil actions. Unless the parties ~~agree otherwise~~,otherwise agree in writing, notice of an initial application for an order shall be served in the manner provided by law for service of summons in civil actions."

SECTION 17. G.S. 50-59 reads as rewritten:

"**§ 50-59. Court; ~~jurisdiction.~~jurisdiction; other definitions.**

(a) The term "court" means a court of competent jurisdiction of this State. Making an agreement in this State described in G.S. 50-42 or any agreement providing for arbitration in this State or under its laws confers jurisdiction on the court to enforce the agreement under this Article and to enter judgment on an award under the agreement.

(b) The term 'person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government,

governmental subdivision, agency or instrumentality, public corporation, or any other legal or commercial entity."

SECTION 18. G.S. 50-61 reads as rewritten:

"**§ 50-61. Article not retroactive.**

This Article applies to agreements made on or after October 1, 1999, unless parties by separate written agreement after that date state that this Article shall apply to agreements dated before October 1, 1999."

SECTION 19. G.S. 50-62 reads as rewritten:

"**§ 50-62. Construction; uniformity of interpretation.**

(a) Certain provisions of this Article have been adapted from the Uniform Arbitration Act formerly in force in this State, the Revised Uniform Arbitration Act in force in this State, the North Carolina International Commercial Arbitration and Conciliation Act, and Chapters 50, 50A, 50B, 51, 52, and 52C of the General Statutes. This Article shall be construed to effect its general purpose to make uniform provisions of these Acts and Chapters 50, 50A, 50B, 51, 52, 52B, and 52C of the General Statutes.

(b) The provisions of this Article governing the legal effect, validity, or enforceability of electronic records or electronic signatures, or of contracts performed with the use of these records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., or as otherwise authorized by federal or State law governing these electronic records or electronic signatures."

SECTION 20. This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies.

HOUSE BILL 1319:
Amend Family Law Arbitration Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 16, 2005
Introduced by:	Reps. Hackney, Goodwin	**Summary by:**	Kory Goldsmith
Version:	PCS to Second Edition H1319-CSRC-64		Committee Counsel

SUMMARY: House Bill 1319 amends various provisions of the Family Law Arbitration Act. The changes are intended to make the Family Law Arbitration Act conform to the Revised Uniform Arbitration Act, which the General Assembly enacted in 2003.

BILL ANALYSIS: Throughout the bill, several phrases are made to provide that variations from the terms of the Act must be in writing. Those sections are not summarized below.

Section 1 creates two new sections.

G.S. 50-42.1 governs which provisions of the Act may not be waived by the parties, or may only be waived at certain points in life of the agreement. Prior to a controversy, parties are not permitted to (i) waive the types of matters that may be the subject of an agreement to arbitrate, (ii) unreasonably restrict the right to notice of the initiation of an arbitration, or (iii) unreasonable restrict the right to a disclosure by the arbitrator of any material facts that could affect the arbitrator's impartiality. Parties are prohibited from waiving the following, regardless of when the waiver would occur: (i) the ability of a party to request certain relief from a court, (ii) judicial immunity for arbitrators, (iii) an arbitrator's authority to change an award under certain circumstances, (iv) the ability of a party to have an award confirmed, vacated, modified, corrected and docketed, and (v) the ability of a party to appeal certain aspects of the arbitration. This section also provides that any waiver contrary to the provisions shall not be effective and shall have the effect of voiding the agreement to arbitrate.

G.S. 50-42.1 creates the standards for notice for initiating an arbitration proceeding. Notice must be given as provided in the agreement, or in the absence of agreement, by certified or registered mail, return receipt requested, or by service under the rules of civil procedure. A person's appearance at the hearing waives any objection to lack of or insufficiency of notice unless they object no later than the beginning of the hearing.

Section 2 Section 3 allows an arbitration proceeding to continue pending a courts determination of whether an arbitration agreement exists, or whether an issue is subject to arbitration, unless the court orders otherwise.

Section 3 provides that a person does not waive the right to arbitrate by seeking preliminary relief from the court.

Section 5 creates a new section, G.S. 50-45.1 regarding the interests or relationships that a person requested to serve as an arbitrator, or serving as an arbitrator, must disclose, including any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the proceeding. Failure by the arbitrator to make the disclosure may be grounds for vacating an award.

Section 8 repeals G.S. 50-50. This statute governs consolidation or arbitrations.

Section 9 creates a new G.S. 50-50A which permits the court to order consolidation of separate arbitration agreements under certain circumstances.

Section 10 requires the arbitrator's award to state the place where the arbitration was conducted and also allows the parties to agree that fees and expenses of counsel will not be included in the award.

Section 11 provides that the arbitrator may modify or correct the award on certain grounds if the arbitrators had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding, or to clarify the award.

Section 15 allows a court to seal all or part of an arbitration award, or court order relating to the arbitration, upon good cause shown.

Section 17 defines "person" as an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation, or any other legal or commercial entity.

Section 19 provides that the Family Law Arbitration Act conforms to the Electronic Signatures in Global and National Commerce Act.

EFFECTIVE DATE: The act becomes effective October 1, 2005, and applies to agreements made on or after that date. It also applies to agreements to arbitrate made before October 1, 2005 if all parties to the agreement or to the arbitration proceeding agree the act applies.

BACKGROUND: This bill is a recommendation of the Family Law section of the North Carolina Bar Association.

H1319e2-SMRC-CSRC-64

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 1319

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

H1319-ARC-26 [v.1]

Date _____,2005

Comm. Sub. [YES]
Amends Title [NO]
Second Edition

Senator _____

moves to amend the bill on page 2, lines 6-8, by rewriting the lines to read:
"(b) Unless a person objects to the lack or insufficiency of notice not later than the beginning of the hearing, the person's appearance at the hearing waives the objection.";

and on page 2, line 13, by deleting the phrase "is given" and substituting "has";

and on page 2, line 15, by deleting the phrase "gives actual" and substituting "receives";

and on page 4, line 30, by rewriting the line to read:
"before the hearing. Appearance of a party".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

CORRECTED NOTICE:

Two bills added, two bills removed

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	June 21, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 345	Winston-Salem Police.	Representative Womble
HB 801	Child Custody/Guardianship Jurisdiction.	Representative Dickson Representative Alexander Representative Glazier
HB 821	Evidence/Speed-Measuring Instruments.	Representative Kiser Representative Glazier
HB 1430	Obstructing Use of Boat Ramp.	Representative Stiller

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	June 21, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 1417	Revise Judicial Standards Commission.	Representative Haire
HB 801	Child Custody/Guardianship Jurisdiction.	Representative Dickson Representative Alexander Representative Glazier
HB 821	Evidence/Speed-Measuring Instruments.	Representative Kiser Representative Glazier
HB 1150	Expedite Juv. Proceedings/Guardians ad Litem.	Representative Ross Representative Goodwin Representative Glazier

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, June 21, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 345	Winston-Salem Police.	Representative Womble
HB 801	Child Custody/Guardianship Jurisdiction.	Representative Dickson Representative Alexander Representative Glazier
HB 821	Evidence/Speed-Measuring Instruments.	Representative Kiser Representative Glazier
HB 1430	Obstructing Use of Boat Ramp.	Representative Stiller

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

June 21, 2005

In Senator Hartsell's absence, Senator Scott Thomas, Vice Chair, called Senate Judiciary II to order on June 21, 2005 with sixteen members present. Senator Thomas introduced pages Meredith Greeson and Brently Boyle and thanked them for serving.

HB 345 (Winston-Salem Police.) Senator Thomas recognized Representative Womble to explain the bill. Officer Ronnie Abernathy, Assistant Police Chief of Winston-Salem, spoke on the bill. Questions from Senators Forrester, Goodall, Webster, Dorsett, Allran and Bingham were answered by Representative Womble, Officer Abernathy, Senator Thomas and Kory Goldsmith, Staff Attorney. Senator Holloman moved for a favorable report. All voted and the motion carried.

HB 821 (Evidence/Speed-Measuring Instruments.) Representative Glazier was recognized to explain the bill. Senator Goodall moved for a favorable report. All voted and the motion carried.

HB 1430 (Obstructing Use of Boat Ramp.) Senator Apodaca moved to accept the Proposed Committee Substitute for purposes of discussion. All voted and the motion carried. Senator Thomas recognized Senator Apodaca to explain the bill. Senator Kinnaird commented on the bill. Senator Swindell's question was answered by Mr. Dick Hamilton, representing the North Carolina Wildlife Commission. Senator Allran moved for a favorable report. All voted and the motion carried.

HB 801 (Child Custody/Guardianship Jurisdiction.) Senator Thomas noted that Senator Hartsell and named a sub-committee to study the bill and report back to the committee. Senator Snow will serve as Chair and member are Senators Kinnaird, Allran, Goodall and Berger.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, June 21, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B.(CS #1) **345** Winston-Salem Police.
Sequential Referral: None
Recommended Referral: None

H.B. **821** Evidence/Speed-Measuring Instruments.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **451** Adoption/Crim. Checks/Prospective Families.
Draft Number: PCS80428
Sequential Referral: None
Recommended Referral: None
Long Title Amended: Yes

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1319** Amend Family Law Arbitration Act.
Draft Number: PCS80429
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

TOTAL REPORTED: 4

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, June 21, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1430** Obstructing Use of Boat Ramp.

Draft Number:	PCS70521
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 6-21-05

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
DICK HAMILTON	NCWRC
Otis Belton	Winston-Salem Police Dept. 725 N. Cherry St., W-5, NC 27102
Ronnie Abernathy	Winston-Salem Police Dept.
Lorrin Freeman	NC Dept. of Justice
GEORGE HARE	DOJ / CJ STANDARDS
megan glazier	ben ginzler
John Rubin	NCFPC
Matt Gerrald	NCFPC
Susannah Gerrald	NCFPC
Tim Hesler	NCFPC
Melissa Lovell	NC DOJ

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Anne Winn	
Russ Dubisky	CCPS
David Humphrey	Sen. Apodaca's office
Rob Lawrence	HHS
Dr Al Wentzy	Director, DSS Northampton Co
Angeline Serushyana	NCGA Intern
Ed Dugan	
Jim Sparks	CAB
Colleen Kochanek	Holt York McDaniel High
Stella McKenney	NC DHHS

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 345

Committee Substitute Favorable 3/2/05

Short Title: Winston-Salem Police. (Local)

Sponsors:

Referred to:

February 22, 2005

A BILL TO BE ENTITLED

AN ACT REQUIRING COMPANY POLICE AGENCIES TO NOTIFY THE CITY OF WINSTON-SALEM POLICE DEPARTMENT WHEN THEY ARE PROVIDING ON-SITE POLICE SECURITY PERSONNEL SERVICES WITHIN THE DEPARTMENT'S JURISDICTION AND TO PROVIDE THE DEPARTMENT WITH CERTAIN INFORMATION ON ARRESTS MADE BY THE AGENCIES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 74E-13 is amended by adding the following new subsection to read:

"(d) Prior to the provision of services, a company police agency certified under this Chapter shall notify the Winston-Salem Police Department that it is providing on-site police security personnel services for persons or property within the Police Department's territorial jurisdiction. The notification shall be in writing and shall include the names of the companies or individuals receiving services, the physical locations where services will be provided, and the beginning and ending dates for the contracts for each location.

Within 48 hours of any arrest made by a company police officer within the Winston-Salem Police Department's territorial jurisdiction, the agency shall provide to the Police Department the following information:

(1) The name and address of the individual arrested;

(2) The offense for which the individual was arrested; and

(3) The date and location of the offense.

As used in this act, the term 'territorial jurisdiction' includes the Winston-Salem Police Department's jurisdiction as defined in G.S. 160A-286."

SECTION 2. This act applies only to the City of Winston-Salem and company police agencies providing on-site police security personnel services for persons or property within the territorial jurisdiction of the Winston-Salem Police Department.

SECTION 3. This act becomes effective July 1, 2005. It applies to all contracts for services existing on or commencing after the effective date and to arrests made on or after the effective date.

HOUSE BILL 345:
Winston-Salem Police

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Womble
Date:	June 21, 2005	**Summary by:**	Kory J. Goldsmith
Version:	2nd Edition		Committee Counsel

SUMMARY: ***House Bill 345 is a local act that would require company police agencies providing on-site personnel services in Winston-Salem and within the 1-mile area surrounding the city's corporate limits to notify the Winston-Salem Police Department prior to providing those services. The notification would include the name of the company or individual receiving services, the location where services will be provided, and the length of each service contract. The company police agency would also be required to provide certain information to the Police Department within 48 hours of any arrest made by the agency. That information would include: the name and address of the person arrested, the offense, and the date and location of the offense.***

The act would only apply to the City of Winston-Salem and company police agencies providing on-site personnel services within one mile of the city's corporate limits.

The act would become effective July 1, 2005, and apply to existing contracts and new contracts, and to offenses occurring on or after the effective date.

CURRENT LAW: Company police agencies are licensed and regulated by the Attorney General under Chapter 74E of the General Statutes. The companies must maintain liability insurance. Company police officers are sworn law enforcement officers. During the performance of their duties of employment, they have the same powers as municipal and county police officers to make arrests for both felonies and misdemeanors and may charge for infractions occurring in the following locations:

- Real property owned or in the possession and control of their employer;
- Real property owned or in the possession and control of a person who has contracted with their employer for on-site company police security personnel services; and
- Any other real property while in continuous and immediate pursuit of a person for an offense committed on the property described above.

If authorized by a superior officer, company police officers may carry concealed weapons. A violation of any of the provisions of Chapter 74E by any person, firm, association, or corporation, or their agents and employees is a Class 1 misdemeanor. The presumptive minimum sentence for a Class 1 misdemeanor for a person with no prior convictions is 1-45 days of community punishment.

City police departments have jurisdiction to arrest and have all the other powers invested in law enforcement officers both within the city's corporate limits and for up to one mile beyond the corporate limits of the city. G.S. 15A-402 and G.S. 160A-286.

BILL ANALYSIS: House Bill 345 would require a company police agency to notify the Winston-Salem Police Department (Police Department) prior to providing on-site police security personnel services within the Police Department's jurisdiction. The notification would include the names of the companies or persons receiving services, the physical locations where services are being provided, and the start and end dates of the contracts for those services. The company police agency would also be required

to provide the Police Department within 48 hours of making an arrest the following information: the name and address of the individual arrested, the offense, and the date and location of the offense.

Failure to comply with the provisions of this act would be a Class 1 misdemeanor. Class 1 misdemeanors are punishable by 1-45 days of community punishment if the defendant has no prior convictions.

H345e2-SMRC

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Incarceration Fiscal Note

BILL NUMBER: House Bill 345 (Second Edition)

SHORT TITLE: Winston-Salem Police.

SPONSOR(S): Representative Womble

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
GENERAL FUND					
Correction	Exact amount cannot be determined; no substantial impact anticipated.				
Judicial	Exact amount cannot be determined; no substantial impact anticipated.				
LOCAL GOVERNMENTS	Exact amount cannot be determined; no substantial impact anticipated.				
ADDITIONAL PRISON BEDS*	Exact amount cannot be determined; no substantial impact anticipated.				
POSITIONS: (cumulative)	Exact amount cannot be determined; no additional positions anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch; Local Governments

EFFECTIVE DATE: July 1, 2005

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: HB 345 would require company police agencies providing on-site personnel services in Winston-Salem and within the 1-mile area surrounding the city's corporate limits to notify the Winston-Salem Police Department prior to providing those services. The notification must include the name of the company or individual receiving services, the location where services will be provided, and the length of each service contract. The company police agency must also

provide the following information to the Police Department within 48 hours of any arrest made by the agency: the name and address of the person arrested, the offense, and the date and location of the offense.[1]

ASSUMPTIONS AND METHODOLOGY:

General

Assuming that at least one charge would result from this legislation, there would be a fiscal impact associated with the bill. However, a violation under this bill would arise only if a company police agency certified under existing Chapter 74E failed to adhere to the new notification requirements outlined in this legislation. To the extent that the police agencies regulated by this bill are already complying with Chapter 74E and would be expected to also abide by the requirements of this bill, few charges and convictions under this legislation would be expected. As such, any fiscal impact associated with the bill is not expected to be substantial.

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2005 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory group, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.*

- In FY 2003-04, 19 percent of Class 1 misdemeanors resulted in active sentences and the average estimated time served was 31 days.
- DOC reimburses counties for housing offenders between thirty and ninety days at a rate of $18 per day per offender. If, for example, one offender were sentenced to 31 days active time as a result of this bill, costs to DOC to reimburse the county would be $558.

The remaining 81 percent of Class 1 misdemeanants received non-active sentences. For those offenders sentenced to supervised probation, the Division of Community Correction (DCC) would incur costs of $1.87 per offender per day. Offenders sentenced to community service would cost $0.67 per offender per day, and offenders given unsupervised probation would not impact DCC.

Because most Class 1 misdemeanants serving active time as a result of this bill would be housed in county jails, this legislation is not expected to significantly impact prison population.

[1] Source: Kory Goldsmith, North Carolina General Assembly Research Division.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

AOC anticipates that certified company police agencies in Winston-Salem would comply with the new requirements, and that few, if any, new criminal or civil cases would arise as a result of this bill. Based upon the costs of time in court, attorney preparation time, and indigent defense, the average estimated total cost to process one Class 1 misdemeanor is $3,224 per trial and $284 per guilty plea. The total cost per trial consists of an estimated $1,333 in indigent defense costs and $1,891 in jury fees, costs of time in court, and costs of attorney preparation. Assuming that the majority of any new charges resulting from this bill are likely to be settled via guilty plea, costs to AOC are not anticipated to be substantial.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission

TECHNICAL CONSIDERATIONS: This bill would become effective July 1, 2005. Traditionally, most bills with criminal penalties become effective on December 1. This date has been used to give the criminal justice system time to change their operating systems to accommodate criminal penalty changes and to inform and train attorneys and judges of those changes. There is typically a delay of six months between charging and sentencing an offender. The NC Sentencing and Policy Advisory Commission population projections assume a December 1 effective date, and thus are based on changes in population starting the second year. The expenditures and savings calculated by Fiscal Research use these projections and, thus, assume that the legislation will not impact the prison system until the beginning of 2006-07. If the bill becomes effective prior to December 1, there could be an impact on local jails or the prison system in the 2004-05 fiscal year.

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Aaron Paul and Jim Mills

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

DATE: March 3, 2005

Signed Copy Located in the NCGA Principal Clerk's Offices

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

HOUSE BILL 821

Short Title:	Evidence/Speed-Measuring Instruments.	(Public)
Sponsors:	Representatives Glazier and Kiser (Primary Sponsors).	
Referred to:	Judiciary IV.	

March 21, 2005

A BILL TO BE ENTITLED

AN ACT RELATING TO THE ADMISSIBILITY OF THE RESULTS OF SPEED-MEASURING INSTRUMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 8-50.2 reads as rewritten:

"**§ 8-50.2. Results of speed-measuring instruments; admissibility.**

(a) The results of the use of radio microwave, laser, or other speed-measuring instruments shall be admissible as evidence of the speed of an object in any criminal or civil proceeding for the purpose of corroborating the opinion of a person as to the speed of an object based upon the visual observation of the object by such person.

(b) Notwithstanding the provisions of subsection (a) of this section, the results of a radio microwave, laser, or other electronic speed-measuring instrument are not admissible in any proceeding unless it is found that:

(1) The operator of the instrument held, at the time the results of the speed-measuring instrument were obtained, a certificate from the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter referred to as the Commission) authorizing him to operate the speed-measuring instrument from which the results were obtained.

(2) The operator of the instrument operated the speed-measuring instrument in accordance with the procedures established by the Commission for the operation of such instrument.

(3) The instrument employed was approved for use by the Commission and the Secretary of Crime Control and Public Safety pursuant to G.S. 17C-6.

(4) The speed-measuring instrument had been calibrated and tested for accuracy in accordance with the standards established by the Commission for that particular instrument.

(c) All radio ~~microwave~~ microwave, laser, and other electronic speed-measuring instruments shall be tested for accuracy within a 12-month period prior to the alleged violation by a technician possessing at least a ~~second-class or general radiotelephone license from the Federal Communications Commission or a certification issued by organizations or committees endorsed by the Federal Communications Commission within a period of 12 months prior to the alleged violation.~~ General Radiotelephone Operator License from the Federal Communications Commissions or possessing a Certified Electronics Technician certificate issued by a Federal Communications Commission Commercial Operators License Examination Manager or by a laboratory established by the International Association of Chiefs of Police. A written certificate by ~~such~~ the technician or laboratory showing that the test was made within the required period and that the instrument was accurate shall be competent and prima facie evidence of those facts in any proceeding referred to in subsection (a) of this section.

All ~~laser~~ radio microwave, laser, and other speed enforcement instruments shall be tested in accordance with standards established by the North Carolina Criminal Justice Education and Training Standards Commission. The Commission shall provide for certification of ~~laser~~ all radio microwave, laser, and other speed enforcement instruments. ~~A written certificate by a technician certified by the Commission showing that a test was made within the required testing period and that the instrument was accurate shall be competent and prima facie evidence of those facts in any proceeding referred to in subsection (a) of this section.~~

(d) In every proceeding where the results of a radio microwave, laser, or other speed-measuring instrument is sought to be admitted, judicial notice shall be taken of the rules approving the use of the models and types of radio ~~microwave~~ microwave, laser, and other speed-measuring instruments and the procedures for operation and calibration or measuring accuracy of such instruments."

SECTION 2. This act becomes effective October 1, 2005.

HOUSE BILL 821: Evidence/Speed-Measuring Instruments

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 20, 2005
Introduced by:	Reps. Glazier, Kiser	**Summary by:**	Ben Popkin
Version:	First Edition		Committee Counsel

SUMMARY: House Bill 821 would update and clarify language in the General Statute governing the testing of speed-measuring and speed enforcement instruments and the required qualifications of the technicians testing those instruments. The act would become effective October 1, 2005.

CURRENT LAW: G.S. 8-50.2. addresses the admissibility of results of speed-measuring instruments as evidence in civil or criminal proceedings. G.S. 8-50.2.(c) specifically addresses the testing for accuracy of the instruments and sets forth the required qualifications of technicians that may test and verify the accuracy of the instruments.

Certification of Technicians – A technician must have either of the following to be properly certified:

- At least a second class or general radiotelephone license from the FCC; or
- Certification issued by organizations or committees endorsed by the FCC.

Testing for Accuracy of Speed-Measuring and Speed Enforcement Instruments – In order for the results of a radio microwave or other electronic speed-measuring instrument to be admissible into evidence, the instrument must have been calibrated within 12 months of the alleged violation by a technician possessing the qualifications listed above. A laser speed enforcement instrument must be tested in accordance with standards established by the NC Criminal Justice Education and Training Standards Commission.

BILL ANALYSIS: House Bill 821 would clarify the language of G.S. 8-50.2.(c), broaden the categories of instruments covered by the statute and specify the licensure or certification required of technicians testing the accuracy of the speed-measuring instruments. Instruments addressed would now include "All radio microwave, laser, or other...instruments" rather than the current "radio microwave speed-measuring" or "laser speed enforcement" instrument specification.

Certification of Technicians. – A technician would be required to have either of the following:

- A General Radiotelephone Operator License from the FCC; or
- A Certified Electronics Technician certificate issued by a FCC Commercial Operators License Examination Manager or by a laboratory established by the International Association of Chiefs of Police.

Testing for Accuracy of Speed-Measuring and Speed Enforcement Instruments – The requirements would remain as currently set forth by statute, however, the language would be clarified.

EFFECTIVE DATE: The act would become effective October 1, 2005.

Trina Griffin, counsel to House Judiciary IV, substantially contributed to this summary.

H0821e1-SMRD

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1430
Committee Substitute Favorable 5/9/05

Short Title: Obstructing Use of Boat Ramp. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT TO LIMIT THE PENALTY FOR OBSTRUCTING A BOAT LAUNCHING AREA.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 113-135.1 reads as rewritten:

"**§ 113-135.1. Limitation upon penalty for offense created by rules of Wildlife Resources Commission in certain instances.**

(a) To prevent unsuspecting members of the public from being subject to harsh criminal penalties for offenses created by rules of the Wildlife Resources Commission, the penalty for an offense which is solely a violation of rules of the Wildlife Resources Commission is limited to a fine of ten dollars ($10.00) except that offenses set out in ~~Section~~subsection (b) of this section are punished as set forth in G.S. 113-135 or other ~~sections.~~sections, and except that a person who parks a vehicle in violation of a rule regulating the parking of vehicles at boating access or boating launch areas is responsible for an infraction and shall pay a fine of fifty dollars ($50.00).

(b) The limitation upon penalty does not apply to any rule violation:

(1) Punishable under G.S. 113-294 or otherwise involving aggravating elements which result in a greater punishment than provided by G.S. 113-135;

(2) Which involves a defendant subject to the collection-license provisions of G.S. 113-272.4 or who is a dealer as defined in G.S. 113-273; or

(3) Relating to seasons, bag limits, creel limits, taking fish other than with hook and line, buying or selling wildlife, possessing or transporting live wildlife, taking wildlife at night or with the aid of a conveyance, or falconry."

SECTION 2. G.S. 113-264 is amended by adding a new subsection to read:

"(e) Any wildlife protector or law enforcement officer of this State and its subdivisions may have a vehicle parked at any Commission-owned or operated public boating access area towed if such vehicle:

(1) Is parked in any area other than one designated for parking; or
(2) Is left by an individual for any purpose other than the launching or retrieval of a vessel or while operating that vessel."

SECTION 3. This act becomes effective December 1, 2005.

HOUSE BILL 1430:
Obstructing Use of Boat Ramp

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 20, 2005
Introduced by:	Rep. Stiller	**Summary by:**	Robin Johnson
Version:	PCS to Second Edition H1430-CSRH-45[v.2]		Committee Counsel

SUMMARY: HB 1430 changes the penalty for illegal parking at a boat access or boat launch area from a misdemeanor to an infraction, raises the fine from $10 to $50, and provides the Wildlife Resources Commission with authority to tow illegally parked vehicles.

The PCS makes technical changes.

CURRENT LAW:

The Wildlife Resources Commission (WRC) rules prohibit leaving vehicles, boat trailers and equipment at a boat access area in such a way as to impede or inconvenience access to the ramps or facilities by others, or parking a vehicle, boat, boat trailer or other object on an access area other than at a place designated as an authorized parking zone. [See attached 15A NCAC 10E .0104(a).] As provided in G.S. 113-135, a violation of this rule is a misdemeanor, punishable by a $10 fine.

BILL ANALYSIS:

House Bill 1430 would change the level of offense for violating the WRC rules regarding parking at boat access and boat launch areas from a misdemeanor to an infraction and would raise the amount of the fine from $10 to $50. The bill also would allow the WRC employees with law enforcement powers and other law enforcement officers to have towed a vehicle that is improperly parked or left at the access or launch area. A vehicle would not be towed if it were in the location for the purpose of launching, operating, or retrieving watercraft.

EFFECTIVE DATE:

The act would become effective December 1, 2005, and apply to offenses committed on or after that date.

Barbara Riley, counsel to the House Committee on Wildlife Resources, substantially contributed to this summary.

H1430e2-SMRH-CSRH-45v2

§ 113-135. General penalties for violating Subchapter or rules; increased penalty for prior convictions; interpretive provisions.

(a) Any person who violates any provision of this Subchapter or any rule adopted by the Marine Fisheries Commission or the Wildlife Resources Commission, as appropriate, pursuant to the authority of this Subchapter, is guilty of a misdemeanor except that punishment for violation of the rules of the Wildlife Resources Commission is limited as set forth in G.S. 113-135.1. Unless a different level of punishment is elsewhere set out, anyone convicted of a misdemeanor under this section is punishable as follows:

(1) For a first conviction, as a Class 3 misdemeanor.

(2) For a second or subsequent conviction within three years, as a Class 2 misdemeanor.

(b) In interpreting this section, provisions elsewhere in this Subchapter making an offense a misdemeanor "punishable in the discretion of the court" must be considered to set a different level of punishment, to be interpreted in the light of G.S. 14-3 or any equivalent or successor statute. Noncriminal sanctions, however, such as license revocation or suspension, and exercise of powers auxiliary to criminal prosecution, such as seizure of property involved in the commission of an offense, do not constitute different levels of punishment so as to oust criminal liability. Any previous conviction of an offense under this Subchapter, or under rules authorized by it, serves to increase the punishment under subsection (a) even though for a different offense than the second or subsequent one.

(c) For the purposes of this Subchapter, violations of laws or rules administered by the Wildlife Resources Commission under any former general or local law replaced by the present provisions of this Subchapter are deemed to be violations of laws or rules under this Subchapter.

Document 1 of 1

Source:
Michie's North Carolina Primary Law/North Carolina Administrative Code/TITLE 15A - Environment and Natural Resources/CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY/SUBCHAPTER 10E - FISHING AND BOATING ACCESS AREAS/15A NCAC 10E .0104 USE OF AREAS REGULATED

15A NCAC 10E .0104 USE OF AREAS REGULATED

(a) No person shall leave any vehicle, boat trailer or other obstruction on any access area in such a location, position or condition that it will prevent, impede, or inconvenience the use by other persons of any ramp or other facility constructed for the purpose of launching or landing boats. No person shall leave parked any vehicle, boat, boat trailer or other object at any place on any access area other than on such place or zone as is designated as an authorized parking zone and posted or marked as such.

(b) No person shall possess a loaded firearm on any boat access area. No person shall operate a vehicle on any boat access area in a manner so as to endanger life or property.

(c) No person, when using any access area, shall deposit any debris or refuse anywhere on the grounds of the area. No person, when using any access area, shall do any act which is prohibited or neglect to do any act which is required by signs or markings placed on such area under authority of this Regulation for the purpose of regulating the use of the area. At any time when all designated parking zones on any access area are fully occupied, any person may enter and use such facilities, provided such person makes other arrangements for parking and violates none of the provisions of this Regulation or the signs or markings made or posted pursuant hereto.

(d) No person shall operate a motorboat in the public waters of North Carolina within 50 yards of a Commission-owned or managed boat launching ramp at greater than "no wake" speed. For the purpose of this Regulation, "no wake" speed shall mean idling speed or a slow speed creating no appreciable wake.

(e) Except where facilities are provided, it is unlawful to use any boating access area for purposes other than the launching of boats and parking vehicles and boat trailers. All other uses--including swimming, skiing, camping, building fires, operating concessions or other activities not directly involved with launching of boats--are expressly prohibited, except that those activities including fish weigh-ins which have been approved by the Commission and for which a permit has been issued may be conducted, provided that the permit authorizing such activity is available for inspection by wildlife enforcement officers at the time the activity is taking place.

(f) Except where facilities are provided and approved uses are posted, it is unlawful to use any public fishing area for purposes other than fishing. All prohibited uses and activities shall be posted including possession of loaded firearms, swimming, launching or mooring jet skis or boats, skiing, building fires, operating concessions, or other activities not directly associated with fishing.

History Note: Authority G.S. 113-134; 113-264; 75A-14;

Eff. February 1, 1976;

Amended Eff. July 1, 1995; February 1, 1994; September 1, 1992; July 1, 1991.

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Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	June 23, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 288	MV Move-Over Law Changes.	Representative Rapp Representative McGee
HB 355	Restrict Use of Blue and Red Vehicle Lights.	Representative Rapp Representative McGee
HB 1400	School Bus Safety Act.	Representative Folwell

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, June 23, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 288	MV Move-Over Law Changes.	Representative Rapp Representative McGee
HB 355	Restrict Use of Blue and Red Vehicle Lights.	Representative Rapp Representative McGee
HB 1400	School Bus Safety Act.	Representative Folwell

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

June 23, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on June 23, 2005, with ten members present. Senator Hartsell introduced pages Hannah Kate Mitchell and Ashley Maltbia and thanked them for serving.

HB 288 (MV Move-Over Law Changes.) Senator Hartsell moved to accept a technical correction to the bill. Senator Jacumin so moved, all voted and the motion carried. Senator Hartsell recognized Representative Rapp to explain the bill. Lt. Everett Clendenin of the North Carolina Highway Patrol spoke in favor of the bill. Questions from Senators Goodall and Dorsett were answered by Representative Rapp and Lt. Clendenin. Senator Bingham moved for a favorable report, unfavorable to the original bill, favorable to the committee substitute. All voted and the motion carried. Senator Forrester commended the North Carolina Highway Patrol for their performance at the US Open in Pinehurst and thanked them for their service.

HB 355 (Restrict Use of Blue and Red Vehicle Lights.) Representative McGee was recognized to explain the bill. Questions from Senators Bingham, Dannelly, Forrester and Goodall were answered by Representative McGee. Senator Bingham moved for a favorable report. All voted and the motion carried.

HB 1400 (School Bus Safety Act.) Senator Apodaca moved to accept the Proposed Committee Substitute for purposes of discussion. All voted and the motion carried. Representative Folwell was recognized to explain the bill. Senator Forrester's question was answered by Robin Johnson, Staff Attorney. Senator Dannelly moved for a favorable report to the Proposed Committee Substitute. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, June 23, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B.(CS #1) **355** Restrict Use of Blue and Red Vehicle Lights.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

June 23, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Kevin Lacy	NCDOT
Cassandra Skinner	CCPS
Jamie Hatcher	SHP
Mark Johnson	SHP
Matt Osborne	AOC
David Humphrey	Sen. Apodaca's office
Colleen Kochanek	TRPNC
Russ Dubisky	CCPS
Michael Houser	NCAE
Kathleen Edwards	UNC-CH Legis Reporting Service
Eddie Caldwell	NC Sheriffs Assn

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Lindsey Wakely	Intern
Molly Ryan	NCSBA
Doug Heron	NC BAR ASSOC
Brian Turner	BOC Enf.
Kerry Scarlett	State Watch
Jami Fitzgerald	NAFR

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 3

HOUSE BILL 288

Committee Substitute Favorable 5/31/05
Third Edition Engrossed 6/1/05

Short Title: MV Move-Over Law Changes. (Public)

Sponsors:

Referred to:

February 17, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW CONCERNING WHAT THE DRIVER OF A MOTOR VEHICLE SHALL DO UPON APPROACH OF AN EMERGENCY VEHICLE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-157 reads as rewritten:

"**§ 20-157. Approach of police, fire department or rescue squad vehicles or ambulances; driving over fire hose or blocking fire-fighting equipment; parking, etc., near police, fire department, or rescue squad vehicle or ambulance.**

(a) Upon the approach of any police or fire department vehicle or public or private ambulance or rescue squad emergency service vehicle giving warning signal by appropriate light and by audible bell, siren or exhaust whistle, audible under normal conditions from a distance not less than 1000 feet, the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right-hand edge or curb, clear of any intersection of streets or highways, and shall stop and remain in such position unless otherwise directed by a police or traffic officer until police or fire department vehicle or public or private ambulance or rescue squad emergency service vehicle shall have passed. Provided, however, this subsection shall not apply to vehicles traveling in the opposite direction of the vehicles herein enumerated when traveling on a four-lane limited access highway with a median divider dividing the highway for vehicles traveling in opposite directions, and provided further that the violation of this subsection shall ~~not~~ be negligence per se. Violation of this subsection is a Class 2 misdemeanor.

(b) It shall be unlawful for the driver of any vehicle other than one on official business to follow any fire apparatus traveling in response to a fire alarm closer than one block or to drive into or park such vehicle within one block where fire apparatus has stopped in answer to a fire alarm.

(c) Outside of the corporate limits of any city or town it shall be unlawful for the driver of any vehicle other than one on official business to follow any fire apparatus traveling in response to a fire alarm closer than 400 feet or to drive into or park such vehicle within a space of 400 feet from where fire apparatus has stopped in answer to a fire alarm.

(d) It shall be unlawful to drive a motor vehicle over a fire hose or any other equipment that is being used at a fire at any time, or to block a fire-fighting apparatus or any other equipment from its source of supply regardless of its distance from the fire.

(e) It shall be unlawful for the driver of a vehicle, other than one on official business, to park and leave standing such vehicle within 100 feet of police or fire department vehicles, public or private ambulances, or rescue squad emergency vehicles which are engaged in the investigation of an accident or engaged in rendering assistance to victims of such accident.

(f) When an authorized emergency vehicle as described in subsection (a) of this section or any public service vehicle is parked or standing within 12 feet of a roadway and is giving a warning signal by appropriate light, the driver of every other approaching vehicle shall, as soon as it is safe and when not otherwise directed by an individual lawfully directing traffic, do one of the following:

(1) Move the vehicle into a lane that is not the lane nearest the parked or standing authorized emergency vehicle and continue traveling in that lane until safely clear of the authorized emergency vehicle. This paragraph applies only if the roadway has at least two lanes for traffic proceeding in the direction of the approaching vehicle and if the approaching vehicle may change lanes safely and without interfering with any vehicular traffic.

(2) Slow the vehicle, maintaining a safe speed for traffic conditions, and operate the vehicle at a reduced speed and be prepared to stop until completely past the authorized emergency vehicle. This paragraph applies only if the roadway has only one lane for traffic proceeding in the direction of the approaching vehicle or if the approaching vehicle may not change lanes safely and without interfering with any vehicular traffic.

For purposes of this section, "public service vehicle" means a vehicle that has been called to the scene by a motorist or a law enforcement officer, is being used to assist motorists or law enforcement officers with wrecked or disabled vehicles, and is operating an amber-colored flashing light authorized by G.S. 20-130.2. Violation of this subsection shall ~~not~~ be negligence per se.

(g) Except as provided in subsections (a), (h), and (i) of this section, violation of this section shall be an infraction punishable by a fine of two hundred fifty dollars ($250.00).

(h) A person who violates this section and causes damage to property in the immediate area of the authorized emergency vehicle or public service vehicle in excess of five hundred dollars ($500.00), or causes injury to a police officer, a firefighter, an emergency vehicle operator, an Incident Management Assistance Patrol member, a

public service vehicle operator, or any other emergency response person in the immediate area of the authorized emergency vehicle or public service vehicle is guilty of a Class 1 misdemeanor.

(i) A person who violates this section and causes serious injury or death to a police officer, a firefighter, an emergency vehicle operator, an Incident Management Assistance Patrol member, a public service vehicle operator, or any other emergency response person in the immediate area of the authorized emergency vehicle or public service vehicle is guilty of a Class I felony. The Division may suspend, for up to six months, the drivers license of any person convicted under this subsection. If the Division suspends a person's license under this subsection, a judge may allow the licensee a limited driving privilege for a period not to exceed the period of suspension, provided the person's license has not also been revoked or suspended under any other provision of law. The limited driving privilege shall be issued in the same manner and under the terms and conditions prescribed in G.S. 20-16.1(b)."

SECTION 2. This act becomes effective July 1, 2006, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 288

Committee Substitute Favorable 5/31/05
Third Edition Engrossed 6/1/05
Fourth Edition Engrossed 6/1/05
PROPOSED SENATE COMMITTEE SUBSTITUTE H288-CSRD-26 [v.1]

6/22/2005 4:26:33 PM

Short Title: MV Move-Over Law Changes. (Public)

Sponsors:

Referred to:

February 17, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW CONCERNING WHAT THE DRIVER OF A MOTOR VEHICLE SHALL DO UPON APPROACH OF AN EMERGENCY VEHICLE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-157 reads as rewritten:

"**§ 20-157. Approach of ~~police,~~ law enforcement, fire department or rescue squad vehicles or ambulances; driving over fire hose or blocking fire-fighting equipment; parking, etc., near ~~police,~~ law enforcement, fire department, or rescue squad vehicle or ambulance.**

(a) Upon the approach of any ~~police~~ law enforcement or fire department vehicle or public or private ambulance or rescue squad emergency service vehicle giving warning signal by appropriate light and by audible bell, siren or exhaust whistle, audible under normal conditions from a distance not less than 1000 feet, the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right-hand edge or curb, clear of any intersection of streets or highways, and shall stop and remain in such position unless otherwise directed by a ~~police~~ law enforcement or traffic officer until ~~police~~ law enforcement or fire department vehicle or public or private ambulance or rescue squad emergency service vehicle shall have passed. Provided, however, this subsection shall not apply to vehicles traveling in the opposite direction of the vehicles herein enumerated when traveling on a four-lane limited access highway with a median divider dividing the highway for vehicles traveling in opposite directions, and provided further that the violation of this subsection shall ~~not~~ be negligence per se. Violation of this subsection is a Class 2 misdemeanor.

(b) It shall be unlawful for the driver of any vehicle other than one on official business to follow any fire apparatus traveling in response to a fire alarm closer than one block or to drive into or park such vehicle within one block where fire apparatus has stopped in answer to a fire alarm.

(c) Outside of the corporate limits of any city or town it shall be unlawful for the driver of any vehicle other than one on official business to follow any fire apparatus traveling in response to a fire alarm closer than 400 feet or to drive into or park such vehicle within a space of 400 feet from where fire apparatus has stopped in answer to a fire alarm.

(d) It shall be unlawful to drive a motor vehicle over a fire hose or any other equipment that is being used at a fire at any time, or to block a fire-fighting apparatus or any other equipment from its source of supply regardless of its distance from the fire.

(e) It shall be unlawful for the driver of a vehicle, other than one on official business, to park and leave standing such vehicle within 100 feet of ~~police~~ law enforcement or fire department vehicles, public or private ambulances, or rescue squad emergency vehicles which are engaged in the investigation of an accident or engaged in rendering assistance to victims of such accident.

(f) When an authorized emergency vehicle as described in subsection (a) of this section or any public service vehicle is parked or standing within 12 feet of a roadway and is giving a warning signal by appropriate light, the driver of every other approaching vehicle shall, as soon as it is safe and when not otherwise directed by an individual lawfully directing traffic, do one of the following:

(1) Move the vehicle into a lane that is not the lane nearest the parked or standing authorized emergency vehicle and continue traveling in that lane until safely clear of the authorized emergency vehicle. This paragraph applies only if the roadway has at least two lanes for traffic proceeding in the direction of the approaching vehicle and if the approaching vehicle may change lanes safely and without interfering with any vehicular traffic.

(2) Slow the vehicle, maintaining a safe speed for traffic conditions, and operate the vehicle at a reduced speed and be prepared to stop until completely past the authorized emergency vehicle. This paragraph applies only if the roadway has only one lane for traffic proceeding in the direction of the approaching vehicle or if the approaching vehicle may not change lanes safely and without interfering with any vehicular traffic.

For purposes of this section, "public service vehicle" means a vehicle that has been called to the scene by a motorist or a law enforcement officer, is being used to assist motorists or law enforcement officers with wrecked or disabled vehicles, and is operating an amber-colored flashing light authorized by G.S. 20-130.2. Violation of this subsection shall ~~not~~ be negligence per se.

(g) Except as provided in subsections (a), (h), and (i) of this section, violation of this section shall be an infraction punishable by a fine of two hundred fifty dollars ($250.00).

(h) A person who violates this section and causes damage to property in the immediate area of the authorized emergency vehicle or public service vehicle in excess of five hundred dollars ($500.00), or causes injury to a law enforcement officer, a firefighter, an emergency vehicle operator, an Incident Management Assistance Patrol member, a public service vehicle operator, or any other emergency response person in the immediate area of the authorized emergency vehicle or public service vehicle is guilty of a Class 1 misdemeanor.

(i) A person who violates this section and causes serious injury or death to a law enforcement officer, a firefighter, an emergency vehicle operator, an Incident Management Assistance Patrol member, a public service vehicle operator, or any other emergency response person in the immediate area of the authorized emergency vehicle or public service vehicle is guilty of a Class I felony. The Division may suspend, for up to six months, the drivers license of any person convicted under this subsection. If the Division suspends a person's license under this subsection, a judge may allow the licensee a limited driving privilege for a period not to exceed the period of suspension, provided the person's license has not also been revoked or suspended under any other provision of law. The limited driving privilege shall be issued in the same manner and under the terms and conditions prescribed in G.S. 20-16.1(b)."

SECTION 2. This act becomes effective July 1, 2006, and applies to offenses committed on or after that date.

HOUSE BILL 288:
MV Move-Over Law Changes

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 22, 2005
Introduced by:	Reps. Rapp, McGee	**Summary by:**	Ben Popkin
Version:	PCS to Fourth Edition H288-CSRD		Committee Counsel

SUMMARY: House Bill 288 would amend the law concerning what a driver of a motor vehicle must do when approaching an emergency vehicle, require that drivers also move over for public service vehicles, and increase the penalties for violating that law when property damage, injury or death occur as a result. The Proposed Committee Substitute would update the language of G.S. 20-157 by replacing the term "police" with "law enforcement" throughout the body of the bill.

CURRENT LAW: Currently, under G.S. 20-157, the driver of a motor vehicle must do the following with regard to authorized emergency vehicles:

When an emergency vehicle approaches. Subsection (a) requires a driver to pull over to the right hand edge or curb, clear of any intersections, when approached by an emergency vehicle and stop until the emergency vehicle passes.

Following, parking near, or blocking fire apparatus. Subsections (b), (c), and (d) make it unlawful to follow any fire apparatus too closely when it is traveling in response to a fire alarm, to park too close to where a fire apparatus has stopped to answer an alarm, or to drive a motor vehicle over or block a fire hose or any other equipment being used at a fire.

Parking near emergency vehicles at an accident scene. Subsection (e) makes it unlawful to park and leave a vehicle within 100 feet of an emergency vehicle that is engaged in the investigation of an accident or is rendering assistance to victims of an accident.

When approaching a stationary emergency vehicle. Subsection (f) requires a driver to pull over into the far lane when passing an authorized emergency vehicle that is stopped within 12 feet of the roadway. If there is only one lane for traffic traveling in the direction of the approaching vehicle, or if the vehicle cannot move over safely, then the vehicle is required to slow down until it is clear of the emergency vehicle.

BILL ANALYSIS: House bill 288 would amend G.S. 20-157(f) by adding "public service vehicles" to the list of vehicles for which drivers would have to move into a far lane, or slow down while passing, when they are stopped on the side of a roadway. "Public service vehicle" is defined as a vehicle that has been called to the scene by a motorist or law enforcement officer, is being used to assist motorists or law enforcement officers with wrecked or disabled vehicles, and is equipped with an amber-colored flashing light.

When a motor ~~vehicle~~ is required to slow down because it cannot ~~move~~ into a far lane, the bill would also add that the vehicle must ~~slow to a speed of~~ at least 20 mph less than the posted speed limit if the posted speed limit is 25 ~~mph~~ or greater, or slow to 5 ~~mph if the~~ speed limit is 20 mph or less. The driver would also ~~have~~ to be prepared to stop.

In addition, the bill would increase the fines applicable to violations of subsections (b) through (f) of G.S. 20-157 and would provide for enhanced penalties when any provision in G.S. 20-157 is violated

and it results in damage to property or injury or death. (See chart below for comparison of penalties under current law and under this bill.)

Subsection	Current G.S. 20-157	G.S. 20-157 under H 288
(a) Requires vehicles to pull over when emergency vehicle approaches.	Class 2 Misdemeanor – up to 60 days, fine not more than $1,000	No change
(b) Prohibits following fire apparatus too closely.	Infraction – fine not more than $100	Infraction – fine of $250
(c) Prohibits following fire apparatus too closely outside corporate limits.	Infraction – fine not more than $100	Infraction – fine of $250
(d) Prohibits driving over or blocking fire hose or equipment.	Infraction – fine not more than $100	Infraction – fine of $250
(e) Prohibits parking too close to emergency vehicles at the scene of an accident.	Infraction – fine not more than $100	Infraction – fine of $250
(f) Requires vehicles to move over or slow down when passing standing emergency vehicle.	Infraction – fine not more than $100	Infraction – fine of $250
(h) Enhances penalty for violating subsections (a) through (f) when there is damage to property in excess of $500 or injury.	N/A	Class 1 Misdemeanor – up to 120 days, fine in discretion of court
(i) Enhances penalty for violating subsections (a) through (f) when there is serious injury or death.	N/A	Class I Felony – 3-12 months minimum, fine in discretion of court, license suspended for up to 6 months

EFFECTIVE DATE: The bill would be effective July 1, 2006, and would apply to offenses committed on or after that date.

Wendy Graf Ray, counsel to House Judiciary III, substantially contributed to this summary.

H0288e3-SMRD-CSRD

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 355
Committee Substitute Favorable 4/7/05

Short Title: Restrict Use of Blue and Red Vehicle Lights. (Public)

Sponsors:

Referred to:

February 23, 2005

A BILL TO BE ENTITLED

AN ACT TO RESTRICT THE USE OF RED AND BLUE LIGHTS ON VEHICLES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-130.1 reads as rewritten:

"**§ 20-130.1. Use of red or blue lights on vehicles prohibited; exceptions.**

(a) It is unlawful for any person to install or activate or operate a red light in or on any vehicle in this State. As used in this subsection, unless the context requires otherwise, "red light" means an operable red light not sealed in the manufacturer's original package which: (i) is designed for use by an emergency vehicle or is similar in appearance to a red light designed for use by an emergency vehicle; and (ii) can be operated by use of the vehicle's battery, vehicle's electrical system, or a dry cell battery. As used in this subsection, the term "red light" shall also mean any forward facing red light installed on a vehicle after initial manufacture of the vehicle.

(b) The provisions of subsection (a) of this section do not apply to the following:

(1) A police car;

(2) A highway patrol car;

(3) A vehicle owned by the Wildlife Resources Commission and operated exclusively for law-enforcement purposes;

(4) An ambulance;

(5) A vehicle used by an organ procurement organization or agency for the recovery and transportation of blood, human tissues, or organs for transplantation;

(6) A fire-fighting vehicle;

(7) A school bus;

(8) A vehicle operated by any member of a municipal or rural fire department in the performance of his duties, regardless of whether members of that fire department are paid or voluntary;

(9) A vehicle of a voluntary lifesaving organization (including the private vehicles of the members of such an organization) that has been

officially approved by the local police authorities and which is manned or operated by members of that organization while answering an official call;

(10) A vehicle operated by medical doctors or anesthetists in emergencies;

(11) A motor vehicle used in law enforcement by the sheriff, or any salaried rural policeman in any county, regardless of whether or not the county owns the vehicle;

(11a) A vehicle operated by the State Fire Marshal or his representatives in the performance of their duties, whether or not the State owns the vehicle;

(12) A vehicle operated by any county fire marshal, assistant fire marshal, or emergency management coordinator in the performance of his duties, regardless of whether or not the county owns the vehicle;

(13) A light required by the Federal Highway Administration;

(14) A vehicle operated by a transplant coordinator who is an employee of an organ procurement organization or agency when the transplant coordinator is responding to a call to recover or transport human tissues or organs for transplantation;

(15) A vehicle operated by an emergency medical service as an emergency support vehicle; and

(16) A State emergency management vehicle.

(c) It is unlawful for any person to possess a blue light or to install, activate, or operate a blue light in or on any vehicle in this State, except for a publicly owned vehicle used for law enforcement purposes or any other vehicle when used by law enforcement officers in the performance of their official duties. As used in this subsection, unless the context requires otherwise, "blue light" means <u>any forward facing blue light installed on a vehicle after initial manufacture of the vehicle; or</u> an operable blue light which:

(1) Is not (i) being installed on, held in inventory for the purpose of being installed on, or held in inventory for the purpose of sale for installation on a vehicle on which it may be lawfully operated or (ii) installed on a vehicle which is used solely for the purpose of demonstrating the blue light for sale to law enforcement personnel;

(1a) Is designed for use by an emergency vehicle, or is similar in appearance to a blue light designed for use by an emergency vehicle; and

(2) Can be operated by use of the vehicle's battery, the vehicle's electrical system, or a dry cell battery.

(d) Repealed by Session Laws 1999-249, s. 1.

(e) Violation of subsection (a) or (c) of this section is a Class 1 misdemeanor."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

HOUSE BILL 355:
Restrict Use of Blue and Red Vehicle Lights

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 22, 2005
Introduced by:	Reps. McGee, Rapp	**Summary by:**	Robin Johnson
Version:	Second Edition		Committee Counsel

SUMMARY: House Bill 355 would prohibit the installation and use of red or blue forward-facing vehicle lights, including windshield washer lights and lights placed on vehicle dashes that are similar in appearance to law enforcement blue lights.

CURRENT LAW: Under current law it is a Class 1 misdemeanor for a person to install, activate, or use an operable red light in or on any vehicle, other than those listed in G.S. 20-130.1(b). It also is a Class 1 misdemeanor for a person to possess, activate, install or use an operable blue light in or on any vehicle other than a publicly owned vehicle used for law enforcement or a vehicle when used by law enforcement officers in the performance of their official duties. Red and blue lights are defined as those that are designed for use in an emergency vehicle or are similar in appearance to a red or blue light designed for use in an emergency vehicle.

Also, under G.S. 14-277 (*Impersonation of a law-enforcement or other public officer*), it is a Class 1 misdemeanor for a person to unlawfully operate a vehicle on a public street, highway or public vehicular area with an operating red light. It is a Class I felony to unlawfully operate a vehicle on a public street, highway, or public vehicular area with an operating blue light.

Punishment for a Class 1 misdemeanor ranges from 1-45 days of community punishment (for someone with no prior convictions) to 1-120 days of community punishment, intermediate punishment or active punishment (for someone with five or more prior convictions). Fines may be imposed with any disposition. For a Class 1 misdemeanor, the amount of the fine is in the discretion of the court. The presumptive punishment range for a Class I felony is 4-6 months of community punishment to 8-10 months of intermediate or active punishment.

BILL ANALYSIS: House Bill 355 would extend the current restriction on the use of red and blue lights to prohibit the installation, activation, and use of forward facing red or blue lights, installed on a vehicle after initial manufacture, including red or blue windshield washer lights, or the placement of a light on a dash that is similar in appearance to a blue light used by law enforcement.

Punishment levels for violations would not change.

EFFECTIVE DATE: House Bill 355 would become effective December 1, 2005, and apply to offenses committed on or after that date.

Giles Perry, co- counsel to House Judiciary III, substantially contributed to this summary.

H0355e2-SMRH

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: House Bill 355 (Second Edition)[1]

SHORT TITLE: Restrict Use of Blue and Red Vehicle Lights.

SPONSOR(S): Representatives McGee and Rapp

FISCAL IMPACT

Yes (X) No ( ) No Estimate Available ( )

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
GENERAL FUND					
Correction	Exact amount cannot be determined; no substantial impact anticipated.				
Judicial	Exact amount cannot be determined; no substantial impact anticipated.				
LOCAL GOVERNMENTS	Exact amount cannot be determined; no substantial impact anticipated.				
ADDITIONAL PRISON BEDS*	It is likely that most offenders receiving active sentences under this bill would be housed in local jails at a cost to the state of $18/day. The exception would be Class 1 misdemeanants falling in Prior Record Level III, who are eligible for active sentences long enough to be served in state prison.				
POSITIONS: (cumulative)	Exact amount cannot be determined; no additional positions anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch; Local Governments

EFFECTIVE DATE: December 1, 2005

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: This bill amends G.S. 20-130.1 to specify that forward-facing red and blue vehicle lights installed on a vehicle after initial manufacture are included in the current prohibition of red and blue vehicle lights. The second edition eliminates specific references to windshield washer lights and blue lights placed on a vehicle dash similar in appearance to those used by law enforcement. Possession or use of these lights in violation of this statute would be a Class 1 misdemeanor.

[1] Changes to the second edition of the bill do not affect the fiscal impact assessment from the first edition.

ASSUMPTIONS AND METHODOLOGY:

General

The Administrative Office of the Courts (AOC) notes that offenders could arguably be charged under current G.S. 20-130.1 for possession of the types of lights prohibited by this bill. However, there is no evidence to indicate that offenders are presently being charged for possession of these lights. As such, additional charges and convictions would be expected to result from this bill.

Due to lack of data regarding the number of vehicles in operation with these lights, it is not possible to estimate the number of offenders eligible to be charged under this legislation. Likewise, because this legislation expands the scope of an existing offense, there is no historical data from which to estimate the number of additional charges and convictions that might occur due to this bill. However, because of the small number of charges and convictions for similar offenses under existing law, the fiscal impact associated with this bill is not expected to be substantial.

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2005 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory group, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.*

Because this bill would expand the scope of an existing offense, the Sentencing Commission has no historical data from which to project the impact that this legislation would have on prison population. In FY 2003-04, there were 179 convictions under existing G.S. 20-131.1. No data is available regarding how many, if any, of these convictions were for possession of the types of lights specifically prohibited by this bill. Also, due to lack of data regarding the number of vehicles in operation with forward-facing red and blue lights, it is not possible to estimate the volume of offenses that might be committed under this bill.

- In FY 2003-04, 19 percent of Class 1 misdemeanors resulted in active sentences and the average active sentence length was 43 days.
- Offenders with active sentences of less than ninety days are housed in county jails.
- DOC reimburses counties for housing offenders between thirty and ninety days at a rate of $18 per day per offender. If, for example, one offender were sentenced to 43 days active time as a result of this bill, costs to DOC to reimburse the county would be $774.
- The remaining 81 percent of Class 1 misdemeanants received non-active sentences. For those offenders sentenced to supervised probation, the Division of Community Correction

(DCC) would incur costs of $1.87 per offender per day. Offenders sentenced to community service would cost $0.67 per offender per day, and offenders given unsupervised probation would not impact DCC.

Because most Class 1 misdemeanants serving active time as a result of this bill would be housed in county jails, this legislation is not expected to significantly impact prison population.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

In calendar year 2004, AOC data indicates that 1,032 defendants were charged under current G.S. 20-130.1 for unlawful use of red and blue vehicle lights. No data exists regarding how many, if any, of these charges were for possession of the lights prohibited by this bill. Because we cannot estimate the number of offenses that would be committed under this legislation, we are unable to quantify the number of new charges that the Court system would handle.

Based on the costs of time in court, attorney preparation time, and indigent defense, the average estimated cost to process one Class 1 misdemeanor is $5,000 per trial and $219 per guilty plea. The trial cost includes an estimated $2,627 in jury fees, costs of time in court, and attorney costs and an additional $2,373 in indigent defense. Based on prior-year data, the majority of any new Class 1 misdemeanor charges are likely to be settled by plea.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Aaron Paul and Jim Mills

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Fiscal Research Division

Official
Fiscal Research Division
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GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1400

Committee Substitute Favorable 5/17/05

Short Title: School Bus Safety Act. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT TO INCREASE THE PENALTY FOR PASSING A STOPPED SCHOOL BUS AND TO MAKE SCHOOL BUS STOPS SAFER.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-217 reads as rewritten:

"(a) The driver of any vehicle upon approaching from any direction on the same street, highway, or public vehicular area any school bus (including privately owned buses transporting children and school buses transporting senior citizens under G.S. 115C-243), while the bus is displaying its mechanical stop signal or flashing red stoplights, and is stopped for the purpose of receiving or discharging passengers, shall bring the vehicle to a full stop ~~before passing or attempting to pass the bus,~~ and shall remain stopped until the mechanical stop signal has been withdrawn, the flashing red stoplights have been turned off, and the bus has moved ~~on.~~on before passing or attempting to pass the bus.

(b) The provisions of this section are applicable only in the event the school bus bears upon the front and rear a plainly visible sign containing the words ~~"school bus" in letters not less than eight inches in height.~~'school bus.'

(c) Notwithstanding the provisions of subsection (a) of this section, the driver of a vehicle traveling in the opposite direction from the school bus, upon any road, highway or city street which has been divided into two roadways, so constructed as to separate vehicular traffic between the two roadways by an intervening space (including a center lane for left turns if the roadway consists of at least four more lanes) or by a physical barrier, need not stop upon meeting and passing any school bus which has stopped in the roadway across such dividing space or physical barrier.

(d) It shall be unlawful for any school bus driver to stop and receive or discharge passengers or for any principal or superintendent of any school, routing a school bus, to authorize the driver of any school bus to stop and receive or discharge passengers upon any roadway described by subsection (c) of this section where passengers would be required to cross the roadway to reach their destination or to board the bus; provided,

that passengers may be discharged or received at points where pedestrians and vehicular traffic are controlled by adequate stop-and-go traffic signals.

(e) ~~Any~~ Except as provided in subsection (g) of this section, any person violating the provisions of this section shall be guilty of a Class ~~2~~1 misdemeanor.

(f) Expired.

(g) Any person who violates subsection (a) of this section and willfully strikes any person causing serious bodily injury to that person shall be guilty of a Class I felony."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 1400

Committee Substitute Favorable 5/17/05

PROPOSED SENATE COMMITTEE SUBSTITUTE H1400-CSRH-49 [v.3]

6/22/2005 4:52:01 PM

Short Title: School Bus Safety Act. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT TO INCREASE THE PENALTY FOR PASSING A STOPPED SCHOOL BUS AND TO MAKE SCHOOL BUS STOPS SAFER.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-217 reads as rewritten:

"(a) ~~The driver of any vehicle upon approaching from any direction on the same street, highway, or public vehicular area any school bus (including privately owned buses transporting children and school buses transporting senior citizens under G.S. 115C-243), while the bus is displaying its mechanical stop signal or flashing red stoplights, and is stopped for the purpose of receiving or discharging passengers, shall bring the vehicle to a full stop before passing or attempting to pass the bus, and shall remain stopped until the mechanical stop signal has been withdrawn, the flashing red stoplights have been turned off, and the bus has moved on.~~When a school bus is displaying its mechanical stop signal or flashing red lights and the bus is stopped for the purpose of receiving or discharging passengers, the driver of any other vehicle that approaches the school bus from any direction on the same street, highway, or public vehicular area shall bring that other vehicle to a full stop and shall remain stopped. The driver of the other vehicle shall not proceed to move, pass, or attempt to pass the school bus until after the mechanical stop signal has been withdrawn, the flashing red stoplights have been turned off, and the bus has started to move.

(b) ~~The provisions of this section are applicable~~ For the purpose of this section, a school bus includes a public school bus transporting children or school personnel, a public school bus transporting senior citizens under G.S. 115C-243, or a privately owned bus transporting children. This section applies only in the event the school bus bears upon the front and rear a plainly visible sign containing the words ~~"school bus" in letters not less than eight inches in height.~~'school bus.'

(c) Notwithstanding ~~the provisions of~~ subsection (a) of this section, the driver of a vehicle traveling in the opposite direction from the school bus, upon any road, highway or city street ~~which~~ that has been divided into two roadways, so constructed as to separate vehicular traffic between the two roadways by an intervening space (including a center lane for left turns if the roadway consists of at least four more lanes) or by a physical barrier, need not stop upon meeting and passing any school bus ~~which~~ that has stopped in the roadway across ~~such~~ the dividing space or physical barrier.

(d) It shall be unlawful for any school bus driver to stop and receive or discharge passengers or for any principal or superintendent of any school, routing a school bus, to authorize the driver of any school bus to stop and receive or discharge passengers upon any roadway described by subsection (c) of this section where passengers would be required to cross the roadway to reach their destination or to board the bus; provided, that passengers may be discharged or received at points where pedestrians and vehicular traffic are controlled by adequate stop-and-go traffic signals.

(e) ~~Any~~ Except as provided in subsection (g) of this section, any person violating ~~the provisions of~~ this section shall be guilty of a Class ~~2~~1 misdemeanor.

(f) Expired.

(g) Any person who violates subsection (a) of this section and willfully strikes any person causing serious bodily injury to that person shall be guilty of a Class I felony."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

HOUSE BILL 1400:
School Bus Safety Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 22, 2005
Introduced by:	Rep. Folwell	**Summary by:**	Robin Johnson
Version:	PCS to Second Edition H1400-CSRH-49[v.3]		Committee Counsel

SUMMARY: House Bill 1400 would amend the statute concerning when a motor vehicle must stop for school buses, increases the penalty for violations of the section and creates a new penalty.

The PCS makes grammatical and other clarifying changes.

CURRENT LAW: G.S. 20-217 provides that a motorist approaching a school bus from any direction on the same street as the school bus while the school bus is displaying its mechanical stop sign or flashing red stoplights must bring the vehicle to a full stop before passing or attempting to pass the bus and must remain stopped until the stop signal has been withdrawn, the flashing red stoplights turned off and the bus has moved on. In order for there to be a violation, the bus must have "school bus" written on it in letters that are not less than eight inches in height.

A violation of the section results in a Class 2 misdemeanor. Punishment for a Class 2 misdemeanor ranges from 1-30 days of community punishment (for someone with no prior convictions) to 1-60 days of community punishment, intermediate punishment or active punishment (for someone with five or more prior convictions).

Passing a stopped school bus results in five driver's license points and four insurance points.

BILL ANALYSIS:

House Bill 1400 would clarify that a driver must bring a vehicle to a full stop and must remain stopped until the mechanical stop signal has been withdrawn, the flashing red stoplights have been turned off and the bus has started to move. The bill also would eliminate the height restriction for the words "school bus" and would simply require that the words are plainly visible on the front and rear of the bus.

The penalty for violation of the G.S. 20-217 would be increased to a Class 1 misdemeanor. Punishment for a Class 1 misdemeanor ranges from 1-45 days of community punishment (for someone with no prior convictions) to 1-120 days of community punishment, intermediate punishment or active punishment (for someone with five or more prior convictions). Fines may be imposed with any disposition. For a Class 1 misdemeanor, the amount of the fine is in the discretion of the court. (This increase in penalty would apply to any violation of the statute, including subsection (b), which prohibits school bus drivers from receiving or discharging a student on a divided highway where the student must cross the highway to reach his or her destination.)

The bill also would add a new penalty of a Class I felony if a person violates the statute and willfully strikes and causes serious bodily injury to a person. The presumptive punishment range for a Class I felony is 4-6 months of community punishment to 8-10 months of intermediate or active punishment.

EFFECTIVE DATE: The bill would become effective December 1, 2005 and apply to offenses committed on or after that date.

Drupti Chauhan, co counsel to House Judiciary II, substantially contributed to this summary.

H1400e2-SMRH-CSRH-49v3

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: House Bill 1400 (Second Edition)

SHORT TITLE: School Bus Safety Act.

SPONSOR(S): Representative Folwell

FISCAL IMPACT

Yes (X) No ( ) No Estimate Available ( )

	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10
GENERAL FUND					
Correction	Exact amount cannot be determined; small increase in payments by DOC to local jails for offenders with active sentences longer than thirty days (see pg. 2 for details).				
Judicial	$28,086	$48,147	$50,554	$53,082	$55,736
LOCAL GOVERNMENTS	Exact amount cannot be determined; no substantial impact anticipated.				
ADDITIONAL PRISON BEDS*	Exact amount cannot be determined; no substantial impact anticipated.				
POSITIONS: (cumulative)	Exact amount cannot be determined; no additional positions anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch; Local Governments

EFFECTIVE DATE: December 1, 2005

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: Current G.S. 20-217(a) prohibits passing or attempting to pass a stopped school bus which is loading or unloading passengers. This bill would reclassify a violation of this provision from a Class 2 to a Class 1 misdemeanor. Additionally, the bill enacts G.S. 20-217(g), providing for a new Class I felony to pass or attempt to pass a stopped school bus and willfully strike a person causing serious bodily injury.

ASSUMPTIONS AND METHODOLOGY:

Summary

Class 2 → Class 1 Misdemeanor

Elevating the penalty from a Class 2 to a Class 1 misdemeanor under G.S. 20-217(e) for passing a stopped school bus that is loading or unloading passengers would be expected to lead to longer sentences for convicted offenders and an increase in payments by the Department of Correction (DOC) to local jails for housing offenders with active sentences. Additionally, costs in district court would be expected to increase due to more vigorous defense and prosecution as a result of the increased penalty for the offense. Cost estimates for the Courts due to this provision are shown in the table on the first page. Due to lack of data on the number of convictions for this offense in the past, the cost to DOC to reimburse local jails for offenders with active sentences cannot be determined.

New Class I Felony

Class I felony convictions for willfully striking a person and causing severe injury while unlawfully passing a stopped school bus would be expected to result in the need for additional prison beds and would have an associated impact on the Department of Correction. To dispose of new Class I felony charges, workload and costs in superior court would also be expected to increase. Because the offense is new, no historical data is available on the number of charges and convictions that would occur for this offense.

Division of Motor Vehicles data from FY 2003-04 indicates that 4 pedestrians were struck by other vehicles in school bus related accidents. It is unknown how many of these incidents involved a pedestrian being struck willfully, resulted in severe injury and involved vehicles unlawfully passing a stopped school bus and could thus result in a Class I felony charge or conviction. However, given the relatively small number of incidents that could potentially result in a new charge or conviction, the impact on the Courts and Department of Correction due to this provision is not expected to be substantial.

General

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2005 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory group, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.*

Because the Sentencing and Policy Advisory Commission does not maintain data on Class 2 and Class 3 misdemeanor traffic offenses, the number of convictions for current violations of G.S. 20-217(a) is unknown. As such, the cost associated with convictions elevated from Class 2 to Class 1 misdemeanors due to this bill cannot be determined. Given the relatively small number of school bus related accidents in which a pedestrian was struck by another vehicle (see "General"), the number of new Class I felony convictions, and the associated cost, is not expected to be substantial.

Class 2 → Class 1 Misdemeanor: In FY 2003-04, 19 percent of Class 1 misdemeanants, as opposed to 15 percent of Class 2 misdemeanants, received active sentences, and the average estimated sentence length was 43 days, as opposed to 23 days for Class 2. Because active sentences of less than ninety days are served in county jails, Class 1 misdemeanor convictions resulting from this legislation are not expected to significantly impact prison population. However, convictions elevated from Class 2 to Class 1 misdemeanors would be expected to impact local jail populations, as Class 1 misdemeanors carry a longer sentence and are slightly more likely to be active, on average. DOC reimburses counties for housing offenders sentenced to between thirty and ninety days at a rate of $18 per offender per day. Thus, elevating this offense from a Class 2 to Class 1 misdemeanor would be likely to increase payments by DOC to counties for housing offenders sentenced to active time under this bill.

New Class I Felony: In FY 2003-04, 11 percent of Class I felony convictions resulted in active sentences and the average minimum active sentence length was seven months with a corresponding maximum of nine months. If, for example, there were ten additional Class I convictions for this offense per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and two additional prison beds the second year. The average annual operating cost for one prison bed in FY 2006-07 will be an estimated $24,740.

Non-Active Sentences: As Class 1 misdemeanants are slightly less likely to receive non-active sentences, convictions elevated from Class 2 to Class 1 misdemeanors due to this bill would be expected to result in some cost savings to the Division of Community Corrections (DCC). Of Class I felony offenders given a non-active sentence, 45 percent received intermediate and 55 percent received a community sanction. Probation officers in DCC supervise offenders with intermediate sanctions at an estimated cost of $10.94 per day for the first six months and $1.87 per day thereafter. (This cost estimate is based on the average cost and duration of intensive probation, the most common intermediate sanction.) The estimated cost for a supervised community offender is $1.87 per day.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks, and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

AOC data for calendar year 2004 show 1,054 defendants charged with Class 2 misdemeanors under G.S. 20-217 for unlawfully passing a stopped school bus. If reclassified as Class 1 misdemeanors, AOC anticipates that additional court time and attorney preparation time would be

needed to dispose of the charges as a result of more vigorous defense and prosecution. For any new Class I felony charges for willfully striking and severely injuring a person while passing a stopped school bus, superior court workload and costs would increase. The costs associated with this new Class I felony cannot be determined due to lack of historical data. However, DMV data (see "General") suggests that the number of new charges may not be substantial.

AOC estimates that the increase in cost of processing these 1,054 charges as Class 1 rather than Class 2 misdemeanors would be $48,147 in the first full year. This cost reflects presumed increases in trial rates, trial length, attorney preparation time, and time to handle pleas. Based on the costs of attorney preparation, and court time, the cost to dispose of these cases as Class 2 misdemeanors would be an estimated $57,937, with an additional $29,094 for indigent defense. As Class 1 misdemeanors, the cost would be an estimated $91,882 for attorney and court costs and an additional $43,296 for indigent defense. The figures in the box on the front page reflect the difference in total cost ($48,147), inflated at a rate of five percent annually, and adjusted in FY 2005-06 to reflect only the seven months for which the bill would be effective.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission; Division of Motor Vehicles.

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Aaron Paul and Jim Mills

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

Official
Fiscal Research Division
Publication

DATE: May 19, 2005

Signed Copy Located in the NCGA Principal Clerk's Offices

Meeting Cancelled

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	June 28, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 804	Order of Payment/Equitable Distribution.	Representative Hackney Representative Goodwin
HB 923	Amend Postseparation Support Laws.	Representative Hackney Representative Goodwin
HB 1221	Parenting Coordinator Established.	Representative Hackney
HB 1318	Consider Tax Consequences/Equit. Distribution.	Representative Hackney Representative Goodwin
HB 1417	Revise Judicial Standards Commission.	Representative Haire

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk
Reading Clerk

SENATE
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AND
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Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, June 28, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 804	Order of Payment/Equitable Distribution.	Representative Hackney Representative Goodwin
HB 923	Amend Postseparation Support Laws.	Representative Hackney Representative Goodwin
HB 1221	Parenting Coordinator Established.	Representative Hackney
HB 1417	Revise Judicial Standards Commission.	Representative Haire

Presentations

Other Business

Adjournment

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, June 28, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **288** MV Move-Over Law Changes.

Draft Number:	PCS70523
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1400** School Bus Safety Act.

Draft Number:	PCS80432
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 2

Committee Clerk Comments:

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	June 30, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 804	Order of Payment/Equitable Distribution.	Representative Hackney Representative Goodwin
HB 923	Amend Postseparation Support Laws.	Representative Hackney Representative Goodwin
HB 1221	Parenting Coordinator Established.	Representative Hackney
HB 1417	Revise Judicial Standards Commission.	Representative Haire

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, June 30, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 804	Order of Payment/Equitable Distribution.	Representative Hackney Representative Goodwin
HB 923	Amend Postseparation Support Laws.	Representative Hackney Representative Goodwin
HB 1221	Parenting Coordinator Established.	Representative Hackney
HB 1417	Revise Judicial Standards Commission.	Representative Haire

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

June 30, 2005

Senator Austin Allran, Vice Chairman, presided in the absence of Senator Hartsell and called the Senate Judiciary II Committee to order on June 30, 2005.

Senator Kinnaird was recognized for a moment of personal privilege.

HB 804 (Order of Payment/Equitable Distribution.) Representative Hackney was recognized to explain the bill. Questions from Senators Forrester and Goodall were answered by Representative Hackney. Senator Kinnaird moved for a favorable report. All voted and the motion carried.

HB 923 (Amend Postseparation Support Laws.) Representative Hackney was recognized to explain the bill. Representative Hackney answered Senator Bingham's question. Senator Dannelly moved for a favorable report. All voted and the motion carried.

HB 1221 (Parenting Coordinator Established.) Senator Allran asked for a motion to accept the Proposed Committee Substitute for purposes of discussion. Senator Dannelly so moved, all voted and the motion carried. Representative Hackney was recognized to explain the bill. Questions from Senators Snow, Goodall and Dorsett were answered by Representative Hackney, and Kory Goldsmith, Staff Attorney. Mr. John Rustin, Director of Government Relations for the North Carolina Family Policy Council, spoke on the bill. Senator Atwater moved for a favorable report to the Committee Substitute, unfavorable to the original bill. All voted and the motion carried.

HB 1417 (Revise Judicial Standards Commission.) The Proposed Committee Substitute for this bill had previously been accepted. Senator Allran sent forward a technical amendment and moved that it be accepted. Representative Haire accepted the amendment. All voted and the motion carried. Representative Haire explained the bill. Questions from Senators Bingham, Jacumin, Forrester, Apodaca and Kinnaird were answered by Representative Haire, Judge Martin, of the Judicial Standards Commission and Robin Johnson, Staff Attorney. Michelle Frazier, representing the Bar Association, spoke on the bill. Senator Bingham moved for a favorable report to the Committee Substitute, unfavorable to the original bill. All voted and the motion carried.

Senator Dorsett requested that all bills and handouts be distributed simultaneously at the beginning of the meeting so that the members could have them prior to their being called.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, June 30, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B.(CS #1) **804** Order of Payment/Equitable Distribution.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **923** Amend Postseparation Support Laws.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 2

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, July 05, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1221** Parenting Coordinator Established.

Draft Number:	PCS70530
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1417** Revise Judicial Standards Commission.

Draft Number:	PCS10375
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 2

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

June 30, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John McCoy	GOV Office
[signature]	AOC
[signature]	NASW, NC
Sally Cameron	NC Psychological Assoc
Stephanie Erba	SBE
[signature]	NCFPC
[signature]	NCFPC
[signature]	Court of Appeals, Judicial Standards Comm
Paul Ross	Judicial Stds Comm
David Fox	Alley Associates
[signature]	AOC

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

June 30, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
[signature]	PL Justice Ctr
[signature]	NCCCC
Dana Simpson	Smith Anderson
Christine Craig	NAMI-Wake
BRIAN LEWIS	Covenant w/ NC's Children
[signature]	The Pulse Group
DOUG HERON	NC BAR ASSOC
MIKE MANN	NCCBAA
Colleen Kochanek	NCAWA

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 804

Committee Substitute Favorable 3/31/05

Short Title: Order of Payment/Equitable Distribution. (Public)

Sponsors:

Referred to:

March 21, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE ORDER OF PAYMENT OF A CLAIM FOR EQUITABLE DISTRIBUTION UNDER THE LAWS RELATING TO THE ADMINISTRATION OF DECEDENTS' ESTATES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 28A-19-6 reads as rewritten:

"**§ 28A-19-6. Order of payment of claims.**

After payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order:

First class. Claims which by law have a specific lien on property to an amount not exceeding the value of such property.

Second class. Funeral expenses to the extent of two thousand five hundred dollars ($2,500). This limitation shall not include cemetery lot or gravestone. The preferential limitation herein granted shall be construed to be only a limit with respect to preference of payment and shall not be construed to be a limitation on reasonable funeral expenses which may be incurred; nor shall the preferential limitation of payment in the amount of two thousand five hundred dollars ($2,500) be diminished by any Veterans Administration, social security or other federal governmental benefits awarded to the estate of the decedent or to his or her beneficiaries.

Third class. All dues, taxes, and other claims with preference under the laws of the United States.

Fourth class. All dues, taxes, and other claims with preference under the laws of the State of North Carolina and its subdivisions.

Fifth class. Judgments of any court of competent jurisdiction within the State, docketed and in force, to the extent to which they are a lien on the property of the decedent at his death.

Sixth class. Wages due to any employee employed by the decedent, which claim for wages shall not extend to a period of more than 12 months next preceding the death; or if such employee was employed for the year current at the decease, then from the time

of such employment; for medical services within the 12 months preceding the decease; for drugs and all other medical supplies necessary for the treatment of such decedent during the last illness of such decedent, said period of last illness not to exceed 12 months.

Seventh class. A claim for equitable distribution.

~~Seventh~~ Eighth class. All other claims."

SECTION 2. This act is effective when it becomes law and applies to the estates of persons who died on or after June 12, 2003, provided that an agreement entered into or performed pursuant to G.S. 28A-19-19(b) before the effective date is not affected by this act.

HOUSE BILL 804:
Order of Payment/Equitable Distribution

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 28, 2005
Introduced by:	Reps. Hackney, Goodwin	**Summary by:**	Robin Johnson
Version:	Second Edition		Committee Counsel

SUMMARY: House Bill 804 would amend G.S. 28A-19-6, which governs the order of payment of claims against a decedent's estate, by placing a claim for equitable distribution in a separate, seventh class of eight classes. "All other claims", which currently comprise the seventh class, would be placed in a newly created eighth class.

CURRENT LAW: Chapter 28A of the General Statutes provides the structure for administering decedents' estates. G.S. 28A-19-6 creates the order for paying claims against the estate by establishing seven classes in which claims fall. Claims in the first class must be paid first, claims in the second class are paid next, and so on.

BACKGROUND: Equitable distribution is the process by which a court determines what is marital property and divisible property in a divorce. The court then provides for an "equitable distribution" of the property in accordance with G.S. 50-20 (see attached).

In 2003, G.S. 50-20 was amended by adding a new subsection (l) to provide that Article 19 of Chapter 28A (*Claims Against the Estate*) would apply to a claim for equitable distribution against the estate of a deceased spouse. However, it is unclear whether the 2003 amendment adequately delineated that the priority system for payment of claims applies to a claim for equitable distribution. Also, assuming a court would find that the priority system does apply to a claim for equitable distribution, it would place an equitable distribution claim in the final class of claims with "all other claims."

BILL ANALYSIS: House Bill 804 would clarify that the priority system for payment of claims against a decedent's estate, as set out in G.S. 28A-19-6, applies to a claim for equitable distribution and would place an equitable distribution claim in a separate, seventh class above the final class of "all other claims."

EFFECTIVE DATE: House Bill 804 would be effective when it becomes law and apply to the estates of persons who died on or after June 12, 2003. (June 12, 2003 is the effective date of the previous change to G.S. 50-20 discussed above.) However, House Bill 804 would not affect an agreement between an estate's personal representative and a claimant for equitable distribution entered into or performed before this bill's effective date.

Tim Hovis, co-counsel to the House Committee on Judiciary I, substantially contributed to this summary.

H0804e2-SMRH

§ 50-20. Distribution by court of marital and divisible property.

(a) Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section.

(b) For purposes of this section:

(1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection. Marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act. It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. This presumption may be rebutted by the greater weight of the evidence.

(2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property.

(3) "Distributive award" means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code.

(4) "Divisible property" means all real and personal property as set forth below:

a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

b. All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.

c. Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.

d. Increases and decreases in marital debt and financing charges and interest related to marital debt.

(c) There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection:

(1) The income, property, and liabilities of each party at the time the division of property is to become effective.

(2) Any obligation for support arising out of a prior marriage.

(3) The duration of the marriage and the age and physical and mental health of both parties.

(4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects.

(5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.

(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.

(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.

(9) The liquid or nonliquid character of all marital property and divisible property.

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.

(11) The tax consequences to each party.

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.

(11b) In the event of the death of either party prior to the entry of any order for the distribution of property made pursuant to this subsection:

a. Property passing to the surviving spouse by will or through intestacy due to the death of a spouse.

b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of a spouse.

c. Property passing to the surviving spouse from life insurance, individual retirement accounts, pension or profit-sharing plans, any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary (excluding any benefits under the federal social security system), or any other retirement accounts or contracts, due to the death of a spouse.

d. The surviving spouse's right to claim an "elective share" pursuant to G.S. 30-3.1 through G.S. 30-33, unless otherwise waived.

(12) Any other factor which the court finds to be just and proper.

(c1) Notwithstanding any other provision of law, a second or subsequent spouse acquires no interest in the marital property and divisible property of his or her spouse from a former marriage until a final determination of equitable distribution is made in the marital property and divisible property of the spouse's former marriage.

(d) Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property or divisible property, or both, in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

(e) Subject to the presumption of subsection (c) of this section that an equal division is equitable, it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

(f) The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

(g) If the court orders the transfer of real or personal property or an interest therein, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(h) If either party claims that any real property is marital property or divisible property, that party may cause a notice of lis pendens to be recorded pursuant to Article 11 of Chapter 1 of the General Statutes. Any person whose conveyance or encumbrance is recorded or whose interest is obtained by descent, prior to the filing of the lis pendens, shall take the real property free of any claim resulting from the equitable distribution proceeding. The court may cancel the notice of lis pendens upon substitution of a bond with surety in an amount determined by the court to be sufficient provided the court finds that the claim of the spouse against property subject to the notice of lis pendens can be satisfied by money damages.

(i) Upon filing an action or motion in the cause requesting an equitable distribution or alleging that an equitable distribution will be requested when it is timely to do so, a party may seek injunctive relief pursuant to G.S. 1A-1, Rule 65 and Chapter 1, Article 37, to prevent the disappearance, waste or conversion of property alleged to be marital property, divisible property, or separate property of the party seeking relief. The court, in lieu of granting an injunction, may require a bond or other assurance of sufficient amount to protect the interest of the other spouse in the property. Upon application by the owner of separate property which was removed from the marital home or possession of its owner by the other spouse, the court may

enter an order for reasonable counsel fees and costs of court incurred to regain its possession, but such fees shall not exceed the fair market value of the separate property at the time it was removed.

(i1) Unless good cause is shown that there should not be an interim distribution, the court may, at any time after an action for equitable distribution has been filed and prior to the final judgment of equitable distribution, enter orders declaring what is separate property and may also enter orders dividing part of the marital property, divisible property or debt, or marital debt between the parties. The partial distribution may provide for a distributive award and may also provide for a distribution of marital property, marital debt, divisible property, or divisible debt. Any such orders entered shall be taken into consideration at trial and proper credit given.

Hearings held pursuant to this subsection may be held at sessions arranged by the chief district court judge pursuant to G.S. 7A-146 and, if held at such sessions, shall not be subject to the reporting requirements of G.S. 7A-198.

(j) In any order for the distribution of property made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property and divisible property has been equitably divided.

(k) The rights of the parties to an equitable distribution of marital property and divisible property are a species of common ownership, the rights of the respective parties vesting at the time of the parties' separation.

(l) *(1)* ***A claim for equitable distribution, whether an action is filed or not, survives the death of a spouse so long as the parties are living separate and apart at the time of death.***

(2) ***The provisions of Article 19 of Chapter 28A of the General Statutes shall be applicable to a claim for equitable distribution against the estate of the deceased spouse.***

(3) ***Any claim for equitable distribution against the surviving spouse made by the estate of the deceased spouse must be filed with the district court within one year of the date of death of the deceased spouse or be forever barred.***

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 923

Committee Substitute Favorable 4/26/05

Short Title: Amend Postseparation Support Laws. (Public)

Sponsors:

Referred to:

March 28, 2005

A BILL TO BE ENTITLED

AN ACT AMENDING THE LAWS REGULATING POSTSEPARATION SUPPORT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 50-16.1A(4) reads as rewritten:

"As used in this Chapter, unless the context clearly requires otherwise, the following definitions apply:

...

(4) "Postseparation support" means spousal support to be paid until the earlier of ~~either the date specified in the order of postseparation support, or an order awarding or denying alimony.~~ any of the following:

a. The date specified in the order for postseparation support.

b. The entry of an order awarding or denying alimony.

c. The dismissal of the alimony claim.

d. The entry of a judgment of absolute divorce if no claim of alimony is pending at the time of entry of the judgment of absolute divorce.

e. Termination of postseparation support as provided in G.S. 50-16.9(b).

Postseparation support may be ordered in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce. However, if postseparation support is ordered at the time of the entry of a judgment of absolute divorce, a claim for alimony must be pending at the time of the entry of the judgment of divorce."

SECTION 2. This act becomes effective October 1, 2005, and applies to all postseparation support orders issued on or after that date.

HOUSE BILL 923:
Amend Postseparation Support Laws

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 28, 2005
Introduced by:	Reps. Hackney, Goodwin	**Summary by:**	Robin Johnson
Version:	Second Edition		Committee Counsel

SUMMARY: ***House Bill 923 would amend the definition of "postseparation support" as used in Chapter 50 of the General Statutes (Divorce and Alimony) to add the following new "triggers" for the termination of postseparation support:***

- ***Dismissal of a claim for alimony; or***
- ***Entry of a judgment of absolute divorce, if no claim for alimony is pending at that time.***

In addition, as a condition for ordering postseparation support at the time of entry of a judgment for absolute divorce, the bill would require that there be a pending alimony claim.

CURRENT LAW: Under existing law, postseparation support, if ordered, is paid until the earlier of the following:

- The date specified in the order of postseparation support;
- An order awarding or denying alimony is entered;

Postseparation support also is terminated:

- If the dependent spouse remarries or engages in cohabitation; or
- Upon the death of either the supporting or dependent or spouse.

EFFECTIVE DATE: House Bill 923 would be effective October 1, 2005, and apply to postseparation support orders issued on or after that date.

BACKGROUND: Postseparation support may be requested in an action for divorce, annulment, or alimony without divorce. The court may order spousal support for a spouse substantially dependent upon the other spouse based on the financial needs of the parties, considering their accustomed standard of living, income-earning abilities, debt service obligations, expenses reasonably necessary to support each of them, and each party's legal obligations to support any other persons. Assuming there is no marital misconduct, the dependent spouse is entitled to postseparation support if the court finds the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay.

Tim Hovis, co-counsel to the House Committee on Judiciary I, substantially contributed to this summary.

H0923e2-SMRH

§ 50-16.1A. Definitions.

As used in this Chapter, unless the context clearly requires otherwise, the following definitions apply:

(1) "Alimony" means an order for payment for the support and maintenance of a spouse or former spouse, periodically or in a lump sum, for a specified or for an indefinite term, ordered in an action for divorce, whether absolute or from bed and board, or in an action for alimony without divorce.

(2) "Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.

(3) "Marital misconduct" means any of the following acts that occur during the marriage and prior to or on the date of separation:

a. Illicit sexual behavior. For the purpose of this section, illicit sexual behavior means acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.1(4), voluntarily engaged in by a spouse with someone other than the other spouse;

b. Involuntary separation of the spouses in consequence of a criminal act committed prior to the proceeding in which alimony is sought;

c. Abandonment of the other spouse;

d. Malicious turning out-of-doors of the other spouse;

e. Cruel or barbarous treatment endangering the life of the other spouse;

f. Indignities rendering the condition of the other spouse intolerable and life burdensome;

g. Reckless spending of the income of either party, or the destruction, waste, diversion, or concealment of assets;

h. Excessive use of alcohol or drugs so as to render the condition of the other spouse intolerable and life burdensome;

i. Willful failure to provide necessary subsistence according to one's means and condition so as to render the condition of the other spouse intolerable and life burdensome.

(3a) through (3d) Reserved for future codification purposes.

(3e) "Payor" means any payor, including any federal, State, or local governmental unit, of disposable income to an obligor. When the payor is an employer, payor means employer as defined under 20 U.S.C. § 203(d) of the Fair Labor Standards Act.

(4) "Postseparation support" means spousal support to be paid until the earlier of either the date specified in the order of postseparation support, or an order awarding or denying alimony. Postseparation support may be ordered in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce.

(5) "Supporting spouse" means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support.

§ 50-16.9. Modification of order.

(a) An order of a court of this State for alimony or postseparation support, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. This section shall not apply to orders entered by consent before October 1, 1967.

Any motion to modify or terminate alimony or postseparation support based on a resumption of marital relations between parties who remain married to each other shall be determined pursuant to G.S. 52-10.2.

(b) If a dependent spouse who is receiving postseparation support or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the postseparation support

or alimony shall terminate. Postseparation support or alimony shall terminate upon the death of either the supporting or the dependent spouse.

As used in this subsection, cohabitation means the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations. Nothing in this section shall be construed to make lawful conduct which is made unlawful by other statutes.

(c) When an order for alimony has been entered by a court of another jurisdiction, a court of this State may, upon gaining jurisdiction over the person of both parties in a civil action instituted for that purpose, and upon a showing of changed circumstances, enter a new order for alimony which modifies or supersedes such order for alimony to the extent that it could have been so modified in the jurisdiction where granted.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 3

HOUSE BILL 1221

Committee Substitute Favorable 5/25/05

Third Edition Engrossed 5/26/05

Short Title: Parenting Coordinator Established. (Public)

Sponsors:

Referred to:

April 14, 2005

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH THE APPOINTMENT OF PARENTING COORDINATORS IN DOMESTIC CHILD CUSTODY ACTIONS.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 50 of the General Statutes is amended by adding a new Article to read:

"Article 5.

"Parenting Coordinator.

"**§ 50-90. Definitions.**

As used in this Article, the following terms mean:

(1) High-conflict case. – An action brought under Article 1 of this Chapter where minor children are involved and the parties demonstrate an ongoing pattern of any of the following:

a. Excessive litigation.

b. Anger and distrust.

c. Verbal abuse.

d. Physical aggression or threats of physical aggression.

e. Difficulty in communicating about and cooperating in the care of their children.

f. Conditions that in the discretion of the court warrant the appointment of a parenting coordinator.

(2) Parenting coordinator. – An impartial person qualified under this Article, appointed by the court to assist parties in resolving issues and deciding disputed issues relating to parenting and other family issues, in actions brought under Article 1 of this Chapter where a minor child is involved, particularly, but not exclusively, in high-conflict cases.

"**§ 50-91. Appointment of parenting coordinators.**

(a) In any action brought under Article 1 of this Chapter where minor children are involved, the court may, at any time during the proceedings, upon its own motion, or by motion or agreement of the parties, appoint a parenting coordinator to assist the parties in resolving issues and decide disputed issues related to parenting and other family issues in the case as set forth in this Article. A parenting coordinator may not be appointed under this subsection if any party objects.

(b) Notwithstanding subsection (a) of this section, the court may appoint a parenting coordinator, without the consent of the parties, upon the entry of a custody order (other than an ex parte order) or parenting agreement.

(c) If the court determines that a parenting coordinator should be appointed pursuant to subsection (b) of this section, or if the parties agree without motion to the appointment of a parenting coordinator, the court shall:

(1) Complete a referral form listing contact information for the parties and their attorneys, if any, and the issues warranting the appointment of a parenting coordinator. The form shall be provided to any proposed parenting coordinator prior to his or her appointment.

(2) Appoint a parenting coordinator at which appointment the parties and their attorneys, and the proposed parenting coordinator if possible, shall be present.

"**§ 50-92. Role of parenting coordinator.**

(a) The parenting coordinator shall:

(1) Assist parents in implementing custody and visitation court orders on an ongoing basis.

(2) Reduce conflict between parents.

(3) Facilitate both parents' relationships with the children.

(4) Provide attorneys and any unrepresented party with written summaries of developments in the case.

(5) Act to resolve any issues in the implementation of the parenting plan not specifically governed by the court order over which the parents reach an impasse, until further orders are entered.

(6) Empower the parents to successfully resolve conflicts over their children on their own.

(b) The parenting coordinator shall not serve or act in any professional capacity for either or both parents or children.

(c) The parenting coordinator shall not deal directly with financial issues and shall refer financial issues to the attorneys.

(d) The appointment of a parenting coordinator shall not divest the court of its exclusive jurisdiction to determine fundamental issues of custody, visitation, and support, and the authority to exercise management and control of the case.

"**§ 50-93. Qualifications.**

A parenting coordinator shall be chosen by the court from a list maintained by the district court. To be included on the list, a parenting coordinator must provide documentation as evidence that the person meets the following criteria:

(1) Education. – Masters or doctorate in psychology, law, social work, counseling, medicine, or related degrees and relevant training or experience.

(2) Training and experience. –

a. No less than five years of related professional postdegree experience.

b. Participation in 24 hours of training in topics of developmental stages of children, dynamics of high-conflict families, stages and effects of divorce, problem solving techniques, mediation, and legal issues.

c. Participation in parenting coordinators seminars which will provide continuing education, group discussion, and peer review and support on a monthly basis.

(3) Licensing. – Current license in the parenting coordinator's area of practice, if applicable.

"**§ 50-94. Appointment conference.**

At the time of the appointment of the parenting coordinator, the court shall do the following:

(1) Explain the parenting coordinator's role, authority, and responsibilities.

(2) Determine who will provide what information to the parenting coordinator.

(3) Determine financial arrangements for the parenting coordinator's fee to be paid by each party and authorize the parenting coordinator to charge any party separately for individual contacts made necessary by that party's behavior.

(4) Inform the participants of the rules regarding communication among them and with the court.

(5) Enter the appointment order.

The parenting coordinator and any guardians ad litem shall bring to the appointment conference all necessary releases, contracts, and consents. The parenting coordinator also shall schedule the first sessions with the parties.

"**§ 50-95. Fees.**

(a) The parenting coordinator shall be entitled to reasonable compensation for services rendered and to a reasonable retainer. The parenting coordinator may request a hearing in the event of a fee dispute.

(b) The court may make the appointment of a parenting coordinator contingent upon the parties' payment of a specific fee to the parenting coordinator. The parenting coordinator shall not begin the parenting coordinator's duties until the fee has been paid.

"**§ 50-96. Meetings and communications.**

Meetings between the parenting coordinator and the parties need not follow any specific procedures, and the meetings may be informal and ex parte. All communications between the parties and the parenting coordinator shall not be confidential. The parenting coordinator and the court shall not engage in any ex parte communication.

"**§ 50-97. Actions by parenting coordinator.**

Any decision made by the parenting coordinator, in an attempt to resolve any disagreement between the parties, shall prevail until, upon motion, the matter is reviewed by the court. The parenting coordinator, any party or the attorney for any party, may request a hearing, file a motion, and schedule a hearing on an expedited basis. A parenting coordinator may be subpoenaed to appear and testify only by the judge presiding over the case.

"**§ 50-98. Reports.**

(a) The parenting coordinator shall promptly notify the court, parties, and attorneys for the parties in writing in any of the following events:

(1) The parenting coordinator determines that the existing custody order is not in the best interests of the child.

(2) The parenting coordinator determines that there exist issues in the case which the parenting coordinator is not qualified to address or resolve.

(b) Upon receipt of notice from the parenting coordinator under this section, the court shall promptly schedule the matter for review no later than two weeks following receipt of the report, and the parenting coordinator shall remain involved in the case until the review hearing.

(c) If the parties agree to any fundamental change in the order, the parenting coordinator shall send the agreement to the parties' attorneys for preparation of a consent order.

"**§ 50-99. Parenting coordinator records.**

(a) The parenting coordinator shall provide the attorneys and the parties with any written summaries of developments in the case following every meeting with the parents. Copies of any written communication with the parent coordinator shall be sent to attorneys for the parties and any unrepresented parties.

(b) The parenting coordinator shall maintain records of each meeting. These records may only be subpoenaed by order of the judge presiding over the case. These records shall be subject to an in camera inspection by the court and shall be released to the parties and their attorneys only if the court determines that the information contained in the records will assist the parties with the presentation of their case at trial.

"**§ 50-100. Modification or termination of parenting coordinator appointment.**

The court may terminate or modify the parenting coordinator appointment for good cause upon motion of either party at the request of the parenting coordinator, upon the agreement of the parties and the parenting coordinator, or by the court on its own motion. Good cause includes any of the following:

(1) Lack of reasonable progress over a significant period of time despite the best efforts of the parties and/or the parenting coordinator.

(2) Determination that the parties no longer need the assistance of a parenting coordinator.

(3) Impairment on the part of a party that significantly interferes with participating in the process.

(4) The parenting coordinator is unable or unwilling to continue to serve.

"**§ 50-101. Parenting coordinator immunity.**

A parenting coordinator shall not be liable for damages arising from acts or omissions of ordinary negligence arising in connection with that person's duties and responsibilities as a parenting coordinator. The immunity provided in this section does not apply if it is determined that the personal injury, wrongful death, property damage, or other loss arose out of the operation of a motor vehicle."

SECTION 2. This act becomes effective October 1, 2005.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 1221

Committee Substitute Favorable 5/25/05

Third Edition Engrossed 5/26/05

PROPOSED SENATE COMMITTEE SUBSTITUTE H1221-CSRC-70 [v.3]

6/29/2005 6:53:47 PM

Short Title: Parenting Coordinator Established. (Public)

Sponsors:

Referred to:

April 14, 2005

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH THE APPOINTMENT OF PARENTING COORDINATORS IN DOMESTIC CHILD CUSTODY ACTIONS.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 50 of the General Statutes is amended by adding a new Article to read:

"Article 5.

"Parenting Coordinator.

"**§ 50-90. Definitions.**

As used in this Article, the following terms mean:

(1) High-conflict case. – A child custody action involving minor children brought under Article 1 of this Chapter where the parties demonstrate an ongoing pattern of any of the following:

a. Excessive litigation.

b. Anger and distrust.

c. Verbal abuse.

d. Physical aggression or threats of physical aggression.

e. Difficulty communicating about and cooperating in the care of the minor children.

f. Conditions that in the discretion of the court warrant the appointment of a parenting coordinator.

(2) Minor child. – A person who is less than 18 years of age and who is not married or legally emancipated.

(3) Parenting coordinator. – An impartial person who meets the qualifications of G.S. 90-93.

"**§ 50-91. Appointment of parenting coordinator.**

(a) The court may appoint a parenting coordinator at any time during the proceedings of a child custody action involving minor children brought under Article 1 of this Chapter if all parties consent to the appointment. The parties may agree to limit the parenting coordinator's decision-making authority to specific issues or areas.

(b) The court may appoint a parenting coordinator without the consent of the parties upon entry of a custody order other than an ex parte order, or upon entry of a parenting plan only if the court also makes specific findings that the action is a high-conflict case, that the appointment of the parenting coordinator is in the best interests of any minor child in the case, and that the parties are able to pay for the cost of the parenting coordinator.

(c) The order appointing a parenting coordinator shall specify the issues the parenting coordinator is directed to assist the parties in resolving and deciding. The order may also incorporate any agreement regarding the role of the parenting coordinator made by the parties under subsection (a) of this section. The court shall give a copy of the appointment order to the parties prior to the appointment conference. Notwithstanding the appointment of a parenting coordinator, the court shall retain exclusive jurisdiction to determine fundamental issues of custody, visitation, and support, and the authority to exercise management and control of the case.

(d) The court shall select a parenting coordinator from a list maintained by the district court. Prior to the appointment conference, the court must complete and give to the parenting coordinator a referral form listing contact information for the parties and their attorneys, the court's findings in support of the appointment, and any agreement by the parties.

"**§ 50-92. Authority of parenting coordinator.**

(a) The authority of a parenting coordinator shall be specified in the court order appointing the parenting coordinator and shall be limited to matters that will aid the parties:

(1) Identify disputed issues.
(2) Reduce misunderstandings.
(3) Clarify priorities.
(4) Explore possibilities for compromise.
(5) Develop methods of collaboration in parenting.
(6) Comply with the court's order of custody, visitation, or guardianship.

(b) Notwithstanding subsection (a) of this section, the court may authorize a parenting coordinator to decide issues regarding the implementation of the parenting plan that are not specifically governed by the court order and which the parties are unable to resolve. The parties must comply with the parenting coordinator's decision until the court reviews the decision. The parenting coordinator, any party or the attorney for any party may request an expedited hearing to review a parenting coordinator's decision. Only the judge presiding over the case may subpoena the parenting coordinator to appear and testify at the hearing.

(c) The parenting coordinator shall not provide any professional services or counseling to either parent or any of the minor children. The parenting coordinator shall refer financial issues to the parties' attorneys.

"§ 50-93. Qualifications.

(a) To be eligible to be included on the district court's list of parenting coordinators, a person must meet all of the following requirements:

(1) Hold a masters or doctorate degree in psychology, law, social work, counseling, medicine, or a related subject area.

(2) Have at least five years of related professional post-degree experience.

(3) Hold a current license in the parenting coordinator's area of practice, if applicable.

(4) Participate in 24 hours of training in topics related to the developmental stages of children, the dynamics of high-conflict families, the stages and effects of divorce, problem solving techniques, mediation, and legal issues.

(b) In order to remain eligible as a parenting coordinator, the person must also attend monthly parenting coordinator seminars that provide continuing education, group discussion, and peer review and support.

"§ 50-94. Appointment conference.

(a) The parties, their attorneys and the proposed parenting coordinator must all attend the appointment conference.

(b) At the time of the appointment conference, the court shall do all of the following:

(1) Explain to the parties the parenting coordinator's role, authority, and responsibilities as specified in the appointment order and any agreement entered into by the parties.

(2) Determine the information each party must provide to the parenting coordinator.

(3) Determine financial arrangements for the parenting coordinator's fee to be paid by each party and authorize the parenting coordinator to charge any party separately for individual contacts made necessary by that party's behavior.

(4) Inform the parties, their attorneys, and the parenting coordinator of the rules regarding communications among them and with the court.

(5) Enter the appointment order.

(c) The parenting coordinator and any guardians ad litem shall bring to the appointment conference all necessary releases, contracts, and consents. The parenting coordinator must also schedule the first sessions with the parties.

"§ 50-95. Fees.

(a) The parenting coordinator shall be entitled to reasonable compensation from the parties for services rendered and to a reasonable retainer. The parenting coordinator may request a hearing in the event of a fee dispute.

(b) The court may make the appointment of a parenting coordinator contingent upon the parties' payment of a specific fee to the parenting coordinator. The parenting coordinator shall not begin any duties until the fee has been paid.

"§ 50-96. Meetings and communications.

Meetings between the parenting coordinator and the parties may be informal and ex parte. Communications between the parties and the parenting coordinator are not confidential. The parenting coordinator and the court shall not engage in any ex parte communications.

"**§ 50-97. Reports.**

(a) The parenting coordinator shall promptly provide written notification to the court, the parties, and attorneys for the parties if the parenting coordinator makes any of the following determinations:

(1) The existing custody order is not in the best interests of the child.

(2) The parenting coordinator is not qualified to address or resolve certain issues in the case.

(b) The court shall schedule a hearing and review the matter no later than two weeks following receipt of the report. The parenting coordinator shall remain involved in the case until the hearing.

(c) If the parties agree to any fundamental change in the child custody order, the parenting coordinator shall send the agreement to the parties' attorneys for preparation of a consent order.

"**§ 50-98. Parenting coordinator records.**

(a) The parenting coordinator shall provide the following to the attorneys for the parties and to the parties:

(1) A written summary of the developments in the case following each meeting with the parties.

(2) Copies of any other written communications.

(b) The parenting coordinator shall maintain records of each meeting. These records may only be subpoenaed by order of the judge presiding over the case. The court must review the records in camera and may release the records to the parties and their attorneys only if the court determines release of the information contained in the records will assist the parties with the presentation of their case at trial.

"**§ 50-99. Modification or termination of parenting coordinator appointment.**

(a) For good cause shown, the court may terminate or modify the parenting coordinator appointment upon motion of either party at the request of the parenting coordinator, upon the agreement of the parties and the parenting coordinator, or by the court on its own motion. Good cause includes any of the following:

(1) Lack of reasonable progress over a significant period of time despite the best efforts of the parties and the parenting coordinator.

(2) A determination that the parties no longer need the assistance of a parenting coordinator.

(3) Impairment on the part of a party that significantly interferes with the party's participation in the process.

(4) The parenting coordinator is unable or unwilling to continue to serve.

(b) If the parties agreed to the appointment of the parenting coordinator under G.S. 90-91(a), the court may terminate or modify the appointment according to that agreement or according to a subsequent agreement by the parties.

"**§ 50-100. Parenting coordinator immunity.**

A parenting coordinator shall not be liable for damages for acts or omissions of ordinary negligence arising out of that person's duties and responsibilities as a parenting coordinator. This section does not apply to actions arising out of the operation of a motor vehicle."

SECTION 2. This act becomes effective October 1, 2005.

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Fiscal Note

BILL NUMBER: House Bill 1221 (First Edition)

SHORT TITLE: Parenting Coordinator Established.

SPONSOR(S): Representative Hackney

FISCAL IMPACT

Yes ( ) **No ( )** **No Estimate Available (x)**

	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10
REVENUES:					
EXPENDITURES:					
POSITIONS (cumulative):					

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Administrative Office of the Courts

EFFECTIVE DATE: October 1, 2005

BILL SUMMARY:

Enacts new Article 5 of GS Chapter 50 to provide for the appointment of parenting coordinators to assist parties in resolving issues related to parenting and other family issues. Authorizes court to appoint parenting coordinator upon entry of a custody order or parenting agreement and allows appointment in any divorce, child custody, or child support case where minor children are involved, upon motion of the court or motion or agreement of the parties unless any party objects. Provides that role of parenting coordinator is to assist parents in implementing custody and visitation orders; reduce conflict between parents; facilitate parents' relationship with the children; resolve any issues in implementation of parenting plan until further court orders are entered; and empower parents to successfully resolve conflicts over their children on their own. Specifies educational and experience qualifications for appointment as a parenting coordinator. Provides that coordinator is entitled to reasonable compensation for services to be paid by parties in accordance with court's order and requires fee to be paid before coordinator begins duties. Requires parties to abide by any decision of parenting coordinator resolving disagreement until matter is reviewed by court. Requires coordinator to notify court, parties, and attorneys in writing if he or she determines that existing custody order is not in best interests of the child or there exist issues in the case that

the parenting coordinator is not qualified to address or resolve. Requires coordinator to provide attorneys and parties with any written summaries of developments that are made following every meeting. Specifies how court may terminate or modify parenting coordinator order and immunity of coordinator. Effective October 1, 2005
Source: Bill Digest H.B. 1221 (04/14/0200).

ASSUMPTIONS AND METHODOLOGY: This bill creates the role of Parenting Coordinator in cases in District Court involving child custody matters. This coordinator would work with parents on a fee-for-service basis to develop plans to maintain custody of their children; the parties must pay the fee, rather than the state. Cases of this type are often very contentious in the courtroom setting. Since the role of the coordinator removes some of the most contentious components of developing custody agreements from the courtroom, cost savings can be projected from this bill, but the Administrative Office of the Courts cannot predict how often judges will make use of these coordinators.

SOURCES OF DATA: Administrative Office of the Courts, Research and Planning Section.

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Douglas R. Holbrook

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

DATE: June 6, 2005

Signed Copy Located in the NCGA Principal Clerk's Offices

HOUSE BILL 1221:
Parenting Coordinator Established

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 27, 2005
Introduced by:	Rep. Hackney	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	PCS to Third Edition H1221-CSRC-70		

SUMMARY: ***House Bill 1221 establishes a procedure for the appointment of a parenting coordinator in domestic child custody actions.***

The Proposed Committee Substitute makes technical changes. It includes a definition of "minor child", uses language from an Oklahoma statute regarding the authority of a parenting coordinator, limits the use of parenting coordinators to "high-conflict cases" in situations where both parties don't agree to the appointment, and requires that the court order appointing the parent coordinator specify the coordinator's authority.

The act would become effective October 1, 2005.

BILL ANALYSIS: House Bill 1221 creates a new Article 5, entitled "Parenting Coordinator", in Chapter 50 of the General Statutes. A parenting coordinator would be an impartial person appointed by the court in child custody actions. The parties may agree to the appointment of a parenting coordinator at any time during the proceeding. If the parties do not agree, the court may appoint a parenting coordinator in high-conflict cases if it is in the best interest of the minor child and the parties are able to pay for the costs. A "high-conflict case" is a child custody action involving minor children where the parties demonstrate an ongoing patter of excessive litigation, anger and distrust, verbal abuse, physical aggression or threats of physical aggression, difficulty in communicating about and cooperating in the care of the minor children, or other conditions that the court determines warrant the appointment of a parenting coordinator. The order appointing the parenting coordinator must specify the coordinator's authority, which is limited to matters that will assist the parties:

- Identify disputed issues
- Reduce misunderstandings.
- Clarify priorities.
- Explore possibilities for compromise.
- Develop methods of collaboration in parenting.
- Comply with the court's order of custody, visitation, or guardianship.

However, the parenting coordinator would have the authority to decide issues that are not covered by a parenting plan and which the parties cannot agree on. The parenting coordinator's decision would be binding on the parties until the court reviews the decision. The parenting coordinator may not provide professional services or counseling to the parties, and must refer financial issues to the parties' attorneys. The court retains jurisdiction over the case and all final decisions.

The parties pay the parenting coordinator's fees. The court may terminate the appointment of the parenting coordinator for good cause.

H1221e3-SMRC-CSRC-70 *Susan Sitze, counsel to House Judiciary I, substantially contributed to this summary.*

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 3

HOUSE BILL 1417

Committee Substitute Favorable 5/26/05
Third Edition Engrossed 6/1/05

Short Title: Revise Judicial Standards Commission. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT TO REVISE AND UPDATE THE PROCEDURES AND RESPONSIBILITIES OF THE JUDICIAL STANDARDS COMMISSION AND TO AUTHORIZE SIX ADDITIONAL MEMBERS OF THE COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. Article 30 of Chapter 7A of the General Statutes reads as rewritten:

"Article 30.

"Judicial Standards Commission.

"**§ 7A-373. Purpose.**

The purpose of this Article is to provide for the investigation and resolution of inquiries concerning the qualification or conduct of any judge or justice of the General Court of Justice. The procedure for discipline of any judge or justice of the General Court of Justice shall be in accordance with the provisions of this Article. Nothing in this Article shall affect the impeachment of judges under the North Carolina Constitution, Article IV, Sections 4 and 17.

"**§ 7A-374. Definitions.**

Unless the context clearly requires otherwise, the definitions in this section shall apply throughout this Article:

(1) "Commission" means the North Carolina Judicial Standards Commission.

(2) "Judge" means any justice or judge of the General Court of Justice of North Carolina, including any retired justice or judge who is recalled for service as an emergency judge of any division of the General Court of Justice.

(3) "Incapacity" means any physical, mental, or emotional condition that seriously interferes with the ability of a judge to perform the duties of judicial office.

(4) "Investigation" means the gathering of information with respect to alleged misconduct or disability.

(5) "Letter of caution" means a written action of the Commission that cautions a judge not to engage in certain conduct that violates the Code of Judicial Conduct as adopted by the Supreme Court.

(6) "Public reprimand" means a written action of the Commission issued upon a finding by the Commission that a judge has violated the Code of Judicial Conduct and has engaged in conduct prejudicial to the administration of justice, but that misconduct is minor and does not warrant a recommendation by the Commission that the judge be disciplined by the Supreme Court. A public reprimand may require that the judge follow a corrective course of action.

(7) "Censure" means a finding by the Supreme Court, based upon a written recommendation by the Commission, that a judge has willfully engaged in misconduct prejudicial to the administration of justice that brings the judicial office into disrepute, but which does not warrant the suspension of the judge from the judge's judicial duties or the removal of the judge from judicial office. A censure may require that the judge follow a corrective course of action. Unless otherwise ordered by the Supreme Court, the judge shall personally appear in the Supreme Court to receive a censure.

(8) "Suspension" means a finding by the Supreme Court, based upon a written recommendation by the Commission, that a judge is temporarily incapacitated, or that a judge has willfully engaged in misconduct prejudicial to the administration of justice that brings the judicial office into disrepute, to such a degree that the judge should be relieved of the duties of the judge's office for a period of time, and upon conditions, including those regarding treatment and compensation, as may be specified by the Supreme Court.

(9) "Removal" means a finding by the Supreme Court, based upon a written recommendation by the Commission, that a judge is suffering from an incapacity that is, or is likely to become, permanent, or that a judge has willfully engaged in misconduct prejudicial to the administration of justice that brings the judicial office into disrepute, to such a degree that the judge should be relieved of all duties of the judge's office and disqualified from holding further judicial office.

"§ 7A-375. Judicial Standards Commission.

(a) The Judicial Standards Commission shall consist ~~of:~~ of the following residents of North Carolina: one Court of Appeals judge, ~~one~~ two superior court ~~judge,~~ judges, and ~~one~~ two district court ~~judge,~~ judges, each appointed by the Chief Justice of the Supreme Court; ~~two~~ four members of the State Bar who have actively practiced in the courts of the State for at least 10 years, elected by the State Bar Council; and ~~two~~ four citizens who are not judges, active or retired, nor members of the State Bar, ~~appointed by the Governor.~~ two appointed by the Governor, and two appointed by the

General Assembly in accordance with G.S. 120-121, one upon recommendation of the President Pro Tempore of the Senate, and one upon recommendation of the Speaker of the House of Representatives. The Court of Appeals judge shall act as chair of the Commission.

(b) Terms of Commission members shall be for six years, except that, to achieve overlapping of terms, one of the judges, one of the practicing members of the State Bar, and one of the citizens shall be appointed initially for a term of only three ~~years.~~ years, and except that the Court of Appeals judge shall serve at the pleasure of the Chief Justice. Initial terms of the following members appointed to the Commission effective January 1, 2006, shall be for three-year terms: one district court judge, one member of the North Carolina State Bar, and one citizen. No member who has served a full six-year term is eligible for reappointment. If a member ceases to have the qualifications required for ~~his~~ the member's appointment, ~~he~~ that person ceases to be a member. Vacancies are filled in the same manner as the original appointment, for the remainder of the term. Members who are not judges are entitled to per diem and all members are entitled to reimbursement for travel and subsistence expenses at the rate applicable to members of State boards and commissions generally, for each day engaged in official business.

(c) If a member of the Commission who is a judge becomes disabled, or becomes a respondent before the Commission, the Chief Justice shall appoint an alternate member to serve during the period of disability or disqualification. The alternate member shall be from the same division of the General Court of Justice as the judge whose place ~~he~~ the alternate member takes. If a member of the Commission who is not a judge becomes disabled, the Governor, if ~~he~~ the Governor appointed the disabled member, shall appoint, or the State Bar Council, if it elected the disabled member, shall elect, an alternate member to serve during the period of disability. In a particular case, if a member ~~disqualifies himself,~~ becomes disqualified, or is successfully challenged for cause, ~~his~~ the member's seat for that case shall be filled by an alternate member selected as provided in this subsection.

(d) A member may serve after expiration of ~~his~~ the member's term only to participate until the conclusion of a formal proceeding begun before expiration of ~~his~~ the member's term. Such participation shall not prevent ~~his~~ the successor from taking office, but the successor may not participate in the proceeding for which ~~his~~ the predecessor's term was extended. This subsection shall apply also to any judicial member whose membership on the Commission is automatically terminated by retirement or resignation from judicial office, or expiration of the term of judicial office.

(e) Members of the Commission and its employees shall be immune from civil suit for all conduct undertaken in the course of their official duties.

(f) The chair of the Commission may employ, if funds are appropriated for that purpose, an executive director, Commission counsel, investigator, and any support staff as may be necessary to assist the Commission in carrying out its duties. With the approval of the Chief Justice, for specific cases, the Chair may also employ special counsel or call upon the Attorney General to furnish counsel. In addition, with the approval of the Chief Justice, for specific cases, the Chair or executive director may also

call upon the Director of the State Bureau of Investigation to furnish an investigator who shall serve under the supervision of the executive director. While performing duties for the Commission, the executive secretary, counsel, or investigator has authority throughout the State to serve subpoenas or other process issued by the Commission in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice.

(g) The Commission may adopt, and may amend from time to time, its own rules of procedure for the performance of the duties and responsibilities prescribed by this Article, subject to the approval of the Supreme Court.

"§ 7A-376. ~~Grounds for censure or removal.~~ **Grounds for discipline by Commission; censure, suspension, or removal by the Supreme Court.**

(a) The Commission upon a determination that any judge has engaged in conduct that violates the North Carolina Code of Judicial Conduct as adopted by the Supreme Court but that is not of such a nature as would warrant a recommendation of censure, suspension, or removal, may privately admonish the judge against engaging in that conduct, or may issue a public reprimand to the judge.

(b) Upon recommendation of the Commission, the Supreme Court may ~~censure or remove~~ censure, suspend, or remove any judge for willful misconduct in office, willful and persistent failure to perform ~~his~~ the judge's duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. ~~Upon recommendation of the Commission, the Supreme Court may remove any judge for mental or physical incapacity interfering with the performance of his duties, which is, or is likely to become, permanent.~~ A judge who is suspended for any of the foregoing reasons shall receive no compensation during the period of that suspension. A judge who is removed for any of the foregoing reasons shall receive no retirement compensation and is disqualified from holding further judicial office.

(c) Upon recommendation of the Commission, the Supreme Court may suspend, for a period of time the Supreme Court deems necessary, any judge for temporary physical or mental incapacity interfering with the performance of the judge's duties, and may remove any judge for physical or mental incapacity interfering with the performance of the judge's duties which is, or is likely to become, permanent. A judge who is suspended for temporary incapacity shall continue to receive compensation during the period of the suspension. A judge removed for mental or physical incapacity is entitled to retirement compensation if ~~he~~ the judge has accumulated the years of creditable service required for incapacity or disability retirement under any provision of State law, but he shall not sit as an emergency justice or judge. ~~A judge removed for other than mental or physical incapacity receives no retirement compensation, and is disqualified from holding further judicial office.~~

"§ 7A-377. **Procedures; employment of executive secretary, special counsel or investigator.**

(a) Any citizen of the State may file a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the General Court of Justice, and thereupon the Commission shall make such investigation as it deems

necessary. The Commission may also make an investigation on its own motion. The Commission ~~is authorized to~~ may issue process to compel the attendance of witnesses and the production of evidence, to administer oaths, and to punish for ~~contempt, and to prescribe its own rules of procedure.~~ contempt. No justice or judge shall be recommended for censure or removal unless he has been given a hearing affording due process of law.

(a1) Unless otherwise waived by the justice or judge involved, all papers filed with and proceedings before the Commission, including any preliminary investigation ~~which~~ that the Commission may make, are confidential, and no person shall disclose information obtained from Commission proceedings or papers filed with or by the Commission, except as provided herein. Those papers shall not be subject to disclosure under Chapter 132 of the General Statutes.

(a2) Information submitted to the Commission or its staff, and testimony given in any proceeding before the Commission, shall be absolutely privileged, and no civil action predicated upon that information or testimony may be instituted against any complainant, witness, or his or her counsel.

(a3) If, after the preliminary investigation is completed, the Commission concludes that a letter of caution is appropriate, it shall issue a letter of caution to the judge in lieu of any further proceeding in the matter. The issuance of a letter of caution shall be confidential in accordance with subsection (a) of this section.

(a4) If, after the formal investigation is completed, the Commission concludes that a public reprimand is appropriate, the judge shall be served with a copy of the proposed reprimand and shall be allowed 20 days within which to accept the reprimand or to reject it and demand, in writing, that disciplinary proceedings be instituted in accordance with subsection (a5) of this section. A public reprimand, when issued by the Commission and accepted by the respondent judge, is not confidential.

(a5) ~~After~~ If, after the ~~preliminary~~ formal investigation is completed, ~~and if~~ the Commission concludes that ~~formal~~ disciplinary proceedings should be instituted, the notice and ~~complaint~~ statement of charges filed by the Commission, along with the answer and all other pleadings, are not confidential. ~~Formal~~ Disciplinary hearings ordered by the Commission are not confidential, and recommendations of the Commission to the Supreme Court, along with the record filed in support of such recommendations are not confidential. Testimony and other evidence presented to the Commission is privileged in any action for defamation. At least five members of the Commission must concur in any recommendation to censure or remove any ~~justice or~~ judge. A respondent who is recommended for ~~censure or removal~~ censure, suspension, or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if ~~he~~ the respondent has objections to it, to have the record settled by the ~~Commission.~~ Commission's chair. ~~He~~ The respondent is also entitled to present a brief and to argue ~~his~~ the respondent's case, in person and through counsel, to the Supreme Court. A majority of the members of the Supreme Court voting must concur in any order of ~~censure~~ censure, suspension, or removal. The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation. A

justice of the Supreme Court or a member of the Commission who is a judge is disqualified from acting in any case in which he is a respondent.

~~(b) The chair of the Commission is authorized to employ an executive secretary to assist the Commission in carrying out its duties. For specific cases, the Commission may also employ special counsel or call upon the Attorney General to furnish counsel. For specific cases, the Commission may also employ an investigator or call upon the Director of the State Bureau of Investigation to furnish an investigator. While performing duties for the Commission such executive secretary, special counsel or investigator shall have authority throughout the State to serve subpoenas or other process issued by the Commission in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice.~~

(c) The Commission may issue advisory opinions to judges, in accordance with rules and procedures adopted by the Commission.

(d) The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process issued by the Commission.

"**§ 7A-378. Censure or removal of justice of Supreme Court.**

(a) The recommendation of the Judicial Standards Commission for ~~censure~~ censure, suspension, or removal of any justice of the Supreme Court for any grounds provided by G.S. 7A-376 shall be made to, and the record filed with, the Court of Appeals, which shall have and shall proceed under the same authority for censure or removal of any justice as is granted to the Supreme Court under G.S. 7A-376 and 7A-377(a) for censure or removal of any judge.

(b) The proceeding shall be heard by a panel of the Court of Appeals consisting of the Chief Judge, who shall be the presiding judge of the panel, and six other judges, the senior in service, excluding the judge who is chairman of the ~~commission.~~ Commission. For good cause, a judge may be excused by a majority of the panel. If the Chief Judge is excused, the presiding judge shall be designated by a majority of the panel. The vacancy created by an excused judge shall be filled by the judge of the court who is next senior in service."

SECTION 2. This act becomes effective January 1, 2006.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 1417
Committee Substitute Favorable 5/26/05
Third Edition Engrossed 6/1/05
PROPOSED SENATE COMMITTEE SUBSTITUTE H1417-CSRH-44 [v.2]

6/15/2005 7:13:28 PM

Short Title: Revise Judicial Standards Commission. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT TO REVISE AND UPDATE THE PROCEDURES AND RESPONSIBILITIES OF THE JUDICIAL STANDARDS COMMISSION AND TO AUTHORIZE SIX ADDITIONAL MEMBERS OF THE COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. Article 30 of Chapter 7A of the General Statutes reads as rewritten:

"Article 30.

"Judicial Standards Commission.

"**§ 7A-374.1. Purpose.**

The purpose of this Article is to provide for the investigation and resolution of inquiries concerning the qualification or conduct of any judge or justice of the General Court of Justice. The procedure for discipline of any judge or justice of the General Court of Justice shall be in accordance with this Article. Nothing in this Article shall affect the impeachment of judges under the North Carolina Constitution, Article IV, Sections 4 and 17.

"**§ 7A-374.2. Definitions.**

Unless the context clearly requires otherwise, the definitions in this section shall apply throughout this Article:

(1) "Censure" means a finding by the Supreme Court, based upon a written recommendation by the Commission, that a judge has willfully engaged in misconduct prejudicial to the administration of justice that brings the judicial office into disrepute, but which does not warrant the suspension of the judge from the judge's judicial duties or the removal of the judge from judicial office. A censure may require that the judge follow a corrective course of action. Unless otherwise ordered by the

Supreme Court, the judge shall personally appear in the Supreme Court to receive a censure.

(2) "Commission" means the North Carolina Judicial Standards Commission.

(3) "Incapacity" means any physical, mental, or emotional condition that seriously interferes with the ability of a judge to perform the duties of judicial office.

(4) "Investigation" means the gathering of information with respect to alleged misconduct or disability.

(5) "Judge" means any justice or judge of the General Court of Justice of North Carolina, including any retired justice or judge who is recalled for service as an emergency judge of any division of the General Court of Justice.

(6) "Letter of caution" means a written action of the Commission that cautions a judge not to engage in certain conduct that violates the Code of Judicial Conduct as adopted by the Supreme Court.

(7) "Public reprimand" means a written action of the Commission issued upon a finding by the Commission that a judge has violated the Code of Judicial Conduct and has engaged in conduct prejudicial to the administration of justice, but that misconduct is minor and does not warrant a recommendation by the Commission that the judge be disciplined by the Supreme Court. A public reprimand may require that the judge follow a corrective course of action.

(8) "Remove" or "removal" means a finding by the Supreme Court, based upon a written recommendation by the Commission, that a judge should be relieved of all duties of the judge's office and disqualified from holding further judicial office.

(9) "Suspend" or "suspension" means a finding by the Supreme Court, based upon a written recommendation by the Commission, that a judge should be relieved of the duties of the judge's office for a period of time, and upon conditions, including those regarding treatment and compensation, as may be specified by the Supreme Court.

"§ 7A-375. Judicial Standards Commission.

(a) The Judicial Standards Commission shall consist ~~of:~~ of the following residents of North Carolina: one Court of Appeals judge, ~~one~~ two superior court ~~judge,~~ judges, and ~~one~~ two district court ~~judge,~~ judges, each appointed by the Chief Justice of the Supreme Court; ~~two~~ four members of the State Bar who have actively practiced in the courts of the State for at least 10 years, elected by the State Bar Council; and ~~two~~ four citizens who are not judges, active or retired, nor members of the State Bar, ~~appointed by the Governor.~~ two appointed by the Governor, and two appointed by the General Assembly in accordance with G.S. 120-121, one upon recommendation of the President Pro Tempore of the Senate and one upon recommendation of the Speaker of the House of Representatives. The Court of Appeals judge shall act as chair of the Commission.

(b) The Court of Appeals judge shall serve at the pleasure of the Chief Justice. Terms of other Commission members shall be for six ~~years, except that, to achieve overlapping of terms, one of the judges, one of the practicing members of the State Bar, and one of the citizens shall be appointed initially for a term of only three years.~~ years. No member who has served a full six-year term is eligible for reappointment. If a member ceases to have the qualifications required for ~~his~~ the member's appointment, ~~he~~ that person ceases to be a member. Vacancies of members, other than those appointed by the General Assembly, are filled in the same manner as the original appointment, for the remainder of the term. Vacancies of members appointed by the General Assembly are filled as provided under G.S. 120-122. Members who are not judges are entitled to per diem and all members are entitled to reimbursement for travel and subsistence expenses at the rate applicable to members of State boards and commissions generally, for each day engaged in official business.

(c) If a member of the Commission who is a judge becomes disabled, or becomes a respondent before the Commission, the Chief Justice shall appoint an alternate member to serve during the period of disability or disqualification. The alternate member shall be from the same division of the General Court of Justice as the judge whose place ~~he~~ the alternate member takes. If a member of the Commission who is not a judge becomes disabled, the Governor, if he appointed the disabled member, shall appoint, or the State Bar Council, if it elected the disabled member, shall elect, an alternate member to serve during the period of disability. If a member of the Commission who is not a judge and who was appointed by the General Assembly becomes disabled, an alternate member shall be appointed to serve during the period of disability in the same manner as if there were a vacancy to be filled under G.S. 120-122. In a particular case, if a member ~~disqualifies himself,~~ becomes disqualified, or is successfully challenged for cause, ~~his~~ the member's seat for that case shall be filled by an alternate member selected as provided in this subsection.

(d) A member may serve after expiration of ~~his~~ the member's term only to participate until the conclusion of a ~~formal~~ disciplinary proceeding begun before expiration of ~~his~~ the member's term. Such participation shall not prevent ~~his~~ the successor from taking office, but the successor may not participate in the proceeding for which ~~his~~ the predecessor's term was extended. This subsection shall apply also to any judicial member whose membership on the Commission is automatically terminated by retirement or resignation from judicial office, or expiration of the term of judicial office.

(e) Members of the Commission and its employees are immune from civil suit for all conduct undertaken in the course of their official duties.

(f) The chair of the Commission may employ, if funds are appropriated for that purpose, an executive director, Commission counsel, investigator, and any support staff as may be necessary to assist the Commission in carrying out its duties. With the approval of the Chief Justice, for specific cases, the Chair also may employ special counsel or call upon the Attorney General to furnish counsel. In addition, with the approval of the Chief Justice, for specific cases, the Chair or executive director also may call upon the Director of the State Bureau of Investigation to furnish an investigator who shall serve under the supervision of the executive director. While performing duties

for the Commission, the executive director, Commission counsel, and investigator have authority throughout the State to serve subpoenas or other process issued by the Commission in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice.

(g) The Commission may adopt, and may amend from time to time, its own rules of procedure for the performance of the duties and responsibilities prescribed by this Article, subject to the approval of the Supreme Court.

"§ 7A-376. ~~Grounds for censure or removal.~~ **Grounds for discipline by Commission; censure, suspension, or removal by the Supreme Court.**

(a) The Commission upon a determination that any judge has engaged in conduct that violates the North Carolina Code of Judicial Conduct as adopted by the Supreme Court but that is not of such a nature as would warrant a recommendation of censure, suspension, or removal, may issue to the judge a private letter of caution or may issue to the judge a public reprimand.

(b) Upon recommendation of the Commission, the Supreme Court may ~~censure or remove~~ censure, suspend, or remove any judge for willful misconduct in office, willful and persistent failure to perform ~~his~~ the judge's duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. ~~Upon recommendation of the Commission, the Supreme Court may remove any judge for mental or physical incapacity interfering with the performance of his duties, which is, or is likely to become, permanent.~~ A judge who is suspended for any of the foregoing reasons shall receive no compensation during the period of that suspension. A judge who is removed for any of the foregoing reasons shall receive no retirement compensation and is disqualified from holding further judicial office.

(c) Upon recommendation of the Commission, the Supreme Court may suspend, for a period of time the Supreme Court deems necessary, any judge for temporary physical or mental incapacity interfering with the performance of the judge's duties, and may remove any judge for physical or mental incapacity interfering with the performance of the judge's duties which is, or is likely to become, permanent. A judge who is suspended for temporary incapacity shall continue to receive compensation during the period of the suspension. A judge removed for mental or physical incapacity is entitled to retirement compensation if ~~he~~ the judge has accumulated the years of creditable service required for incapacity or disability retirement under any provision of State law, but he shall not sit as an emergency justice or judge. ~~A judge removed for other than mental or physical incapacity receives no retirement compensation, and is disqualified from holding further judicial office.~~

"§ 7A-377. ~~Procedures; employment of executive secretary, special counsel or investigator.~~**Procedures.**

(a) Any citizen of the State may file a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the General Court of Justice, and thereupon the Commission shall make such investigation as it deems necessary. The Commission may also make an investigation on its own motion. The Commission ~~is authorized to~~ may issue process to compel the attendance of witnesses

and the production of evidence, to administer oaths, and to punish for ~~contempt, and to prescribe its own rules of procedure.~~ contempt. No justice or judge shall be recommended for ~~censure~~ censure, suspension, or removal unless he has been given a hearing affording due process of law.

(a1) Unless otherwise waived by the justice or judge involved, all papers filed with and proceedings before the Commission, including any ~~preliminary~~ investigation ~~which~~ that the Commission may make, are confidential, and no person shall disclose information obtained from Commission proceedings or papers filed with or by the Commission, except as provided herein. Those papers are not subject to disclosure under Chapter 132 of the General Statutes.

(a2) Information submitted to the Commission or its staff, and testimony given in any proceeding before the Commission, shall be absolutely privileged, and no civil action predicated upon that information or testimony may be instituted against any complainant, witness, or his or her counsel.

(a3) If, after an investigation is completed, the Commission concludes that a letter of caution is appropriate, it shall issue to the judge a letter of caution in lieu of any further proceeding in the matter. The issuance of a letter of caution is confidential in accordance with subsection (a1) of this section.

(a4) If, after an investigation is completed, the Commission concludes that a public reprimand is appropriate, the judge shall be served with a copy of the proposed reprimand and shall be allowed 20 days within which to accept the reprimand or to reject it and demand, in writing, that disciplinary proceedings be instituted in accordance with subsection (a5) of this section. A public reprimand, when issued by the Commission and accepted by the respondent judge, is not confidential.

(a5) ~~After the preliminary~~ If, after an investigation is completed, ~~and if~~ the Commission concludes that ~~formal~~ disciplinary proceedings should be instituted, the notice and ~~complaint~~ statement of charges filed by the Commission, along with the answer and all other pleadings, are not confidential. ~~Formal~~ Disciplinary hearings ordered by the Commission are not confidential, and recommendations of the Commission to the Supreme Court, along with the record filed in support of such recommendations are not confidential. Testimony and other evidence presented to the Commission is privileged in any action for defamation. At least five members of the Commission must concur in any recommendation to ~~censure~~ censure, suspend, or remove any ~~justice or~~ judge. A respondent who is recommended for ~~censure or removal~~ censure, suspension, or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if ~~he~~ the respondent has objections to it, to have the record settled by the ~~Commission.~~ Commission's chair. ~~He~~ The respondent is also entitled to present a brief and to argue ~~his~~ the respondent's case, in person and through counsel, to the Supreme Court. A majority of the members of the Supreme Court voting must concur in any order of ~~censure~~ censure, suspension, or removal. The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation. A justice of the Supreme Court or a member of the Commission who is a judge is disqualified from acting in any case in which he is a respondent.

~~(b) The chair of the Commission is authorized to employ an executive secretary to assist the Commission in carrying out its duties. For specific cases, the Commission may also employ special counsel or call upon the Attorney General to furnish counsel. For specific cases, the Commission may also employ an investigator or call upon the Director of the State Bureau of Investigation to furnish an investigator. While performing duties for the Commission such executive secretary, special counsel or investigator shall have authority throughout the State to serve subpoenas or other process issued by the Commission in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice.~~

(c) The Commission may issue advisory opinions to judges, in accordance with rules and procedures adopted by the Commission.

(d) The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process issued by the Commission.

"**§ 7A-378. ~~Censure~~ Censure, suspension, or removal of justice of Supreme Court.**

(a) The recommendation of the Judicial Standards Commission for ~~censure~~ censure, suspension, or removal of any justice of the Supreme Court for any grounds provided by G.S. 7A-376 shall be made to, and the record filed with, the Court of Appeals, which shall have and shall proceed under the same authority for ~~censure~~ censure, suspension, or removal of any justice as is granted to the Supreme Court under G.S. 7A-376 and 7A-377(a) for ~~censure~~ censure, suspension, or removal of any judge.

(b) The proceeding shall be heard by a panel of the Court of Appeals consisting of the Chief Judge, who shall be the presiding judge of the panel, and six other judges, the senior in service, excluding the judge who is chairman of the ~~commission.~~ Commission. For good cause, a judge may be excused by a majority of the panel. If the Chief Judge is excused, the presiding judge shall be designated by a majority of the panel. The vacancy created by an excused judge shall be filled by the judge of the court who is next senior in service."

SECTION 2. In order to provide for an orderly transition in membership to the Judicial Standards Commission to the six-year terms specified in G.S. 7A-375(b), as amended by Section 1 of this act, and notwithstanding G.S. 7A-375(b), as amended by Section 1 of this act, the following provisions apply:

(1) The initial terms of the new district court judge and of one new member of the North Carolina Bar appointed to the Commission effective January 1, 2006, shall be three-year terms.

(2) The initial terms of all other new members appointed to the Commission effective January 1, 2006, shall be six-year terms.

(3) The term of the citizen, appointed by the Governor to the Commission effective January 1, 2006, shall be a three-year term.

(4) The term for the citizen, appointed by the Governor to the Commission effective January 1, 2009, shall be a three-year term.

SECTION 3. This act becomes effective January 1, 2006.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 1417

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

H1417-ARH-33 [v.1]

Date _____,2005

Comm. Sub. [YES]
Amends Title [NO]
PCS to Third Edition

Senator _____

moves to amend the PCS on page 4, line 1, by rewriting the line to read: "for the Commission, the executive director, counsel, and investigator have".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

HOUSE BILL 1417:
Revise Judicial Standards Commission

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 28, 2005
Introduced by:	Rep. Haire	**Summary by:**	Robin Johnson
Version:	PCS to Third Edition H1417-CSRH-44[v.2]		Committee Counsel

SUMMARY: ***House Bill 1417 amends the current statutes governing the Judicial Standards Commission by expanding the Commission, expanding disciplinary action to include suspension, private letters of caution, and public reprimands, and making other changes.***

The PCS makes technical changes, provides for appointment of an alternate member if one of the members appointed by the General Assembly is disabled, and adds a procedure to implement staggered terms for the new members.

CURRENT LAW: Section 17 of Article IV of the North Carolina Constitution [see attached] allows for the removal of justices and judges for mental or physical incapacity by joint resolution of two-thirds of all members of each house of the General Assembly. The Constitution also directs the General Assembly to adopt a procedure for the censure or removal of justices or judges.

Current G.S. 7A-375 establishes the seven member Judicial Standards Commission. Current G.S. 7A-376 sets out grounds for censure and removal of a judge by the Supreme Court, upon recommendation of the Commission. Current G.S. 7A-377 sets out the procedures of the Commission. Current G.S. 7A-378 sets out the grounds and procedure for removal of a justice of the Supreme Court.

BILL ANALYSIS: House Bill 1417:

- **In new G.S. 7A-374.1:** Sets out the purpose of the Judicial Standards Commission Article: " to provide for the investigation and resolution of inquires concerning the qualification or conduct of any judge or justice."
- **In new G.S. 7A-374.2:** Provides definitions of the following terms used in the Article: Commission, Judge, Incapacity, Investigation, Letter of caution, Public reprimand, Censure, Suspension, and Removal.
- **In amended G.S. 7A-375:**

  --expands the Commission from 7 to 13 members, provides for staggering of terms, and requires members to be residents of the State.

  --provides that two of the new members of the Commission shall be appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives and one upon the recommendation of the President Pro Tempore of the Senate.

  --provides that the Court of Appeals Judge on the Commission serves at the pleasure of the Chief Justice.

  --provides a mechanism for appointing an alternate member if a member appointed by the General Assembly becomes disabled.

--provides that the members of the Commission and its employees are immune from civil suit for conduct undertaken in the course of their official duties.

--reenacts existing law providing that the chair of the Commission may employ, if funds are appropriated for this purpose, an executive director, counsel, investigator, and support staff. In addition, with the approval of the Chief Justice, for specific cases, the chair may employ special counsel and ask the SBI to furnish an investigator. Also allows executive director, counsel or investigator to serve subpoenas and other process.

--reenacts existing law providing that the Commission may adopt rules of procedure, subject to Supreme Court approval.

- **In amended G.S. 7A-376**:

--expands possible disciplinary action to include suspension, private letters of caution, and public reprimands.

--provides that judges suspended for misconduct would not receive compensation during a period of suspension, and, if removed, would be disqualified from holding another judicial office and would not be eligible for retirement compensation.

--clarifies that judges suspended for temporary physical or mental incapacity shall continue to receive compensation.

- **In amended G.S. 7A-377:**

--specifies that no person shall disclose information obtained from Commission proceedings or papers, and that Commission papers are not subject to disclosure under the State public records laws (Chapter 132).

--provides that information submitted to the Commission or its staff is privileged, and no civil action may be predicated upon it.

--authorizes Commission issuance of confidential letters of caution.

--authorizes Commission issuance of public reprimands.

--provides that the Commission may issue advisory opinions to judges.

--provides that the Commission may punish for contempt, and refusal to obey lawful orders or process of the Commission.

- **In amended G.S. 7A-378:**

--provides for suspension, as well as the currently authorized censure and removal, of justices of the Supreme Court.

- **Section 4 of the bill**

--establishes a procedure for the orderly incorporation of new members in order to implement staggered terms.

EFFECTIVE DATE: This act becomes effective January 1, 2006.

Giles Perry, counsel to House Judiciary III, substantially contributed to this summary.

H1417e3-SMRH-CSRH-44v2

§ 120-122. Vacancies in legislative appointments.

When a vacancy occurs in any office subject to appointment by the General Assembly upon the recommendation of the Speaker of the House of Representatives, upon the recommendation of the President Pro Tempore of the Senate, or upon the recommendation of the President of the Senate, and the vacancy occurs either: (i) after election of the General Assembly but before convening of the regular session; (ii) when the General Assembly has adjourned to a date certain, which date is more than 20 days after the date of adjournment; (iii) after sine die adjournment of the regular session; or (iv) when the term of office expires and a successor has not been appointed, then the Governor may appoint a person to serve until the expiration of the term or until the General Assembly fills the vacancy, whichever occurs first. The General Assembly may fill the vacancy in accordance with G.S. 120-121 during a regular or extra session. When a person is holding over in office after the expiration of the term, for the purpose of this section that office may be filled as if it were vacant. Before making an appointment, the Governor shall consult the officer who recommended the original appointment to the General Assembly (the Speaker of the House of Representatives, the President Pro Tempore of the Senate, or the President of the Senate), and ask for a written recommendation. After receiving the written recommendation, the Governor must within 30 days either appoint the person recommended or inform the officer who made the recommendation that he is rejecting the recommendation. Failure to act within 30 days as required under the provisions of the preceding sentence shall be deemed to be approval of the candidate, and the candidate shall be eligible to enter the office in as full and ample extent as if the Governor had executed the appointment. The Governor shall not appoint a person other than the person so recommended. Any position subject to initial appointment by the General Assembly but not filled prior to sine die adjournment of the Session at which the position was created or adjournment to a date certain which date is more than 20 days after the date of adjournment of the session at which the position was created may be filled by the Governor under this section as if it were a vacancy occurring after the General Assembly had made an appointment.

Sec. 17. Removal of Judges, Magistrates and Clerks.

(1) Removal of Judges by the General Assembly. Any Justice or Judge of the General Court of Justice may be removed from office for mental or physical incapacity by joint resolution of two-thirds of all the members of each house of the General Assembly. Any Justice or Judge against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least 20 days before the day on which either house of the General Assembly shall act thereon. Removal from office by the General Assembly for any other cause shall be by impeachment.

(2) Additional method of removal of Judges. The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this Section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(3) Removal of Magistrates. The General Assembly shall provide by general law for the removal of Magistrates for misconduct or mental or physical incapacity.

(4) Removal of Clerks. Any Clerk of the Superior Court may be removed from office for misconduct or mental or physical incapacity by the senior regular resident Superior Court Judge serving the county. Any Clerk against whom proceedings are instituted shall receive written notice of the charges against him at least 10 days before the hearing upon the charges. Any Clerk so removed from office shall be entitled to an appeal as provided by law.

Judicial Standards Commission

Formed in1973, the North Carolina Judicial Standards Commission was established to consider complaints against judges and, where appropriate, to make recommendations for censure or removal.

The commission is authorized to receive written complaints from citizens concerned with qualifications or conduct of any judge and to investigate those complaints. After a complaint has been investigated and the judge has been given a due process hearing, the commission may recommend to the Supreme Court that the judge be censured and removed.

In addition, upon the commission's recommendation, the Supreme Court may remove any judge for mental or physical incapacity interfering with the performance of duties when the incapacity is, or is likely to become, permanent.

The seven-member commission is composed of three judges appointed by the chief justice: a Court of Appeals judge, a Superior Court judge and a District Court judge. The State Bar Council appoints two attorneys and the governor appoints two citizens who are not judges or lawyers. Members serve a six-year term.

MEETING CANCELLED

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	July 7, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 877	Foreclosure Notice of Sale/Disp. of Proceeds.	Representative Justus
HB 1176	Property Exempt From Enforcement Actions.	Representative Weiss Representative Goodwin Representative Harrison Representative Glazier
HB 1243	Manufactured Homes/Longer Termination Notice.	Representative Bordsen Representative Fisher
HB 1375	Child Support Reforms.	Representative Culpepper, III
HB 1432	Register of Deeds-Certifications.	Representative Ross Representative Stam

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk ____
Reading Clerk ____

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AND
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Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, July 7, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 877	Foreclosure Notice of Sale/Disp. of Proceeds.	Representative Justus
HB 1176	Property Exempt From Enforcement Actions.	Representative Weiss Representative Goodwin Representative Harrison Representative Glazier
HB 1243	Manufactured Homes/Longer Termination Notice.	Representative Bordsen Representative Fisher
HB 1375	Child Support Reforms.	Representative Culpepper, III

Presentations

Other Business

Adjournment

Corrected Notice – Room Changed to 1124

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Wednesday	August 10, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 723	UNC/Criminal Record Checks/Fee.-AB	Representative Dickson Representative Glazier
HB 877	Foreclosure Notice of Sale/Disp. of Proceeds.	Representative Justus
HB 926	Concealing a Death/Crim. Offense.	Representative Preston
HB 1176	Property Exempt From Enforcement Actions.	Representative Weiss Representative Goodwin Representative Harrison Representative Glazier
HB 1243	Manufactured Homes/Longer Termination Notice.	Representative Bordsen Representative Fisher
HB 1375	Child Support Reforms.	Representative Culpepper, III
HB 1436	Death Penalty/Add Aggravating Factor.	Representative Johnson

Senator Fletcher L. Hartsell, Jr., Chair

Please note date and room change

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Wednesday	**August 10, 2005**	**10:00 AM**	**414 LOB**

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 723	UNC/Criminal Record Checks/Fee.-AB	Representative Dickson Representative Glazier
HB 877	Foreclosure Notice of Sale/Disp. of Proceeds.	Representative Justus
HB 926	Concealing a Death/Crim. Offense.	Representative Preston
HB 1176	Property Exempt From Enforcement Actions.	Representative Weiss Representative Goodwin Representative Harrison Representative Glazier
HB 1243	Manufactured Homes/Longer Termination Notice.	Representative Bordsen Representative Fisher
HB 1375	Child Support Reforms.	Representative Culpepper, III
HB 1436	Death Penalty/Add Aggravating Factor.	Representative Johnson

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Wednesday, August 10, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 723	UNC/Criminal Record Checks/Fee.-AB	Representative Dickson Representative Glazier
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HB 1176	Property Exempt From Enforcement Actions.	Representative Weiss Representative Goodwin Representative Harrison Representative Glazier
HB 1243	Manufactured Homes/Longer Termination Notice.	Representative Bordsen Representative Fisher
HB 1375	Child Support Reforms.	Representative Culpepper, III
HB 1436	Death Penalty/Add Aggravating Factor.	Representative Johnson

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

August 10, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on August 10, 2005, with eleven members present. Senator Hartsell introduced pages Wallis Hutchens, Mary Catherine Hollowell, Ashley Mills and Virginia Mayo and thanked them for serving.

HB 1243 (Manufactured Homes/Longer Termination Notice.) Senator Hartsell recognized Representative Fisher to explain the bill. Senator Dorsett moved for a favorable report. All voted and the motion carried.

HB 1436 (Death Penalty/Add Aggravating Factor.) Senator Hartsell invited Representative Johnson to explain the bill. Senator Dorsett moved for a favorable report. All voted and the motion carried.

HB 1375 (Child Support Reforms.) Senator Hartsell asked for a motion to accept the Proposed Committee Substitute for purposes of discussion. Senator Forrester so moved, all voted and the motion carried. Senator Hartsell then recognized Representative Culpepper to explain the bill. Questions from Senators Berger, Dorsett, Kinnaird, Webster and Thomas were answered by Representative Culpepper and Senator Hartsell. Mr. Barry Berger and Mr. Kevin Fitzgerald, formerly of the Department of Health and Human Services spoke in support of the bill. Senator Thomas sent forth an amendment which was accepted by Representative Culpepper. Senator Thomas moved for adoption, all voted and the amendment passed. Senator Bingham moved for a favorable report as amended and rolled into a new committee substitute. All voted and the motion carried.

HB 926 (Concealing a Death/Crim. Offense.) Senator Thomas was recognized to explain the bill in the absence of Representative Preston. Senator Thomas answered the question by Senator Kerr. Senator Bingham moved for a favorable report, all voted and the motion carried.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell Jr.

Fletcher L. Hartsell, Chairman

Gerry Johnson

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, August 10, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B.(CS #1) **926** Concealing a Death/Crim. Offense.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #2) **1243** Manufactured Homes/Longer Termination Notice.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **1436** Death Penalty/Add Aggravating Factor.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1375** Child Support Reforms.
Draft Number: PCS70545
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

TOTAL REPORTED: 4

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

Aug. 10, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
	ACLU
Marlene Foster	NCAHP
Doug Heron	NCBA
Margaret Westbrook	KCLH
Algernon Butler	Butler & Butler LLP
William Brewer	The Brewer Law Firm
Colleen Kochanek	Holt York McDaris & Hisk
Stephanie Thompson	NC Assn. of REALTORS
	DHHS
Barry Barnes	DHHS

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

August 10, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Rick Glazier	NC House
Teross Young	Food Lion
Paul Meyer	NCACC
John Goodman	Riley Associates
Grover Nicholson	NCDENR
Roz Sandt	NCCCA
Kerry Burnside	CRA
Sid Harrell	DENR/DEH/PWSS
Butch Gunnells	NCSDA
Mildred Spearman	NCDOC

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

August 10, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Brad Lovin	NC Manufactured Housing Institute
Ryan Pusley	intern; Rep. Glazier
David Barnes	Poyner + Spruill
John McKay	Gov Ethics
Chris Kukla	Self-Help
Kathleen Edwards	UNC-CH Institute of Gov't
David Fox	Alley Associates
Gene Royall	North Carolina Family Policy Council
Kathleen Dalton	NCCBI
Bill Rowe	NC Justice Ctr.
[illegible]	HEW

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 3

HOUSE BILL 926

Committee Substitute Favorable 5/11/05
Third Edition Engrossed 5/17/05

Short Title: Concealing a Death/Crim. Offense. (Public)

Sponsors:

Referred to:

March 28, 2005

A BILL TO BE ENTITLED

AN ACT TO MAKE IT A CRIMINAL OFFENSE TO CONCEAL THE DEATH OF A PERSON.

The General Assembly of North Carolina enacts:

SECTION 1. Article 52 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-401.22. Concealment of death.**

(a) Any person who, with the intent to conceal the death of a person, fails to notify a law enforcement authority of the death or secretly buries or otherwise secretly disposes of a dead human body is guilty of a Class I felony.

(b) Any person who aids, counsels, or abets any other person in concealing the death of a person is guilty of a Class A1 misdemeanor."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

HOUSE BILL 926:
Concealing a Death/Crim. Offense

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 9, 2005
Introduced by:	Rep. Preston	**Summary by:**	Robin Johnson*
Version:	Third Edition		Committee Counsel

SUMMARY: House Bill 926 would make it a Class I felony for any person, with the intent to conceal a death, to fail to notify a law enforcement authority of a death, or to secretly bury or dispose of a dead human body. Aiding or abetting the offense would be a Class A1 misdemeanor. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

CURRENT LAW:

- In the event of death without medical attendance, it is the duty of the funeral director or other person having knowledge of the death to notify the local medical examiner of the death. It is a Class 1 misdemeanor for any person to fail to notify the medical examiner or to remove or permit the removal of a dead human body without authorization of the medical examiner. (G.S. 130A-26A(a)(2) &(4))
- Any person who, in an attempt to conceal a birth, secretly disposes the dead body of a newborn child is guilty of a Class I felony. Aiding or abetting the offense is a Class 1 misdemeanor. (G.S. 14-46)
- Under the common law, aiding or abetting a felony is punishable at the same level as the felony itself.

BILL ANALYSIS:

This bill would make it a Class I felony for any person, with intent to conceal the death of a person, to do the following:

- Fail to notify a law enforcement authority of the death
- Secretly bury or dispose of a dead human body

Aiding or abetting the offense would be a Class A1 misdemeanor.

The presumptive punishment, assuming no prior convictions, for a Class I felony is community service, with a 4-6 month minimum sentence. A Class A1 misdemeanant, with no prior convictions, may be sentenced from 1 – 60 days of community service, intermediate, or active punishment.

EFFECTIVE DATE:

This act would become effective December 1, 2005, and would apply to offenses committed on or after that date.

Summary contribution by Karen Cochrane-Brown, Staff Attorney.

H0926e3-SMRH

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: House Bill 926 (Third Edition)

SHORT TITLE: Concealing a Death/Crim. Offense.

SPONSOR(S): Representative Preston

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10
GENERAL FUND					
Correction	Exact amount cannot be determined; no substantial impact anticipated.				
Judicial	Exact amount cannot be determined; no substantial impact anticipated.				
LOCAL GOVERNMENTS	Exact amount cannot be determined; no substantial impact anticipated.				
ADDITIONAL PRISON BEDS*	Exact amount cannot be determined; no substantial impact anticipated.				
POSITIONS: (cumulative)	Exact amount cannot be determined; no additional positions anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch; Local Governments

EFFECTIVE DATE: December 1, 2005

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: This bill would enact new G.S. 14-401.22 to provide that, with the intent to conceal an individual's death, failure to notify a law enforcement authority of the death and secretly burying or otherwise disposing of the body would be a Class I felony. Additionally, any person aiding, counseling, or abetting the concealment of an individual's death would be guilty of a Class A1 misdemeanor.

The third edition specifies that the offense would apply to failure to notify a law enforcement authority *or* secretly disposing of the body, rather than stipulating that a person *both* fail to notify law enforcement and secretly dispose of the body.

ASSUMPTIONS AND METHODOLOGY:

General

Current G.S. 130A-115(e) prohibits the disposal or removal of a dead human body without the authorization of the medical examiner. Administrative Office of the Courts (AOC) data indicates that, in calendar year 2004, 15 defendants were charged with Class 1 misdemeanor public health violations under G.S. 130A-25, which would include violations of G.S. 130A-115(e). No data exists with respect to how many, if any, of these 15 charges were for violations of G.S. 130A-115(e) for unlawfully disposing of a dead human body.

As the bill creates 1) a new Class I felony for failing to notify law enforcement in the event of a death *or* secretly disposing of the body with intent to conceal the death; and, 2) a Class A1 misdemeanor for aiding, counseling, or abetting such behavior, it would be expected to result in additional charges and convictions and would consequently incur a fiscal impact. Changes in the third edition specifying that the offense would apply to either failing to notify law enforcement or secretly disposing of the body, rather than requiring both, would expand the scope of the offense slightly and could result in some additional charges and convictions.

Because the offense is new, it is not known how many offenders might be charged and convicted as a result of this bill. However, as the small number of charges for violations of G.S. 130A-115(e) is some indication that disposing of a dead body without proper authorization occurs infrequently, the numbers of new charges and convictions resulting from this bill is not expected to be significant and the fiscal impact is not expected be substantial.

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2005 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory group, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.*

Because this bill creates new criminal offenses, the Sentencing Commission has no historical data from which to estimate the impact on prison population. As no data is available regarding the frequency with which individuals secretly bury or otherwise dispose of a dead human body to intentionally conceal the death, it is not known how many offenders might be sentenced under this bill. However, due to indications that convictions for a similar offense under G.S. 130A-115(e) are rare (see "General"), the number of convictions under this bill is not expected to be substantial.

Class I Felonies: In FY 2003-04, eleven percent of Class I felony convictions resulted in active sentences. If, for example, there were ten Class I convictions for this proposed offense per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and three additional prison beds the second year. The average annual operating cost for one prison bed in FY 2006-07 will be an estimated $24,740.

Class A1 Misdemeanors: In FY 2003-04, 24 percent of Class A1 misdemeanors resulted in active sentences and the average active sentence length was 73 days. Offenders with active sentences of less than ninety days are housed in county jails and DOC reimburses counties for housing offenders between thirty and ninety days at a rate of $18 per day per offender. Because most Class A1 misdemeanants serving active time as a result of this bill would be housed in county jails, Class A1 convictions due to this bill would not be expected to substantially impact prison population.

Non-Active Sentences: In FY 2003-04, 40 percent of Class I convictions resulted in intermediate sanctions and 49 percent in community sanctions; 4 percent of Class A1 misdemeanants received intermediate sanctions and 72 percent received community punishment. Probation officers in the Division of Community Corrections (DCC) supervise offenders with intermediate sanctions at an estimated cost of $10.94 per day for the first six months and $1.87 per day thereafter. (This cost estimate is based on the average cost and duration of intensive probation, the most common intermediate sanction.) The estimated cost for a supervised community offender is $1.87 per day.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

Although AOC has no historical data from which to project the specific number of charges that might result from this bill, based on the small number of charges for a similar offense under G.S. 130A-115(e), we do not expect the number of charges under this bill to be substantial. For any new Class A1 misdemeanor or Class I felony charges due to this bill, there would be additional court and preparation time needed to process the charge, thus increasing district and superior court workload, respectively. AOC estimates the cost to dispose of one charge as shown in the table below.

Offense Class	Settled via Trial			Settled via Guilty Plea
	Court/Attorney Costs	*Indigent Defense*	*Total*	-
Class A1 Misdemeanor	$2,087	$1,502	**$3,589**	**$286**
Class I Felony	$3,877	$1,931	**$5,808**	**$329**

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Aaron Paul and Jim Mills

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

DATE: June 9, 2005

Signed Copy Located in the NCGA Principal Clerk's Offices

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 3

HOUSE BILL 1243

Committee Substitute Favorable 5/12/05

Committee Substitute #2 Favorable 6/1/05

Short Title: Manufactured Homes/Longer Termination Notice. (Public)

Sponsors:

Referred to:

April 18, 2005

A BILL TO BE ENTITLED

AN ACT REQUIRING A LONGER NOTICE PERIOD FOR A TERMINATION OF A TENANCY FOR THE RENTAL SPACE FOR RESIDENTIAL MANUFACTURED HOMES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 42-14 reads as rewritten:

"**§ 42-14. Notice to quit in certain tenancies.**

A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. Provided, however, where the tenancy involves only the rental of a space for a manufactured home as defined in G.S. 143-143.9(6), a notice to quit must be given at least ~~30~~ 60 days before the end of the current rental period, regardless of the term of the tenancy."

SECTION 2. This act becomes effective January 1, 2006, and applies to all notices to quit given on or after that date.

HOUSE BILL 1243:
Manufactured Homes/Longer Termination Notice

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 10, 2005
Introduced by:	Reps. Fisher, Bordsen	**Summary by:**	Kory Goldsmith
Version:	Third Edition		Committee Counsel

SUMMARY: House Bill 1243 would lengthen the notice period required for the termination of a tenancy for the rental space for a manufactured home.

The bill would become effective January 1, 2006, and apply to all notices to quit given on or after that date.

CURRENT LAW: G.S. 42-14 provides the statutory minimum amount of time a landlord must give notice to quit to a tenant.

- A tenancy from year to year - one month notice to quit
- A tenancy from month to month - seven days notice to quit
- A tenancy from week to week: - two days notice to quit
- For the rental of a space for a manufactured home – at least 30 days before the end of the current rental period regardless of the term of the tenancy

The owner of a manufactured housing community must give notice of 180 days before the owner intends to ***convert*** the community to another use that will require the homes to be moved. The owner of the community must give the notice to the owner of the manufactured home. If the closure is due to a valid order of a state or local government, then notice must be given of the closure within 3 days of the date of the order.

A tenant who holds over without the permission of the landlord can be ejected from the premises in any of the following situations:

- When the tenancy has expired
- When the tenant has committed any act that the lease stipulates would terminate the lease
- When the tenant who is in arrears for rent or has agreed to cultivate the land and pay a part of the crop or has given the landlord a lien on the crop does not cultivate the land

H1243e3-SMRC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1375

Committee Substitute Favorable 5/4/05

Short Title: Child Support Reforms. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT AMENDING THE LAWS RELATING TO CHILD SUPPORT ENFORCEMENT IN ORDER TO CLARIFY AND ENHANCE THOSE LAWS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 50-13.9 reads as rewritten:

"**§ 50-13.9. Procedure to insure payment of child support.**

(a) Upon its own motion or upon motion of either party, the court may order at any time that support payments be made to the State Child Support Collection and Disbursement Unit for remittance to the party entitled to receive the payments. For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) apply.

(b) After entry of an order by the court under subsection (a) of this section, the State Child Support Collection and Disbursement Unit shall transmit child support payments that are made to it to the custodial parent or other party entitled to receive them, unless a court order requires otherwise.

(b1) In a IV-D case:

(1) The designated child support enforcement agency shall have the sole responsibility and authority for monitoring the obligor's compliance with all child support orders in the case and for initiating any enforcement procedures that it considers appropriate.

(2) The clerk of court shall maintain all official records in the case.

(3) The designated child support enforcement agency shall maintain any other records needed to monitor the obligor's compliance with or to enforce the child support orders in the case, including records showing the amount of each payment of child support received from or on behalf of the obligor, along with the dates on which each payment was received. In any action establishing, enforcing, or modifying a child support order, the payment records maintained by the designated child

support agency shall be admissible evidence, and the court shall permit the designated representative to authenticate those records.

(b2) In a non-IV-D case:

~~(1) The clerk of court shall have the responsibility and authority for monitoring the obligor's compliance with all child support orders in the case and for initiating any enforcement procedures that it considers appropriate. The State Child Support Collection and Disbursement Unit shall notify the clerk of court of all payments made in non-IV-D cases so that the clerk of court can initiate enforcement proceedings as provided in subsection (d) of this section.~~

(2) The clerk of court shall maintain all official records in the case.

~~(3) The clerk of court shall maintain any other records needed to monitor the obligor's compliance with or to enforce the child support orders in the case, including records showing the amount of each payment of child support received from or on behalf of the obligor, along with the dates on which each payment was received.~~

(c) ~~In a non-IV-D case, the parties affected by the order shall inform the clerk of court of any change of address or of other condition that may affect the administration of the order.~~ In a IV-D case, the parties affected by the order shall inform the designated child support enforcement agency of any change of address or other condition that may affect the administration of the order. The court may provide in the order that a party failing to inform the court or, as appropriate, the designated child support enforcement agency, of a change of address within a reasonable period of time may be held in civil contempt.

(d) ~~In a non-IV-D case, when the clerk of superior court is notified by the State Child Support Collection and Disbursement Unit that an obligor has failed to make a required payment of child support and is in arrears, the clerk of superior court shall mail by regular mail to the last known address of the obligor a notice of delinquency. The notice shall set out the amount of child support currently due and shall demand immediate payment of that amount. The notice shall also state that failure to make immediate payment will result in the issuance by the court of an enforcement order requiring the obligor to appear before a district court judge and show cause why the support obligation should not be enforced by income withholding, contempt of court, revocation of licensing privileges, or other appropriate means. Failure to receive the delinquency notice is not a defense in any subsequent proceeding. Sending the notice of delinquency is in the discretion of the clerk if the clerk has, during the previous 12 months, sent a notice or notices of delinquency to the obligor for nonpayment, or if income withholding has been implemented against the obligor or the obligor has been previously found in contempt for nonpayment under the same child support order.~~

~~If the arrearage is not paid in full within 21 days after the mailing of the delinquency notice, or without waiting the 21 days if the clerk has elected not to mail a delinquency notice for any of the reasons provided in this subsection, the clerk shall cause an enforcement order to be issued and shall issue a notice of hearing before a district court judge.~~ Upon request of an obligee, the clerk or a district court judge may order the

obligor to appear and show cause why the obligor should not be subjected to income withholding or adjudged in contempt of court, or both. The ~~enforcement~~ order shall ~~order~~ require the obligor to appear and show cause why the obligor should not be subjected to income withholding or adjudged in contempt of court, or both, and shall order the obligor to bring to the hearing records and information relating to the obligor's employment, the obligor's licensing privileges, and the amount and sources of the obligor's disposable income. The ~~enforcement~~ order shall state:

(1) That the obligor is under a court order to provide child support, the name of each child for whose benefit support is due, and information sufficient to identify the order;

(2) That the obligor is delinquent and the amount of overdue support;

(2a) That the court may order the revocation of some or all of the obligor's licensing privileges if the obligor is delinquent in an amount equal to the support due for one month;

(3) That the court may order income withholding if the obligor is delinquent in an amount equal to the support due for one month;

(4) That income withholding, if implemented, will apply to the obligor's current payors and all subsequent payors and will be continued until terminated pursuant to G.S. 110-136.10;

(5) That failure to bring to the hearing records and information relating to his employment and the amount and sources of his disposable income will be grounds for contempt;

(6) That if income withholding is not an available or appropriate remedy, the court may determine whether the obligor is in contempt or whether any other enforcement remedy is appropriate.

The ~~enforcement~~ order may be signed by the clerk or a district court judge, and shall be served on the obligor pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure. ~~The clerk shall also notify the party to whom support is owed of the pending hearing. The clerk may withdraw the order to the supporting party upon receipt of the delinquent payment.~~ On motion of the person to whom support is ~~owed,~~ owed in a non-IV-D case, with the approval of the district court judge, if the district court judge finds it is in the best interest of the child, no ~~enforcement~~ order shall be issued.

~~When the matter comes before the court, the court shall proceed as in the case of a motion for income withholding under G.S. 110-136.5. If income withholding is not an available or adequate remedy, the court may proceed with contempt, imposition of a lien, or other available, appropriate enforcement remedies.~~

~~This subsection shall apply only to non-IV-D cases, except that the clerk shall issue an enforcement order in a IV-D case when requested to do so by an IV-D obligee.~~

~~(e) The clerk of court shall maintain and make available to the district court judge a list of attorneys who are willing to undertake representation, pursuant to this section, of persons to whom child support is owed. No attorney shall be placed on such list without his permission.~~

~~(f) At least seven days prior to an enforcement hearing as set forth in subsection (d), the clerk must notify the district court judge of all cases to be heard for enforcement~~

~~at the next term, and the judge shall appoint an attorney from the list described in subsection (e) to represent each party to whom support payments are owed if the judge deems it to be in the best interest of the child for whom support is being paid, unless:~~

~~(1) The attorney of record for the party to whom support payments are owed has notified the clerk of court that he will appear for said party; or~~

~~(2) The party to whom support payments are owed requests the judge not to appoint an attorney; or~~

~~(3) An attorney for the enforcement of child support obligations pursuant to Title IV, Part D, of the Social Security Act as amended is available.~~

~~The judge may order payment of reasonable attorney's fees as provided in G.S. 50-13.6.~~

(g) Nothing in this section shall preclude the independent initiation by a party of proceedings for civil contempt or for income withholding."

SECTION 2. G.S. 110-135 reads as rewritten:

"**§ 110-135. Debt to State created.**

Acceptance of public assistance by or on behalf of a dependent child creates a debt, in the amount of public assistance paid, due and owing the State by the responsible parent or parents of the child. Provided, however, that in those cases in which child support was required to be paid incident to a court order during the time of receipt of public assistance, the debt shall be limited to the amount specified in such court order. This liability shall attach only to public assistance granted subsequent to June 30, 1975, and only with respect to the period of time during which public assistance is granted, and only if the responsible parent or parents were financially able to furnish support during this period.

The United States, the State of North Carolina, and any county within the State which has provided public assistance to or on behalf of a dependent child shall be entitled to share in any sum collected under this section, and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid.

No action to collect such debt shall be commenced after the expiration of five years subsequent to the receipt of the last grant of public assistance. The county attorney or an attorney retained by the county and/or State shall represent the State in all proceedings brought under this section.

A past-due public assistance debt as described in this section may be deemed negotiable and subject to reduction if the public assistance debt is not less than fifteen thousand dollars ($15,000) and the responsible parent continues to be obligated to pay current child support. Upon agreement between the State and the responsible parent, the responsible parent shall pay all child support payments, including payments due on child support arrears, entered by a valid court order for a 24-month period of time. Upon the timely payment of each court-ordered child support obligation during the full 24-month period, including payments due on child support arrears, the State shall reduce the responsible parent's public assistance debt by two-thirds. If the responsible parent is late or defaults on any single payment during the 24-month period, no portion

of the public assistance debt shall be reduced. The responsible parent may attempt to achieve 24 consecutive months of child support payments as often as possible in order to reduce his or her public assistance debt. However, once the responsible parent's public assistance debt has been reduced by two-thirds because of the successful completion of this agreement, the responsible parent shall no longer be eligible for this program. The reduction of public assistance debt as set forth in this section shall be in addition to all other remedies available to the State for the retirement of the debt. This program shall not prevent the State from taking any and all other measures available by law.

Upon the termination of a child support obligation due to the death of the obligor, the Department shall determine whether the obligor's estate contains sufficient assets to satisfy any child support arrearages. If sufficient assets are available, the Department shall attempt to collect the arrearage."

SECTION 3. G.S. 49-14(a) reads as rewritten:

"(a) The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A ~~certified~~ copy of a certificate of birth of the child shall be attached to the complaint. The establishment of paternity shall not have the effect of legitimation. The social security numbers, if known, of the minor child's parents shall be placed in the record of the proceeding."

SECTION 4. G.S. 130A-101(f) reads as rewritten:

"(f) If the mother was unmarried at all times from date of conception through date of birth, the name of the father shall not be entered on the certificate unless the child's mother and father complete an affidavit acknowledging paternity which contains the following:

(1) A sworn statement by the mother consenting to the assertion of paternity by the father and declaring that the father is the child's natural father;

(2) A sworn statement by the father declaring that he believes he is the natural father of the child;

(3) Information explaining in plain language the effect of signing the affidavit, including a statement of parental rights and responsibilities and an acknowledgment of the receipt of this information; and

(4) The social security numbers of both parents.

The State Registrar, in consultation with the Child Support Enforcement Section of the Division of Social Services, shall develop and disseminate a form affidavit for use in compliance with this section, together with an information sheet that contains all the information required to be disclosed by subdivision (3) of this subsection.

Upon the execution of the affidavit, the declaring father shall be listed as the father on the birth ~~certificate and shall be presumed to be the natural father of the child,~~certificate, subject to the declaring father's right to rescind under G.S. 110-132. The executed affidavit shall be filed with the registrar along with the birth certificate. ~~A~~ In the event paternity is properly placed at issue, a certified copy of the affidavit shall be admissible in any action to establish paternity. The surname of the child shall be determined by the mother, except if the father's name is entered on the certificate, the

mother and father shall agree upon the child's surname. If there is no agreement, the child's surname shall be the same as that of the mother.

The execution and filing of this affidavit with the registrar does not affect rights of inheritance unless the affidavit is also filed with the clerk of court in accordance with G.S. 29-19(b)(2)."

SECTION 5. G.S. 110-139.2(b1) reads as rewritten:

"(b1) The Department of Health and Human Services Child Support Enforcement Agency may notify any financial institution doing business in this State that an obligor who maintains an identified account with the financial institution has a ~~delinquent~~ child support obligation that may be eligible for levy on the account in an amount that satisfies some or all of the ~~delinquency.~~amount of unpaid support owed. In order to be able to attach a lien on and levy an obligor's account, the ~~obligor's child support obligation~~amount of unpaid support owed shall be ~~in arrears in~~ an amount not less than the amount of support owed for six months or one thousand dollars ($1,000), whichever is less.

Upon certification of the ~~arrears amount~~amount of unpaid support owed in accordance with G.S. 44-86(c), the Child Support Agency shall serve or cause to be served upon the ~~obligor~~ obligor, and when the matched account is owned jointly, any other nonliable owner of the account, and the financial institution a notice as provided by this subsection. ~~The notice shall be served in any manner provided in Rule 4 of the North Carolina Rules of Civil Procedure, except that a notice may be served on a financial institution in any other manner that the financial institution has agreed to in writing at any time prior to the time the notice is sent.~~ The notice shall include the name of the obligor, the financial institution where the account is located, the account number of the account to be levied to satisfy the lien, the certified ~~arrears amount,~~amount of unpaid support, information for the obligor or account owner on how to remove the lien or contest the lien in order to avoid the levy, and a copy of the applicable law, G.S. 110-139.2. The notice shall be served on the obligor, and any nonliable account owner, in any manner provided in Rule 4 of the North Carolina Rules of Civil Procedure. The financial institution shall be served notice in accordance with Rule 5 of the North Carolina Rules of Civil Procedure. Upon service of the notice, the financial institution shall proceed in the following manner:

(1) Immediately attach a lien to the identified account.

(2) Notify the Child Support Agency of the balance of the account and date of the lien or that the account does not meet the requirement for levy under this subsection.

In order for an obligor or account owner to contest the lien, within 10 days after the obligor or account owner is served with the notice, the obligor or account owner shall send written notice of the basis of the ~~obligor's~~ contest to the Child Support Agency and shall request a hearing before the district court in the county where the support order was entered. The ~~lien may be contested~~obligor account holder may contest the lien only on the basis that the ~~arrearage~~ amount owed is an amount less than the amount of support owed for six months, or is less than one thousand dollars ($1,000), whichever is less, or the ~~obligor~~ contesting party is not the person subject to the court order of

support. The district court may assess court costs against the nonprevailing party. If no response is received from the obligor or account owner within 10 days of the service of the notice, the Child Support Agency shall notify the financial institution to submit payment, up to the total amount of the child support arrears, if available. This amount is to be applied to the debt of the ~~delinquent~~ obligor.

A financial institution shall not be liable to any person for complying in good faith with this subsection. The remedy set forth in this section shall be in addition to all other remedies available to the State for the reduction of the obligor's child support arrears. This remedy shall not prevent the State from taking any and all other concurrent measures available by law.

This levy procedure is to be available for direct use by all states' child support programs to financial institutions in this ~~State.~~State without involvement of the Department."

SECTION 6. This act is effective 90 days after it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 1375

Committee Substitute Favorable 5/4/05

PROPOSED SENATE COMMITTEE SUBSTITUTE H1375-CSRC-80 [v.1]

8/9/2005 5:03:13 PM

Short Title: Child Support Reforms. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT AMENDING THE LAWS RELATING TO CHILD SUPPORT ENFORCEMENT IN ORDER TO CLARIFY AND ENHANCE THOSE LAWS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 50-13.9 reads as rewritten:

"**§ 50-13.9. Procedure to insure payment of child support.**

(a) Upon its own motion or upon motion of either party, the court may order at any time that support payments be made to the State Child Support Collection and Disbursement Unit for remittance to the party entitled to receive the payments. For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) apply.

(b) After entry of an order by the court under subsection (a) of this section, the State Child Support Collection and Disbursement Unit shall transmit child support payments that are made to it to the custodial parent or other party entitled to receive them, unless a court order requires otherwise.

(b1) In a IV-D case:

(1) The designated child support enforcement agency shall have the sole responsibility and authority for monitoring the obligor's compliance with all child support orders in the case and for initiating any enforcement procedures that it considers appropriate.

(2) The clerk of court shall maintain all official records in the case.

(3) The designated child support enforcement agency shall maintain any other records needed to monitor the obligor's compliance with or to enforce the child support orders in the case, including records showing the amount of each payment of child support received from or on behalf of the obligor, along with the dates on which each payment was received. In any action establishing, enforcing, or modifying a child

support order, the payment records maintained by the designated child support agency shall be admissible evidence, and the court shall permit the designated representative to authenticate those records.

(b2) In a non-IV-D case:

~~(1) The clerk of court shall have the responsibility and authority for monitoring the obligor's compliance with all child support orders in the case and for initiating any enforcement procedures that it considers appropriate. The State Child Support Collection and Disbursement Unit shall notify the clerk of court of all payments made in non-IV-D cases so that the clerk of court can initiate enforcement proceedings as provided in subsection (d) of this section.~~

(2) The clerk of court shall maintain all official records ~~in the case.~~ and all case data concerning child support matters previously enforced by the clerk of court.

~~(3) The clerk of court shall maintain any other records needed to monitor the obligor's compliance with or to enforce the child support orders in the case, including records showing the amount of each payment of child support received from or on behalf of the obligor, along with the dates on which each payment was received.~~

(c) ~~In a non-IV-D case, the parties affected by the order shall inform the clerk of court of any change of address or of other condition that may affect the administration of the order.~~ In a IV-D case, the parties affected by the order shall inform the designated child support enforcement agency of any change of address or other condition that may affect the administration of the order. The court may provide in the order that a party failing to inform the court or, as appropriate, the designated child support enforcement agency, of a change of address within a reasonable period of time may be held in civil contempt.

(d) ~~In a non-IV-D case, when the clerk of superior court is notified by the State Child Support Collection and Disbursement Unit that an obligor has failed to make a required payment of child support and is in arrears, the clerk of superior court shall mail by regular mail to the last known address of the obligor a notice of delinquency. The notice shall set out the amount of child support currently due and shall demand immediate payment of that amount. The notice shall also state that failure to make immediate payment will result in the issuance by the court of an enforcement order requiring the obligor to appear before a district court judge and show cause why the support obligation should not be enforced by income withholding, contempt of court, revocation of licensing privileges, or other appropriate means. Failure to receive the delinquency notice is not a defense in any subsequent proceeding. Sending the notice of delinquency is in the discretion of the clerk if the clerk has, during the previous 12 months, sent a notice or notices of delinquency to the obligor for nonpayment, or if income withholding has been implemented against the obligor or the obligor has been previously found in contempt for nonpayment under the same child support order.~~

~~If the arrearage is not paid in full within 21 days after the mailing of the delinquency notice, or without waiting the 21 days if the clerk has elected not to mail a delinquency~~

~~notice for any of the reasons provided in this subsection, the clerk shall cause an enforcement order to be issued and shall issue a notice of hearing before a district court judge.~~ Upon affidavit of an obligee, the clerk or a district court judge may order the obligor to appear and show cause why the obligor should not be subjected to income withholding or adjudged in contempt of court, or both. The ~~enforcement~~ order shall ~~order~~ require the obligor to appear and show cause why the obligor should not be subjected to income withholding or adjudged in contempt of court, or both, and shall order the obligor to bring to the hearing records and information relating to the obligor's employment, the obligor's licensing privileges, and the amount and sources of the obligor's disposable income. The ~~enforcement~~ order shall state:

(1) That the obligor is under a court order to provide child support, the name of each child for whose benefit support is due, and information sufficient to identify the order;

(2) That the obligor is delinquent and the amount of overdue support;

(2a) That the court may order the revocation of some or all of the obligor's licensing privileges if the obligor is delinquent in an amount equal to the support due for one month;

(3) That the court may order income withholding if the obligor is delinquent in an amount equal to the support due for one month;

(4) That income withholding, if implemented, will apply to the obligor's current payors and all subsequent payors and will be continued until terminated pursuant to G.S. 110-136.10;

(5) That failure to bring to the hearing records and information relating to his employment and the amount and sources of his disposable income will be grounds for contempt;

(6) That if income withholding is not an available or appropriate remedy, the court may determine whether the obligor is in contempt or whether any other enforcement remedy is appropriate.

The ~~enforcement~~ order may be signed by the clerk or a district court judge, and shall be served on the obligor pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure. ~~The clerk shall also notify the party to whom support is owed of the pending hearing. The clerk may withdraw the order to the supporting party upon receipt of the delinquent payment.~~ On motion of the person to whom support is ~~owed,~~ owed in a non-IV-D case, with the approval of the district court judge, if the district court judge finds it is in the best interest of the child, no ~~enforcement~~ order shall be issued.

~~When the matter comes before the court, the court shall proceed as in the case of a motion for income withholding under G.S. 110-136.5. If income withholding is not an available or adequate remedy, the court may proceed with contempt, imposition of a lien, or other available, appropriate enforcement remedies.~~

~~This subsection shall apply only to non-IV-D cases, except that the clerk shall issue an enforcement order in a IV-D case when requested to do so by an IV-D obligee.~~

~~(e) The clerk of court shall maintain and make available to the district court judge a list of attorneys who are willing to undertake representation, pursuant to this~~

~~section, of persons to whom child support is owed. No attorney shall be placed on such list without his permission.~~

~~(f) At least seven days prior to an enforcement hearing as set forth in subsection (d), the clerk must notify the district court judge of all cases to be heard for enforcement at the next term, and the judge shall appoint an attorney from the list described in subsection (e) to represent each party to whom support payments are owed if the judge deems it to be in the best interest of the child for whom support is being paid, unless:~~

~~(1) The attorney of record for the party to whom support payments are owed has notified the clerk of court that he will appear for said party; or~~

~~(2) The party to whom support payments are owed requests the judge not to appoint an attorney; or~~

~~(3) An attorney for the enforcement of child support obligations pursuant to Title IV, Part D, of the Social Security Act as amended is available.~~

~~The judge may order payment of reasonable attorney's fees as provided in G.S. 50-13.6.~~

(g) Nothing in this section shall preclude the independent initiation by a party of proceedings for civil contempt or for income withholding."

SECTION 2. G.S. 110-135 reads as rewritten:

"**§ 110-135. Debt to State created.**

Acceptance of public assistance by or on behalf of a dependent child creates a debt, in the amount of public assistance paid, due and owing the State by the responsible parent or parents of the child. Provided, however, that in those cases in which child support was required to be paid incident to a court order during the time of receipt of public assistance, the debt shall be limited to the amount specified in such court order. This liability shall attach only to public assistance granted subsequent to June 30, 1975, and only with respect to the period of time during which public assistance is granted, and only if the responsible parent or parents were financially able to furnish support during this period.

The United States, the State of North Carolina, and any county within the State which has provided public assistance to or on behalf of a dependent child shall be entitled to share in any sum collected under this section, and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid.

No action to collect such debt shall be commenced after the expiration of five years subsequent to the receipt of the last grant of public assistance. The county attorney or an attorney retained by the county and/or State shall represent the State in all proceedings brought under this section.

A past-due public assistance debt as described in this section may be deemed negotiable and subject to reduction if the public assistance debt is not less than fifteen thousand dollars ($15,000) and the responsible parent continues to be obligated to pay current child support. Upon agreement between the State and the responsible parent, the responsible parent shall pay all child support payments, including payments due on child support arrears, entered by a valid court order for a 24-month period of time.

Upon the timely payment of each court-ordered child support obligation during the full 24-month period, including payments due on child support arrears, the State shall reduce the responsible parent's public assistance debt by two-thirds. If the responsible parent is late or defaults on any single payment during the 24-month period, no portion of the public assistance debt shall be reduced. The responsible parent may attempt to achieve 24 consecutive months of child support payments as often as possible in order to reduce his or her public assistance debt. However, once the responsible parent's public assistance debt has been reduced by two-thirds because of the successful completion of this agreement, the responsible parent shall no longer be eligible for this program. The reduction of public assistance debt as set forth in this section shall be in addition to all other remedies available to the State for the retirement of the debt. This program shall not prevent the State from taking any and all other measures available by law.

Upon the termination of a child support obligation due to the death of the obligor, the Department shall determine whether the obligor's estate contains sufficient assets to satisfy any child support arrearages. If sufficient assets are available, the Department shall attempt to collect the arrearage."

SECTION 3. G.S. 49-14(a) reads as rewritten:

"(a) The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A ~~certified~~ copy of a certificate of birth of the child shall be attached to the complaint. The establishment of paternity shall not have the effect of legitimation. The social security numbers, if known, of the minor child's parents shall be placed in the record of the proceeding."

SECTION 4. G.S. 130A-101(f) reads as rewritten:

"(f) If the mother was unmarried at all times from date of conception through date of birth, the name of the father shall not be entered on the certificate unless the child's mother and father complete an affidavit acknowledging paternity which contains the following:

(1) A sworn statement by the mother consenting to the assertion of paternity by the father and declaring that the father is the child's natural father;

(2) A sworn statement by the father declaring that he believes he is the natural father of the child;

(3) Information explaining in plain language the effect of signing the affidavit, including a statement of parental rights and responsibilities and an acknowledgment of the receipt of this information; and

(4) The social security numbers of both parents.

The State Registrar, in consultation with the Child Support Enforcement Section of the Division of Social Services, shall develop and disseminate a form affidavit for use in compliance with this section, together with an information sheet that contains all the information required to be disclosed by subdivision (3) of this subsection.

Upon the execution of the affidavit, the declaring father shall be listed as the father on the birth ~~certificate and shall be presumed to be the natural father of the child,~~certificate, subject to the declaring father's right to rescind under G.S. 110-132.

The executed affidavit shall be filed with the registrar along with the birth certificate. ~~A~~ In the event paternity is properly placed at issue, a certified copy of the affidavit shall be admissible in any action to establish paternity. The surname of the child shall be determined by the mother, except if the father's name is entered on the certificate, the mother and father shall agree upon the child's surname. If there is no agreement, the child's surname shall be the same as that of the mother.

The execution and filing of this affidavit with the registrar does not affect rights of inheritance unless the affidavit is also filed with the clerk of court in accordance with G.S. 29-19(b)(2)."

SECTION 5. G.S. 110-139.2(b1) reads as rewritten:

"(b1) The Department of Health and Human Services Child Support Enforcement Agency may notify any financial institution doing business in this State that an obligor who maintains an identified account with the financial institution has a ~~delinquent~~ child support obligation that may be eligible for levy on the account in an amount that satisfies some or all of the ~~delinquency.~~amount of unpaid support owed. In order to be able to attach a lien on and levy an obligor's account, the ~~obligor's child support obligation~~amount of unpaid support owed shall be ~~in arrears in~~ an amount not less than the amount of support owed for six months or one thousand dollars ($1,000), whichever is less.

Upon certification of the ~~arrears amount~~amount of unpaid support owed in accordance with G.S. 44-86(c), the Child Support Agency shall serve or cause to be served upon the ~~obligor~~ obligor, and when the matched account is owned jointly, any other nonliable owner of the account, and the financial institution a notice as provided by this subsection. ~~The notice shall be served in any manner provided in Rule 4 of the North Carolina Rules of Civil Procedure, except that a notice may be served on a financial institution in any other manner that the financial institution has agreed to in writing at any time prior to the time the notice is sent.~~ The notice shall include the name of the obligor, the financial institution where the account is located, the account number of the account to be levied to satisfy the lien, the certified ~~arrears amount,~~amount of unpaid support, information for the obligor or account owner on how to remove the lien or contest the lien in order to avoid the levy, and a copy of the applicable law, G.S. 110-139.2. The notice shall be served on the obligor, and any nonliable account owner, in any manner provided in Rule 4 of the North Carolina Rules of Civil Procedure. The financial institution shall be served notice in accordance with Rule 5 of the North Carolina Rules of Civil Procedure. Upon service of the notice, the financial institution shall proceed in the following manner:

(1) Immediately attach a lien to the identified account.

(2) Notify the Child Support Agency of the balance of the account and date of the lien or that the account does not meet the requirement for levy under this subsection.

In order for an obligor or account owner to contest the lien, within 10 days after the obligor or account owner is served with the notice, the obligor or account owner shall send written notice of the basis of the ~~obligor's~~ contest to the Child Support Agency and shall request a hearing before the district court in the county where the support order

was entered. The ~~lien may be contested~~obligor account holder may contest the lien only on the basis that the ~~arrearage~~ amount owed is an amount less than the amount of support owed for six months, or is less than one thousand dollars ($1,000), whichever is less, or the ~~obligor~~ contesting party is not the person subject to the court order of support. The district court may assess court costs against the nonprevailing party. If no response is received from the obligor or account owner within 10 days of the service of the notice, the Child Support Agency shall notify the financial institution to submit payment, up to the total amount of the child support arrears, if available. This amount is to be applied to the debt of the ~~delinquent~~ obligor.

A financial institution shall not be liable to any person for complying in good faith with this subsection. The remedy set forth in this section shall be in addition to all other remedies available to the State for the reduction of the obligor's child support arrears. This remedy shall not prevent the State from taking any and all other concurrent measures available by law.

This levy procedure is to be available for direct use by all states' child support programs to financial institutions in this ~~State.~~State without involvement of the Department."

SECTION 6. Section 1 becomes effective July 1, 2007. The remainder of the act is effective 90 days after it becomes law.

HOUSE BILL 1375:
Child Support Reforms

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 10, 2005
Introduced by:	Rep. Culpepper	**Summary by:**	Kory Goldsmith
Version:	PCS to Second Edition H1375-CSRC-80		Committee Counsel

SUMMARY: ***House Bill 1375 makes several changes to the child support enforcement laws, including the following:***

- ***Removing the clerk of court's authority to monitor child support payment compliance.***
- ***Authorizing DSS to reduce by two-thirds an obligor's past-due public assistance debt where the debt is at least $15,000 and the obligor timely makes all child support payments, including arrearages, for a 24-month period.***
- ***Eliminating the requirement that birth certificates be certified when submitted as part of a paternity action.***
- ***Changing the method of service on financial institutions regarding liens on accounts of child support obligors from Rule 4 to Rule 5 of the North Carolina Rules of Civil Procedure.***

The primary change in the Proposed Committee Substitute is that it postpones the removal of the clerk of court's authority to enforce child support payment compliance until January 1, 2007.

CURRENT LAW: Like all states, North Carolina has enacted a number of statutes to increase collections of child support. Many of these statutes are the results of federal initiatives in the area of child support. When an order for child support directs the obligor to pay the amount into the court, the obligor sends the payment to a centralized collection agency, the State Child Support Collection and Disbursement Unit (SCSCDU). If the custodial parent is a recipient of welfare assistance under Title IV-D of the Social Security Act, all payments for child support must be paid to the SCSCDU. The child support enforcement agency monitors payments to the SCSCDU and seeks various enforcement remedies if the obligor becomes delinquent.

In non-IV-D cases, the parties may agree that payments be made to the SCSCDU or the court may make such an order in its discretion. However, in these cases, the clerk of court has the responsibility and authority for monitoring the obligor's compliance with all child support orders in the case and for initiating enforcement procedures that it considers appropriate. The SCSCDU must notify the clerk of court of all payments made in non IV-D cases so that the clerk can initiate enforcement proceedings. The clerk sends by regular mail a notice of delinquency to the obligor. If the arrearage is not paid within 21 days, the clerk calendars a hearing to seek an enforcement remedy, such as entry of an income withholding order, contempt of court, or revocation of licensing privileges.

BILL ANALYSIS:

Section 1. Removal of clerk's authority to process child support payments

Under current law, a person has four options in seeking assistance with child support enforcement: (1) self-representation; (2) representation by a private attorney; (3) the child support enforcement, or IV-D, agency; or (4) the clerk of court. DSS, or child support enforcement, handles the vast majority of the

overall child support enforcement cases and has more resources and enforcement tools at its disposal than the clerks of court.[1]

Effective January 1, 2007, Section 1 of the bill would eliminate the authority of the clerk of court to monitor enforcement of payment under child support orders, further centralizing this function within DSS. The clerk would still be required to maintain all official records and all case data concerning child support matters previously enforced by the clerk of court in the case. The clerk or a district court judge would also have the authority, upon affidavit of the oblige, to issue an order ordering an obligor to appear and show cause why the obligor should not be the subject of one of the available enforcement remedies.

Section 2. Authorization for reduction of past-due public assistance debt in certain circumstances

A noncustodial parent ordered to pay child support would owe a debt to the custodial parent for failure to pay support. In addition, acceptance of public assistance on behalf of a dependent child creates a debt due and owing to the State. The State may bring an action against the responsible parent to recover amounts owed within 5 years of receipt of the last grant of public assistance.

Section 2 of the bill would authorize the State, through DSS, to negotiate and reduce by two-thirds the amount of past-due public assistance debt owed by a responsible parent on the condition that the parent timely pay all child support payments, including arrearages, for a 24-month period of time. The parent's public assistance debt would have to be at least $15,000 before the parent would be eligible to participate in the program. If the parent is late or defaults on any payment during the 24-month period, no portion of the public assistance debt would be reduced. Once a parent has obtained a reduction as the result of timely payments for a 24-month period, the parent is not eligible for a subsequent reduction. Of the 450,000 child support cases in North Carolina, less than 3,000 are cases involving arrearages of public assistance debt in excess of $15,000.

Section 3. Removal of certification requirement for birth certificates.

G.S. 49-14 sets out the procedure for establishing paternity. The purpose of this Article is to enable an illegitimate child to receive support from its biological father. Paternity may be established by filing a civil action with a certified copy of the child's birth certificate attached.

Section 3 of the bill would remove the requirement that the birth certificate be a "certified" copy.

Section 4. Clarification of "presumed natural father" reference.

G.S. 110-132 sets out the procedure by which parentage is determined for purposes of establishing a child support obligation. It states that a written affidavit executed by the putative father and mother of the child constitutes an admission of paternity and has the same legal effect as a judgment of paternity. G.S. 130A-101(f), which is the Vital Statistics Article, indicates that where the mother and father have signed affidavits acknowledging paternity, the father "shall be presumed to be the natural father of the child." This "presumed" language has created some confusion in light of G.S. 110-132.

Section 4 of the bill deletes the "presumed" language in order to clarify that G.S. 110-132 is the substantive law that governs paternity determinations, and that G.S. 130A-101(f) merely directs Vital Statistics to list the father on the birth certificate where an affidavit acknowledging paternity has been executed.

Section 5. Modifications to notice requirements related to liens on bank accounts.

[1]DHHS currently has about 412,000 cases compared to the clerks of court, which have a total of about 47,000.

Under current law, one enforcement mechanism available to DSS is levying an obligor's bank account. If a noncustodial parent has arrearages equal to six (6) months of their child support obligation or $1000 (whichever is less), the child support enforcement agency can request that a lien be placed on the parent's financial institution accounts. The child support agency is required to notify both the obligor and the financial institution of the relevant lien information in accordance with Rule 4 of the North Carolina Rules of Civil Procedure.

Section 5 of the bill does two things regarding the notice requirement:

- It would require the child support agency to notify any nonliable joint account holders, in addition to the responsible parent.
- It would require notice on the financial institution to be served in accordance with Rule 5 rather than Rule 4 of the North Carolina Rules of Civil Procedure. Rule 5 does not require a summons from the clerk, service by the sheriff, or use of certified mail (except where it refers to Rule 4). Service is made by either hand-delivery or regular mail.

EFFECTIVE DATE: Section 1 of the bill will become effective January 1, 2007. The remainder of the act is effective 90 days after it becomes law.

BACKGROUND: None of the changes in this bill are federal mandates. They are, however, recommendations of the Child Support Enforcement agency for improving the amount and efficiency with which child support payments are collected.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1436
Committee Substitute Favorable 5/26/05

Short Title: Death Penalty/Add Aggravating Factor. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT TO DIRECT THE SENTENCING COMMISSION TO STUDY AND MAKE RECOMMENDATIONS REGARDING EVIDENCE THAT A MURDER WAS COMMITTED IN VIOLATION OF A VALID DOMESTIC VIOLENCE PROTECTIVE ORDER AS AN AGGRAVATING FACTOR IN CAPITAL SENTENCING.

The General Assembly of North Carolina enacts:

SECTION 1. The North Carolina Sentencing and Policy Advisory Commission, pursuant to its statutory responsibilities under Article 4 of Chapter 164 of the General Statutes, shall study aggravating factors which may be considered in capital felony sentencing pursuant to G.S. 15A-2000(e). In particular, the Commission shall examine the question of whether the State's capital sentencing law should include as an aggravating factor that the capital felony was committed at a time when the defendant knew the behavior was prohibited by a valid protective order entered pursuant to Chapter 50B of the General Statutes of North Carolina, or by a valid protective order entered by the courts of another state or the courts of an Indian tribe. The Commission shall report its findings and recommendations to the 2005 General Assembly not later than May 1, 2006. The report shall describe the Commission's deliberations and shall include any policy recommendations and proposed legislation.

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 1436:
Death Penalty/Add Aggravating Factor

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 9, 2005
Introduced by:	Rep. Johnson	**Summary by:**	Robin Johnson
Version:	Second Edition		Committee Counsel

SUMMARY: ***House Bill 1436 would direct the NC Sentencing Commission to study the list of aggravating factors for a capital offense to determine whether an aggravating factor should be added for when the murder was committed in violation of a valid domestic violence protective order. The Commission would be required to report to the General Assembly by May 1, 2006. The report must describe the Commission's deliberations and must include any policy recommendations and proposed legislation.***

CURRENT LAW: When a person is convicted of first-degree murder in a case in which the State has given notice of its intent to seek the death penalty, the court conducts a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. Evidence may be presented as to any matter that the court deems relevant to the sentence, and may include matters relating to the aggravating or mitigating circumstances enumerated in G.S. 15A-2000. After hearing the evidence, the jury renders a sentence recommendation based on whether sufficient aggravating circumstances exist, whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances, and based on those considerations whether the defendant should be sentenced to death or to life imprisonment. The aggravating circumstances that may be considered are currently limited to the following:

- The murder was committed by an incarcerated defendant
- The defendant was previously convicted of a capital felony
- The defendant was previously convicted of a felony involving the use or threat of violence
- The murder was committed to avoiding arrest or to effect an escape from custody
- The murder was committed before, during, or after the commission of any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb
- The murder was committed for pecuniary gain
- The murder was committed to disrupt or hinder a governmental function or the enforcement of laws
- The murder was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of their official duties or because of the exercise of their official duty
- The murder was especially heinous, atrocious, or cruel
- The defendant created a great risk of death to more than one person by a hazardous weapon or device
- The murder was part of the defendant's course of violent conduct against another person or persons

EFFECTIVE DATE: This act is effective when it becomes law.

**Brenda Carter, counsel to House Judiciary III, substantially contributed to this summary.*

H1436e2-SMRH

Please note time

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	August 11, 2005	9:00 - 11:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 561	Commissions for Personal Representatives.	Representative Haire
HB 723	UNC/Criminal Record Checks/Fee.-AB	Representative Dickson Representative Glazier
HB 801	Child Custody/Guardianship Jurisdiction.	Representative Dickson Representative Alexander Representative Glazier
HB 967	Health Care Power of Atty/Dispos. of Remains.	Representative Tucker
HB 1085	Care of Dogs Illegally Used for Fighting.	Representative Parmon Representative Insko
HB 1145	Probation Stayed/Appeal for Trial de Novo.	Representative Michaux, Jr.
HB 1150	Expedite Juv. Proceedings/Guardians ad Litem.	Representative Ross Representative Goodwin Representative Glazier
HB 1176	Property Exempt From Enforcement Actions.	Representative Weiss Representative Goodwin Representative Harrison

		Representative Glazier
HB 1311	Domestic Violence Victims Empowerment Act.	Representative Johnson Representative Hilton
HB 1328	Pardon/Expunction of Record.	Representative Parmon Representative Womble Representative Coleman Representative Harrison
HB 1401	Concealed Carry By Law Enforcement Officers.	Representative Folwell
HB 1485	Search Warrants/Audio & Video Transmission.	Representative Culpepper, III

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, August 11, 2005, 9:00 - 11:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 561	Commissions for Personal Representatives.	Representative Haire
HB 723	UNC/Criminal Record Checks/Fee.-AB	Representative Dickson Representative Glazier
HB 801	Child Custody/Guardianship Jurisdiction.	Representative Dickson Representative Alexander Representative Glazier
HB 967	Health Care Power of Atty/Dispos. of Remains.	Representative Tucker
HB 1085	Care of Dogs Illegally Used for Fighting.	Representative Parmon Representative Insko
HB 1145	Probation Stayed/Appeal for Trial de Novo.	Representative Michaux, Jr.
HB 1150	Expedite Juv. Proceedings/Guardians ad Litem.	Representative Ross Representative Goodwin Representative Glazier
HB 1176	Property Exempt From Enforcement Actions.	Representative Weiss Representative Goodwin Representative Harrison Representative Glazier
HB 1311	Domestic Violence Victims Empowerment Act.	Representative Johnson Representative Hilton
HB 1328	Pardon/Expunction of Record.	Representative Parmon Representative Womble Representative Coleman Representative Harrison
HB 1401	Concealed Carry By Law Enforcement Officers.	Representative Folwell
HB 1485	Search Warrants/Audio & Video Transmission.	Representative Culpepper, III

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

August 11, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on August 11, 2005, with eighteen members present. Senator Hartsell introduced pages Virginia Mayo, Kathryn Lorbacher, Mary Hollowell and Erika Kiser and thanked them for serving.

HB 1176 (Property Exempt From Enforcement Actions.) Senator Forrester moved to accept the committee substitute for purposes of discussion. All voted and the motion carried. Senator Hartsell then recognized Representative Weiss to explain the bill. Mr. Butler, Attorney, representing the Bar Association and Mr. Billy Brewer, Bankruptcy Attorney from Raleigh, spoke on the bill. Questions from Senators Kinnaird, Goodall, Forrester and Dannelly were answered by Representative Weiss, Mr. Butler and Mr. Brewer. Senator Goodall moved for a favorable report to the committee substitute, unfavorable to the original bill. All voted and the motion carried.

HB 723 (UNC/Criminal Record Checks/Fee.-AB) Senator Forrester moved to accept the committee substitute for purposes of discussion. All voted and the motion carried. Representative Glazier was recognized by Senator Hartsell to explain the bill. Representative Glazier and Kory Goldsmith, Staff Attorney, answered Senator Kinnaird's question. Senator Bingham moved for a favorable report, unfavorable to the original bill with a referral to Finance. All voted and the motion carried.

HB 561 (Commissions for Personal Representatives.) Senator Forrester moved to accept the committee substitute for purposes of discussion. Representative Haire was recognized to explain the bill. Representative Haire introduced Mr. Alex Atchison, representing the Bar Association, to speak on the bill. Questions from Senators Allran, Bingham, Kinnaird and Goodall were answered by Kory Goldsmith, Staff Attorney. Senator Bingham moved for a favorable report to the committee substitute, unfavorable to the original bill. All voted and the motion carried.

HB 967 (Health Care Power of Atty/Dispos. Of Remains.) Senator Forrester moved to accept the committee substitute for purposes of discussion. Representative Tucker was recognized to explain the bill. Questions from Senators Allran, Bingham, Forrester and Webster were answered by Representative Tucker and Kory Goldsmith, Staff Attorney. Senator Apodaca moved for a favorable report to the committee substitute, unfavorable to the original bill. The motion was held and after much discussion Representative Tucker requested the bill be displaced until a later time.

HB 1085 (Care of Dogs Illegally Used for Fighting.) Senator Hartsell recognized Representative Insko to explain the bill. Mr. John Sauls, Animal Control Officer from Chatham County, spoke in favor of the bill. Questions from Senators Kerr, Webster, Dannelly, Berger, Bingham and Atwater were answered by Representative Insko and Mr. Sauls. Senator Berger sent forth an amendment that was accepted by Representative Insko. All voted and the amendment was adopted. Senator Graham moved for a favorable report as amended and rolled into a new committee substitute. All voted and the motion carried.

HB 1145 (Probation Stayed/Appeal for Trial de Novo.) Representative Michaux was recognized to explain the bill. Representative Michaux answered Senator Berger's question. Senator Berger moved for a favorable report. All voted and the motion carried.

HB 1311 (Domestic Violence Victims Empowerment Act.) Senator Hartsell recognized Representative Johnson to explain the bill. Representative Hilton was invited to give additional explanation. Questions from Senators Bingham, Dannelly and Kinnaird were answered by Representatives Johnson and Hilton. Mr. Jeff Rowell, representing Grass Roots of North Carolina, Teresa Pell, Executive Director of the North Carolina Council for Women/Domestic Violence Commission, and Mr. Alyandro Crespi spoke in opposition to the bill. Mr. Joe McClees, representing the Firearms Dealers Group of North Carolina, spoke in favor of the bill. Senator Bingham moved for a favorable report. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, August 11, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B.(CS #1) **1145** Probation Stayed/Appeal for Trial de Novo.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **1311** Domestic Violence Victims Empowerment Act.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 2

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, August 11, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 2, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #2) **723** UNC/Criminal Record Checks/Fee.-AB

Draft Number:	PCS30373
Sequential Referral:	Finance
Recommended Referral:	None
Long Title Amended:	No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1085** Care of Dogs Illegally Used for Fighting.

Draft Number:	PCS70554
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 3, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #3) **1176** Property Exempt From Enforcement Actions.

Draft Number:	PCS10389
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 3

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, August 11, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **561** Commissions for Personal Representatives.

Draft Number:	PCS 10395
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

August 11, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Stacy Flannery	NCHCPA
ALEJANDRO CRESPI	286 E. DAVIE ST RALEIGH 27601
ALEX ATCHISON	YOUNG MOORE AND HENDERSON, P.A 3101 GLENWOOD AVE RALEIGH NC 27622
Staples Hughes	Appellate Defender
Anne Winner	AAG
Teresa Pell	NC Council for Women / DV Commission
Allen Trask, III	Butler & Butler, LLP
Margaret Westbrook	KCLH
Doug Heron	NC BAR ASSN
Ryan Presley	Intern – Rep. Glazier
Mildred Spearman	NCDOC

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — August 11, 2005

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Robert Lee Guy	DOC / DCC
John Mahe	Gov Office
Al Ripley	NC Judicial Ctr
Brent Hanson	GRNC
Steve Keene	NCMS
Joanne Stevens	Nursing
Paul Harris	NC Board of Funeral Service
Steve Dirksen	NCBFS
Jeff Ran	GRNC
Billy Brewer	The Brewer Law Firm
Diane Hoover	GAL / AOC

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — August 11, 2005

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Rick Zechini	NC Assoc. of Realtors
Colleen Kochanek	HYMH
Amy Jo Home	NCMS
John Sauls	NC Task Force against Animal Fighting
Eddie Caldwell	NC Sheriffs' Assn
Amy Fulbright	Hunton & Wms.
Jim Bone	Bone & Assoc.
Bill Rowe	NC Justice Ctr
Gary Mack	NC Abo
John Goodman	Allen Associates
Peggy Myers	

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

August 11, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
JOEL MAYNARD	EPM & ASSOC.
Kevin Howell	Gov's office
Rob Schofield	NC Justice Ctr.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 561

Committee Substitute Favorable 5/2/05

Short Title: Commissions for Personal Representatives. (Public)

Sponsors:

Referred to:

March 10, 2005

A BILL TO BE ENTITLED

AN ACT RELATING TO COMMISSIONS ALLOWED TO PERSONAL REPRESENTATIVES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 28A-23-3 reads as rewritten:

"**§ 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,~~ the clerk of superior court, in ~~his~~ the clerk's discretion, deems just and adequate.

(b) In determining the amount of such commissions, both upon personal property received and upon expenditures made, the clerk of superior court shall consider the time, responsibility, trouble and skill involved in the management of the estate. Where real property is sold to pay debts or legacies, the commission shall be computed only on the proceeds actually applied in the payment of debts or legacies.

(c) The clerk of superior court may allow commissions from time to time during the course of the administration, but the total commissions allowed shall be determined on final settlement of the estate and shall not exceed the limit fixed in this section.

(d) Nothing in this section shall be construed:

(1) To prevent the clerk of the superior court from allowing reasonable sums for necessary charges and disbursements incurred in the management of the estate; or

(2) To allow commissions on distribution of the shares of heirs or on distribution of shares of devisees; or

(3) To abridge the right of any party interested in the administration of a decedent's estate to appeal an order of the clerk of superior court to a judge of superior court.

(d1) In determining the maximum commissions allowable pursuant to subsection (a) of this section, the clerk of superior court may take into account the fees paid by the estate for professional services performed that were a part of the ordinary routine of administration, including services performed by attorneys and accountants. The discretion authorized by this subsection does not require the clerk to reduce the maximum commissions allowed by the aggregate fees paid to professionals on a dollar-for-dollar basis.

(e) No personal representative, collector or public administrator, who has been guilty of ~~such~~ default or misconduct in the due execution of his or her office resulting in the revocation of his or her appointment of the personal representative, collector, or public administrator 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.

(g) The provisions of subsection (a) of this section do not apply when the testator's will specifies a stipulated amount or method or standard for determining the compensation for the services rendered by the personal representative, including:

(1) A provision in the will that the compensation of the personal representative is to be determined by applying its regularly adopted schedule of compensation in effect at the time of performance of those services.

(2) A provision in the will that the personal representative is to receive "reasonable compensation" for those services or similar language to that effect.

(h) Notwithstanding the provisions of subdivision (g)(2) of this section:

(1) When the will provides that the personal representative is to receive "reasonable compensation" or similar language to that effect, the personal representative shall receive commissions as determined under subsection (a) of this section unless the personal representative and the beneficiaries whose shares would be charged with the payment of the personal representative's compensation consent in writing to the specific amount that constitutes reasonable compensation.

(2) When the will provides that compensation of the personal representative shall be the amount "as provided by law," the "maximum amount provided by law," or other similar language, that language shall be construed as the intention that the personal representative shall receive commissions as determined under subsection (a) of this section."

SECTION 2. G.S. 28A-19-6 reads as rewritten:

"**§ 28A-19-6. Order of payment of claims.**

After payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order:

First class. Claims which by law have a specific lien on property to an amount not exceeding the value of such property.

Second class. Funeral expenses to the extent of two thousand five hundred dollars ($2,500). This limitation shall not include cemetery lot or gravestone. The preferential limitation herein granted shall be construed to be only a limit with respect to preference of payment and shall not be construed to be a limitation on reasonable funeral expenses which may be incurred; nor shall the preferential limitation of payment in the amount of two thousand five hundred dollars ($2,500) be diminished by any Veterans Administration, social security or other federal governmental benefits awarded to the estate of the decedent or to his or her beneficiaries.

Third class. All dues, taxes, and other claims with preference under the laws of the United States.

Fourth class. All dues, taxes, and other claims with preference under the laws of the State of North Carolina and its subdivisions.

Fifth class. Judgments of any court of competent jurisdiction within the State, docketed and in force, to the extent to which they are a lien on the property of the decedent at his death.

Sixth class. Wages due to any employee employed by the decedent, which claim for wages shall not extend to a period of more than 12 months next preceding the death; or if such employee was employed for the year current at the decease, then from the time of such employment; for medical services within the 12 months preceding the decease; for drugs and all other medical supplies necessary for the treatment of such decedent during the last illness of such decedent, said period of last illness not to exceed 12 months.

Seventh class. All other claims.

Notwithstanding the above provisions, if payment of the commissions of the personal representative under G.S. 28A-23-3(g) would cause the estate to be unable to pay all claims against the estate of a decedent, then the commissions shall be limited to the amount allowed under G.S. 28A-23-3(a)."

SECTION 3. This act becomes effective January 1, 2006, and applies to commissions paid on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 561

Committee Substitute Favorable 5/2/05

PROPOSED SENATE COMMITTEE SUBSTITUTE H561-CSRC-87 [v.1]

8/10/2005 9:44:00 PM

Short Title: Commissions for Personal Representatives. (Public)

Sponsors:

Referred to:

March 10, 2005

A BILL TO BE ENTITLED

AN ACT RELATING TO COMMISSIONS ALLOWED TO PERSONAL REPRESENTATIVES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 28A-23-3 reads as rewritten:

"**§ 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~~ law. In determining the maximum commissions allowable under this subsection, the clerk of superior court may take into consideration fees paid by the estate for professional services performed in the ordinary course of administering the estate, including services performed by attorneys and accountants. However, the clerk is not required to reduce the maximum commissions allowed by the aggregate fees paid to professionals on a dollar-for-dollar basis.

The 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~~ If the gross value of an estate is two thousand dollars ($2,000) or less, the clerk of superior court ~~is authorized and empowered to~~ may fix the commission to be received by the personal representative, collector or public administrator in an amount ~~as he,~~ the clerk of superior court, in ~~his~~ the clerk's discretion, deems just and adequate.

(b) In determining the amount of ~~such~~ the commissions, both upon personal property received and upon expenditures made, the clerk of superior court shall consider the time, responsibility, trouble and skill involved in the management of the estate.

Where real property is sold to pay debts or legacies, the commission shall be computed only on the proceeds actually applied in the payment of debts or legacies.

(c) The clerk of superior court may allow commissions from time to time during the course of the administration, but the total commissions allowed shall be determined on final settlement of the estate and shall not exceed the limit fixed in this section.

(d) Nothing in this section shall be ~~construed:~~construed to:

(1) ~~To prevent~~ Prevent the clerk of the superior court from allowing reasonable sums for necessary charges and disbursements incurred in the management of the ~~estate; or~~estate.

(2) ~~To allow~~ Allow commissions on distribution of the shares of heirs or on distribution of shares of ~~devisees; or~~devisees.

(3) ~~To abridge~~ Abridge the right of any party interested in the administration of a decedent's estate to appeal an order of the clerk of superior court to a judge of superior court.

(e) No personal representative, collector or public administrator, who has been guilty of ~~such~~ default or misconduct in the due execution of his or her office resulting in the revocation of his or her appointment of the personal representative, collector, or public administrator 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.

(g) Subsection (a) of this section does not apply if the testator's will specifies a stipulated amount or method or standard for determining the compensation for the services rendered by the personal representative, including a provision in the will that the compensation of the personal representative is to be determined by applying the personal representative's regularly adopted schedule of compensation in effect at the time of performance of those services. Subsection (a) of this section also shall not apply if the testator's will provides that the personal representative is to receive "reasonable compensation" for those services or similar language to that effect if the personal representative and the beneficiaries whose shares would be charged with the payment of the personal representative's compensation consent in writing to the specific amount that constitutes reasonable compensation.

(h) Subsection (a) of this section shall apply if the testator's will provides that compensation of the personal representative shall be the amount "as provided by law," the "maximum amount provided by law," or other similar language."

SECTION 2. G.S. 28A-19-6, as amended by S.L. 2005-180, reads as rewritten:

"**§ 28A-19-6. Order of payment of claims.**

(a) After payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order:

First class. Claims which by law have a specific lien on property to an amount not exceeding the value of such property.

Second class. Funeral expenses to the extent of two thousand five hundred dollars ($2,500). This limitation shall not include cemetery lot or gravestone. The preferential limitation herein granted shall be construed to be only a limit with respect to preference of payment and shall not be construed to be a limitation on reasonable funeral expenses which may be incurred; nor shall the preferential limitation of payment in the amount of two thousand five hundred dollars ($2,500) be diminished by any Veterans Administration, social security or other federal governmental benefits awarded to the estate of the decedent or to his or her beneficiaries.

Third class. All dues, taxes, and other claims with preference under the laws of the United States.

Fourth class. All dues, taxes, and other claims with preference under the laws of the State of North Carolina and its subdivisions.

Fifth class. Judgments of any court of competent jurisdiction within the State, docketed and in force, to the extent to which they are a lien on the property of the decedent at his death.

Sixth class. Wages due to any employee employed by the decedent, which claim for wages shall not extend to a period of more than 12 months next preceding the death; or if such employee was employed for the year current at the decease, then from the time of such employment; for medical services within the 12 months preceding the decease; for drugs and all other medical supplies necessary for the treatment of such decedent during the last illness of such decedent, said period of last illness not to exceed 12 months.

Seventh class. A claim for equitable distributions.

Eighth class. All other claims.

(b) Notwithstanding subsection (a) of this section, if payment of the commissions of the personal representative under G.S. 28A-23-3(g) would cause the estate to be unable to pay all claims against the estate of a decedent, then the commissions shall be limited to the amount allowed under G.S. 28A-23-3(a)."

SECTION 3. This act becomes effective January 1, 2006, and applies to commissions paid on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 561

Committee Substitute Favorable 5/2/05

PROPOSED SENATE COMMITTEE SUBSTITUTE H561-CSRC-87 [v.1]

8/10/2005 9:44:00 PM

Short Title: Commissions for Personal Representatives. (Public)

Sponsors:

Referred to:

March 10, 2005

A BILL TO BE ENTITLED

AN ACT RELATING TO COMMISSIONS ALLOWED TO PERSONAL REPRESENTATIVES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 28A-23-3 reads as rewritten:

"**§ 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~~ law. In determining the maximum commissions allowable under this subsection, the clerk of superior court may take into consideration fees paid by the estate for professional services performed in the ordinary course of administering the estate, including services performed by attorneys and accountants. However, the clerk is not required to reduce the maximum commissions allowed by the aggregate fees paid to professionals on a dollar-for-dollar basis.

The 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~~ If the gross value of an estate is two thousand dollars ($2,000) or less, the clerk of superior court ~~is authorized and empowered to~~ may fix the commission to be received by the personal representative, collector or public administrator in an amount ~~as he,~~ the clerk of superior court, in ~~his~~ the clerk's discretion, deems just and adequate.

(b) In determining the amount of ~~such~~ the commissions, both upon personal property received and upon expenditures made, the clerk of superior court shall consider the time, responsibility, trouble and skill involved in the management of the estate.

Where real property is sold to pay debts or legacies, the commission shall be computed only on the proceeds actually applied in the payment of debts or legacies.

(c) The clerk of superior court may allow commissions from time to time during the course of the administration, but the total commissions allowed shall be determined on final settlement of the estate and shall not exceed the limit fixed in this section.

(d) Nothing in this section shall be ~~construed:~~construed to:

(1) ~~To prevent~~ Prevent the clerk of the superior court from allowing reasonable sums for necessary charges and disbursements incurred in the management of the ~~estate; or~~estate.

(2) ~~To allow~~ Allow commissions on distribution of the shares of heirs or on distribution of shares of ~~devisees; or~~devisees.

(3) ~~To abridge~~ Abridge the right of any party interested in the administration of a decedent's estate to appeal an order of the clerk of superior court to a judge of superior court.

(e) No personal representative, collector or public administrator, who has been guilty of ~~such~~ default or misconduct in the due execution of his or her office resulting in the revocation of his or her appointment of the personal representative, collector, or public administrator 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.

(g) Subsection (a) of this section does not apply if the testator's will specifies a stipulated amount or method or standard for determining the compensation for the services rendered by the personal representative, including a provision in the will that the compensation of the personal representative is to be determined by applying the personal representative's regularly adopted schedule of compensation in effect at the time of performance of those services. Subsection (a) of this section also shall not apply if the testator's will provides that the personal representative is to receive "reasonable compensation" for those services or similar language to that effect if the personal representative and the beneficiaries whose shares would be charged with the payment of the personal representative's compensation consent in writing to the specific amount that constitutes reasonable compensation.

(h) Subsection (a) of this section shall apply if the testator's will provides that compensation of the personal representative shall be the amount "as provided by law," the "maximum amount provided by law," or other similar language."

SECTION 2. G.S. 28A-19-6, as amended by S.L. 2005-180, reads as rewritten:

"**§ 28A-19-6. Order of payment of claims.**

(a) After payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order:

First class. Claims which by law have a specific lien on property to an amount not exceeding the value of such property.

Second class. Funeral expenses to the extent of two thousand five hundred dollars ($2,500). This limitation shall not include cemetery lot or gravestone. The preferential limitation herein granted shall be construed to be only a limit with respect to preference of payment and shall not be construed to be a limitation on reasonable funeral expenses which may be incurred; nor shall the preferential limitation of payment in the amount of two thousand five hundred dollars ($2,500) be diminished by any Veterans Administration, social security or other federal governmental benefits awarded to the estate of the decedent or to his or her beneficiaries.

Third class. All dues, taxes, and other claims with preference under the laws of the United States.

Fourth class. All dues, taxes, and other claims with preference under the laws of the State of North Carolina and its subdivisions.

Fifth class. Judgments of any court of competent jurisdiction within the State, docketed and in force, to the extent to which they are a lien on the property of the decedent at his death.

Sixth class. Wages due to any employee employed by the decedent, which claim for wages shall not extend to a period of more than 12 months next preceding the death; or if such employee was employed for the year current at the decease, then from the time of such employment; for medical services within the 12 months preceding the decease; for drugs and all other medical supplies necessary for the treatment of such decedent during the last illness of such decedent, said period of last illness not to exceed 12 months.

Seventh class. A claim for equitable distributions.

Eighth class. All other claims.

(b) Notwithstanding subsection (a) of this section, if payment of the commissions of the personal representative under G.S. 28A-23-3(g) would cause the estate to be unable to pay all claims against the estate of a decedent, then the commissions shall be limited to the amount allowed under G.S. 28A-23-3(a)."

SECTION 3. This act becomes effective January 1, 2006, and applies to commissions paid on or after that date.

HOUSE BILL 561:
Commissions for Personal Representatives

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 10, 2005
Introduced by:	Rep. Haire	**Summary by:**	Kory Goldsmith
Version:	PCS to Second Edition H561-CSRC-87		Committee Counsel

SUMMARY: ***House Bill 561 amends the law regarding the calculation of commissions for persons who administer estates. It would give the clerk of superior court the discretion to not reduce the commission by amounts paid for professional services such as attorney's fees, accountant's fees, and tax advisory fees. It would also provide that the maximum statutory commission of 5% would not apply to when the testator's will or a contract specifies a stipulated amount or method for determining compensation of the personal representative. However, the statutory maximum would apply if the provisions of the will would have the effect of increasing the commission so that the estate would be unable to pay all the claims against the decedant.***

The PCS makes technical changes to the 2nd Edition.

The bill would become effective January 1, 2006 and apply to commissions paid on or after that date.

CURRENT LAW: Current law provides that personal representatives of estates are entitled to commissions to be fixed in the discretion of the clerk of superior court, not to exceed 5% for receipts and 5% for expenditures. If the gross value of the estate is $2,000 or less, the clerk may fix the commission in an amount the clerk deems just and adequate. Commissions are charged as a part of the costs of administration. Under G.S. 28a-19-6, the costs of administration are paid from the assets of an estate before any other claims against the estate are made.

H0561e2-SMRC-CSRC-87

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 3

HOUSE BILL 723

Committee Substitute Favorable 5/26/05
Committee Substitute #2 Favorable 6/8/05

Short Title: UNC/Criminal Record Checks/Fee.-AB (Public)

Sponsors:

Referred to:

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO PERMIT THE UNIVERSITY OF NORTH CAROLINA TO OBTAIN CRIMINAL RECORD CHECKS, TO ALLOW CERTAIN FEES TO BE CHARGED FOR THE CRIMINAL RECORD CHECK, AND TO MAKE IT A CRIMINAL OFFENSE TO PROVIDE FALSE INFORMATION THAT IS THE BASIS OF A CRIMINAL RECORD CHECK.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 114 of the General Statutes is amended by adding a new section to read:

"**§ 114-19.2A. Criminal record checks of University personnel.**

(a) The Department of Justice may provide a criminal record check to administrators of The University of North Carolina, or of any of its institutions or entities, concerning a person who has applied for employment or a promotion in The University of North Carolina System, or its institutions or entities, if the applicant consents to the record check. The Department may also provide a criminal record check to The University of North Carolina by fingerprint card from National Repositories of Criminal Histories, in accordance with G.S. 116-40.5A. The information shall be kept confidential as provided in G.S. 116-40.5A.

(b) For a criminal record check performed by the Department of Justice, the Department shall charge a reasonable fee for conducting a criminal record check under this section. The fee shall not exceed the actual cost of locating, editing, researching, and retrieving the information.

(c) The Department of Justice shall adopt rules to implement this section."

SECTION 2. Chapter 116 of the General Statutes is amended by adding a new section to read:

"**§ 116-40.5A. University personnel criminal history checks.**

(a) As used in this section:

(1) "Criminal history" means a county, State, or federal criminal history of conviction of a crime, whether a misdemeanor or a felony, that indicates the applicant (i) poses a threat to the physical safety of students or personnel, or (ii) has demonstrated that he or she does not have the integrity or honesty to fulfill his or her duties for The University of North Carolina. Such crimes include the following crimes contained in any of the following Articles of Chapter 14 of the General Statutes: Article 4A, Prohibited Secret Societies and Activities; Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive, Legislative, and Court Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 9, Hazing; Article 10, Kidnapping and Abduction; Article 11, Abortion and Kindred Offenses; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 19C, Financial Identity Fraud; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 27A, Sex Offender and Public Protection Registration Programs; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36, Offenses Against the Public Safety; Article 36A, Riots and Civil Disorders; Article 36B, Nuclear, Biological, or Chemical Weapons of Mass Destruction; Article 39, Protection of Minors; Article 47, Cruelty to Animals; Article 51, Protection of Athletic Contests; Article 52, Miscellaneous Police Regulations; Article 58, Records, Tapes and Other Recorded Devices; and Article 60, Computer-Related Crime.

Such crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

In addition to the crimes listed in this subdivision, such crimes also include similar crimes under federal law or under the laws of other states.

(2) "University personnel" means any:

a. Applicant for employment or promotion with The University of North Carolina or any of its institutions or entities whether full-time or part-time, or

b. Independent contractor or employee of an independent contractor of The University of North Carolina, or any of its institutions or entities, if the independent contractor carries out duties customarily performed by University personnel, whether paid with federal, State, local, or other funds.

(3) "University" means The University of North Carolina, or any of its institutions or entities, including the University of North Carolina Health Care System.

(b) The Board of Governors of The University of North Carolina shall adopt a policy to be applied uniformly to all constituent institutions of the University and the General Administration on whether and under what circumstances an applicant for a position or promotion shall be required to be checked for a criminal history before the applicant is offered an unconditional job or promotion. The Board of Directors of the UNC Health Care System shall adopt such a policy for the Health Care System. Each constituent institution and other entities of the University shall apply its policy uniformly in requiring applicants for University positions or promotions to be checked for a criminal history. The University may employ an applicant conditionally while the University is checking the person's criminal history and making a decision based on the results of the check.

(c) The Department of Justice shall provide to the University the criminal history from the State and National Repositories of Criminal Histories of any applicant for a University position or promotion in the University, or any of its institutions or entities, which requires a criminal history check. The University shall require the person to be checked by the Department of Justice to (i) be fingerprinted and to provide any additional information required by the Department of Justice to a person designated by the University, or to the local sheriff or the municipal police, whichever is more convenient for the person, and (ii) sign a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the repositories. The University shall consider refusal to consent when making employment decisions and decisions with regard to independent contractors.

(d) The University shall review the criminal history it receives on a person. The University shall determine whether the results of the review indicate that the person (i) poses a threat to the physical safety of students or personnel, or (ii) has demonstrated that he or she does not have the integrity or honesty to fulfill his or her duties as a University employee and shall use the information when making employment decisions and decisions with regard to independent contractors. The University shall make written findings with regard to how it used the information when making employment decisions and decisions with regard to independent contractors. The University may delegate any of the duties in this section to one or more of its administrators.

(e) All the information received by the University through the checking of the criminal history in accordance with this section is privileged information and is not a public record but is for the exclusive use of the University. The University may destroy the information after it is used for the employment purposes authorized by this section after one calendar year.

(f) Any applicant for employment or promotion who willfully furnishes, supplies, or otherwise gives false information on an employment application that is the basis for a criminal history record check under this section shall be guilty of a Class A1 misdemeanor."

SECTION 3. This act becomes effective December 1, 2005. G.S. 116-40.5A(f), as enacted by this act, applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 723

Committee Substitute Favorable 5/26/05

Committee Substitute #2 Favorable 6/8/05

PROPOSED SENATE COMMITTEE SUBSTITUTE H723-CSRC-83 [v.1]

8/10/2005 4:53:37 PM

Short Title: UNC/Criminal Record Checks/Fee.-AB (Public)

Sponsors:

Referred to:

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO PERMIT THE UNIVERSITY OF NORTH CAROLINA TO OBTAIN CRIMINAL RECORD CHECKS, TO ALLOW CERTAIN FEES TO BE CHARGED FOR THE CRIMINAL RECORD CHECK, AND TO MAKE IT A CRIMINAL OFFENSE TO PROVIDE FALSE INFORMATION THAT IS THE BASIS OF A CRIMINAL RECORD CHECK.

The General Assembly of North Carolina enacts:

SECTION 1. Part 2 of Article 4 of Chapter 114 of the General Statutes is amended by adding a new section to read:

"**§ 114-19.2A. Criminal record checks of University personnel.**

(a) The Department of Justice may provide a criminal record check to administrators of The University of North Carolina, or of any of its institutions or entities, concerning a person who has applied for employment or a promotion in The University of North Carolina System, or its institutions or entities, if the applicant consents to the record check. The Department may also provide a criminal record check to The University of North Carolina by fingerprint card from National Repositories of Criminal Histories, in accordance with G.S. 116-40.5A. The information shall be kept confidential as provided in G.S. 116-40.5A.

(b) University law enforcement personnel who are certified DCI operators may conduct the criminal record check, to the extent permitted by law. For a criminal record check performed by the Department of Justice, the Department shall charge the University of North Carolina System, or its institutions or entities, a reasonable fee for conducting a criminal record check under this section. The fee shall not exceed the actual cost of locating, editing, researching, and retrieving the information.

(c) The Department of Justice shall adopt rules to implement this section."

SECTION 2. Part 3 of Article 1 of Chapter 116 of the General Statutes is amended by adding a new section to read:

"**§ 116-40.5A. University personnel criminal history checks.**

(a) As used in this section:

(1) "Criminal history" means a county, State, or federal criminal history of conviction of a crime, whether a misdemeanor or a felony, that indicates the applicant (i) poses a threat to the physical safety of students or personnel, or (ii) has demonstrated that he or she does not have the integrity or honesty to fulfill his or her duties for The University of North Carolina. These crimes include the following crimes contained in any of the following Articles of Chapter 14 of the General Statutes: Article 4A, Prohibited Secret Societies and Activities; Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive, Legislative, and Court Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 9, Hazing; Article 10, Kidnapping and Abduction; Article 11, Abortion and Kindred Offenses; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 19C, Financial Identity Fraud; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 27A, Sex Offender and Public Protection Registration Programs; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36, Offenses Against the Public Safety; Article 36A, Riots and Civil Disorders; Article 36B, Nuclear, Biological, or Chemical Weapons of Mass Destruction; Article 39, Protection of Minors; Article 47, Cruelty to Animals; Article 51, Protection of Athletic Contests; Article 52, Miscellaneous Police Regulations; Article 58, Records, Tapes and Other Recorded Devices; and Article 60, Computer-Related Crime.

These crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

In addition to the crimes listed in this subdivision, these crimes also include similar crimes under federal law or under the laws of other states.

(2) "University personnel" means any:

a. Applicant for employment or promotion with The University of North Carolina or any of its institutions or entities whether full-time or part-time, or

b. Independent contractor or employee of an independent contractor of The University of North Carolina, or any of its institutions or entities, if the independent contractor carries out duties customarily performed by University personnel, whether paid with federal, State, local, or other funds.

(3) "University" means The University of North Carolina, or any of its institutions or entities, including the University of North Carolina Health Care System.

(b) The Board of Governors shall adopt a policy to be applied uniformly to all constituent institutions of the University and the General Administration. The Board of Directors of the University of North Carolina Health Care System shall adopt a policy to be applied uniformly to the Health Care System. Each policy shall specify whether and under what circumstances an applicant for a position or promotion shall be required to be checked for a criminal history before the applicant is offered an unconditional job or promotion. Each constituent institution and other entities of the University shall apply its policy uniformly in requiring applicants for University positions or promotions to be checked for a criminal history. The University may employ an applicant conditionally while the University is checking the person's criminal history and making a decision based on the results of the check.

(c) The Department of Justice shall provide to the University the criminal history from the State and National Repositories of Criminal Histories of any applicant for a University position or promotion in the University, or any of its institutions or entities, which requires a criminal history check. The University shall require the person to be checked by the Department of Justice to (i) be fingerprinted and to provide any additional information required by the Department of Justice to a person designated by the University, or to the local sheriff or the municipal police, whichever is more convenient for the person, and (ii) sign a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the repositories. The University shall consider refusal to consent when making employment decisions and decisions with regard to independent contractors.

(d) The University shall review the criminal history it receives on a person. The University shall determine whether the results of the review indicate that the person (i) poses a threat to the physical safety of students or personnel, or (ii) has demonstrated that he or she does not have the integrity or honesty to fulfill his or her duties as a University employee and shall use the information when making employment decisions and decisions with regard to independent contractors. The University shall make written findings with regard to how it used the information when making employment decisions and decisions with regard to independent contractors. The University may delegate any of the duties in this section to one or more of its administrators.

(e) All the information received by the University through the checking of the criminal history in accordance with this section is privileged information and is not a public record but is for the exclusive use of the University. The University may destroy the information after it is used for the employment purposes authorized by this section after one calendar year.

(f) There shall be no liability for negligence on the part of the University, or its employees, arising from any act taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification under Article 31A of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Chapter 31 of Chapter 143 of the General Statutes.

(g) Any applicant for employment or promotion who willfully furnishes, supplies, or otherwise gives false information on an employment application that is the basis for a criminal history record check under this section shall be guilty of a Class A1 misdemeanor."

SECTION 3. This act becomes effective December 1, 2005. G.S. 116-40.5A(f), as enacted by this act, applies to offenses committed on or after that date.

HOUSE BILL 723:
UNC/Criminal Record Checks/Fee.-AB

BILL ANALYSIS

Committee:	Senate Ref to Judiciary II. If fav, re-ref to Finance	**Date:**	August 10, 2005
Introduced by:	Reps. Glazier, Dickson	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	PCS to Third Edition H723-CSRC-83		

SUMMARY: ***House Bill 723 authorizes the Department of Justice (DoJ) to provide criminal record checks to the University of North Carolina (UNC) for applicants for employment and promotion. The bill becomes effective December 1, 2005, and applies to offenses committed on or after that date.***

The proposed committee substitute authorizes University law enforcement personnel who are DCI certified to conduct the criminal checks. It also adds an immunity provision and makes other technical and clarifying changes.

The bill has a serial re-referred to Senate Finance Committee.

CURRENT LAW: Under current State law, criminal record check provisions exist for residential school personnel, employees of local boards of education, and employees of charter schools. The provisions of House Bill 723 are substantially similar to these existing statutes.

BILL ANALYSIS: Section 1.: The bill adds a new section to Chapter 114 of the General Statutes (Department of Justice) that:

- Authorizes DOJ to provide a criminal record check to UNC administrators for a person who has applied for employment or promotion in the UNC System, with the applicant's consent.
- Authorizes DOJ and/or University law enforcement personnel who are certified DCI operators to provide a criminal record check to UNC by fingerprint card from National Repositories of Criminal Histories.
- Provides that the information obtained must be kept confidential.
- Provides that DOJ may charge the University a reasonable fee for conducting the criminal record check, not to exceed the actual cost of locating, editing, researching, and retrieving the information.
- Directs DOJ to adopt rules to implement the provisions.

Section 2.: The bill adds a new section to Chapter 116 of the General Statutes (Higher Education) that:

- Provides that "criminal history" means a conviction of a crime, whether misdemeanor or felony, that indicates the applicant (i) poses a threat to the physical safety of students or personnel, or (ii) has demonstrated that he or she does not have the integrity or honesty to fulfill the his or her duties, and lists crimes included within definition.
- Defines the term "University personnel" as applicants for employment or promotion, and independent contractors (and their employees) who carry out duties customarily performed by university personnel.
- Requires the UNC Board of Governors to adopt a uniform policy for the constituent institutions and General Administration regarding when criminal record checks will be required before an unconditional offer of employment or promotion. Requires the board of directors of the UNC Health Care System to adopt a similar uniform policy for the Health Care System.
- Includes requirements regarding fingerprinting and obtaining consent forms

- Requires the University to consider refusal to consent to a check when making employment decisions.
- Directs the University to determine whether the results of the check indicate that a person (i) poses a threat to the physical safety of students or personnel, or (ii) has demonstrated that the person does not have the integrity or honesty to fulfill his or her duties. This information must be used when making employment decisions or when making decisions regarding independent contractors. The University must make written findings as to how it used the information when making these decisions. These duties may be delegated to one or more administrators.
- Provides that the results of the check are confidential and allows the University to destroy the information after one calendar year.
- Provide limitations on liability for the University and its employees.
- Makes it a Class A1 misdemeanor to willfully furnish, supply, or give false information on an employment application that is the basis for a criminal record check. A Class A1 misdemeanor is punishable by 1 to 60 days of active, intermediate, or community punishment, assuming no prior convictions. This provision applies to offenses committed on or after the effective date.

BACKGROUND: The UNC Board of Governors requested this bill. Currently, some campuses in the UNC System conduct pre-employment criminal conviction checks on prospective employees. Those that perform checks are using the Administrative Office of the Courts database, which contains only North Carolina convictions or are using automated databases in certain states that are available through commercial vendors.

EFFECTIVE DATE: The bill becomes effective December 1, 2005.

Jennifer McGinnis, Ashley Huffstetler, and Robin Johnson, Staff Attorneys, substantially contributed to this summary.

H0723e3-SMRC-CSRC-83

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Fiscal Note

BILL NUMBER: House Bill 723 (Third Edition)

SHORT TITLE: UNC/Criminal Record Checks/Fee.-AB

SPONSOR(S): Representatives Glazier and Dickson

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10
GENERAL FUND REVENUES					
Justice	Up to $199,000 annually (see pgs. 2 - 4)				
GENERAL FUND EXPENDITURES					
Correction	Exact amount cannot be determined				
Judicial	Exact amount cannot be determined				
Justice	Up to $202,000 annually (see pgs. 2 - 4)				
UNC	Up to $199,000 annually (see pgs. 2 - 4)				
ADDITIONAL PRISON BEDS*	No significant impact anticipated				
POSITIONS: (cumulative)	No additional positions anticipated				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch; Department of Justice; University of North Carolina System

EFFECTIVE DATE: December 1, 2005

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: This bill would add new G.S. 114-19.2A providing that the Department of Justice (DOJ) may provide a criminal record check to University of North Carolina (UNC) administrators concerning a person who has applied for employment or promotion in the UNC System, with the consent of the applicant. DOJ also may provide a criminal record check to UNC by fingerprint card from National Repositories of Criminal Histories, in accordance with G.S. 116-40.5A. The UNC Board of Governors would be required to adopt policies with respect to when criminal record checks will be required. It would be a Class A1 misdemeanor under this

bill to willfully furnish, supply or give false information on an employment application that is the basis for a criminal record check.

The second and third editions require that the Board of Governors adopt a policy to be applied uniformly to all constituent institutions of the University and the General Administration regarding when criminal record checks will be required and permit UNC to charge applicants for the cost of the criminal history and associated fingerprints. The third edition deletes the subsection providing that there is no liability for negligence on the part of the University, or its employees, arising from any act taken or omission by any of them in carrying out the provisions of this bill. The third edition also deletes the language permitting certain University law enforcement personnel to conduct criminal record checks to the extent permitted by law.
Source: Adapted from Bill Digest H.B. 723 (03/17/0200).

ASSUMPTIONS AND METHODOLOGY:

Department of Justice and University of North Carolina
The UNC System estimates that it could request as many as 5,266 criminal histories per year. This is the number of new employees hired in 2004. While the Department of Justice is authorized to conduct state and national background checks for the UNC System under this bill, it is unclear whether the UNC System could also request background checks from other sources (see Technical Considerations). UNC personnel have indicated that they will probably request state and national fingerprint background checks from DOJ only if the applicant has lived out of state. Otherwise, they anticipate requesting name checks through commercial vendors; some campuses already use commercial vendors for some background checks.

Costs of commercial background checks vary, and may not be permitted under this bill. If new G.S. 116-40.5A(c) in fact requires that all background checks on UNC employees be state and national fingerprint checks conducted through the Department of Justice, with the exception of those checks that UNC police can perform themselves, the following fees would apply:

NC Fingerprint Check:	$14
National Fingerprint Check:	$24 ($2 to DOJ, $22 remitted to the FBI)
Total:	$38

The State Bureau of Investigation (SBI) in the Department of Justice conducts background checks for criminal justice and non-criminal justice agencies. For the latter group, the Department charges fees that are used to support the positions required to conduct the checks. In addition to the $22 remitted to the Federal Bureau of Investigation for national checks, costs to the SBI per state and national check average $16.33,[1] not including overhead or equipment. Each person in the fingerprint identification section can perform, on average, 10,000 checks per year. The number of checks anticipated by UNC would be the equivalent of one half-time position. The Department believes that this workload can be absorbed by existing personnel.

The UNC Police can access criminal history information on applicants for employment with the police department through a national name check, but they cannot share that information outside of the police department. As a law enforcement agency, UNC Police can also request state and

[1] In 2003, average cost was $11.45 per electronic fingerprint check and $17.95 per paper fingerprint check; approximately 25% of non-criminal justice fingerprint submissions were electronic.

national fingerprint criminal history checks on their employees from the SBI free of charge. The annual number of UNC Police applicants is unknown at this time.

In addition to the fees for criminal histories, local law enforcement agencies may charge for fingerprinting. Charges range from $0 to $15. The second edition of this bill permits UNC to pass the costs of criminal record checks and fingerprinting on to the applicants. In practice, UNC has indicated that it does not plan to charge applicants for either cost.

Alternative Background Check Costs: If this bill permits UNC to request other types of criminal histories or use other sources, options include (see Technical Considerations):

DOJ ***Fingerprint*** Checks: NC Only	$14.00
DOJ ***Fingerprint*** Checks: NC and National ($22 remitted to the FBI)	$38.00
DOJ ***Fingerprint*** Checks: NC and National - UNC Police applicants	no charge
DOJ ***Name*** Checks	$10.00
Clerks of Court ***Name*** Checks: single NC county	$10.00
Private Vendor ***Name*** Checks: NC or Multi-State	varies
UNC Police ***Name*** Checks: UNC Police applicants only	internal cost

General – Criminal Penalties

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2005 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory group, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.*

As this bill would create a new Class A1 misdemeanor offense for intentionally falsifying information furnished in relation to a criminal history check performed prior to employment or promotion for selected positions within the North Carolina University System, no historical data is available to estimate the number of additional convictions that would result.

- In FY 2003-04, 24 percent of Class A1 misdemeanors resulted in active sentences and the average active sentence length was 73 days. Active sentences of less than ninety days are served in county jail, and DOC reimburses counties at a rate of $18 per day for any sentence between thirty and ninety days in length.
- The remaining 76 percent of Class A1 misdemeanants received non-active sentences. For those offenders sentenced to supervised probation, the Division of Community Corrections (DCC) would incur costs of $1.87 per offender per day. Offenders sentenced to community service would cost $0.67 per offender per day, and offenders given unsupervised probation would not impact DCC.

Because most Class A1 misdemeanants serving active time as a result of this bill would be housed in county jails, this legislation is not expected to significantly impact prison population.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

As this bill would create a new Class A1 misdemeanor offense for intentionally falsifying information furnished in relation to a criminal history check concerning employment or promotion in the North Carolina University system, no historical data is available to estimate the number of additional convictions that would result. Of the additional background checks that would occur under this bill, it is not possible to estimate the number that would result in charges for intentionally falsifying information provided to conduct the criminal history check.

Based on the costs of time in court, attorney preparation time, and indigent defense, the average estimated cost to process one Class A1 misdemeanor is $3,589 per trial and $286 per guilty plea. The trial cost includes an estimated $2,087 in jury fees, costs of time in court, and attorney costs and an additional $1,502 in indigent defense. Based on prior-year data, the majority of any new Class A1 misdemeanor charges that are not dismissed are likely to be settled by plea.

SOURCES OF DATA: Department of Correction, Judicial Branch, North Carolina Sentencing and Policy Advisory Commission, Office of State Budget and Management, Department of Justice, University of North Carolina

TECHNICAL CONSIDERATIONS: New G.S. 114-19.2A(a) states that DOJ ***may*** provide a criminal record check to UNC, and new 116-40.5A(c) states that DOJ ***shall*** provide a state and national criminal history of any applicant for any position that UNC has determined requires a criminal history check. It is unclear whether UNC is required under this bill to request all criminal history checks through the Department of Justice, and whether UNC must request a state and national fingerprint check on each applicant for whom a criminal history check is required. Maximum costs on the front page box assume that all checks will be state and national fingerprint checks conducted through the Department of Justice.

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Fiscal Research Division
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Signed Copy Located in the NCGA Principal Clerk's Offices

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 967
Committee Substitute Favorable 5/18/05

Short Title: Health Care Power of Atty/Dispos. of Remains. (Public)

Sponsors:

Referred to:

March 29, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT IF A VALIDLY EXECUTED HEALTH CARE POWER OF ATTORNEY AUTHORIZES THE HEALTH CARE AGENT TO EXERCISE RIGHTS WITH RESPECT TO ANATOMICAL GIFTS, AUTOPSY, OR DISPOSITION OF THE PRINCIPAL'S REMAINS, THE AUTHORIZING PROVISION WILL CONTINUE IN EFFECT AFTER THE DEATH OF THE PRINCIPAL FOR PURPOSES OF EXERCISING THE AUTHORIZED RIGHTS, TO DEFINE "DISPOSITION OF REMAINS", AND TO MAKE CONFORMING CHANGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 32A-16 reads as rewritten:

"**§ 32A-16. Definitions.**

As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified:

(1) "Disposition of remains" means the decision to bury or cremate human remains as defined in G.S. 90-210.121(17).

~~(1)~~(1a) "Health care" means any care, treatment, service, or procedure to maintain, diagnose, treat, or provide for the principal's physical or mental health or personal care and comfort including, life-sustaining procedures. "Health care" includes mental health treatment as defined in subdivision (8) of this section.

(2) "Health care agent" means the person appointed as a health care attorney-in-fact.

(3) "Health care power of attorney" means a written instrument, signed in the presence of two qualified witnesses, and acknowledged before a notary public, pursuant to which an attorney-in-fact or agent is appointed to act for the principal in matters relating to the health care of the principal, and which substantially meets the requirements of this Article.

(4) "Life-sustaining procedures" are those forms of care or treatment which only serve to artificially prolong the dying process and may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and other forms of treatment which sustain, restore or supplant vital bodily functions, but do not include care necessary to provide comfort or to alleviate pain.

(5) "Principal" means the person making the health care power of attorney.

(6) "Qualified witness" means a witness in whose presence the principal has executed the health care power of attorney, who believes the principal to be of sound mind, and who states that he (i) is not related within the third degree to the principal nor to the principal's spouse, (ii) does not know nor have a reasonable expectation that he would be entitled to any portion of the estate of the principal upon the principal's death under any existing will or codicil of the principal or under the Intestate Succession Act as it then provides, (iii) is not the attending physician or mental health treatment provider of the principal, nor an employee of the attending physician or mental health treatment provider, nor an employee of a health facility in which the principal is a patient, nor an employee of a nursing home or any group-care home in which the principal resides, and (iv) does not have a claim against any portion of the estate of the principal at the time of the principal's execution of the health care power of attorney.

(7) "Advance instruction for mental health treatment" or "advance instruction" means a written instrument as defined in G.S. 122C-72(1) pursuant to which the principal makes a declaration of instructions, information, and preferences regarding mental health treatment.

(8) "Mental health treatment" means the process of providing for the physical, emotional, psychological, and social needs of the principal for the principal's mental illness. "Mental health treatment" includes, but is not limited to, electroconvulsive treatment, treatment of mental illness with psychotropic medication, and admission to and retention in a facility for care or treatment of mental illness."

SECTION 2. G.S. 32A-20(b) reads as rewritten:

"**§ 32A-20. Effectiveness and duration; revocation.**

...

(b) ~~A~~ Except for purposes of exercising authority granted by a health care power of attorney with respect to anatomical gifts, autopsy, or disposition of remains as provided in G.S. 32A-19(b), a health care power of attorney is revoked by the death of the principal. A health care power of attorney may be revoked by the principal at any time, so long as the principal is capable of making and communicating health care decisions. The principal may exercise this right of revocation by executing and acknowledging an instrument of revocation, by executing and acknowledging a subsequent health care power of attorney, or in any other manner by which the principal

is able to communicate an intent to revoke. This revocation becomes effective only upon communication by the principal to each health care agent named in the revoked health care power of attorney and to the principal's attending physician or eligible psychologist.

...."

SECTION 3. G.S. 32A-25 reads as rewritten:

"**§ 32A-25. Statutory form health care power of attorney.**

The use of the following form in the creation of a health care power of attorney is lawful and, when used, it shall meet the requirements of and be construed in accordance with the provisions of this Article:

(Notice: This document gives the person you designate your health care agent broad powers to make health care decisions, including mental health treatment decisions, for you. Except to the extent that you express specific limitations or restrictions on the authority of your health care agent, this power includes the power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive, admit you to a facility, and administer certain treatments and medications. This power exists only as to those health care decisions for which you are unable to give informed consent.

This form does not impose a duty on your health care agent to exercise granted powers, but when a power is exercised, your health care agent will have to use due care to act in your best interests and in accordance with this document. For mental health treatment decisions, your health care agent will act according to how the health care agent believes you would act if you were making the decision. Because the powers granted by this document are broad and sweeping, you should discuss your wishes concerning life-sustaining procedures, mental health treatment, and other health care decisions with your health care agent.

Use of this form in the creation of a health care power of attorney is lawful and is authorized pursuant to North Carolina law. However, use of this form is an optional and nonexclusive method for creating a health care power of attorney and North Carolina law does not bar the use of any other or different form of power of attorney for health care that meets the statutory requirements.)

1. Designation of health care agent.

I, _____, being of sound mind, hereby appoint

Name: _____

Home Address: _____

Home Telephone Number _____Work Telephone Number_____

as my health care attorney-in-fact (herein referred to as my "health care agent") to act for me and in my name (in any way I could act in person) to make health care decisions for me as authorized in this document.

If the person named as my health care agent is not reasonably available or is unable or unwilling to act as my agent, then I appoint the following persons (each to act alone and successively, in the order named), to serve in that capacity: (Optional)

A. Name: _____

Home Address: _____

Home Telephone Number _____ Work Telephone Number_____

B. Name: _____

Home Address: _____

Home Telephone Number _____ Work Telephone Number_____

Each successor health care agent designated shall be vested with the same power and duties as if originally named as my health care agent.

2. Effectiveness of appointment.

(Notice: This health care power of attorney may be revoked by you at any time in any manner by which you are able to communicate your intent to revoke to your health care agent and your attending physician.)

Absent revocation, the authority granted in this document shall become effective when and if the physician or physicians designated below determine that I lack sufficient understanding or capacity to make or communicate decisions relating to my health care and will continue in effect during my incapacity, until my ~~death.~~death, except if I authorize my health care agent to exercise my rights with respect to anatomical gifts, autopsy, or disposition of my remains, this authority will continue after my death to the extent necessary to exercise the authority granted in this document for these purposes.

This determination shall be made by the following physician or physicians. For decisions related to mental health treatment, this determination shall be made by the following physician or eligible psychologist. (You may include here a designation of your choice, including your attending physician or eligible psychologist, or any other physician or eligible psychologist. You may also name two or more physicians or eligible psychologists, if desired, both of whom must make this determination before the authority granted to the health care agent becomes effective.):

_____

_____

_____

_____

3. General statement of authority granted.

Except as indicated in section 4 below, I hereby grant to my health care agent named above full power and authority to make health care decisions, including mental health treatment decisions, on my behalf, including, but not limited to, the following:

A. To request, review, and receive any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records, and to consent to the disclosure of this information.

B. To employ or discharge my health care providers.

C. To consent to and authorize my admission to and discharge from a hospital, nursing or convalescent home, or other institution.

D. To consent to and authorize my admission to and retention in a facility for the care or treatment of mental illness.

E. To consent to and authorize the administration of medications for mental health treatment and electroconvulsive treatment (ECT) commonly referred to as "shock treatment".

F. To give consent for, to withdraw consent for, or to withhold consent for, X ray, anesthesia, medication, surgery, and all other diagnostic and treatment procedures ordered by or under the authorization of a licensed physician, dentist, or podiatrist. This authorization specifically includes the power to consent to measures for relief of pain.

G. To authorize the withholding or withdrawal of life-sustaining procedures when and if my physician determines that I am terminally ill, permanently in a coma, suffer severe dementia, or am in a persistent vegetative state. Life-sustaining procedures are those forms of medical care that only serve to artificially prolong the dying process and may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and other forms of medical treatment which sustain, restore or supplant vital bodily functions. Life-sustaining procedures do not include care necessary to provide comfort or alleviate pain.

I DESIRE THAT MY LIFE NOT BE PROLONGED BY LIFE-SUSTAINING PROCEDURES IF I AM TERMINALLY ILL, PERMANENTLY IN A COMA, SUFFER SEVERE DEMENTIA, OR AM IN A PERSISTENT VEGETATIVE STATE.

H. To exercise any right I may have to make a disposition of any part or all of my body for medical ~~purposes,~~purposes; ~~to donate my organs,~~ to authorize an ~~autopsy,~~autopsy; to make an anatomical gift of my organs or body, or part thereof, and to direct the disposition of my remains.

I. To take any lawful actions that may be necessary to carry out these decisions, including the granting of releases of liability to medical providers.

4. Special provisions and limitations.

(Notice: The above grant of power is intended to be as broad as possible so that your health care agent will have authority to make any decisions you could make to obtain or terminate any type of health care. If you wish to limit the scope of your health care agent's powers, you may do so in this section.)

A. In exercising the authority to make health care decisions on my behalf, the authority of my health care agent is subject to the following special provisions and limitations (Here you may include any specific limitations you deem appropriate such as: your own definition of when life-sustaining treatment should be withheld or discontinued, or instructions to refuse any specific types of treatment that are inconsistent with your religious beliefs, or unacceptable to you for any other reason.):

B. In exercising the authority to make mental health decisions on my behalf, the authority of my health care agent is subject to the following special provisions and limitations. (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority to make only mental health treatment decisions, your own instructions regarding the administration or withholding of psychotropic medications and electroconvulsive treatment (ECT), instructions regarding your admission to and retention in a health care facility for mental health treatment, or instructions to refuse any specific types of treatment that are unacceptable to you):

C. (Notice: This health care power of attorney may incorporate or be combined with an advance instruction for mental health treatment, executed in accordance with Part 2 of Article 3 of Chapter 122C of the General Statutes, which you may use to state your instructions regarding mental health treatment in the event you lack sufficient understanding or capacity to make or communicate mental health treatment decisions. Because your health care agent's decisions about decisions must be consistent with any statements you have expressed in an advance instruction, you should indicate here whether you have executed an advance instruction for mental health treatment.):

D. In exercising the authority to make decisions regarding autopsy, anatomical gifts and disposition of remains on my behalf, the authority of my health care agent is subject to the following special provisions and limitations. (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority and the scope of authority, instructions regarding gifts of the body or body part, or instructions regarding burial or cremation):

5. Guardianship provision.

If it becomes necessary for a court to appoint a guardian of my person, I nominate my health care agent acting under this document to be the guardian of my person, to serve without bond or security. The guardian shall act consistently with G.S. 35A-1201(a)(5).

6. Reliance of third parties on health care agent.

A. No person who relies in good faith upon the authority of or any representations by my health care agent shall be liable to me, my estate, my heirs, successors, assigns, or personal representatives, for actions or omissions by my health care agent.

B. The powers conferred on my health care agent by this document may be exercised by my health care agent alone, and my health care agent's signature or act under the authority granted in this document may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. All acts performed in good faith by my health care agent pursuant to this power of attorney are done with my consent and shall have the same validity and effect as if I were present and exercised the powers myself, and shall inure to the benefit of and bind me, my estate, my heirs, successors, assigns, and personal representatives. The authority of my health care agent pursuant to this power of attorney shall be superior to and binding upon my family, relatives, friends, and others.

7. Miscellaneous provisions.

A. I revoke any prior health care power of attorney.

B. My health care agent shall be entitled to sign, execute, deliver, and acknowledge any contract or other document that may be necessary, desirable, convenient, or proper in order to exercise and carry out any of the powers described in this document and to incur reasonable costs on my behalf incident to the exercise of these powers; provided, however, that except as shall be necessary in order to exercise the powers described in this document relating to my health care, my health care agent shall not have any authority over my property or financial affairs.

C. My health care agent and my health care agent's estate, heirs, successors, and assigns are hereby released and forever discharged by me, my estate, my heirs, successors, and assigns and personal representatives from all liability and from all claims or demands of all kinds arising out of the acts or omissions of my health care agent pursuant to this document, except for willful misconduct or gross negligence.

D. No act or omission of my health care agent, or of any other person, institution, or facility acting in good faith in reliance on the authority of my health care agent pursuant to this health care power of attorney shall be considered suicide, nor the cause of my death for any civil or

criminal purposes, nor shall it be considered unprofessional conduct or as lack of professional competence. Any person, institution, or facility against whom criminal or civil liability is asserted because of conduct authorized by this health care power of attorney may interpose this document as a defense.

8. Signature of principal.

By signing here, I indicate that I am mentally alert and competent, fully informed as to the contents of this document, and understand the full import of this grant of powers to my health care agent.

_____ (SEAL) _____

Signature of Principal Date

9. Signatures of Witnesses.

I hereby state that the Principal, _____, being of sound mind, signed the foregoing health care power of attorney in my presence, and that I am not related to the principal by blood or marriage, and I would not be entitled to any portion of the estate of the principal under any existing will or codicil of the principal or as an heir under the Intestate Succession Act, if the principal died on this date without a will. I also state that I am not the principal's attending physician, nor an employee of the principal's attending physician, nor an employee of the health facility in which the principal is a patient, nor an employee of a nursing home or any group care home where the principal resides. I further state that I do not have any claim against the principal.

Witness: _____ Date: _____

Witness: _____ Date: _____

STATE OF NORTH CAROLINA

COUNTY OF_____

CERTIFICATE

I, _____, a Notary Public for _____ County, North Carolina, hereby certify that _____ appeared before me and swore to me and to the witnesses in my presence that this instrument is a health care power of attorney, and that he/she willingly and voluntarily made and executed it as his/her free act and deed for the purposes expressed in it.

I further certify that _____ and _____, witnesses, appeared before me and swore that they witnessed _____ sign the attached health care power of attorney, believing him/her to be of sound mind; and also swore that at the time they witnessed the signing (i) they were not related within the third degree to him/her or his/her spouse, and (ii) they did not know nor have a reasonable expectation that they would be entitled to any portion of his/her estate upon his/her death under any will or codicil thereto then

existing or under the Intestate Succession Act as it provided at that time, and (iii) they were not a physician attending him/her, nor an employee of an attending physician, nor an employee of a health facility in which he/she was a patient, nor an employee of a nursing home or any group-care home in which he/she resided, and (iv) they did not have a claim against him/her. I further certify that I am satisfied as to the genuineness and due execution of the instrument.

This the _____ day of _____, ____

_____

Notary Public

My Commission Expires:

_____

(A copy of this form should be given to your health care agent and any alternate named in this power of attorney, and to your physician and family members.)"

SECTION 4. G.S. 130A-389(b) reads as rewritten:

"(b) In deaths where the Chief Medical Examiner and the medical examiner investigating the case do not deem it advisable and in the public interest that an autopsy be performed, but the next-of-kin of the deceased requests that an autopsy be performed, the Chief Medical Examiner or a designated pathologist may perform the autopsy and the cost shall be paid by the ~~next-of-kin.~~ next-of-kin, unless the deceased's health care power of attorney granted authority for such decisions to the health care agent."

SECTION 5. G.S. 130A-398 reads as rewritten:

"**§ 130A-398. Limitation on right to perform autopsy.**

The right to perform an autopsy shall be limited to those cases in which:

(1) The Chief Medical Examiner or a county medical examiner, acting pursuant to G.S. 130A-389, directs that an autopsy be performed;

(2) The Commission of Anatomy, acting pursuant to G.S. 130A-415, has given written consent for an autopsy to be performed on an unclaimed body;

(3) A prosecuting officer or district attorney, acting pursuant to G.S. 15-7 in case of homicide, directs that an autopsy be performed;

(4) The decedent directs in writing prior to death that an autopsy be performed upon the occurrence of the decedent's death;

(4a) The health care agent under a health care power of attorney with authority to make decisions with respect to autopsies;

(5) The personal representative of the estate of the decedent requests that an autopsy be performed upon the decedent; or

(6) Any of the following persons, in order of priority, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual

opposition by a member of the same or prior class, authorizes an autopsy to be performed:

a. The spouse;
b. Any adult child or stepchild;
c. Any parent or stepparents;
d. Any adult sibling;
e. A guardian of the person of the decedent at the time of the decedent's death;
f. Any relative or person who accepts responsibility for final disposition of the body by other customary and lawful procedures;
g. Any person under obligation to dispose of the body."

SECTION 6. G.S. 130A-404(b) reads as rewritten:

"(b) If the decedent has not made a gift in the manner prescribed in G.S. 130A-406, then any of the following persons, in order of priority stated, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class, may give all or any part of the decedent's body for any purpose specified in G.S. 130A-405.

(1) ~~The spouse;~~The health care agent under a health care power of attorney with authority to make decisions with respect to anatomical gifts;
(2) ~~An adult child;~~The spouse;
(3) ~~Either parent;~~An adult child;
(4) ~~An adult sibling;~~Either parent;
(5) ~~A guardian of the person of the decedent at the time of decedent's death;~~An adult sibling;
(6) ~~Any other person authorized or under obligation to dispose of the body.~~A guardian of the person of the decedent at the time of decedent's death;
(7) Any other person authorized or under obligation to dispose of the body."

SECTION 7. This act becomes effective October 1, 2005, and applies to powers of attorney created before and after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 967

Committee Substitute Favorable 5/18/05

PROPOSED SENATE COMMITTEE SUBSTITUTE H967-CSRC-85 [v.1]

8/10/2005 7:48:54 PM

Short Title: Health Care Power of Atty/Dispos. of Remains. (Public)

Sponsors:

Referred to:

March 29, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT IF A VALIDLY EXECUTED HEALTH CARE POWER OF ATTORNEY AUTHORIZES THE HEALTH CARE AGENT TO EXERCISE RIGHTS WITH RESPECT TO ANATOMICAL GIFTS, AUTOPSY, OR DISPOSITION OF THE PRINCIPAL'S REMAINS, THE AUTHORIZING PROVISION WILL CONTINUE IN EFFECT AFTER THE DEATH OF THE PRINCIPAL FOR PURPOSES OF EXERCISING THE AUTHORIZED RIGHTS, TO DEFINE "DISPOSITION OF REMAINS", AND TO MAKE CONFORMING CHANGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 32A-16 reads as rewritten:

"**§ 32A-16. Definitions.**

As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified:

(1) "Disposition of remains" means the decision to bury or cremate human remains as defined in G.S. 90-210.121(17).

~~(1)~~(1a) "Health care" means any care, treatment, service, or procedure to maintain, diagnose, treat, or provide for the principal's physical or mental health or personal care and comfort including, life-sustaining procedures. "Health care" includes mental health treatment as defined in subdivision (8) of this section.

(2) "Health care agent" means the person appointed as a health care attorney-in-fact.

(3) "Health care power of attorney" means a written instrument, signed in the presence of two qualified witnesses, and acknowledged before a notary public, pursuant to which an attorney-in-fact or agent is appointed to act for the principal in matters relating to the health care

of the principal, and which substantially meets the requirements of this Article.

(4) "Life-sustaining procedures" are those forms of care or treatment which only serve to artificially prolong the dying process and may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and other forms of treatment which sustain, restore or supplant vital bodily functions, but do not include care necessary to provide comfort or to alleviate pain.

(5) "Principal" means the person making the health care power of attorney.

(6) "Qualified witness" means a witness in whose presence the principal has executed the health care power of attorney, who believes the principal to be of sound mind, and who states that he (i) is not related within the third degree to the principal nor to the principal's spouse, (ii) does not know nor have a reasonable expectation that he would be entitled to any portion of the estate of the principal upon the principal's death under any existing will or codicil of the principal or under the Intestate Succession Act as it then provides, (iii) is not the attending physician or mental health treatment provider of the principal, nor an employee of the attending physician or mental health treatment provider, nor an employee of a health facility in which the principal is a patient, nor an employee of a nursing home or any group-care home in which the principal resides, and (iv) does not have a claim against any portion of the estate of the principal at the time of the principal's execution of the health care power of attorney.

(7) "Advance instruction for mental health treatment" or "advance instruction" means a written instrument as defined in G.S. 122C-72(1) pursuant to which the principal makes a declaration of instructions, information, and preferences regarding mental health treatment.

(8) "Mental health treatment" means the process of providing for the physical, emotional, psychological, and social needs of the principal for the principal's mental illness. "Mental health treatment" includes, but is not limited to, electroconvulsive treatment, treatment of mental illness with psychotropic medication, and admission to and retention in a facility for care or treatment of mental illness."

SECTION 2. G.S. 32A-20(b) reads as rewritten:

"**§ 32A-20. Effectiveness and duration; revocation.**

...

(b) ~~A~~ Except for purposes of exercising authority granted by a health care power of attorney with respect to anatomical gifts, autopsy, or disposition of remains as provided in G.S. 32A-19(b), a health care power of attorney is revoked by the death of the principal. A health care power of attorney may be revoked by the principal at any time, so long as the principal is capable of making and communicating health care decisions. The principal may exercise this right of revocation by executing and

acknowledging an instrument of revocation, by executing and acknowledging a subsequent health care power of attorney, or in any other manner by which the principal is able to communicate an intent to revoke. This revocation becomes effective only upon communication by the principal to each health care agent named in the revoked health care power of attorney and to the principal's attending physician or eligible psychologist.

...."

SECTION 3. G.S. 32A-25 reads as rewritten:

"**§ 32A-25. Statutory form health care power of attorney.**

The use of the following form in the creation of a health care power of attorney is lawful and, when used, it shall meet the requirements of and be construed in accordance with the provisions of this Article:

(Notice: This document gives the person you designate your health care agent broad powers to make health care decisions, including mental health treatment decisions, for you. Except to the extent that you express specific limitations or restrictions on the authority of your health care agent, this power includes the power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive, admit you to a facility, and administer certain treatments and medications. This power exists only as to those health care decisions for which you are unable to give informed consent.

This form does not impose a duty on your health care agent to exercise granted powers, but when a power is exercised, your health care agent will have to use due care to act in your best interests and in accordance with this document. For mental health treatment decisions, your health care agent will act according to how the health care agent believes you would act if you were making the decision. Because the powers granted by this document are broad and sweeping, you should discuss your wishes concerning life-sustaining procedures, mental health treatment, and other health care decisions with your health care agent.

Use of this form in the creation of a health care power of attorney is lawful and is authorized pursuant to North Carolina law. However, use of this form is an optional and nonexclusive method for creating a health care power of attorney and North Carolina law does not bar the use of any other or different form of power of attorney for health care that meets the statutory requirements.)

1. Designation of health care agent.

I, _____, being of sound mind, hereby appoint

Name: _____

Home Address: _____

Home Telephone Number _____Work Telephone Number_____

as my health care attorney-in-fact (herein referred to as my "health care agent") to act for me and in my name (in any way I could act in person) to make health care decisions for me as authorized in this document.

If the person named as my health care agent is not reasonably available or is unable or unwilling to act as my agent, then I appoint the following persons (each to act alone and successively, in the order named), to serve in that capacity: (Optional)

A. Name: _____
Home Address: _____
Home Telephone Number _____Work Telephone Number_____

B. Name: _____
Home Address: _____
Home Telephone Number _____Work Telephone Number_____

Each successor health care agent designated shall be vested with the same power and duties as if originally named as my health care agent.

2. Effectiveness of appointment.

(Notice: This health care power of attorney may be revoked by you at any time in any manner by which you are able to communicate your intent to revoke to your health care agent and your attending physician.)

Absent revocation, the authority granted in this document shall become effective when and if the physician or physicians designated below determine that I lack sufficient understanding or capacity to make or communicate decisions relating to my health care and will continue in effect during my incapacity, until my ~~death.~~death, except if I authorize my health care agent to exercise my rights with respect to anatomical gifts, autopsy, or disposition of my remains, this authority will continue after my death to the extent necessary to exercise the authority granted in this document for these purposes.

This determination shall be made by the following physician or physicians. For decisions related to mental health treatment, this determination shall be made by the following physician or eligible psychologist. (You may include here a designation of your choice, including your attending physician or eligible psychologist, or any other physician or eligible psychologist. You may also name two or more physicians or eligible psychologists, if desired, both of whom must make this determination before the authority granted to the health care agent becomes effective.):

_____
_____
_____
_____

3. General statement of authority granted.

Except as indicated in section 4 below, I hereby grant to my health care agent named above full power and authority to make health care decisions, including mental health treatment decisions, on my behalf, including, but not limited to, the following:

A. To request, review, and receive any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records, and to consent to the disclosure of this information.

B. To employ or discharge my health care providers.

C. To consent to and authorize my admission to and discharge from a hospital, nursing or convalescent home, or other institution.

D. To consent to and authorize my admission to and retention in a facility for the care or treatment of mental illness.

E. To consent to and authorize the administration of medications for mental health treatment and electroconvulsive treatment (ECT) commonly referred to as "shock treatment".

F. To give consent for, to withdraw consent for, or to withhold consent for, X ray, anesthesia, medication, surgery, and all other diagnostic and treatment procedures ordered by or under the authorization of a licensed physician, dentist, or podiatrist. This authorization specifically includes the power to consent to measures for relief of pain.

G. To authorize the withholding or withdrawal of life-sustaining procedures when and if my physician determines that I am terminally ill, permanently in a coma, suffer severe dementia, or am in a persistent vegetative state. Life-sustaining procedures are those forms of medical care that only serve to artificially prolong the dying process and may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and other forms of medical treatment which sustain, restore or supplant vital bodily functions. Life-sustaining procedures do not include care necessary to provide comfort or alleviate pain.

I DESIRE THAT MY LIFE NOT BE PROLONGED BY LIFE-SUSTAINING PROCEDURES IF I AM TERMINALLY ILL, PERMANENTLY IN A COMA, SUFFER SEVERE DEMENTIA, OR AM IN A PERSISTENT VEGETATIVE STATE.

H. To exercise any right I may have to make a disposition of any part or all of my body for medical ~~purposes,~~purposes; ~~to donate my organs,~~ to authorize an ~~autopsy,~~autopsy; to make an anatomical gift of my organs or body, or part thereof, and to direct the disposition of my remains.

I. To take any lawful actions that may be necessary to carry out these decisions, including the granting of releases of liability to medical providers.

4. Special provisions and limitations.

(Notice: The above grant of power is intended to be as broad as possible so that your health care agent will have authority to make any decisions you could make to obtain or terminate any type of health care. If you wish to limit the scope of your health care agent's powers, you may do so in this section.)

A. In exercising the authority to make health care decisions on my behalf, the authority of my health care agent is subject to the following special provisions and limitations (Here you may include any specific limitations you deem appropriate such as: your own definition of when life-sustaining treatment should be withheld or discontinued, or instructions to refuse any specific types of treatment that are

inconsistent with your religious beliefs, or unacceptable to you for any other reason.):

_____

_____

_____

_____

B. In exercising the authority to make mental health decisions on my behalf, the authority of my health care agent is subject to the following special provisions and limitations. (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority to make only mental health treatment decisions, your own instructions regarding the administration or withholding of psychotropic medications and electroconvulsive treatment (ECT), instructions regarding your admission to and retention in a health care facility for mental health treatment, or instructions to refuse any specific types of treatment that are unacceptable to you):

_____

_____

_____

_____

C. (Notice: This health care power of attorney may incorporate or be combined with an advance instruction for mental health treatment, executed in accordance with Part 2 of Article 3 of Chapter 122C of the General Statutes, which you may use to state your instructions regarding mental health treatment in the event you lack sufficient understanding or capacity to make or communicate mental health treatment decisions. Because your health care agent's decisions about decisions must be consistent with any statements you have expressed in an advance instruction, you should indicate here whether you have executed an advance instruction for mental health treatment.):

_____

_____

_____

_____

D. In exercising the authority to make decisions regarding autopsy, anatomical gifts and disposition of remains on my behalf, the authority of my health care agent is subject to the following special provisions and limitations. (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority and the scope of authority, instructions regarding gifts of the body or body part, or instructions regarding burial or cremation):

_____

_____

_____

_____

5. Guardianship provision.

If it becomes necessary for a court to appoint a guardian of my person, I nominate my health care agent acting under this document to be the guardian of my person, to serve without bond or security. The guardian shall act consistently with G.S. 35A-1201(a)(5).

6. Reliance of third parties on health care agent.

A. No person who relies in good faith upon the authority of or any representations by my health care agent shall be liable to me, my estate, my heirs, successors, assigns, or personal representatives, for actions or omissions by my health care agent.

B. The powers conferred on my health care agent by this document may be exercised by my health care agent alone, and my health care agent's signature or act under the authority granted in this document may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. All acts performed in good faith by my health care agent pursuant to this power of attorney are done with my consent and shall have the same validity and effect as if I were present and exercised the powers myself, and shall inure to the benefit of and bind me, my estate, my heirs, successors, assigns, and personal representatives. The authority of my health care agent pursuant to this power of attorney shall be superior to and binding upon my family, relatives, friends, and others.

7. Miscellaneous provisions.

A. I revoke any prior health care power of attorney.

B. My health care agent shall be entitled to sign, execute, deliver, and acknowledge any contract or other document that may be necessary, desirable, convenient, or proper in order to exercise and carry out any of the powers described in this document and to incur reasonable costs on my behalf incident to the exercise of these powers; provided, however, that except as shall be necessary in order to exercise the powers described in this document relating to my health care, my health care agent shall not have any authority over my property or financial affairs.

C. My health care agent and my health care agent's estate, heirs, successors, and assigns are hereby released and forever discharged by me, my estate, my heirs, successors, and assigns and personal representatives from all liability and from all claims or demands of all kinds arising out of the acts or omissions of my health care agent pursuant to this document, except for willful misconduct or gross negligence.

D. No act or omission of my health care agent, or of any other person, institution, or facility acting in good faith in reliance on the authority of my health care agent pursuant to this health care power of attorney shall be considered suicide, nor the cause of my death for any civil or criminal purposes, nor shall it be considered unprofessional conduct or as lack of professional competence. Any person, institution, or facility against whom criminal or civil liability is asserted because of conduct authorized by this health care power of attorney may interpose this document as a defense.

8. Signature of principal.

By signing here, I indicate that I am mentally alert and competent, fully informed as to the contents of this document, and understand the full import of this grant of powers to my health care agent.

_____ (SEAL) _____

Signature of Principal Date

9. Signatures of Witnesses.

I hereby state that the Principal, _____, being of sound mind, signed the foregoing health care power of attorney in my presence, and that I am not related to the principal by blood or marriage, and I would not be entitled to any portion of the estate of the principal under any existing will or codicil of the principal or as an heir under the Intestate Succession Act, if the principal died on this date without a will. I also state that I am not the principal's attending physician, nor an employee of the principal's attending physician, nor an employee of the health facility in which the principal is a patient, nor an employee of a nursing home or any group care home where the principal resides. I further state that I do not have any claim against the principal.

Witness: _____ Date: _____

Witness: _____ Date: _____

STATE OF NORTH CAROLINA

COUNTY OF_____

CERTIFICATE

I, _____, a Notary Public for _____ County, North Carolina, hereby certify that _____ appeared before me and swore to me and to the witnesses in my presence that this instrument is a health care power of attorney, and that he/she willingly and voluntarily made and executed it as his/her free act and deed for the purposes expressed in it.

I further certify that _____ and _____, witnesses, appeared before me and swore that they witnessed _____ sign the attached health care power of attorney,

believing him/her to be of sound mind; and also swore that at the time they witnessed the signing (i) they were not related within the third degree to him/her or his/her spouse, and (ii) they did not know nor have a reasonable expectation that they would be entitled to any portion of his/her estate upon his/her death under any will or codicil thereto then existing or under the Intestate Succession Act as it provided at that time, and (iii) they were not a physician attending him/her, nor an employee of an attending physician, nor an employee of a health facility in which he/she was a patient, nor an employee of a nursing home or any group-care home in which he/she resided, and (iv) they did not have a claim against him/her. I further certify that I am satisfied as to the genuineness and due execution of the instrument.

This the _____ day of _____, ____

_____

Notary Public

My Commission Expires:

_____

(A copy of this form should be given to your health care agent and any alternate named in this power of attorney, and to your physician and family members.)"

SECTION 4. G.S. 130A-389(b) reads as rewritten:

"(b) In deaths where the Chief Medical Examiner and the medical examiner investigating the case do not deem it advisable and in the public interest that an autopsy be performed, but the next-of-kin of the deceased requests that an autopsy be performed, the Chief Medical Examiner or a designated pathologist may perform the ~~autopsy and~~ autopsy, unless the deceased's health care power of attorney granted authority for such decisions to the health care agent. If the Chief Medical Examiner or a designated pathologist performs the autopsy at the request of the next of kin, the cost shall be paid by the next of kin."

SECTION 5. G.S. 130A-398 reads as rewritten:

"**§ 130A-398. Limitation on right to perform autopsy.**

The right to perform an autopsy shall be limited to those cases in which:

(1) The Chief Medical Examiner or a county medical examiner, acting pursuant to G.S. 130A-389, directs that an autopsy be performed;

(2) The Commission of Anatomy, acting pursuant to G.S. 130A-415, has given written consent for an autopsy to be performed on an unclaimed body;

(3) A prosecuting officer or district attorney, acting pursuant to G.S. 15-7 in case of homicide, directs that an autopsy be performed;

(4) The decedent directs in writing prior to death that an autopsy be performed upon the occurrence of the decedent's death;

(4a) The health care agent under a health care power of attorney with authority to make decisions with respect to autopsies requests that an autopsy be performed upon the deceased Principal;

(5) The personal representative of the estate of the decedent requests that an autopsy be performed upon the decedent; or

(6) Any of the following persons, in order of priority, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual opposition by a member of the same or prior class, authorizes an autopsy to be performed:

a. The spouse;

b. Any adult child or stepchild;

c. Any parent or stepparents;

d. Any adult sibling;

e. A guardian of the person of the decedent at the time of the decedent's death;

f. Any relative or person who accepts responsibility for final disposition of the body by other customary and lawful procedures;

g. Any person under obligation to dispose of the body."

SECTION 6. G.S. 130A-404(b) reads as rewritten:

"(b) If the decedent has not made a gift in the manner prescribed in G.S. 130A-406, then any of the following persons, in order of priority stated, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class, may give all or any part of the decedent's body for any purpose specified in G.S. 130A-405.

(1) ~~The spouse;~~The health care agent under a health care power of attorney with authority to make decisions with respect to anatomical gifts;

(2) ~~An adult child;~~The spouse;

(3) ~~Either parent;~~An adult child;

(4) ~~An adult sibling;~~Either parent;

(5) ~~A guardian of the person of the decedent at the time of decedent's death;~~An adult sibling;

(6) ~~Any other person authorized or under obligation to dispose of the body.~~A guardian of the person of the decedent at the time of decedent's death;

(7) Any other person authorized or under obligation to dispose of the body."

SECTION 7. This act becomes effective October 1, 2005, and applies to powers of attorney created before and after that date.

HOUSE BILL 967:
Health Care Power of Atty/Dispos. of Remains

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 11, 2005
Introduced by:	Rep. Tucker	**Summary by:**	Kory Goldsmith
Version:	PCS to Second Edition H967-CSRC-85		Committee Counsel

SUMMARY: ***House Bill 967 would extend a health care power of attorney past death of the principal for purposes of exercising explicitly granted rights with respect to decisions of anatomical gifts, autopsy and disposition of remains. The PCS makes technical and clarifying changes.***

The bill would become effective October 1, 2005, and apply to all powers of attorney whenever created.

CURRENT LAW:

Health Care Powers of Attorney. A health care power of attorney may authorize the health care agent to exercise rights the principal may have with respect to anatomical gifts, autopsies, and disposition of the remains of the principal. However, the health care power of attorney is revoked by the death of the principal.

Autopsies. Medical Examiner investigations are authorized by statute for deaths resulting from any of the following circumstances: 1) violence, poisoning, accident, suicide or homicide; 2) occurring suddenly when the deceased has been in apparent good health or when unattended by a physician; 3) occurring in jail, prison, correctional institution or in police custody; 4) occurring as a result of execution by the State; or 5) occurring under any suspicious, unusual or unnatural circumstance. The Medical Examiner may conduct an autopsy or other study if the Medical Examiner deems it advisable and in the public interest. Other autopsies may be requested by the next-of-kin of the deceased. G.S. 130-398 provides that the right to perform an autopsy shall be limited to those cases in which:

1. The Chief Medical Examiner or a county medical examiner, acting pursuant to G.S. 130A-389, directs that an autopsy be performed.
2. The Commission of Anatomy, acting pursuant to G.S. 130A-415, has given written consent for an autopsy to be performed on an unclaimed body.
3. A prosecuting officer or district attorney, acting pursuant to G.S. 15-7 in case of homicide, directs that an autopsy be performed.
4. The decedent directs in writing prior to death that an autopsy be performed upon the occurrence of the decedent's death.
5. The personal representative of the estate of the decedent requests that an autopsy be performed upon the decedent. OR
6. Any of the following persons, in order of priority, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual opposition by a member of the same or prior class, authorizes an autopsy to be performed:
   a. The spouse.
   b. Any adult child or stepchild.
   c. Any parent or stepparents.
   d. Any adult sibling.
   e. A guardian of the person of the decedent at the time of the decedent's death.

f. Any relative or person who accepts responsibility for final disposition of the body by other customary and lawful procedures.
g. Any person under obligation to dispose of the body.

Anatomical Gifts. A person of sound mind and at least 18 years old may give all or part of that individual's body upon death as an anatomical gift. If no gift has been made, then any of the following persons, in order of priority, may make the anatomical gift at the time of death (either immediately before or after):

1. The spouse.
2. An adult child.
3. Either parent.
4. An adult sibling.
5. A guardian of the person of the decedent at the time of decedent's death.
6. Any other person authorized or under obligation to dispose of the body.

Disposition of Remains. A person at 18 years of age may authorize the disposition of that person's remains in a will, in a health care power of attorney, a pre-need funeral contract, cremation authorization form, or in a written statement signed by the person and witnessed by 2 others at least 18 years old. If there is no such authorization, the following persons, in order, may authorize the disposition of the remains:

1. The surviving spouse.
2. A majority of the surviving children.
3. The surviving parents.
4. A majority of the surviving siblings.
5. A majority of the persons in the classes of the next degrees of kinship, in descending order, who, under State law, would inherit the decedent's estate if the decedent died intestate.
6. A person who has exhibited special care and concern for the decedent and is willing and able to make decisions about the disposition.

BILL ANALYSIS:

Section 1 amends the definitions applicable to the craeations of health care powers of attorney to define "disposition of remains" to mean the decision to bury or cremate human remains.

Sections 2 and 3 would allow the health care power of attorney to extend past death of the principal when the health care power of attorney authorizes the health care agent to exercise rights of the principal with respect to anatomical gifts, autopsy, or disposition of the remains so that the health care agent may exercise the rights granted. The bill would also make a conforming change in the statutory short form health care power of attorney.

Sections 4, 5, and 6 would make conforming changes to the statutes governing autopsy, anatomical gifts and disposition of remains to allow for the health care agent to make decisions with regard to those actions.

EFFECTIVE DATE: The act would become effective October 1, 2005 and apply to powers of attorney created before or after that date.

Erika Churchill, counsel to House Judiciary I, substantially contributed to this summary.

H0967e2-SMRC-CSRC-85

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1085

Committee Substitute Favorable 5/2/05

Short Title: Care of Dogs Illegally Used for Fighting. (Public)

Sponsors:

Referred to:

April 4, 2005

A BILL TO BE ENTITLED

AN ACT TO REQUIRE A DEFENDANT ARRESTED FOR USING DOGS FOR FIGHTING TO POST A DEPOSIT TO THE ANIMAL SHELTER TO PAY FOR THE DOGS' KEEP DURING THE PERIOD PRIOR TO ADJUDICATION OF THE CHARGES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 19A of the General Statutes is amended by adding a new Article to read:

"Article 6.

"Care of Dogs Illegally Used for Fighting.

"**§ 19A-70. Care of dogs illegally used for fighting.**

(a) In every arrest under G.S. 14-362.2, if an animal shelter takes custody of dogs illegally used for fighting, the animal shelter may file a petition with the court requesting that the defendant be ordered to deposit funds in an amount sufficient to secure payment of all the reasonable expenses expected to be incurred by the animal shelter in caring for and providing for the dogs pending the disposition of the charges. For purposes of this section, 'reasonable expenses' includes the cost of providing food, water, shelter, and care, including medical care, for at least 30 days.

(b) Upon receipt of a petition, the court shall set a hearing on the petition. The hearing shall be conducted no less than 10 and no more than 15 business days after the petition is filed. The animal shelter shall mail written notice of the hearing and a copy of the petition to the defendant at the address contained in the criminal charges. If the defendant is in a local detention facility at the time the petition is filed, the animal shelter shall also provide notice to the custodian of the detention facility.

(c) The court shall set the amount of funds necessary for 30 days' care after taking into consideration all of the facts and circumstances of the case, including the recommendation of the animal shelter and the estimated cost of caring for the dogs as well as the defendant's ability to pay. If the court determines that the defendant is unable

to deposit funds, the court may consider issuing an order under subsection (f) of this section.

Any order for funds to be deposited pursuant to this section shall state that if the animal shelter files an affidavit with the clerk of superior court, at least two business days prior to the expiration of a 30-day period, stating that, to the best of the shelter's knowledge, the criminal case against the defendant has not yet been resolved, the order shall be automatically renewed every 30 days until the criminal case is resolved.

(d) If the court orders that funds be deposited, the amount of funds necessary for 30 days shall be posted with the clerk of superior court. The defendant shall also deposit the same amount with the clerk of superior court every 30 days thereafter until the criminal charges are resolved, unless the defendant requests a hearing no less than five business days prior to the expiration of a 30-day period. If the defendant fails to deposit the funds within five business days of the initial hearing, or five business days of the expiration of a 30-day period, the dogs are forfeited by operation of law. If funds have been deposited in accordance with this section, the animal shelter may draw from the funds the actual costs incurred in caring for the dogs.

In the event of forfeiture, the animal shelter may determine whether any of the dogs are suitable for adoption and whether adoption can be arranged for any of the dogs. The dogs may not be adopted by the defendant or by any person residing in the defendant's household, and the animal shelter shall notify any persons adopting the dogs of the liability provisions for owners of dangerous dogs under Article 1A of Chapter 67 of the General Statutes. If no adoption can be arranged after the forfeiture, or the dogs are unsuitable for adoption, the shelter shall humanely euthanize the dogs.

(e) The deposit of funds shall not prevent the animal shelter from disposing of the dogs prior to the expiration of the 30-day period covered by the deposit if the court makes a final determination of the charges against the defendant. Upon the adjudication of the charges, the defendant is entitled to a refund for any portion of the deposit not incurred as expenses by the animal shelter.

(f) Pursuant to subsection (c) of this section, the court may order a defendant to provide necessary food, water, shelter, and care, including any necessary medical care, for any dogs that are the basis of the charges against the defendant without the removal of the dogs from the existing location and until the charges against the defendant are adjudicated. If the court issues such an order, the court shall provide for an animal control officer or other law enforcement officer to make regular visits to the location to ensure that the dogs are receiving necessary food, water, shelter, and care, including any necessary medical care, and to impound the animals if they are not receiving those necessities."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. 2nd

H. B. No. 1085 DATE

S. B. No. Amendment No. (to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE

Rep.) Berger
Sen.)

moves to amend the bill on page 2, line 28

( ) WHICH CHANGES THE TITLE

by adding the following at the end of the line to read:

"A person who is adjudicated not guilty of the charges under G.S. 14-362.2 shall be entitled to a refund of the deposit."

full

SIGNED

ADOPTED X FAILED TABLED

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1145

Committee Substitute Favorable 4/19/05

Short Title: Probation Stayed/Appeal for Trial de Novo. (Public)

Sponsors:

Referred to:

April 7, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT PROBATION IS STAYED DURING AN APPEAL FOR A TRIAL DE NOVO FROM A JUDGMENT ENTERED BY A MAGISTRATE OR DISTRICT COURT JUDGE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1431 reads as rewritten:

"**§ 15A-1431. Appeals by defendants from magistrate and district court judge; trial de novo.**

(a) A defendant convicted before a magistrate may appeal for trial de novo before a district court judge without a jury.

(b) A defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law. Upon the docketing in the superior court of an appeal from a judgment imposed pursuant to a plea arrangement between the State and the defendant, the jurisdiction of the superior court over any misdemeanor dismissed, reduced, or modified pursuant to that plea arrangement shall be the same as was had by the district court prior to the plea arrangement.

(c) Within 10 days of entry of judgment, notice of appeal may be given orally in open court or in writing to the clerk. Within 10 days of entry of judgment, the defendant may withdraw his appeal and comply with the judgment. Upon expiration of the 10-day period, if an appeal has been entered and not withdrawn, the clerk must transfer the case to the appropriate court.

(d) A defendant convicted by a magistrate or district court judge is not barred from appeal because of compliance with the judgment, but notice of appeal after compliance must be given by the defendant in person to the magistrate or judge who heard the case or, if he is not available, notice must be given:

(1) Before a magistrate in the county, in the case of appeals from the magistrate; or

(2) During an open session of district court in the district court district as defined in G.S. 7A-133, in the case of appeals from district court.

The magistrate or district court judge must review the case and fix conditions of pretrial release as appropriate. If a defendant has paid a fine or costs and then appeals, the amount paid must be remitted to the defendant, but the judge, clerk or magistrate to whom notice of appeal is given may order the remission delayed pending the determination of the appeal.

(e) Any order of pretrial release remains in effect pending appeal by the defendant unless the judge modifies the order.

~~(f) Appeal pursuant to this section stays the execution of portions of the judgment relating to fine and costs. Appeal stays portions of the judgment relating to confinement when the defendant has complied with conditions of pretrial release. If the defendant cannot comply with conditions of pretrial release, the judge may order confinement in a local confinement facility pending the trial de novo in superior court.~~

(f1) Appeal pursuant to this section stays the execution of all portions of the judgment, including all of the following:

(1) Payment of costs.

(2) Payment of a fine.

(3) Probation or special probation.

(4) Active punishment.

Pursuant to subsection (e) of this section, however, the judge may order any appropriate condition of pretrial release, including confinement in a local confinement facility, pending the trial de novo in superior court.

(g) The defendant may withdraw his appeal at any time prior to calendaring of the case for trial de novo. The case is then automatically remanded to the court from which the appeal was taken, for execution of the judgment.

(h) The defendant may withdraw his appeal after the calendaring of the case for trial de novo only by consent of the court, and with the attachment of costs of that court, unless the costs or any part of the costs are remitted by the court. The case may then be remanded by order of the court to the court from which the appeal was taken for execution of the judgment with any additional court costs that attached and that have not been remitted."

SECTION 2. This act is effective when it becomes law and applies to appeals noticed on or after that date.

HOUSE BILL 1085:
Care of Dogs Illegally Used for Fighting

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 11, 2005
Introduced by:	Reps. Insko, Parmon	**Summary by:**	Kory Goldsmith
Version:	Second Edition		Committee Counsel

SUMMARY: House Bill 1085 requires a defendant arrested for using dogs for fighting to post a security deposit to pay the animal shelter for the dog's keep during the period prior to adjudication of the charges.

BILL ANALYSIS: H1085-CSSA-9 creates a new statute, G.S. 19A-70.

Subsection (a) of the section allows an animal shelter that takes custody of dogs illegally used for fighting to petition the court asking that the criminal defendant be required to post security to pay for the reasonable expenses for the care of the dogs.

Subsection (b) of the section requires the court, upon receipt of the petition, to set a hearing date no less than ten and no more than fifteen business days later. The shelter must then mail written notice of the hearing and a copy of the petition to the defendant, and if the defendant is in jail, provide a copy to the jail.

Subsection (c) requires the court to consider all the facts, the estimated expenses and the defendant's ability to pay, and set a security amount. If the court determines that the defendant is unable to pay, the court may consider issuing an order under subsection (f). Any order issued for a security amount shall automatically renew every 30 days if the animal shelter files a notarized statement that the criminal charges are still pending.

Subsection (d) requires the defendant to pay the security amount within 5 business days of the hearing and every 30 days thereafter until the criminal charges are resolved. If the defendant fails to post the security the dogs are forfeited. If the dogs are forfeited, the shelter may allow the dogs to be adopted or euthanize them. If the shelter allows any of the dogs to be adopted, they must notify the person adopting the dog of the liability under the dangerous dog provisions of Chapter 67.

Subsection (e) allows the shelter to dispose of the dogs within a 30 day period if the criminal charges are resolved. Any amount of security not used for the dogs actual care shall be refunded to the defendant.

Subsection (f) allows the court, if it finds the defendant is unable to pay a security, to allow the defendant to care for the dogs. An animal control officer or law enforcement officer shall be assigned to ensure that the dogs are being cared for, and impound them if they are not.

EFFECTIVE DATE: This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

Susan Sitze, counsel to House Judiciary I, substantially contributed to this summary.

H1085e2-SMRC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1145

Committee Substitute Favorable 4/19/05

Short Title: Probation Stayed/Appeal for Trial de Novo. (Public)

Sponsors:

Referred to:

April 7, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT PROBATION IS STAYED DURING AN APPEAL FOR A TRIAL DE NOVO FROM A JUDGMENT ENTERED BY A MAGISTRATE OR DISTRICT COURT JUDGE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1431 reads as rewritten:

"**§ 15A-1431. Appeals by defendants from magistrate and district court judge; trial de novo.**

(a) A defendant convicted before a magistrate may appeal for trial de novo before a district court judge without a jury.

(b) A defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law. Upon the docketing in the superior court of an appeal from a judgment imposed pursuant to a plea arrangement between the State and the defendant, the jurisdiction of the superior court over any misdemeanor dismissed, reduced, or modified pursuant to that plea arrangement shall be the same as was had by the district court prior to the plea arrangement.

(c) Within 10 days of entry of judgment, notice of appeal may be given orally in open court or in writing to the clerk. Within 10 days of entry of judgment, the defendant may withdraw his appeal and comply with the judgment. Upon expiration of the 10-day period, if an appeal has been entered and not withdrawn, the clerk must transfer the case to the appropriate court.

(d) A defendant convicted by a magistrate or district court judge is not barred from appeal because of compliance with the judgment, but notice of appeal after compliance must be given by the defendant in person to the magistrate or judge who heard the case or, if he is not available, notice must be given:

(1) Before a magistrate in the county, in the case of appeals from the magistrate; or

(2) During an open session of district court in the district court district as defined in G.S. 7A-133, in the case of appeals from district court.

The magistrate or district court judge must review the case and fix conditions of pretrial release as appropriate. If a defendant has paid a fine or costs and then appeals, the amount paid must be remitted to the defendant, but the judge, clerk or magistrate to whom notice of appeal is given may order the remission delayed pending the determination of the appeal.

(e) Any order of pretrial release remains in effect pending appeal by the defendant unless the judge modifies the order.

~~(f) Appeal pursuant to this section stays the execution of portions of the judgment relating to fine and costs. Appeal stays portions of the judgment relating to confinement when the defendant has complied with conditions of pretrial release. If the defendant cannot comply with conditions of pretrial release, the judge may order confinement in a local confinement facility pending the trial de novo in superior court.~~

(f1) Appeal pursuant to this section stays the execution of all portions of the judgment, including all of the following:

(1) Payment of costs.

(2) Payment of a fine.

(3) Probation or special probation.

(4) Active punishment.

Pursuant to subsection (e) of this section, however, the judge may order any appropriate condition of pretrial release, including confinement in a local confinement facility, pending the trial de novo in superior court.

(g) The defendant may withdraw his appeal at any time prior to calendaring of the case for trial de novo. The case is then automatically remanded to the court from which the appeal was taken, for execution of the judgment.

(h) The defendant may withdraw his appeal after the calendaring of the case for trial de novo only by consent of the court, and with the attachment of costs of that court, unless the costs or any part of the costs are remitted by the court. The case may then be remanded by order of the court to the court from which the appeal was taken for execution of the judgment with any additional court costs that attached and that have not been remitted."

SECTION 2. This act is effective when it becomes law and applies to appeals noticed on or after that date.

HOUSE BILL 1145:
Probation Stayed/Appeal for Trial de Novo

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 11, 2005
Introduced by:	Rep. Michaux	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	Second Edition		

SUMMARY: House Bill 145 would stay probation during a trial de novo from a judgment entered by a magistrate or district court judge.

The bill would be effective when it becomes law and would apply to appeals noticed on or after that date.

CURRENT LAW:

Under current law, a defendant convicted before a magistrate may appeal for a trial de novo before a district court judge and a defendant convicted before a district court judge may appeal for a trial de novo with a jury. A trial de novo is a new trial or retrial in an appellate court that is conducted as if no trial had occurred in the lower court.

During the appeal for a trial de novo, the portion of the judgment relating to fines and penalties is stayed. The portion of the judgment relating to confinement will also be stayed if the defendant has complied with conditions of pretrial release.

BILL ANALYSIS: House Bill 1145 would expand the portion of the judgment that would be stayed during a trial de novo to include probation or special probation.

Jeff Hudson, counsel to House Judiciary III, substantially contributed to this summary.

H1145e2-SMRC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H **4**

HOUSE BILL 1176

Committee Substitute Favorable 5/2/05
Committee Substitute #2 Favorable 5/11/05
Committee Substitute #3 Favorable 5/25/05

Short Title: Property Exempt From Enforcement Actions. (Public)

Sponsors:

Referred to:

April 12, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE CAP ON PROPERTY OF A JUDGMENT DEBTOR THAT IS FREE OF THE ENFORCEMENT OF THE CLAIMS OF CREDITORS, AND TO EXEMPT CERTAIN TYPES OF PROPERTY FROM ENFORCEMENT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1C-1601 reads as rewritten:

"**§ 1C-1601. What property exempt; waiver; exceptions.**

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

(1) The debtor's aggregate interest, not to exceed ~~ten thousand dollars ($10,000)~~eighteen thousand five hundred dollars ($18,500) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the ~~debtor.~~debtor; however, an unmarried debtor who is 65 years of age or older is entitled to retain an aggregate interest in the property not to exceed thirty-seven thousand dollars ($37,000) in value so long as the property was previously owned by the debtor as a tenant by the entireties or as a joint tenant with rights of survivorship and the former co-owner of the property is deceased.

(2) The debtor's aggregate interest in any property, not to exceed ~~three thousand five hundred dollars ($3,500)~~five thousand dollars ($5,000) in value ~~less any amount of the exemption used~~ of any unused exemption amount to which the debtor is entitled under subdivision ~~(1).~~(1) of this subsection.

(3) The debtor's interest, not to exceed ~~one thousand five hundred dollars ($1,500)~~three thousand five hundred dollars ($3,500) in value, in one motor vehicle.

(4) The debtor's aggregate interest, not to exceed ~~three thousand five hundred dollars ($3,500)~~five thousand dollars ($5,000) in value for the debtor plus ~~seven hundred fifty dollars ($750.00)~~one thousand dollars ($1,000) for each dependent of the debtor, not to exceed ~~three thousand dollars ($3,000)~~four thousand dollars ($4,000) total for dependents, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest, not to exceed ~~seven hundred fifty dollars ($750.00)~~two thousand dollars ($2,000) in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor.

(6) Life insurance as provided in Article X, Section 5 of the Constitution of North Carolina.

(7) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(8) Compensation for personal ~~injury~~ injury, including compensation from private disability policies or annuities, or compensation for the death of a person upon whom the debtor was dependent for support, but such compensation is not exempt from claims for funeral, legal, medical, dental, hospital, and health care charges related to the accident or injury giving rise to the compensation.

(9) Individual retirement plans as defined in the Internal Revenue Code and any plan treated in the same manner as an individual retirement plan under the Internal Revenue ~~Code. For purposes of this subdivision, "Internal Revenue Code" means Code as defined in G.S. 105-228.90.~~ Code, including individual retirement accounts and Roth retirement accounts as described in section 408(a) and section 408A of the Internal Revenue Code, individual retirement annuities as described in section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in section 408(c) of the Internal Revenue Code.

(10) Funds in a college savings plan qualified under section 529 of the Internal Revenue Code, not to exceed a cumulative limit of twenty-five thousand dollars ($25,000), but excluding any funds placed in a college savings plan account within the preceding 12 months (except to the extent any of the contributions were made in the ordinary course of the debtor's financial affairs and were consistent with the debtor's past pattern of contributions) and only to the extent that the funds are

for a child of the debtor and will actually be used for the child's college or university expenses.

(11) Retirement benefits under the retirement plans of other states and governmental units of other states, to the extent that these benefits are exempt under the laws of the state or governmental unit under which the benefit plan is established.

(12) Alimony, support, separate maintenance, and child support payments or funds that have been received or to which the debtor is entitled, to the extent the payments or funds are reasonably necessary for the support of the debtor or any dependent of the debtor.

(b) ~~Definition. "Value" as used in this Article~~Definitions. – As used in this section, the following definitions apply:

(1) "Internal Revenue Code" means Code as defined in G.S. 105-228.90.

(2) "Value" means fair market value of an individual's interest in property, less valid liens superior to the judgment lien sought to be enforced.

(c) Waiver. – The exemptions provided in this Article and in Sections 1 and 2 of Article X of the North Carolina Constitution, cannot be waived except by:

(1) Transfer of property allocated as exempt (and in that event only as to the specific property ~~transferred), or~~transferred);

(2) Written waiver, after judgment, approved by the clerk or district court judge. The clerk or district court judge must find that the waiver is made freely, voluntarily, and with full knowledge of the debtor's rights to exemptions and that he is not required to waive them; or

(3) Failure to assert the exemption after notice to do so pursuant to G.S. 1C-1603. The clerk or district court judge may relieve such a waiver made by reason of mistake, surprise or excusable neglect, to the extent that the rights of innocent third parties are not affected.

(d) Recent purchases. – The exemptions provided in subdivisions (2), (3), ~~(4)~~ (4), and (5) of subsection (a) of this section are inapplicable with respect to tangible personal property purchased by the debtor less than 90 days preceding the initiation of judgment collection proceedings or the filing of a petition for ~~bankruptcy.~~bankruptcy, unless the purchase of the property is directly traceable to the liquidation or conversion of property that may be exempt and no additional property was transferred into or used to acquire the replacement property.

(e) Exceptions. – The exemptions provided in this Article are inapplicable to claims:

(1) Of the United States or its agencies as provided by federal law;

(2) Of the State or its subdivisions for taxes, appearance bonds or fiduciary bonds;

(3) Of lien by a laborer for work done and performed for the person claiming the exemption, but only as to the specific property affected;

(4) Of lien by a mechanic for work done on the premises, but only as to the specific property affected;

(5) For payment of obligations contracted for the purchase of the specific real property affected;

(6) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1224, s. 6, effective September 1, 1982;

(7) For contractual security interests in the specific property affected; provided, that the exemptions shall apply to the debtor's household goods notwithstanding any contract for a nonpossessory, nonpurchase money security interest in any such goods;

(8) For statutory liens, on the specific property affected, other than judicial liens;

(9) For child support, alimony or distributive award order pursuant to Chapter 50 of the General Statutes;

(10) For criminal restitution orders docketed as civil judgments pursuant to G.S. 15A-1340.38.

(f) Federal Bankruptcy ~~Act.~~Code. – The exemptions provided in The Bankruptcy ~~Act,~~Code, 11 U.S.C. § 522(d), are not applicable to residents of this State. The exemptions provided by this Article and by other statutory or common law of this State shall apply for purposes of The Bankruptcy ~~Act,~~Code, 11 U.S.C. ~~§522(b).~~ § 522(b).

(g) Effect of exemptions. – Notwithstanding any other provision of law, a creditor shall not obtain possession of a debtor's household goods and furnishings in which the creditor holds a nonpossessory, nonpurchase money security interest until the creditor has fully complied with the procedures required by G.S. 1C-1603."

SECTION 2. G.S. 1C-1603(a)(4) reads as rewritten:

"(4) After judgment, except as provided in G.S. 1C-1603(a)(3) or when exemptions have already been designated, the clerk may not issue an execution or writ of possession unless notice from the court has been served upon the judgment debtor advising ~~him~~ the debtor of ~~his~~ the debtor's rights. The judgment creditor ~~must~~ shall cause the ~~notice~~ notice, which shall be accompanied by the form for the statement by the debtor under subsection (c) of this section, to be served on the debtor as provided in G.S. 1A-1, Rule 4(j)(1). If the judgment debtor cannot be served as provided above, the judgment creditor may serve ~~him~~ the judgment debtor by mailing a copy of the notice to the judgment debtor at ~~his~~ the debtor's last known address. Proof of service by certified or registered mail or personal service is as provided in G.S. 1A-1, Rule 4. The judgment creditor may prove service by mailing to last known address by filing a certificate that the notice was served indicating the circumstances warranting the use of such service and the date and address of service. The notice ~~must~~ shall be substantially in the following form:

NORTH CAROLINA	IN THE GENERAL COURT
_____ COUNTY	OF JUSTICE DISTRICT
	COURT DIVISION
	CvD

_____	)	NOTICE OF
Judgment Creditor	)	PETITION (OR
	)	MOTION) TO SET
vs.	)	OFF DEBTOR'S
_____	)	EXEMPT PROPERTY

GREETINGS:

You have been named as a "judgment debtor" in a proceeding initiated by a "judgment creditor". A "judgment debtor" is a person who a court has declared owes money to another, the "judgment creditor". The purpose of this proceeding is to make arrangements to collect that debt from you personally or from property you own.

It is important that you respond to this notice no later than 20 days after you receive it because you may lose valuable rights if you do nothing. You may wish to consider hiring an attorney to help you with this proceeding to make certain that you receive all the protections to which you are entitled under the North Carolina Constitution and laws.

NOTICE TO JUDGMENT DEBTOR:

THERE ARE CERTAIN EXEMPTIONS UNDER STATE AND FEDERAL LAW THAT YOU ARE ENTITLED TO CLAIM IN ADDITION TO THE EXEMPTIONS LISTED ON THE "SCHEDULE OF DEBTOR'S PROPERTY AND REQUEST TO SET ASIDE EXEMPT PROPERTY" THAT IS ENCLOSED WITH THIS NOTICE.

These exemptions may include social security benefits, unemployment benefits, workers' compensation benefits, and earnings for your personal services rendered within the last 60 days. There is available to you a prompt procedure for challenging an attachment or levy on your property."

SECTION 3. G.S. 1C-1603(c) reads as rewritten:

"(c) Statement by the Debtor. – When proceedings are instituted, the debtor ~~must~~ shall file with the court a schedule of:

(1) ~~His~~ The debtor's assets, including their location;

(2) ~~His~~ The debtor's debts and the names and addresses of ~~his~~ the debtor's creditors;

(3) The property ~~which~~ that ~~he~~ the debtor desires designated as exempt.

The form for the statement ~~must~~ shall be substantially as follows:

NORTH CAROLINA		IN THE GENERAL COURT
_____ COUNTY		OF JUSTICE DISTRICT
		COURT DIVISION
		CvD
Judgment Creditor	)	SCHEDULE OF DEBTOR'S
	)	PROPERTY
vs.	)	AND REQUEST TO

	)	SET ASIDE EXEMPT
Judgment Debtor	)	PROPERTY

NOTICE TO JUDGMENT DEBTOR:

THERE ARE CERTAIN EXEMPTIONS UNDER STATE AND FEDERAL LAW THAT YOU ARE ENTITLED TO CLAIM IN ADDITION TO THE EXEMPTIONS LISTED BELOW.

These exemptions may include social security benefits, unemployment benefits, workers' compensation benefits, and earnings for your personal services rendered within the last 60 days. There is available to you a prompt procedure for challenging an attachment or levy on your property.

I, _____, being duly sworn do depose and say:
(fill in your name)

1. That I am a citizen and resident of _____ County, North Carolina;
2. That I was born on _____;
(date of birth)
3. That I am (married to _____)
(spouse's name)
_____;
(not married)
4. That the following persons live in my household and are in substantial need of my support:

NAME	RELATIONSHIP TO DEBTOR	AGE
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

(Use additional space, as necessary)

5. That (I own) (I am purchasing) (I rent) (choose one; mark out the other choices) a (house) (trailer) (apartment) (choose one; mark out the other choices) located at _____ which is my residence.
(address, city, zip code)
6. That I (do) (do not) own any other real property. If other real property is owned, list that property on the following lines; if no other real property is owned, mark "not applicable" on the first line.

_____
_____
_____
_____

7. That the following persons are, so far as I am able to tell, all of the persons or companies to whom I owe money:

8. That I wish to claim my interest in the following real or personal ~~property~~ property, or in a cooperative that owns property, that I use as a residence or my dependent uses as a residence. I also wish to claim my interest in the following burial plots for myself or my dependents. I understand that my total interest claimed in the residence and burial plots may not exceed ~~$7,500.~~ $18,500, except that if I am unmarried and am 65 years of age or older, I am entitled to claim a total exemption in the residence and burial plots not to exceed $37,000 so long as the property was previously owned by me as a tenant by the entireties or as a joint tenant with rights of survivorship, and the former co-owner of the property is deceased.

I understand that I am not entitled to this exemption if I take the homestead exemption provided by the Constitution of North Carolina in other property. I understand that if I wish to claim more than one parcel exempt I must attach additional pages setting forth the following information for each parcel claimed exempt.

Property Location:

County _____ Township _____

Street Address _____

Legal Description:

Number by which county tax assessor identifies property _____

Description (Attach a copy of your deed or other instrument of conveyance that describes the property and indicate here:_____ or describe the property in as much detail as possible.

Attach additional sheets if necessary.)

_____

_____

_____

Record Owner(s) _____

_____

_____

_____

Estimated Value: _____

Lienholders: _____

(1) Name _____ Current Balance _____

Address _____

(2) Name _____ Current Balance _____

Address _____

(3) Name _____ Current Balance _____

Address _____

(4) If others, attach additional pages.

If you are unmarried and 65 years of age or older, specify which, if any, property listed above was previously owned by you as a tenant by the entireties or as a joint tenant with rights of survivorship and as to which the former co-owner of the property is deceased:

_____

_____

9. That I wish to claim the following life insurance policies whose sole beneficiaries are (my wife) (my children) (my wife and children) as exempt:

Name of Insurer	Policy Number	Face Value	Beneficiary(ies)
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

10. That I wish to claim the following items of health care aid necessary for (myself) (my dependents) to work or sustain health:

Item	Purpose	Person using item
_____	_____	_____
_____	_____	_____
_____	_____	_____

11. That I wish to claim the following implements, professional books, or tools (not to exceed ~~$500),~~$2,000), of my trade or the trade of my dependent. I understand that such property purchased within 90 days of this proceeding ~~is not~~ may not be exempt:

Item	Estimated Value
_____	_____
_____	_____
_____	_____

12. That I wish to claim the following personal property consisting of household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments as exempt from the claims of my creditors. I affirm, that these items of personal property are held primarily for my personal, family or household use or for such use by my dependents.

I understand that I am entitled to personal property worth the sum of ~~$2,500.~~$5,000. I understand that I am also entitled to ~~$500~~$1,000 for each person dependent on me for support, but not to exceed ~~$2,000~~$4,000 for dependents. I further understand that I am entitled to this amount after deduction from the value of the property the amount of any valid lien or purchase money security interest and that property purchased within 90 days of this proceeding ~~is not~~may not be exempt.

Item (or class) of Property	Amount of Lien or Security Interest	Location	Estimated Value of Debtor's Interest
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

13. That I wish to claim my interest in the following motor vehicle as exempt from the claims of my creditors. I understand that I am entitled to my interest in a motor vehicle worth the sum of ~~$1,000~~$3,500 after deduction of the amount of any valid liens or purchase money security interest. I understand that a motor vehicle purchased within 90 days of this proceeding ~~is not~~may not be exempt.

Make and Model of Motor Vehicle	Year	Name(s) of Title Owner of Record	Name(s) of Lien Holder(s) of Record	Estimated Value of Debtor's Interest

14. That I wish to claim as exempt the following compensation ~~which~~ that I received or to which I am entitled for the personal injury of myself or a person upon whom I was dependent for ~~support~~ support, including compensation from a private disability policy or an annuity, or compensation ~~which~~ that I received for the death of a person upon whom I was dependent for support. I understand that this compensation is not exempt from claims for funeral, legal, medical, dental, hospital or health care charges related to the accident or injury ~~which~~ that resulted in the payment of the compensation to me. I understand that if I wish to claim more than one amount of compensation exempt, I must attach additional pages setting forth the following information for each amount of compensation claimed exempt.

(a) amount of compensation _____

(b) method of payment: lump sum or installments _____

(If installments, state amount, frequency and duration of payments)

_____

(c) name and relationship to debtor of person(s) injured or killed giving rise to compensation _____

(d) ~~location~~ location/source of compensation if received in lump or ~~installments~~installments, including name and account number of any disability policy or annuity

_____

(e) unpaid debts arising out of the injury or death giving rise to compensation

_____

Name and Address	Services Rendered	Amount of Debt

15. That I wish to claim the following property as exempt because I claimed residential real or personal property as exempt that is worth less than ~~$2,500~~$18,500 or I made no claim for a residential exemption under section (8) above. I understand that I am entitled to ~~$2,500~~an exemption of up to $5,000 in any property only if I made no claim under section (8) above ~~and that if I make a claim~~ or a claim that was less than $18,500 under section (8) ~~above,~~ above. I understand that I am entitled to ~~$2,500~~claim any unused amount that I was permitted to make under section (8) above up to a maximum of $5,000 in any ~~property minus any amount I claimed under section (8).~~property. (Examples: (a) if you claim ~~of $1,000~~$17,500 under section (8),

~~$1,500~~$1,000 allowed here; (b) if you claim ~~of $2,450~~$13,500 under section (8), ~~$50~~$5,000 allowed here; (c) if you claim ~~of $2,600~~$18,500 under section (8), no claim allowed here.) I further understand that the amount of my claim under this section is after the deduction from the value of this property of the amount of any valid lien or purchase money security interests and that tangible personal property purchased within 90 days of this proceeding ~~is not~~may not be exempt.

PERSONAL PROPERTY:

Property Location	Amount of Liens or Purchase Money Security Interests	Value of Debtor's Interest
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

REAL PROPERTY (I understand that if I wish to claim more than one parcel exempt, I must attach additional pages setting forth the following information for each parcel claimed exempt):

Property Location

County _____ Township _____

Street Address _____

Legal Description:

Number by which county tax assessor identifies property

_____

_____

Description (Attach a copy of your deed or other instrument of conveyance that describes the property and indicate here: _____ or describe the property in as much detail as possible.

Attach additional sheets if necessary.)

_____

_____

_____

_____

_____

_____

Record Owner(s): _____

_____

_____

_____

Estimated Value: _____

Lienholders:

(1) Name _____ Current Balance _____

Address _____

(2) Name _____ Current Balance _____

Address _____

(3) Name _____ Current Balance _____
Address _____
(4) If others, attach additional pages.

16. That I wish to claim as exempt the following retirement plans that I have that are individual retirement plans as described in the Internal Revenue Code or that are treated in the same manner as an individual retirement plan under the Internal Revenue Code, including individual retirement accounts and Roth retirement accounts as described in section 408(a) and section 408A of the Internal Revenue Code, individual retirement annuities as described in section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in section 408(c) of the Internal Revenue Code.

Type of Retirement Account	Name of Account	Account Number

17. That I wish to claim as exempt the following funds I hold in a college savings plan, not to exceed $25,000. I understand that to qualify for this exemption, the college savings plan must qualify as a college savings plan under section 529 of the Internal Revenue Code, and the college savings plan must be for my child and must actually be used for my child's college or university expenses. I understand I may not exempt any funds I placed in this account within the preceding 12 months, except to the extent that any contributions were made in the ordinary course of my financial affairs and were consistent with my past pattern of contributions.

College Savings Plan	Account Number	Value	Name(s) of Child(ren) Beneficiaries

18. That I wish to claim as exempt the following retirement benefits to which I am entitled to under the retirement plans of other states and governmental units of other states. I understand that these benefits are exempt only to the extent these benefits are exempt under the laws of the state or governmental unit under which the benefit plan was established.

State/Governmental Unit	Name of Retirement Plan	Identifying Number

19. That I wish to claim as exempt any alimony, support, separate maintenance, or child support payments or funds that I have received or that I am entitled to receive. I understand that these payments are exempt only to the extent that they are reasonably necessary for my support or for the support of a person dependent on me for support.

Type of Support	Person Paying Support	Amount & Location of Funds

_____	_____	_____
_____	_____	_____
_____	_____	_____

~~16~~20. That the following is a complete listing of all of my assets ~~which~~ that I have not claimed as exempt under any of the preceding paragraphs:

Item	Location	Estimated Value

This the _____ day of_____, ____

Judgment Debtor

Sworn to and Subscribed before
me this _____ day of_____, ____

Notary Public My Commission Expires:".

SECTION 4. G.S. 1C-1603(e)(2) reads as rewritten:

"(2) If the judgment debtor does not file a motion to designate exemptions with a schedule of assets within 20 days after notice of ~~his~~ the debtor's rights was served in accordance with G.S. 1C-1603(a)(4) or if ~~he~~the debtor does not request a hearing before the clerk within 20 days after service of the notice of rights and appear at the requested hearing, the judgment debtor has waived the exemptions provided in this Article and in Sections 1 and 2 of Article X of the North Carolina ~~Constitution.~~Constitution, except as provided in G.S. 1C-1601(a)(13) with regard to recent earnings. Upon request of the judgment creditor, the clerk shall issue a writ of execution or writ of possession."

SECTION 5. Except as otherwise provided, this act becomes effective January 1, 2006, and applies to judgments and bankruptcy petitions filed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 1176

Committee Substitute Favorable 5/2/05
Committee Substitute #2 Favorable 5/11/05
Committee Substitute #3 Favorable 5/25/05
PROPOSED COMMITTEE SUBSTITUTE H1176-PCS10389-RC-81

Short Title: Property Exempt From Enforcement Actions. (Public)

Sponsors:

Referred to:

April 12, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE CAP ON PROPERTY OF A JUDGMENT DEBTOR THAT IS FREE OF THE ENFORCEMENT OF THE CLAIMS OF CREDITORS, AND TO EXEMPT CERTAIN TYPES OF PROPERTY FROM ENFORCEMENT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1C-1601 reads as rewritten:

"**§ 1C-1601. What property exempt; waiver; exceptions.**

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

(1) The debtor's aggregate interest, not to exceed ~~ten thousand dollars ($10,000)~~eighteen thousand five hundred dollars ($18,500) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the ~~debtor.~~debtor; however, an unmarried debtor who is 65 years of age or older is entitled to retain an aggregate interest in the property not to exceed thirty-seven thousand dollars ($37,000) in value so long as the property was previously owned by the debtor as a tenant by the entireties or as a joint tenant with rights of survivorship and the former co-owner of the property is deceased.

(2) The debtor's aggregate interest in any property, not to exceed ~~three thousand five hundred dollars ($3,500)~~five thousand dollars ($5,000) in value ~~less any amount of the exemption used~~ of any unused

exemption amount to which the debtor is entitled under subdivision ~~(1).~~(1) of this subsection.

(3) The debtor's interest, not to exceed ~~one thousand five hundred dollars ($1,500)~~three thousand five hundred dollars ($3,500) in value, in one motor vehicle.

(4) The debtor's aggregate interest, not to exceed ~~three thousand five hundred dollars ($3,500)~~five thousand dollars ($5,000) in value for the debtor plus ~~seven hundred fifty dollars ($750.00)~~one thousand dollars ($1,000) for each dependent of the debtor, not to exceed ~~three thousand dollars ($3,000)~~four thousand dollars ($4,000) total for dependents, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest, not to exceed ~~seven hundred fifty dollars ($750.00)~~two thousand dollars ($2,000) in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor.

(6) Life insurance as provided in Article X, Section 5 of the Constitution of North Carolina.

(7) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(8) Compensation for personal ~~injury~~ injury, including compensation from private disability policies or annuities, or compensation for the death of a person upon whom the debtor was dependent for support, but such compensation is not exempt from claims for funeral, legal, medical, dental, hospital, and health care charges related to the accident or injury giving rise to the compensation.

(9) Individual retirement plans as defined in the Internal Revenue Code and any plan treated in the same manner as an individual retirement plan under the Internal Revenue ~~Code. For purposes of this subdivision, "Internal Revenue Code" means Code as defined in G.S. 105-228.90.~~ Code, including individual retirement accounts and Roth retirement accounts as described in section 408(a) and section 408A of the Internal Revenue Code, individual retirement annuities as described in section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in section 408(c) of the Internal Revenue Code.

(10) Funds in a college savings plan qualified under section 529 of the Internal Revenue Code, not to exceed a cumulative limit of twenty-five thousand dollars ($25,000), but excluding any funds placed in a college savings plan account within the preceding 12 months (except to the extent any of the contributions were made in the ordinary course of the debtor's financial affairs and were consistent with the debtor's

past pattern of contributions) and only to the extent that the funds are for a child of the debtor and will actually be used for the child's college or university expenses.

(11) Retirement benefits under the retirement plans of other states and governmental units of other states, to the extent that these benefits are exempt under the laws of the state or governmental unit under which the benefit plan is established.

(12) Alimony, support, separate maintenance, and child support payments or funds that have been received or to which the debtor is entitled, to the extent the payments or funds are reasonably necessary for the support of the debtor or any dependent of the debtor.

(b) ~~Definition. "Value" as used in this Article~~Definitions. – As used in this section, the following definitions apply:

(1) "Internal Revenue Code" means Code as defined in G.S. 105-228.90.

(2) "Value" means fair market value of an individual's interest in property, less valid liens superior to the judgment lien sought to be enforced.

(c) Waiver. – The exemptions provided in this Article ~~and in Sections 1 and 2 of Article X of the North Carolina Constitution,~~ cannot be waived except by:

(1) Transfer of property allocated as exempt (and in that event only as to the specific property ~~transferred), or~~transferred);

(2) Written waiver, after judgment, approved by the clerk or district court judge. The clerk or district court judge must find that the waiver is made freely, voluntarily, and with full knowledge of the debtor's rights to exemptions and that he is not required to waive them; or

(3) Failure to assert the exemption after notice to do so pursuant to G.S. 1C-1603. The clerk or district court judge may relieve such a waiver made by reason of mistake, surprise or excusable neglect, to the extent that the rights of innocent third parties are not affected.

(d) Recent purchases. – The exemptions provided in subdivisions (2), (3), ~~(4)~~ (4), and (5) of subsection (a) of this section are inapplicable with respect to tangible personal property purchased by the debtor less than 90 days preceding the initiation of judgment collection proceedings or the filing of a petition for ~~bankruptcy.~~bankruptcy, unless the purchase of the property is directly traceable to the liquidation or conversion of property that may be exempt and no additional property was transferred into or used to acquire the replacement property.

(e) Exceptions. – The exemptions provided in this Article are inapplicable to claims:

(1) Of the United States or its agencies as provided by federal law;

(2) Of the State or its subdivisions for taxes, appearance bonds or fiduciary bonds;

(3) Of lien by a laborer for work done and performed for the person claiming the exemption, but only as to the specific property affected;

(4) Of lien by a mechanic for work done on the premises, but only as to the specific property affected;

(5) For payment of obligations contracted for the purchase of the specific real property affected;

(6) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1224, s. 6, effective September 1, 1982;

(7) For contractual security interests in the specific property affected; provided, that the exemptions shall apply to the debtor's household goods notwithstanding any contract for a nonpossessory, nonpurchase money security interest in any such goods;

(8) For statutory liens, on the specific property affected, other than judicial liens;

(9) For child support, alimony or distributive award order pursuant to Chapter 50 of the General Statutes;

(10) For criminal restitution orders docketed as civil judgments pursuant to G.S. 15A-1340.38.

(f) Federal Bankruptcy ~~Act.~~Code. – The exemptions provided in The Bankruptcy ~~Act,~~Code, 11 U.S.C. § 522(d), are not applicable to residents of this State. The exemptions provided by this Article and by other statutory or common law of this State shall apply for purposes of The Bankruptcy ~~Act,~~Code, 11 U.S.C. ~~§522(b).~~ § 522(b).

(g) Effect of exemptions. – Notwithstanding any other provision of law, a creditor shall not obtain possession of a debtor's household goods and furnishings in which the creditor holds a nonpossessory, nonpurchase money security interest until the creditor has fully complied with the procedures required by G.S. 1C-1603."

SECTION 2. G.S. 1C-1603(a)(4) reads as rewritten:

"(4) After judgment, except as provided in G.S. 1C-1603(a)(3) or when exemptions have already been designated, the clerk may not issue an execution or writ of possession unless notice from the court has been served upon the judgment debtor advising ~~him~~ the debtor of ~~his~~ the debtor's rights. The judgment creditor ~~must~~ shall cause the ~~notice~~ notice, which shall be accompanied by the form for the statement by the debtor under subsection (c) of this section, to be served on the debtor as provided in G.S. 1A-1, Rule 4(j)(1). If the judgment debtor cannot be served as provided above, the judgment creditor may serve ~~him~~ the judgment debtor by mailing a copy of the notice to the judgment debtor at ~~his~~ the debtor's last known address. Proof of service by certified or registered mail or personal service is as provided in G.S. 1A-1, Rule 4. The judgment creditor may prove service by mailing to last known address by filing a certificate that the notice was served indicating the circumstances warranting the use of such service and the date and address of service. The notice ~~must~~ shall be substantially in the following form:

NORTH CAROLINA	IN THE GENERAL COURT
_____ COUNTY	OF JUSTICE DISTRICT
	COURT DIVISION
	CvD

_____	)	NOTICE OF
Judgment Creditor	)	PETITION (OR
	)	MOTION) TO SET
vs.	)	OFF DEBTOR'S
_____	)	EXEMPT PROPERTY

GREETINGS:

You have been named as a "judgment debtor" in a proceeding initiated by a "judgment creditor". A "judgment debtor" is a person who a court has declared owes money to another, the "judgment creditor". The purpose of this proceeding is to make arrangements to collect that debt from you personally or from property you own.

It is important that you respond to this notice no later than 20 days after you receive it because you may lose valuable rights if you do nothing. You may wish to consider hiring an attorney to help you with this proceeding to make certain that you receive all the protections to which you are entitled under the North Carolina Constitution and laws.

NOTICE TO JUDGMENT DEBTOR:

THERE ARE CERTAIN EXEMPTIONS UNDER STATE AND FEDERAL LAW THAT YOU ARE ENTITLED TO CLAIM IN ADDITION TO THE EXEMPTIONS LISTED ON THE "SCHEDULE OF DEBTOR'S PROPERTY AND REQUEST TO SET ASIDE EXEMPT PROPERTY" THAT IS ENCLOSED WITH THIS NOTICE.

These exemptions may include social security benefits, unemployment benefits, workers' compensation benefits, and earnings for your personal services rendered within the last 60 days. There is available to you a prompt procedure for challenging an attachment or levy on your property."

SECTION 3. G.S. 1C-1603(c) reads as rewritten:

"(c) Statement by the Debtor. – When proceedings are instituted, the debtor ~~must~~ shall file with the court a schedule of:

(1) ~~His~~ The debtor's assets, including their location;

(2) ~~His~~ The debtor's debts and the names and addresses of ~~his~~ the debtor's creditors;

(3) The property ~~which~~ that ~~he~~ the debtor desires designated as exempt.

The form for the statement ~~must~~ shall be substantially as follows:

NORTH CAROLINA	IN THE GENERAL COURT
_____ COUNTY	OF JUSTICE DISTRICT
	COURT DIVISION
	CvD

Judgment Creditor	)	SCHEDULE OF DEBTOR'S
	)	PROPERTY
vs.	)	AND REQUEST TO

	)	SET ASIDE EXEMPT
Judgment Debtor	)	PROPERTY

NOTICE TO JUDGMENT DEBTOR:

THERE ARE CERTAIN EXEMPTIONS UNDER STATE AND FEDERAL LAW THAT YOU ARE ENTITLED TO CLAIM IN ADDITION TO THE EXEMPTIONS LISTED BELOW.

These exemptions may include social security benefits, unemployment benefits, workers' compensation benefits, and earnings for your personal services rendered within the last 60 days. There is available to you a prompt procedure for challenging an attachment or levy on your property.

I, _____, being duly sworn do depose and say:
(fill in your name)

1. That I am a citizen and resident of _____ County, North Carolina;

2. That I was born on _____;
(date of birth)

3. That I am (married to _____)
(spouse's name)
_____;
(not married)

4. That the following persons live in my household and are in substantial need of my support:

NAME	RELATIONSHIP TO DEBTOR	AGE
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

(Use additional space, as necessary)

5. That (I own) (I am purchasing) (I rent) (choose one; mark out the other choices) a (house) (trailer) (apartment) (choose one; mark out the other choices) located at _____ which is my residence.
(address, city, zip code)

6. That I (do) (do not) own any other real property. If other real property is owned, list that property on the following lines; if no other real property is owned, mark "not applicable" on the first line.

_____
_____
_____
_____

7. That the following persons are, so far as I am able to tell, all of the persons or companies to whom I owe money:

_____

_____

_____

_____

_____

8. That I wish to claim my interest in the following real or personal ~~property~~ property, or in a cooperative that owns property, that I use as a residence or my dependent uses as a residence. I also wish to claim my interest in the following burial plots for myself or my dependents. I understand that my total interest claimed in the residence and burial plots may not exceed ~~$7,500.~~ $18,500, except that if I am unmarried and am 65 years of age or older, I am entitled to claim a total exemption in the residence and burial plots not to exceed $37,000 so long as the property was previously owned by me as a tenant by the entireties or as a joint tenant with rights of survivorship, and the former co-owner of the property is deceased.

I understand that I am not entitled to this exemption if I take the homestead exemption provided by the Constitution of North Carolina in other property. I understand that if I wish to claim more than one parcel exempt I must attach additional pages setting forth the following information for each parcel claimed exempt.

Property Location:

County _____ Township _____

Street Address _____

Legal Description:

Number by which county tax assessor identifies property _____

Description (Attach a copy of your deed or other instrument of conveyance that describes the property and indicate here:_____ or describe the property in as much detail as possible.

Attach additional sheets if necessary.)

_____

_____

_____

Record Owner(s) _____

_____

_____

_____

Estimated Value: _____

Lienholders: _____

(1) Name _____ Current Balance _____

Address _____

(2) Name _____ Current Balance _____

Address _____

(3) Name _____ Current Balance _____

Address _____

(4) If others, attach additional pages.

If you are unmarried and 65 years of age or older, specify which, if any, property listed above was previously owned by you as a tenant by the entireties or as a joint tenant with rights of survivorship and as to which the former co-owner of the property is deceased:

_____

_____

9. That I wish to claim the following life insurance policies whose sole beneficiaries are (my wife) (my children) (my wife and children) as exempt:

Name of Insurer	Policy Number	Face Value	Beneficiary(ies)

10. That I wish to claim the following items of health care aid necessary for (myself) (my dependents) to work or sustain health:

Item	Purpose	Person using item

11. That I wish to claim the following implements, professional books, or tools (not to exceed ~~$500),~~$2,000), of my trade or the trade of my dependent. I understand that such property purchased within 90 days of this proceeding ~~is not~~ may not be exempt:

Item	Estimated Value

12. That I wish to claim the following personal property consisting of household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments as exempt from the claims of my creditors. I affirm, that these items of personal property are held primarily for my personal, family or household use or for such use by my dependents.

I understand that I am entitled to personal property worth the sum of ~~$2,500.~~$5,000. I understand that I am also entitled to ~~$500~~$1,000 for each person dependent on me for support, but not to exceed ~~$2,000~~$4,000 for dependents. I further understand that I am entitled to this amount after deduction from the value of the property the amount of any valid lien or purchase money security interest and that property purchased within 90 days of this proceeding ~~is not~~may not be exempt.

Item (or class) of Property	Amount of Lien or Security Interest	Location	Estimated Value of Debtor's Interest

13. That I wish to claim my interest in the following motor vehicle as exempt from the claims of my creditors. I understand that I am entitled to my interest in a motor vehicle worth the sum of ~~$1,000~~$3,500 after deduction of the amount of any valid liens or purchase money security interest. I understand that a motor vehicle purchased within 90 days of this proceeding ~~is not~~may not be exempt.

Make and Model of Motor Vehicle	Year	Name(s) of Title Owner of Record	Name(s) of Lien Holder(s) of Record	Estimated Value of Debtor's Interest

14. That I wish to claim as exempt the following compensation ~~which~~ that I received or to which I am entitled for the personal injury of myself or a person upon whom I was dependent for ~~support~~ support, including compensation from a private disability policy or an annuity, or compensation ~~which~~ that I received for the death of a person upon whom I was dependent for support. I understand that this compensation is not exempt from claims for funeral, legal, medical, dental, hospital or health care charges related to the accident or injury ~~which~~ that resulted in the payment of the compensation to me. I understand that if I wish to claim more than one amount of compensation exempt, I must attach additional pages setting forth the following information for each amount of compensation claimed exempt.

(a) amount of compensation _____

(b) method of payment: lump sum or installments _____

(If installments, state amount, frequency and duration of payments)

_____

(c) name and relationship to debtor of person(s) injured or killed giving rise to compensation _____

(d) ~~location~~ location/source of compensation if received in lump or ~~installments~~installments, including name and account number of any disability policy or annuity

_____

(e) unpaid debts arising out of the injury or death giving rise to compensation

_____

Name and Address	Services Rendered	Amount of Debt

15. That I wish to claim the following property as exempt because I claimed residential real or personal property as exempt that is worth less than ~~$2,500~~$18,500 or I made no claim for a residential exemption under section (8) above. I understand that I am entitled to ~~$2,500~~an exemption of up to $5,000 in any property only if I made no claim under section (8) above ~~and that if I make a claim~~ or a claim that was less than $18,500 under section (8) ~~above,~~ above. I understand that I am entitled to ~~$2,500~~claim any unused amount that I was permitted to make under section (8) above up to a maximum of $5,000 in any ~~property minus any amount I claimed under section (8).~~property. (Examples: (a) if you claim ~~of $1,000~~$17,500 under section (8),

~~$1,500~~$1,000 allowed here; (b) if you claim ~~of $2,450~~$13,500 under section (8), ~~$50~~$5,000 allowed here; (c) if you claim ~~of $2,600~~$18,500 under section (8), no claim allowed here.) I further understand that the amount of my claim under this section is after the deduction from the value of this property of the amount of any valid lien or purchase money security interests and that tangible personal property purchased within 90 days of this proceeding ~~is not~~may not be exempt.

PERSONAL PROPERTY:

Property Location	Amount of Liens or Purchase Money Security Interests	Value of Debtor's Interest
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

REAL PROPERTY (I understand that if I wish to claim more than one parcel exempt, I must attach additional pages setting forth the following information for each parcel claimed exempt):

Property Location

County _____ Township _____

Street Address _____

Legal Description:

Number by which county tax assessor identifies property

_____

_____

Description (Attach a copy of your deed or other instrument of conveyance that describes the property and indicate here: _____or describe the property in as much detail as possible.

Attach additional sheets if necessary.)

_____

_____

_____

_____

_____

_____

Record Owner(s):_____

_____

_____

_____

Estimated Value: _____

Lienholders:

(1) Name _____ Current Balance _____

Address _____

(2) Name _____ Current Balance _____

Address _____

(3) Name _____ Current Balance _____
Address _____
(4) If others, attach additional pages.

16. That I wish to claim as exempt the following retirement plans that I have that are individual retirement plans as described in the Internal Revenue Code or that are treated in the same manner as an individual retirement plan under the Internal Revenue Code, including individual retirement accounts and Roth retirement accounts as described in section 408(a) and section 408A of the Internal Revenue Code, individual retirement annuities as described in section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in section 408(c) of the Internal Revenue Code.

Type of Retirement Account	Name of Account	Account Number

17. That I wish to claim as exempt the following funds I hold in a college savings plan, not to exceed $25,000. I understand that to qualify for this exemption, the college savings plan must qualify as a college savings plan under section 529 of the Internal Revenue Code, and the college savings plan must be for my child and must actually be used for my child's college or university expenses. I understand I may not exempt any funds I placed in this account within the preceding 12 months, except to the extent that any contributions were made in the ordinary course of my financial affairs and were consistent with my past pattern of contributions.

College Savings Plan	Account Number	Value	Name(s) of Child(ren) Beneficiaries

18. That I wish to claim as exempt the following retirement benefits to which I am entitled to under the retirement plans of other states and governmental units of other states. I understand that these benefits are exempt only to the extent these benefits are exempt under the laws of the state or governmental unit under which the benefit plan was established.

State/Governmental Unit	Name of Retirement Plan	Identifying Number

19. That I wish to claim as exempt any alimony, support, separate maintenance, or child support payments or funds that I have received or that I am entitled to receive. I understand that these payments are exempt only to the extent that they are reasonably necessary for my support or for the support of a person dependent on me for support.

Type of Support	Person Paying Support	Amount & Location of Funds

_____ _____ _____
_____ _____ _____
_____ _____ _____

~~16~~20. That the following is a complete listing of all of my assets ~~which~~ that I have not claimed as exempt under any of the preceding paragraphs:

Item Location Estimated Value

_____
_____
_____

This the _____ day of_____, ____

Judgment Debtor

Sworn to and Subscribed before
me this _____ day of_____, ____

Notary Public My Commission Expires:".

SECTION 4. This act becomes effective January 1, 2006, and applies to judgments and bankruptcy petitions filed on or after that date.

HOUSE BILL 1176:
Property Exempt From Enforcement Actions

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 10, 2005
Introduced by:	Reps. Weiss, Glazier, Goodwin, Harrison	**Summary by:**	Kory Goldsmith
Version:	PCS to Fourth Edition H1176-PCS10389-RC-81		Committee Counsel

SUMMARY: House Bill 1176 would increase the limit on property a judgment debtor can exempt from claims of a creditor and would add new exemptions.

The PCS makes technical corrections by removing a section that is no longer applicable to the bill and correcting the effective date. It also deletes language that has been held to be unconstitutional by the North Carolina Court of Appeals[1].

CURRENT LAW: When a creditor obtains a judgment in an action against a debtor, the creditor can execute the judgment and force a sale of the debtor's property to satisfy the judgment. Debtors are entitled to "exempt", or keep free from the creditor, a certain amount of interest in specified property, including real or personal property, motor vehicles, tools of the trade, life insurance, individual retirement plans, health aids, and compensation for personal injury. According to the NC Bar Association, the amounts of the exemptions have not been updated since 1991. In order to claim these exemptions, a debtor must file a Schedule of Debtor's Property and Request to Set Aside Exempt Property with the court.

BILL ANALYSIS: The bill would make the following changes to the amount of exemptions, and would add the exemptions noted in the table below.

Exemption	Current Law	House Bill 1176
Real or personal property used as a residence, or in a burial plot	$10,000	$18,500; for an unmarried debtor 65 and older, $37,000 if previously owned as entireties or JTROS and the former co-owner is deceased
"Wildcard" or unused exemption	$3,500	$5,000
One motor vehicle	$1,500	$3,500
Household furnishings and goods	$3,500 for debtor $750 for each dependent (total $3,000 dependents)	$5,000 for debtor $1,000 for each dependent (total $4,000 dependents)
Tools of the trade	$750	$2,000
Wedding and engagements rings	Could be included as a household good	$4,000

[1] In Household Finance Corporation v. William Ellis, 419 S.E. 2d 592 (N.C. App. 1992), aff'd per curiam, 429 S.E.2d 716 (N.C. 1993), the Court of Appeals held that a provision in G.S. 1C-1601(c) that allows a debtor to waive exemptions provided in Sections 1 and 2 of Article X of the N.C. Constitutional is unconstitutional. See page 3, lines 17 and 18 of PCS.

Compensation for personal injury	100%	Includes compensation from private disability policies or annuities
Individual retirement plans	100%	Adds Roth IRAs, individual retirement annuities and certain accounts established as part of a trust (did not exist in 1991)
College savings plans (CSPs)	No exemption	$25,000 except funds placed in the account during the last 12 months, unless made in the ordinary course of the debtor's investments and that will actually be used for the college education of the debtor's child. (CSPs did not exist in 1991)
Retirement benefits from other states	No exemption (NC state retirement plan benefits exempt under G.S. 135-9 and 135-5)	100%
Alimony, support, separate maintenance, and child support	No exemption	100% to the extent reasonably necessary for the support of the debtor or any dependent of the debtor

The bill would also make the following substantive changes:

- Codify the "replacement property" exception found in case law that permits debtors to exempt recent purchases if the purchase is directly traceable to the liquidation or conversion of property that may be exempt and no additional property was transferred into or used to acquire the replacement property.
- Specify that the exemptions form must be served on the debtor at the time the debtor is advised of his exemption rights.
- Amend the Notice form and the Schedule form to notify debtors that other exemptions may be available and that there is a prompt procedure for challenging an attachment or levy.

BACKGROUND: The Bankruptcy Section Council of the North Carolina Bar Association formed an Exemption Revision Committee in 2002 out of a concern by the council that "the real and practical values of North Carolina's exemptions have diminished greatly since they were last revised in 1991." The Committee was comprised of debtor and creditor attorneys, a Chapter 7 Trustee, and a staff attorney for the Bankruptcy Court. The Committee analyzed available data and sought to determine what statutory revisions would be appropriate to recommend for endorsement by the Bankruptcy Section Council. The Committee concluded that the dollar amounts of the current exemptions were too low. The changes recommended by the Committee are reflected in House Bill 1176 and were approved by both the Bankruptcy Section Council and the Board of Governors of the North Carolina Bar Association. According to the Bar's report, all of the recommended dollar amounts are within 20% of any corresponding federal bankruptcy exemption.

Jennifer McGinnis, Committee Counsel to House Judiciary IV Committee contributed to this summary.
H1176e4-SMRC-PCS10389-RC-81

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 3

HOUSE BILL 1311

Committee Substitute Favorable 5/10/05
Third Edition Engrossed 5/26/05

Short Title: Domestic Violence Victims Empowerment Act. (Public)

Sponsors:

Referred to:

April 20, 2005

A BILL TO BE ENTITLED

AN ACT ALLOWING DOMESTIC VIOLENCE VICTIMS TO APPLY FOR A TEMPORARY CONCEALED HANDGUN PERMIT UPON SHOWING PROOF OF A PROTECTIVE ORDER ISSUED UNDER CHAPTER 50B OF THE GENERAL STATUTES AS EVIDENCE OF AN EMERGENCY SITUATION IN ORDER TO EMPOWER DOMESTIC VIOLENCE VICTIMS TO PROTECT THEMSELVES AND THEIR FAMILIES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-415.15(b) reads as rewritten:

"(b) Upon presentment to the sheriff of the items required under G.S. 14-415.13(a)(1), (2), and (3), the sheriff may issue a temporary permit for a period not to exceed 90 days to a person who the sheriff reasonably believes is in an emergency situation that may constitute a risk of safety to the person, the person's family or property. The applicant may submit proof of a protective order issued under G.S. 50B-3 for the protection of the applicant as evidence of an emergency situation. The temporary permit may not be renewed and may be revoked by the sheriff without a hearing."

SECTION 2. G.S. 50B-3 is amended by adding the following new subsection to read:

"(c1) When a protective order issued under this Chapter is filed with the Clerk of Superior Court, the clerk shall provide to the applicant an informational sheet developed by the Administrative Office of the Courts that explains the plaintiff's right to apply for a permit under G.S. 14-415.15."

SECTION 3. The Administrative Office of the Courts shall develop a standard informational sheet for plaintiffs issued protective orders under Chapter 50B of the General Statutes that explains the plaintiffs' right to apply for a permit under G.S. 14-415.15.

SECTION 4. This act becomes effective October 1, 2005, and applies to protective orders issued on or after that date.

HOUSE BILL 1311:
Domestic Violence Victims Empowerment Act

BILL ANALYSIS

Committee:	House	**Date:**	August 11, 2005
Introduced by:	Reps. Hilton, Johnson	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	Third Edition		

SUMMARY: House Bill 1311 would allow domestic violence victims to submit proof of a protective order as evidence of an emergency situation to obtain a temporary permit to carry a concealed handgun.

CURRENT LAW: Under the current law, a person may apply for a permit to carry a concealed handgun in North Carolina, and a sheriff must issue a permit to an applicant who meets all of the criteria set out in Article 54B of Chapter 14 of the General Statutes. G.S. 14-415.13 requires that an applicant submit to the sheriff of the county in which the applicant resides all of the following:

- An application.
- A nonrefundable permit fee ($80).
- A full set of fingerprints.
- A certificate of completion from a handgun instruction course.
- A release authorizing disclosure of mental health records to the sheriff.

Once the sheriff has received all of the items required from the applicant, the sheriff must either issue or deny a permit within 90 days.

However, G.S. 14-415.15(b) authorizes the sheriff to issue a temporary permit to a person that may last up to 90 days if the sheriff reasonably believes that the applicant is in an emergency situation that may constitute a risk of safety to the person, the person's family or property. In order to be eligible to receive a temporary permit, the applicant must have submitted the application, the permit fee, and a set of fingerprints. It is entirely within the discretion of the sheriff whether to issue the temporary permit.

BILL ANALYSIS:

Section 1 would amend G.S. 14-415.15(b) to specify that, when a victim of domestic violence applies for a temporary concealed handgun permit, the applicant may submit proof of a domestic violence protective order issued under Chapter 50B of the General Statutes as evidence that he or she is in an emergency situation. It would still be within the discretion of the sheriff whether to issue the temporary permit.

Section 2 would amend G.S. 50B-3 to require that when a protective order is filed with the clerk of superior court, the clerk must provide the applicant with an informational sheet developed by AOC that explains the plaintiff's right to apply for a concealed carry permit.

EFFECTIVE DATE: The bill would become effective October 1, 2005, and would apply to domestic violence protective orders issued on or after that date.

Wendy Graf, counsel to House Judiciary III, substantially contributed to this summary.

H1311e3-SMRC

WRAL.com

Police: Rocky Mount Mother Had Two Protective Orders Against Murder Suspect

POSTED: 10:23 am EDT August 1, 2005
UPDATED: 7:34 pm EDT August 1, 2005

ROCKY MOUNT, N.C. -- Rocky Mount police say a woman who was killed Sunday by her ex-boyfriend did everything she could have done to protect herself.

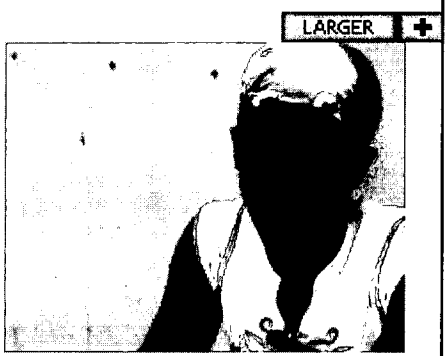
Police say Anthony Wright, 42, slammed into 38-year-old Belinda Davis' vehicle at 30 mph near Brandon Lane early Monday morning. Investigators say Wright then got out of his vehicle and stabbed Davis numerous times. She later died at Nash General Hospital.

Authorities say Belinda Davis, right, was stabbed numerous times by her estranged boyfriend, Anthony Wright.

• **Related Article:** Domestic Violence Resources

At about 3:30 p.m. Monday, police arrested Wright, who was found hiding in his current girlfriend's house, according to authorities.

Davis, a teacher's aide at a local elementary school, leaves behind four children, ages 13 to 20.



"She never did nothing to hurt nobody," Alicia Davis said of her mother, Belinda Davis.

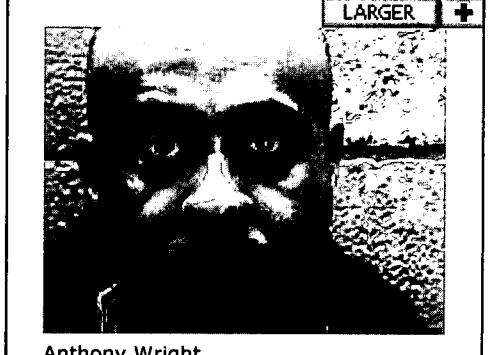
One of Davis' children, 17-year-old Alicia, said Monday that she and her mother were very close -- and that is what she wants to remember.

"She has the craziest laugh -- and her smile," Alicia said.

There had not been a lot of laughing for the family this year. In January, police charged Wright with assault after they say he beat Davis so bad that she spent almost two months in the hospital and more time at a shelter.

Wright was released on a $15,000 bond.

Since that time, Davis took out two restraining orders against Wright and had not seen him in months until Sunday. Davis had left a local bingo parlor that evening. Police said Wright waited for her outside her neighborhood.



Anthony Wright

"It just tell us with all with the precautionary measures you can take, there are no certainties -- as far as what those court papers will protect us from."

State lawmakers are considering a domestic violence bill that could help women in situations like Davis'. The

measure would allow victims to quickly obtain a concealed weapons permit as long as they have proof of a protective order.

Through it all, Alicia said her mother always put up a strong front.

"She had to be there for us to make us feel better in order for her to feel better," Alicia said.

Detectives said Wright has two prior assault convictions involving a former girlfriend. He is now charged with murder.

As for Davis' four children, Alicia said her mother is gone, but all of them vow to make her proud.

Previous Stories:

- June 12, 2005: Vigil Remembers Victims Of Domestic Violence
- June 10, 2005: Vigils Across N.C. Bring Domestic Violence To Spotlight
- May 24, 2005: Proposed Bill Would Allow Temporary Weapon Permit For Domestic Violence Victims

Reporter: Melissa Buscher
Photographer: Courtney Davis
Web Editor: Kelly Gardner

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GRNC

GRASS ROOTS NORTH CAROLINA / FORUM FOR FIREARMS EDUCATION
P.O. BOX 10684, RALEIGH, NC 27605 (919) 664-8565, www.grnc.org

HB 1311: "Domestic Violence Victims' Empowerment Act

GRNC Urges You to Support a Strong HB 1311

HB 1311 is a limited bill intended to empower qualified domestic violence victims being protected by restraining orders to protect themselves against violent abusers by obtaining expedited concealed handgun permits. Despite its limited scope, it has been opposed by some organizations with self-serving agendas. Following are some of the objections against the bill, together with realities.

MYTH: HB 1311 requires sheriffs to issue permits to unqualified applicants

- GRNC has never objected to either training or background requirements for permit applicants.
- In present form, the sheriff has discretion over whether to issue permits.

MYTH: HB 1311 increases the risk to victims

- **Although opponents claim that victims' guns will be "used against" them:**
  - **Abusers don't need guns:** Abusers use guns against domestic victims less often than in other types of homicide (57% vs. 75%), presumably because 91% of abusers are physically stronger males. Preferred methods of homicide include knives, blunt objects or strangulation.
- **Opponents' objections border upon the absurd:**
  - **One self-proclaimed "British forensic psychologist" claims:** "Women who are subject to serious physical assaults from their partners are generally living in a situation where their every movement is monitored, their phone calls checked, their expenditure controlled. The possibility of such women obtaining a gun legally without their partner knowing is therefore very unlikely."
  - **What does this "expert" ignore?** That ***HB 1311 applies only to victims being protected by restraining orders***. Translation: The abuser is already out of the house, meaning that victims are not having their "every movement...monitored" as this "expert" proclaims.

IRRELEVANCE: Opponents claim most victims won't take advantage of the law

- Whether "most" victims take advantage of the ability to protect themselves is less important than if ONE victim does so. In December, Joy Burgess protected herself against her ex-husband, who broke down her door with a shovel after first cutting her phone lines. Who in the legislature would deny a woman of such strength the ability defend herself and her daughter against a homicidal abuser? Joy's mother, Angela Burgess, wouldn't: She supports the bill.

FACT: Police aren't responsible for protecting domestic violence victims

- As reaffirmed yet again by the U.S. Supreme Court, police cannot be held accountable for criminal acts, even when the order has been issued for the protection of the complainant (Castle Rock v. Gonzales).

FACT: HB 1311 is long overdue

- No less than **35 domestic homicides** have marred this year, including at least 6 in which abusers ignored restraining orders. Previous efforts are clearly failing. **How many murders will it take before the General Assembly acts?**

What GRNC wants from HB 1311 changes little in law beyond advising victims of their rights and holding sheriffs accountable for their actions.

Who could reasonably object to that?

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	August 11, 2005	10 min. after end of Senate Session	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 661	Resp. Individuals List/Expunction Process.	Representative Barnhart Representative Alexander Representative Glazier
HB 801	Child Custody/Guardianship Jurisdiction.	Representative Dickson Representative Alexander Representative Glazier
HB 1150	Expedite Juv. Proceedings/Guardians ad Litem.	Representative Ross Representative Goodwin Representative Glazier
HB 1318	Consider Tax Consequences/Equit. Distribution.	Representative Hackney Representative Goodwin
HB 1328	Pardon/Expunction of Record.	Representative Parmon Representative Womble Representative Coleman Representative Harrison
HB 1394	Testamentary Recommendation of Guardian.	Representative Moore
HB 1401	Concealed Carry By Law Enforcement Officers.	Representative Folwell
SB 733	Street Gang Prevention Act.	Senator Graham

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, August 11, 2005, 10 min. after end of Senate Se
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 661	Resp. Individuals List/Expunction Process.	Representative Barnhart Representative Alexander Representative Glazier
HB 801	Child Custody/Guardianship Jurisdiction.	Representative Dickson Representative Alexander Representative Glazier
HB 1150	Expedite Juv. Proceedings/Guardians ad Litem.	Representative Ross Representative Goodwin Representative Glazier
HB 1318	Consider Tax Consequences/Equit. Distribution.	Representative Hackney Representative Goodwin
HB 1328	Pardon/Expunction of Record.	Representative Parmon Representative Womble Representative Coleman Representative Harrison
HB 1394	Testamentary Recommendation of Guardian.	Representative Moore
HB 1401	Concealed Carry By Law Enforcement Officers.	Representative Folwell
SB 733	Street Gang Prevention Act.	Senator Graham

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

August 11, 2005 – Evening Meeting

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on the evening of August 11, 2005, with fifteen members present.

HB 1328 (Pardon/Expunction of Record.) Senator Hartsell recognized Representative Harrison to explain the bill. Senator Berger moved for a favorable report. All voted and the motion carried.

HB 1401 (Concealed Carry By Law Enforcement Officers.) Representative Moore was recognized to explain the bill. Senator Berger moved for a favorable report. All voted and the motion carried.

HB 1394 (Testamentary Recommendation of Guardian.) Senator Hartsell invited Representative Moore to explain the bill. Questions by Senators Forrester, Atwater and Berger were answered by Representative Moore. Senator Dannelly moved for a favorable report. All voted and the motion carried.

HB 1318 (Consider Tax Consequences/Equit. Distribution.) Senator Snow was recognized to explain the bill in the absence of Representative Hackney. Senator Apodaca moved to accept the Committee Substitute for purposes of discussion. All voted and the motion carried. Senator Snow explained the bill. Senator Thomas moved for a favorable report, unfavorable to the original bill. All voted and the motion carried.

SB 733 (Street Gang Prevention Act.) Senator Hartsell recognized Senator Graham to explain the bill for purposes of information to the Committee. After discussion the decision was made to continue the discussion at a later meeting.

HB 1213 (Expunge Multiple Charges/Occur Within 1 Yr.) Representative Moore was recognized to explain the bill. The bill will be heard at a later meeting

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

VISITOR REGISTRATION SHEET evening Meeting

SENATE JUDICIARY II
Name of Committee

August 11, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Kathleen Edwards	UNC-CH Institute of Gov't
Stacy Flannery	NCACFA
[signature]	NC Justice Ctr
David Fox	Alley Associates
Eddie Caldwell	NC Sheriffs Assn.
Beau Mills	NCCM
Doug Heron	NC BAR ASSOC
John McKay	GOO office
JOHN MIDGETTE	NCPBA
Gary McLaughlin	NCAFC
Crystal Hopson	Covenant w/ NC's Children

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Rick Zechini	NC Assoc. of Realtors
Colleen Kochanek	HYMH

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 733*

Short Title:	Street Gang Prevention Act.	(Public)
Sponsors:	Senators Graham; Berger of Franklin, Bingham, Cowell, Dalton, Dannelly, Dorsett, Holloman, Hoyle, Kinnaird, Lucas, Malone, Rand, Swindell, and Weinstein.	
Referred to:	Judiciary II.	

March 22, 2005

A BILL TO BE ENTITLED

AN ACT TO ENACT THE NORTH CAROLINA STREET GANG PREVENTION ACT AS RECOMMENDED BY THE HOUSE SELECT COMMITTEE ON STREET GANG PREVENTION.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 14 of the General Statutes is amended by adding a new Article to read:

"Article 13A.

"North Carolina Street Gang Prevention Act.

"**§ 14-50.15. Short title.**

This Article shall be known and may be cited as the "North Carolina Street Gang Prevention Act".

"**§ 14-50.16. Legislative findings and intent.**

(a) The General Assembly finds and declares that it is the right of every person to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals. It is not the intent of this Article to interfere with the exercise of the constitutionally protected rights of freedom of expression and association. The General Assembly recognizes the constitutional right of every citizen to harbor and express beliefs on any lawful subject whatsoever, to associate lawfully with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process.

(b) The General Assembly, however, further finds that the State of North Carolina is in a state of crisis that has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected.

(c) The General Assembly finds that there are criminal street gangs operating in North Carolina and that the number of gang-related murders is increasing. It is the intent of the General Assembly in enacting this Article to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs which together are the chief source of terror created by street gangs.

(d) The General Assembly further finds that an effective means of punishing and deterring the criminal activities of street gangs is through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by street gangs.

"**§ 14-50.17. Definitions.**

The following definitions apply in this Article:

(1) "Criminal street gang" or "street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, which engages in a pattern of criminal gang activity as defined in subdivision (2) of this section. The existence of the organization, association, or group of individuals associated in fact may be established by evidence of a common name or common identifying signs, symbols, tattoos, graffiti, or attire or other distinguishing characteristics.

(2) "Pattern of criminal gang activity" means the commission, attempted commission, conspiracy to commit, or solicitation, coercion, or intimidation of another person to commit at least two of the following offenses, provided that at least one of these offenses occurred after December 1, 2005, and the last of the offenses occurred within three years, excluding any periods of imprisonment, of prior criminal gang activity:

a. Any offense under Article 5 of Chapter 90 of the General Statutes (Controlled Substances Act).

b. Any offense under Chapter 14 of the General Statutes except Articles 9, 22A, 38, 40, 43, 46, 47, 59 thereof; and further excepting G.S. 14-78.1, 14-82, 14-86, 14-145, 14-179, 14-183, 14-184, 14-186, 14-190.9, 14-195, 14-197, 14-201, 14-247, 14-248, 14-313 thereof.

"**§ 14-50.18. Participation in criminal street gang activity prohibited.**

(a) It is unlawful for any person employed by or associated with a criminal street gang to conduct or participate in the criminal street gang through a pattern of criminal gang activity.

(b) It is unlawful for any person to acquire or maintain, directly or indirectly, through a pattern of criminal gang activity or proceeds derived therefrom, any interest in or control of any real or personal property of any nature, including money.

(c) It is unlawful for any person who occupies a position of organizer, supervisory position, or any other position of management with regard to a criminal street gang to engage in, directly or indirectly, or conspire to engage in, a pattern of criminal gang activity.

(d) It is unlawful for any person to cause, encourage, solicit, or coerce another to participate in a criminal street gang.

(e) It is unlawful for any person to communicate, directly or indirectly, with another any threat of injury or damage to the person or property of the other person or to any associate or relative of the other person with the intent to deter the person from assisting a member or associate of a criminal street gang to withdraw from such criminal street gang.

(f) It is unlawful for any person to communicate, directly or indirectly, with another any threat of injury or damage to the person or property of the other person or to any associate or relative of the other person with the intent to punish or retaliate against the person for having withdrawn from a criminal street gang.

(g) Any person who violates this section shall be punished as follows:

(1) A person who violates subsection (a) or (b) of this section shall, in addition to any other penalty imposed by law, be punished as a Class E felon.

(2) A person who violates subsection (a), (b), (d), (e), or (f) of this section may, if the person also violates subsection (c) of this section in the same course of conduct, in addition to any other penalty provided by law, be punished by imprisonment for an additional 10 years which shall be served consecutively to any other sentence imposed on the person by law.

(3) A person who violates subsection (d), (e), or (f) of this section shall, in addition to any other penalty provided by law, be punished as a Class G felon.

(h) Any crime committed in violation of this section shall be considered a separate offense.

"**§ 14-50.19. Enhanced offense for criminal gang activity.**

Unless a different classification is expressly stated, a person who is convicted of an offense that is committed for the benefit of, at the direction of, or in association with, any criminal street gang, is guilty of an offense that is one class higher than the offense committed. A Class A1 misdemeanor shall be enhanced to a Class I felony under this section.

This section does not apply to the offenses set forth in G.S. 14-50.18.

"**§ 14-50.20. Reports of disposition; criminal street gang activity.**

When a defendant is found guilty of an offense, the presiding judge shall determine whether the offense was committed for the benefit of, at the direction of, or in association with, any criminal street gang. If the judge determines that the offense so qualifies, then the judge shall indicate on the form reflecting the judgment that the offense involved criminal street gang activity. The clerk of court shall ensure that the official record of the defendant's conviction includes the court's determination.

"**§ 14-50.21. Contraband, seizure, and forfeiture.**

(a) All of the following are declared to be contraband, and no person shall have a property interest in them:

(1) All property that is directly or indirectly used or intended for use in any manner to facilitate a violation of this Article.

(2) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this Article.

(b) In any action under this section, the court may enter a restraining order in connection with any interest that is subject to forfeiture.

(c) Within 60 days of the date of the seizure of contraband pursuant to this section, the district attorney or the Attorney General shall initiate a forfeiture proceeding as provided in G.S. 14-2.3.

"**§ 14-50.22. Local ordinances not preempted by State law.**

Nothing in this Article shall prevent a local governing body from adopting and enforcing ordinances relating to gangs and gang violence that are consistent with this Article. Where local laws duplicate or supplement the provisions of this Article, this Article shall be construed as providing alternative remedies and not as preempting the field.

"**§ 14-50.23. Real property used by criminal street gangs declared a public nuisance; abatement; persons injured by gangs entitled to treble damages.**

Any real property that is erected, established, maintained, owned, leased, or used by any criminal street gang for the purpose of conducting criminal gang activity shall constitute a public nuisance and may be abated as provided by Article 1 of Chapter 19 of the General Statutes. If the property is owned by a person who is not a member of the criminal street gang, this section shall apply only if the person has knowledge of the criminal gang activity.

"**§ 14-50.24. Matters proved in criminal trial court.**

A conviction of an offense defined as criminal gang activity shall preclude the defendant from contesting any factual matters determined in the criminal proceeding in any subsequent civil action or proceeding based on the same conduct."

SECTION 2. Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-34.9. Discharging a firearm from within an enclosure.**

Unless covered under some other provision of law providing greater punishment, any person who willfully or wantonly discharges or attempts to discharge a firearm from within any building, structure, motor vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure toward a person or persons not within that enclosure shall be punished as a Class E felon."

SECTION 3. G.S. 15A-533 reads as rewritten:

"**§ 15A-533. Right to pretrial release in capital and noncapital cases.**

(a) A defendant charged with any crime, whether capital or noncapital, who is alleged to have committed this crime while still residing in or subsequent to his escape or during an unauthorized absence from involuntary commitment in a mental health facility designated or licensed by the Department of Health and Human Services, and whose commitment is determined to be still valid by the judge or judicial officer authorized to determine pretrial release to be valid, has no right to pretrial release. In

lieu of pretrial release, however, the individual shall be returned to the treatment facility in which he was residing at the time of the alleged crime or from which he escaped or absented himself for continuation of his treatment pending the additional proceedings on the criminal offense.

(b) A defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534.

(c) A judge may determine in his discretion whether a defendant charged with a capital offense may be released before trial. If he determines release is warranted, the judge must authorize release of the defendant in accordance with G.S. 15A-534.

(d) ~~Subject to rebuttal by the person, it shall be presumed~~ There shall be a rebuttable presumption that no condition of release will reasonably assure the appearance of the person as required and the safety of the community if a judicial official finds the following:

(1) There is reasonable cause to believe that the person committed an offense involving trafficking in a controlled substance;

(2) The drug trafficking offense was committed while the person was on pretrial release for another offense; and

(3) The person has been previously convicted of a Class A through E felony or an offense involving trafficking in a controlled substance and not more than five years has elapsed since the date of conviction or the person's release from prison for the offense, whichever is later.

(e) There shall be a rebuttable presumption that no condition of release will reasonably assure the appearance of the person as required and the safety of the community, if a judicial official finds the following:

(1) There is reasonable cause to believe that the person committed an offense for the benefit of, at the direction of, or in association with, any criminal street gang, as defined in G.S. 14-50.17;

(2) The offense described in subdivision (1) of this subsection was committed while the person was on pretrial release for another offense; and

(3) The person has been previously convicted of an offense described in G.S. 14-50.17, and not more than five years has elapsed since the date of conviction or the person's release for the offense, whichever is later.

~~Such person~~ Persons who are considered for bond under the provisions of subsections (d) and (e) of this section may only be released by a district or superior court judge upon a finding that there is a reasonable assurance that the person will appear and release does not pose an unreasonable risk of harm to the community."

SECTION 4. G.S. 15A-1340.16(d) reads as rewritten:

"(d) Aggravating Factors. – The following are aggravating factors:

(1) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

(2) The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

(2a) The offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy. A "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of felony or violent misdemeanor offenses, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and having a common name or common identifying sign, colors, or symbols.

(3) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(4) The defendant was hired or paid to commit the offense.

(5) The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(6) The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.

(7) The offense was especially heinous, atrocious, or cruel.

(8) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(9) The defendant held public office at the time of the offense and the offense related to the conduct of the office.

(10) The defendant was armed with or used a deadly weapon at the time of the crime.

(11) The victim was very young, or very old, or mentally or physically infirm, or handicapped.

(12) The defendant committed the offense while on pretrial release on another charge.

(13) The defendant involved a person under the age of 16 in the commission of the crime.

(14) The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

(15) The defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense.

(16) The offense involved the sale or delivery of a controlled substance to a minor.

(16a) The offense is the manufacture of methamphetamine and was committed where a person under the age of 18 lives, was present, or was otherwise endangered by exposure to the drug, its ingredients, its by-products, or its waste.

(17) The offense for which the defendant stands convicted was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.

(18) The defendant does not support the defendant's family.

(18a) The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

(19) The serious injury inflicted upon the victim is permanent and debilitating.

(20) Any other aggravating factor reasonably related to the purposes of sentencing.

Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation. Evidence necessary to establish that an enhanced sentence is required under ~~G.S. 15A-1340.16A~~G.S. 15A-1340.16A, G.S. 15A-1340.16B, or G.S. 14-50.19 may not be used to prove any factor in aggravation.

The judge shall not consider as an aggravating factor the fact that the defendant exercised the right to a jury trial."

SECTION 5. Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-1340.16B. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony that was committed for the benefit of, at the direction of, or in association with, any criminal street gang, and the defendant possessed, displayed, or discharged a firearm during the commission of the felony.**

(a) Notwithstanding G.S. 15A-1340.16A, a person who is convicted of a Class A, B1, B2, C, D, or E felony that was committed for the benefit of, at the direction of, or in association with, any criminal street gang as defined in G.S. 14-50.17, and who possessed, displayed, or discharged a firearm during the commission of the felony shall be punished pursuant to one of the following subdivisions:

(1) If the person possessed a firearm during the commission of the felony, the person shall, in addition to the punishment for the underlying felony, be sentenced to a minimum term of imprisonment for 60 months.

(2) If the person displayed a firearm during the commission of the felony, the person shall, in addition to the punishment for the underlying felony, be sentenced to a minimum term of imprisonment for 84 months.

(3) If the person discharged a firearm during the commission of the felony, the person shall, in addition to the punishment for the underlying felony, be sentenced to a minimum term of imprisonment for 120 months.

(b) An indictment or information for the Class A, B1, B2, C, D, or E felony shall allege in that indictment or information or in a separate indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the felony by possessing, displaying, or discharging the firearm. One pleading is sufficient for all Class A, B1, B2, C, D, or E felonies that are tried at a single trial.

(c) The State shall prove the issues set out in subsection (a) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to the issues. If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issues set out in subsection (a) of this section, then a jury shall be impaneled to determine the issues.

(d) The enhanced punishment provided by this section for the acts of possessing or displaying a firearm applies even if the firearm is incapable of firing.

(e) The court shall not suspend any sentence imposed under this section and shall not place a person sentenced under this section on probation for the sentence imposed under this section. Sentences imposed pursuant to this section shall be consecutive to all other sentences imposed and shall begin at the expiration of any other sentence being served by the defendant."

SECTION 6. The Revisor of Statutes shall recodify the existing G.S. 15A-1340.16B and subsequent statutes accordingly.

SECTION 7. G.S. 15A-1340.16A(c) reads as rewritten:

"(c) ~~If~~ Except as provided in G.S. 15A-1340.16B, if a person is convicted of a Class A, B1, B2, C, D, or E felony and it is found as provided in this section that: (i) the person committed the felony by using, displaying, or threatening the use or display of a firearm and (ii) the person actually possessed the firearm about his or her person, then the person shall have the minimum term of imprisonment to which the person is sentenced for that felony increased by 60 months. The maximum term of imprisonment shall be the maximum term that corresponds to the minimum term after it is increased by 60 months, as specified in G.S. 15A-1340.17(e) and (e1)."

SECTION 8. There is appropriated to the State Bureau of Investigation the amount of one hundred fifty thousand dollars ($150,000) to obtain an enterprise license for purchase of software that will create a statewide criminal street gang member database. The database software shall be substantially similar to the Gang Net Program that is currently being used in Durham County.

SECTION 9. There is appropriated to the Governor's Crime Commission, the sum of twenty million dollars ($20,000,000) for the 2005-2006 fiscal year to be used to provide grants for street gang violence prevention and intervention programs.

The Governor's Crime Commission shall develop the criteria for eligibility for these funds. The criteria shall include a matching requirement of twenty-five percent (25%), one-half of which may be in in-kind contributions, and presentation of a written

plan for the services to be provided by the funds. Funds shall be available to public and private entities or agencies for juvenile or adult programs that meet the criteria established by the Governor's Crime Commission.

The Governor's Crime Commission shall report on the uses of these funds no later than April 1, 2006, to the House of Representatives Appropriations Subcommittee on Justice and Public Safety, the Senate Appropriations Subcommittee on Justice and Public Safety, and the Fiscal Research Division.

SECTION 10. Sections 8 and 9 of this act become effective July 1, 2005. The remainder of this act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 1

HOUSE BILL 1213

Short Title:	Expunge Multiple Charges/Occur Within 1 yr.	(Public)
Sponsors:	Representatives Moore, Sutton (Primary Sponsors); Parmon and Womble.	
Referred to:	Judiciary II.	

April 13, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A PERSON CHARGED WITH MULTIPLE OFFENSES MAY HAVE THOSE CHARGES EXPUNGED IF THE ALLEGED OFFENSES OCCURRED WITHIN THE SAME TWELVE-MONTH PERIOD OF TIME AND THE CHARGES ARE SUBSEQUENTLY DISMISSED OR FINDINGS OF NOT GUILTY OR NOT RESPONSIBLE ARE ENTERED AT THE SAME TERM OF COURT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-146 reads as rewritten:

"**§ 15A-146. Expunction of records when charges are dismissed or there are findings of not ~~guilty.~~guilty; expunction of records in certain circumstances for charges of multiple offenses when charges are subsequently dismissed or there are findings of not guilty at the same term of court.**

(a) If any person is charged with a crime, either a misdemeanor or a felony, or was charged with an infraction under G.S. 18B-302(i) prior to December 1, 1999, and the charge is dismissed, or a finding of not guilty or not responsible is entered, that person may apply to the court of the county where the charge was brought for an order to expunge from all official records any entries relating to his apprehension or trial. The court shall hold a hearing on the application and, upon finding that the person had not previously received an expungement under this section, G.S. 15A-145, or G.S. 90-96, and that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

(a1) Notwithstanding subsection (a) of this section, if a person is charged with multiple offenses that occurred within the same 12-month period of time and the

charges are dismissed, or findings of not guilty or not responsible are entered at the same term of court, then a person may apply to have each of those charges expunged. There is no requirement that the multiple offenses arise out of the same transaction or occurrence or that the multiple offenses were consolidated for judgment provided the offenses all occurred within the same 12-month period of time. The court shall hold a hearing on the application. If the court finds that the person had not previously received an expungement under this section except as allowed for multiple offenses under this subsection, that the person had not previously received an expungement under G.S. 15A-145 or G.S. 90-96, and that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

(b) The court may also order that the said entries shall be expunged from the records of the court, and direct all law-enforcement agencies bearing record of the same to expunge their records of the entries. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with the form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. The costs of expunging these records shall not be taxed against the petitioner.

(b1) Any person entitled to expungement under this section may also apply to the court for an order expunging DNA records when the person's case has been dismissed by the trial court and the person's DNA record or profile has been included in the State DNA Database and the person's DNA sample is stored in the State DNA Databank. A copy of the application for expungement of the DNA record or DNA sample shall be served on the district attorney for the judicial district in which the felony charges were brought not less than 20 days prior to the date of the hearing on the application. If the application for expungement is granted, a certified copy of the trial court's order dismissing the charges shall be attached to an order of expungement. The order of expungement shall include the name and address of the defendant and the defendant's attorney and shall direct the SBI to send a letter documenting expungement as required by subsection (b2) of this section.

(b2) Upon receiving an order of expungement entered pursuant to subsection (b1) of this section, the SBI shall purge the DNA record and all other identifying information from the State DNA Database and the DNA sample stored in the State DNA Databank covered by the order, except that the order shall not apply to other offenses committed by the individual that qualify for inclusion in the State DNA Database and the State DNA Databank. A letter documenting expungement of the DNA record and destruction of the DNA sample shall be sent by the SBI to the defendant and the defendant's attorney at the address specified by the court in the order of expungement.

(c) The Clerk of Superior Court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted an expungement under the provisions of this section and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted such expungement. The information contained in such files shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expungement."

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 1213:
Expunge Multiple Charges/Occur Within 1 yr

BILL ANALYSIS

Committee:	House Judiciary II	**Date:**	May 5, 2005
Introduced by:	Reps. Moore, Sutton	**Summary by:**	Drupti Chauhan
Version:	First Edition		Committee Counsel

SUMMARY: ***House Bill 1213 would allow a person charged with multiple offenses to have those charges expunged if the alleged offenses occurred within the same 12 month period of time and the charges are subsequently dismissed or findings of not guilty or not responsible are entered in the same term of court.***

CURRENT LAW: G.S. 15A-146 provides for the expunction of records when charges are dismissed or there is finding of not guilty. A person charged with any crime, whether a misdemeanor or a felony, who is not convicted of that offense, can apply to have the charge expunged. In order to have the records expunged, the court must find that the person has not previously received an expunction under:

- this section (G.S.15A-146);
- G.S. 15A-145 (expunction of records for first offenders under the age of 18 for misdemeanor convictions); or
- G.S. 90-96 (expunction for certain drug-related offenses).

In addition, the court must also find that the person had not previously been convicted of any felony under the laws of the United States, this State or any other state before ordering the expunction.

BILL ANALYSIS: House Bill 1213 would allow a person who is charged with multiple offenses that occurred within the same 12 month time period to apply to have each of those charges expunged if those charges are dismissed or findings of not guilty or not responsible are entered in the same term of court. The multiple offenses do not have to arise out of the same transaction or occurrence nor do the multiple offenses have to have been consolidated for judgment as long as all of the offenses occurred within the same 12 month time period.

The court is required to hold a hearing on the application. The court shall order the expunction if the court finds that the person had not previously:

- Received an expunction under this section except as allowed for multiple offenses under this new provision;
- Received expunctions under G.S. 15A-145 or G.S. 90-96; nor
- Been convicted of any felony under the laws of the United States, this State or any other state.

EFFECTIVE DATE: The bill would become effective when it becomes law.

H1213e1-SMRQ

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1318

Committee Substitute Favorable 5/31/05

Short Title: Consider Tax Consequences/Equit. Distribution. (Public)

Sponsors:

Referred to:

April 20, 2005

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE LAWS REGARDING EQUITABLE DISTRIBUTION BY REQUIRING THE COURT TO CONSIDER EVIDENCE RELATING TO BUILT-IN TAXES AND OTHER TAX CONSEQUENCES OF THE PARTIES TO A DIVORCE ACTION IN DETERMINING EQUITABLE DISTRIBUTION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 50-20(c)(11) reads as rewritten:

"(c) There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection:

...

(11) The tax consequences ~~to each party.~~likely to be incurred by a party as a result of a sale, liquidation, or other taxable event with respect to property distributed to such party.

..."

SECTION 2. This act becomes effective October 1, 2005, and applies to actions filed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 1318

Committee Substitute Favorable 5/31/05

PROPOSED SENATE COMMITTEE SUBSTITUTE H1318-PCS60533-RC-89

Short Title: Consider Tax Consequences/Equit. Distribution. (Public)

Sponsors:

Referred to:

April 20, 2005

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE LAWS REGARDING EQUITABLE DISTRIBUTION BY REQUIRING THE COURT TO CONSIDER EVIDENCE RELATING TO BUILT-IN TAXES AND OTHER TAX CONSEQUENCES OF THE PARTIES TO A DIVORCE ACTION IN DETERMINING EQUITABLE DISTRIBUTION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 50-20(c)(11) reads as rewritten:

"(c) There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection:

...

(11) The tax consequences to each ~~party.~~party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

...."

SECTION 2. This act becomes effective October 1, 2005, and applies to actions filed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

HOUSE BILL 1328

Short Title:	Pardon/Expunction of Record.	(Public)
Sponsors:	Representatives Harrison, Coleman, Parmon, Womble (Primary Sponsors); Fisher, Insko, and Wainwright.	
Referred to:	Judiciary I.	

April 20, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR THE EXPUNCTION OF OFFICIAL RECORDS WHEN A PERSON IS GRANTED A PARDON OF INNOCENCE.

The General Assembly of North Carolina enacts:

SECTION 1. Article 5 of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-149. Expunction of records when pardon of innocence is granted.**

(a) If any person is convicted of a crime and receives a pardon of innocence, the person may apply by petition or written motion to the court in which the person was convicted on a form approved by the Administrative Office of the Courts supplied by the clerk of court for an order to expunge from all official records any entries relating to the person's apprehension, charge, or trial. Upon receipt of the petition or written motion, the clerk of court shall verify that an attested copy of the warrant and return granting a pardon of innocence has been filed with the court in accordance with G.S. 147-25. Upon verification by the clerk that the warrant and return have been filed, the court shall issue an order of expunction.

(b) The order of expunction shall include an instruction that any entries relating to the person's apprehension, charge, or trial shall be expunged from the records of the court and direct all law enforcement agencies, the Division of Motor Vehicles, or any other State or local government agencies bearing record of the same to expunge their records of the entries. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other charging agency; and, when applicable, to the Division of Motor Vehicles and any other State or local agency. The sheriff, chief, or head of such other charging agency shall then transmit the copy of the order with the form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. Upon receipt of a certified copy of the order, the agency must purge its records as

required by this section. The costs of expunging these records shall not be taxed against the petitioner.

(c) No person as to whom such an order has been entered under this section shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of the person's failure to recite or acknowledge any expunged entries concerning apprehension, charge, or trial."

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 1328: Pardon/Expunction of Record

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 11, 2005
Introduced by:	Reps. Harrison, Coleman, Parmon, Womble	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	First Edition		

SUMMARY: House Bill 1328 provides for the expunction of criminal records when a person is granted a pardon of innocence.

CURRENT LAW: The North Carolina Constitution grants the Governor the power to issue pardons. A pardon of innocence is an unconditional pardon that releases the person from any further confinement or supervision.

Current law allows for expunction of criminal records in several instances.

- When charges are dismissed or a person is found not guilty – allowed one time(G.S. 15A-146)
- When charges are dismissed or a person is found not guilty as a result of identity fraud – allowed multiple times (G.S. 15A-147)
- When charges are dismissed or a person is found not guilty of certain drug-related offenses committed while under the age of 21 (G.S. 90-96(d))
- Juvenile records except for any A-E felonies (G.S. 7B-3200)
- Convictions of a misdemeanor while under the age of 18 for first offenders (G.S. 15A-145)
- Conviction of misdemeanor possession of alcohol while under the age of 21 for first offenders (G.S. 15A-145)
- Convictions for certain drug-related offenses for first offenders (G.S. 90-96 and G.S. 90-113.14)

When records are expunged, all entries related to that charge are removed from the records and the person is restored to the status they occupied before the arrest, indictment or conviction. Many of the current statutes only allow one expunction and require that the Administrative Office of the Courts (AOC) keep a registry of persons who have received prior expungements. That registry is only available to judges to determine if a person has received a prior expungement when they apply for expungement under a statute that only allows one.

BILL ANALYSIS: House Bill1328 provides for the expunction of records for anyone who receives a pardon of innocence from the Governor. The bill does not limit the number of expungements possible and does not require any information to be retained at AOC.

EFFECTIVE DATE: This act is effective when it becomes law.

Susan Sitze, counsel to House Judiciary I, substantially contributed to this summary.

H1328e1-SMRC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1394

Committee Substitute Favorable 5/25/05

Short Title: Testamentary Recommendation of Guardian. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT TO ALLOW THE PARENTS OF AN INCOMPETENT ADULT WHO IS NOT MARRIED TO RECOMMEND A GUARDIAN FOR THAT ADULT BY WILL OR OTHER DOCUMENT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 5 of Chapter 35A is amended by adding a new section to read:

"**§ 35A-1212.1. Recommendation of appointment of guardian by will or other writing.**

Any parent may by will recommend appointment of a guardian for an unmarried child who has been adjudicated an incompetent person and specify desired limitations on the powers to be given to the guardian. If both parents make such recommendations, the will with the latest date shall, in the absence of other relevant factors, prevail. Such recommendation shall be a strong guide for the clerk in appointing a guardian, but the clerk is not bound by the recommendation if the clerk finds that a different appointment is in the incompetent adult's best interest. If the will specifically so directs, a guardian appointed pursuant to such recommendation may be permitted to qualify and serve without giving bond, unless the clerk finds as a fact that the interest of the incompetent adult would be best served by requiring the guardian to give bond."

SECTION 2. G.S. 35A-1214 reads as rewritten:

"**§ 35A-1214. Priorities for appointment.**

The clerk shall consider appointing a guardian according to the following order of priority: an individual recommended under G.S. 35A-1212.1; an individual; a corporation; or a disinterested public agent. No public agent shall be appointed guardian until diligent efforts have been made to find an appropriate individual or corporation to serve as guardian, but in every instance the clerk shall base the appointment of a guardian or guardians on the best interest of the ward."

SECTION 3. G.S. 35A-1230 reads as rewritten:

"**§ 35A-1230. Bond required before receiving property.**

Except as otherwise provided by G.S. 35A-1212.1 and G.S. 35A-1225(a), no general guardian or guardian of the estate shall be permitted to receive the ward's property until he has given sufficient surety, approved by the clerk, to account for and apply the same under the direction of the court, provided that if the guardian is a nonresident of this State and the value of the property received exceeds one thousand dollars ($1,000) the surety shall be a bond under G.S. 35A-1231(a) executed by a duly authorized surety company, or secured by cash in an amount equal to the amount of the bond or by a mortgage executed under Chapter 109 of the General Statutes on real estate located in the county, the value of which, excluding all prior liens and encumbrances, shall be at least one and one-fourth times the amount of the bond; and further provided that the nonresident shall appoint a resident agent to accept service of process in all actions and proceedings with respect to the guardianship. The clerk shall not require a guardian of the person who is a resident of North Carolina to post a bond; the clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties."

SECTION 4. This act is effective when it becomes law.

HOUSE BILL 1394:
Testamentary Recommendation of Guardian

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 11, 2005
Introduced by:	Rep. Moore	**Summary by:**	Kory Goldsmith
Version:	Second Edition		Committee Counsel

SUMMARY: ***House Bill 1394 would allow the parents of an unmarried incompetent adult to recommend a guardian for that adult by a will or other written document.***

CURRENT LAW: Any individual may file an application for the appointment of a guardian for an incompetent person. The clerk of court is to make the needed inquiry and receive evidence to determine the nature and the extent of the needed guardianship, the assets, liabilities, and needs of the incompetent person and who can be the best guardian.

BILL ANALYSIS: House Bill 1394 would allow the parent of an unmarried adult who has been adjudicated as incompetent to recommend a guardian for the incompetent adult by will or other writing. The parent may specify any limitations on the powers to be given to the guardian. If both parents make recommendations, the will with the latest date prevails in the absence of other relevant factors.

The clerk shall use the recommendation as a guide in selecting a guardian, but the clerk is not bound by the recommendation if the clerk determines that a different appointment is in the incompetent adult's best interest. The guardian designated in the will shall be the first in the priority list considered by the clerk. The will can direct that the guardian not be required to post a bond, however, the clerk can find it as a fact that the interest of the incompetent adult would best be served by requiring a bond of the guardian.

EFFECTIVE DATE: The bill would become effective when it becomes law.

Drupti Chauhan, counsel to House Judiciary III, substantially contributed to this summary.

H1394e2-SMRC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1401

Committee Substitute Favorable 5/25/05

Short Title: Concealed Carry By Law Enforcement Officers. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE CIRCUMSTANCES UNDER WHICH FEDERAL LAW ENFORCEMENT OFFICERS AND SWORN LAW ENFORCEMENT OFFICERS MAY CARRY CONCEALED WEAPONS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-269(b) reads as rewritten:

"(b) This prohibition shall not apply to the following persons:

(1) Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms and weapons;

(2) Civil and law enforcement officers of the United ~~States while in the discharge of their official duties;~~States;

(3) Officers and soldiers of the militia and the national guard when called into actual service;

(4) Officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties;

(5) Sworn law-enforcement officers, when off-duty, ~~if:~~provided that an officer does not carry a concealed weapon while consuming alcohol or an unlawful controlled substance or while alcohol or an unlawful controlled substance remains in the officer's body.

~~a. Written regulations authorizing the carrying of concealed weapons have been filed with the clerk of superior court in the county where the law-enforcement unit is located by the sheriff or chief of police or other superior officer in charge; and~~

~~b. Such regulations specifically prohibit the carrying of concealed weapons while the officer is consuming or under the influence of alcoholic beverages.~~"

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 1401:
Concealed Carry By Law Enforcement Officers

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 11, 2005
Introduced by:	Rep. Folwell	**Summary by:**	Kory Goldsmith
Version:	Second Edition		Committee Counsel

SUMMARY: House Bill 1401 would change the circumstances under which federal law enforcement officers and State and local law enforcement officers could carry concealed weapons.

The bill would be effective when it becomes law.

CURRENT LAW:

Federal Law

In 2004, Congress enacted the "Law Enforcement Officers Safety Act", which provides that notwithstanding any other provision of state or local law, an individual who is a qualified law enforcement officer carrying proper identification may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce. The act further provides that it shall not be construed to supersede or limit state laws that allow private persons to restrict the possession of concealed firearms on their property or that restrict the possession of firearms on any state or local government property.

State Law

It is unlawful for a person to willfully and intentionally carry a concealed weapon except when the person is on the person's own premises. It is unlawful for a person to willfully and intentionally carry a concealed pistol or gun except when the person is on the person's premises or the weapon is a handgun and the person has a concealed handgun permit. This prohibition doesn't apply to a number of classes of military and law enforcement personnel, including:

- Civil and law enforcement officers of the United States while in the discharge of their official duties.
- Sworn law-enforcement officers, when off duty, if the sheriff or chief of police has filed written regulations authorizing the carrying of weapons with the clerk of superior court in the county where the law-enforcement unit is located and the regulations specifically prohibit the carrying of concealed weapons while the officer is consuming or under the influence of alcoholic beverages.

Violation of the general prohibition on carrying concealed weapons is a Class 2 misdemeanor. Violation of the prohibition on carrying concealed handguns is a Class 2 misdemeanor for a first offense and a Class I felony for a second or subsequent offense.

Relationship between federal and State law; constitutionality of federal law

It is unclear how the federal "Law Enforcement Officers Safety Act of 2004" interacts with our State laws that regulate the carrying of concealed handguns by law enforcement officers. An expansive reading of the federal law would have it largely superseding state laws that regulate the carrying of concealed handguns by law enforcement officers.

The constitutionality of the "Law Enforcement Officers Safety Act of 2004" is also unclear. In *United States v. Lopez (1995)*, the United States Supreme Court examined the constitutionality of the federal "Gun Free School Zones Act of 1990". Congress enacted this act based on its constitutional power to regulate interstate commerce. The Supreme Court found that the "Gun Free School Zones Act of 1990"

did not regulate interstate commerce and held the act unconstitutional because it exceeded the authority of Congress to regulate interstate commerce. Congress appears to have based its authority to enact the "Law Enforcement Officers Safety Act of 2004" on its constitutional power to regulate interstate commerce. Because it is questionable whether the "Law Enforcement Officers Safety Act of 2004" regulates interstate commerce, the act may exceed the authority of Congress to regulate interstate commerce and thus be unconstitutional.

BILL ANALYSIS:

House Bill 1401 would authorize civil and law enforcement officers of the United States to carry concealed weapons even when not discharging their official duties.

House Bill 1401 would also authorize sworn law enforcement officers to carry concealed weapons off duty provided the officer does not at the same time consume any alcoholic beverages or illegal controlled substances, or have any alcohol or illegal controlled substance in the officer's body..

Jeff Hudson, counsel to House Judiciary II, substantially contributed to this summary.

H1401e2-SMRC

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Friday	August 12, 2005	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 490	False Report/Destructive Device.	Representative Hilton Representative Setzer
HB 801	Child Custody/Guardianship Jurisdiction.	Representative Dickson Representative Alexander Representative Glazier
HB 1120	Strengthen Neighborhood Watch Programs.	Representative Frye
HB 1150	Expedite Juv. Proceedings/Guardians ad Litem.	Representative Ross Representative Goodwin Representative Glazier
HB 1213	Expunge Multiple Charges/Occur Within 1 yr.	Representative Sutton Representative Moore
HB 1485	Search Warrants/Audio & Video Transmission.	Representative Culpepper, III
SB 733	Street Gang Prevention Act.	Senator Graham

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Friday, August 12, 2005, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 490	False Report/Destructive Device.	Representative Hilton Representative Setzer
HB 801	Child Custody/Guardianship Jurisdiction.	Representative Dickson Representative Alexander Representative Glazier
HB 1120	Strengthen Neighborhood Watch Programs.	Representative Frye
HB 1150	Expedite Juv. Proceedings/Guardians ad Litem.	Representative Ross Representative Goodwin Representative Glazier
HB 1213	Expunge Multiple Charges/Occur Within 1 yr.	Representative Sutton Representative Moore
HB 1485	Search Warrants/Audio & Video Transmission.	Representative Culpepper, III
SB 733	Street Gang Prevention Act.	Senator Graham

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

August 12, 2005

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on August 12, 2005, with fourteen members present.

HB 1485 (Search Warrants/Auto & Video Transmission.) Senator Hartsell recognized Representative Culpepper to explain the bill. Senator Goodall moved for a favorable report. All voted and the motion carried.

HB 490 (False Report/Destructive Device.) Senator Allran was recognized to explain the bill in the absence of Representative Hilton. Questions from Senators Goodall and Dannelly were answered by Senator Allran. Senator Forrester moved for a favorable report. All voted and the motion carried.

HB 801 (Child Custody/Guardianship Jurisdiction.) Representative Glazier was recognized to explain the bill. Representative Glazier answered the question from Senator Kinnaird. Senator Dalton moved for a favorable report. All voted and the motion carried.

HB 1150 (Expedite Juv. Proceedings/Guardians ad Litem.) Representative Goodwin was recognized to explain the bill. Ms. Deana Fleming, Associate Counsel of North Carolina Administrative Office o/t Courts, Guardian ad Litem Program was recognized from additional explanation. Questions from Senators Berger, Dannelly, Kerr, Bingham and Thomas were answered by Senators Goodwin, Ms. Fleming, Erica Churchill, Staff Attorney, and Senator Snow. Senator Allran sent forth a technical amendment that was accepted by Representative Goodwin. All voted and the amendment was adopted. Senator Thomas moved for a favorable report as amended and rolled into a new committee substitute. All voted and the motion carried.

HB 1120 (Strengthen Neighborhood Watch Programs.) Senator Hartsell recognized Representative Frye to explain the bill. Senator Dannelly's question was answered by Representative Frye. Senator Thomas moved for a favorable report with a referral to Appropriations. All voted and the motion carried.

SB 733 (Street Gang Prevention Act.) Senator Graham was recognized to explain the bill. Senator Graham sent forth two amendments and moved that they be accepted. All voted and the amendments were adopted. Representative Frye added clarification to the bill explanation. Attorney Al Singer, representing the Child Advocacy Commission of Durham, Inc., and Mr. Brian Lewis, representing the Covenant with North Carolina's Children, Inc., spoke on the bill. Senator Thomas moved for a favorable report as amended with a referral to Appropriations. All voted and the motion carried.

HB 1213 (Expunge Multiple Charges/Occur Within 1 Yr.) Representative Sutton was recognized to explain the bill. Senator Dalton moved for a favorable report. All voted and the motion carried.

HB 967 (Health Care Power of Atty/Dispos. of Remains.) Representative Tucker was recognized to explain the bill. Senator Berger moved for a favorable report. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

REVISED REPORT SB 733

Friday, August 12, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B. **490** False Report/Destructive Device.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **801** Child Custody/Guardianship Jurisdiction.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **1120** Strengthen Neighborhood Watch Programs.
Sequential Referral: None
Recommended Referral: Appropriations/Base Budget

H.B. **1485** Search Warrants/Audio & Video Transmission.
Sequential Referral: None
Recommended Referral: None

FAVORABLE, AS AMENDED

S.B. 733 Street Gang Prevention Act.
Sequential Referral: None
Recommended Referral: Appropriations/Base Budget
Long Title Amended: No

TOTAL REPORTED: 5

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Friday, August 12, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **733** Street Gang Prevention Act.
Sequential Referral: None
Recommended Referral: Appropriations/Base Budget

H.B. **490** False Report/Destructive Device.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **801** Child Custody/Guardianship Jurisdiction.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **1120** Strengthen Neighborhood Watch Programs.
Sequential Referral: None
Recommended Referral: Appropriations/Base Budget

H.B. **1485** Search Warrants/Audio & Video Transmission.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 5

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Friday, August 12, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B. **1328** Pardon/Expunction of Record.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **1394** Testamentary Recommendation of Guardian.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **1401** Concealed Carry By Law Enforcement Officers.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1318** Consider Tax Consequences/Equit. Distribution.
Draft Number: PCS 60533
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

TOTAL REPORTED: 4

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Friday, August 12, 2005

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B. **1213** Expunge Multiple Charges/Occur Within 1 yr.

Draft Number:	PCS 10399
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **967** Health Care Power of Atty/Dispos. of Remains.

Draft Number:	PCS 10400
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1150** Expedite Juv. Proceedings/Guardians ad Litem.

Draft Number:	PCS 50492
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 3

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

August 18, 2005
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
A Singer	Child Advocacy of Durham
BRIAN LEWIS	Covenant w/ NC's Children
Lana Dial	NC-AOC
Deana Fleming	GAL/AOC
Staples Hughes	Appellate Defender
Paul Harris	NC Board of Funeral Service
Jeff Rau	GRNC
Beau Mills	NCCM
David Fox	Allen Associates
Nancy Davis	LA Rep. Tim Moore
Joe McClean	McClean Consulting Inc

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Gavin Savel	Rep Glazier
[illegible]	NCJCPC
Colleen Kochanek	HYMH
[illegible]	DTLA
Anna Perry	DJDP
Eddie Caldwell	NC Sheriffs Assn.
Holly Bryan	NCATL
Chip Killian	Nelson Mullins

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

H

HOUSE BILL 490

Short Title:	False Report/Destructive Device.	(Public)
Sponsors:	Representatives Hilton, Setzer (Primary Sponsors); Almond, Barnhart, Culp, Current, Eddins, England, Folwell, Frye, Gillespie, Hollo, Johnson, LaRoque, Moore, Starnes, Steen, Wiley, and Williams.	
Referred to:	Judiciary III.	

March 7, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW WITH REGARD TO MAKING A FALSE REPORT CONCERNING A DESTRUCTIVE DEVICE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-69.1 reads as rewritten:

"**§ 14-69.1. Making a false report concerning destructive device.**

(a) Except as provided in subsection (c) of this section, any person who, by any means of communication to any person or group of persons, makes a report, knowing or having reason to know the report is false, that there is located in or in sufficient proximity to cause damage to any building, house or other structure whatsoever or any vehicle, aircraft, vessel or boat any device designed to destroy or damage the building, house or structure or vehicle, aircraft, vessel or boat by explosion, blasting or burning, is guilty of a Class H felony.

(b) Repealed by S.L. 1997-443, s. 19.25(cc).

(c) Any person who, by any means of communication to any person or groups of persons, makes a report, knowing or having reason to know the report is false, that there is located in or in sufficient proximity to cause damage to any public building any device designed to destroy or damage the public building by explosion, blasting, or burning, is guilty of a Class H felony. Any person who receives a second conviction for a violation of this subsection within five years of the first conviction for violation of this subsection is guilty of a Class G felony. For purposes of this subsection, "public building" means educational property as defined in G.S. 14-269.2(a)(1), a hospital as defined in G.S. 131E-76(3), a building housing only State, federal, or local government offices, or the offices of State, federal, or local government located in a building that is not exclusively occupied by the State, federal, or local government.

(d) The court may order a person convicted under this section to pay restitution, including costs and consequential damages resulting from the disruption of the normal

activity that would have otherwise occurred on the premises but for the false report, pursuant to Article 81C of Chapter 15A of the General Statutes.

(e) For purposes of this section, the term "report" shall include making accessible to another person by computer."

SECTION 2. This act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: House Bill 490 (First Edition)

SHORT TITLE: False Report/Destructive Device.

SPONSOR(S): Representatives Setzer and Hilton

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10
GENERAL FUND					
Correction	Exact amount cannot be determined; no substantial impact anticipated.				
Judicial	Exact amount cannot be determined; no substantial impact anticipated.				
ADDITIONAL PRISON BEDS*	Exact amount cannot be determined; no substantial impact anticipated.				
POSITIONS: (cumulative)	Exact amount cannot be determined; no substantial impact anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch

EFFECTIVE DATE: December 1, 2005

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY:

Current G.S. 14-69.1 subsection (a) specifies that it is a Class H felony to falsely report that a destructive device is located in any building, house, other structure, vehicle, aircraft, vessel, or boat. G.S. 14-69.1 subsection (c) specifies that a second conviction within five years of the first conviction for such a report made in relation to any public building is a Class G felony. H.B. 490 would amend this statute to criminalize a false report of a destructive device *in sufficient proximity* to any of the specified structures that it could damage or destroy those structures.

ASSUMPTIONS AND METHODOLOGY:

General

This bill would be expected to result in additional charges and convictions for Class H felonies and would consequently incur a fiscal impact. Due to the small number of charges and convictions under current G.S. 14-69.1, the fiscal impact associated with this bill is not expected to be substantial.

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2005 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory group, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.*

Because this bill would broaden the scope of existing offenses, the Sentencing Commission has no data from which to project the number of convictions that might result from this legislation. The following number of convictions occurred in fiscal year 2003-04 under current G.S. 14-69.1 for false reports of destructive devices:

Table 1: Fiscal Year 2003-04 Felony Convictions Under G.S. 14-69.1

Class H Felony		Class G Felony
G.S. 14-69.1 (a) Non-Public Structure	G.S. 14-69.1 (c) Public Structure	G.S. 14-69.1 (c) Second Conviction in Five Years
7	12	0

Under this bill, any false report of a destructive device located in sufficient proximity to a structure to cause damage to that structure would also be punishable as a Class H felony (Class G, if the report is in relation to a public building and is a second conviction within five years). Because no data exists regarding how often such reports are made, it is not possible to project the number of convictions that would result from these new provisions.

Class H Felonies: If, for example, there were three additional convictions for Class H felonies per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and two additional prison beds the second year.

Class G Felonies: If, for example, there were two additional Class G felony convictions per year, one additional prison bed would be needed in the first year and two additional beds in the second year.

The average annual operating cost for one prison bed in FY 2006-07 will be an estimated $24,740.

Non-Active Sentences: In FY 2003-04, 50 percent of Class H felony convictions resulted in intermediate sanctions and 13 percent in community sanctions; 56 percent of Class G convictions resulted in intermediate sanctions (the remainder were active). Probation officers in the Division of Community Correction (DCC) supervise offenders with intermediate sanctions at an estimated cost of $10.94 per day for the first six months and $1.87 per day thereafter. This cost estimate is based on the average cost and duration of intensive probation, the most common intermediate sanction.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks, and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

For calendar year 2004, AOC data indicates that 25 individuals were charged with a Class H felony for a false report of a destructive device in a non-public structure, and 51 individuals were charged with a Class H or Class G felony for a false report of a destructive device relating to a public structure. No data is available regarding how many of the 51 charges relating to public structures were for Class G felonies (i.e. a second offense within five years of the first conviction). AOC cannot estimate the number of new charges that would result from this legislation because data regarding the number of false reports that would be criminalized by this bill is not available.

The cost to the Courts to process a felony or misdemeanor charge varies depending upon the method of settlement and the severity of the charge. AOC estimates the following costs to process a single Class H or Class G felony charge. Based on prior-year data, the majority of new charges resulting from this bill that are not dismissed are likely to be settled by guilty plea.

Table 2: Per Charge Settlement Costs

	Settled via Trial			Settled via Guilty Plea
Offense Class	*Court/Attorney Costs*	*Indigent Defense*	*Total*	
Class H Felony	$4,096	$2,100	$6,196	
Class G Felony	$5,092	$2,529	$7,621	

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission.

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Aaron Paul and Jim Mills

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

Official
Fiscal Research Division
Publication

DATE: March 29, 2005

Signed Copy Located in the NCGA Principal Clerk's Offices

HOUSE BILL 490:
False Report/Destructive Device

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 12, 2005
Introduced by:	Reps. Hilton, Setzer	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	First Edition		

SUMMARY: House Bill 490 would make it a Class H felony to make report that a bomb is near a building if the person making the threat knows the threat is false. It would be a Class G felony to make a similar false report for a bomb near a public building.

The bill would become effective December 1, 2005 and apply to offenses committed on or after that date.

[As introduced, this bill was identical to S591, as introduced by Sen. Allran, which is currently in Senate Judiciary II.]

CURRENT LAW: G.S. 14-69.1 makes it a Class H felony to make a report that a bomb is in a building or structure if the person making the report knows the report is false. It is a Class G felony to make a similar false report regarding a bomb in a public building. The term "public building" is defined as educational property, or a building housing State, federal or local government offices.

The minimum presumptive sentences for a person with no prior convictions for a an H and a G felony are 5-6 months of community, intermediate or active punishment, and 10-13 months of intermediate or active punishment (respectively).

BILL ANALYSIS: House Bill 490 would amend the existing law to provide that it is a felony to knowingly make a false report that a bomb is "in sufficient proximity to [a building to] cause damage".

There may be a logical problem with the language in the current form of the bill. It is not clear how a fictitious bomb can ever be considered to cause any damage, regardless of how close it is located to the building.

BACKGROUND:

H0490e1-SMRC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 801

Committee Substitute Favorable 4/13/05

Short Title: Child Custody/Guardianship Jurisdiction. (Public)

Sponsors:

Referred to:

March 21, 2005

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH A PROCEDURE TO RESOLVE THE ISSUE OF CONFLICTING CHILD CUSTODY ORDERS; TO CLARIFY THE EFFECT OF TERMINATING JURISDICTION IN CERTAIN JUVENILE CASES; TO GIVE THE COURT AUTHORITY TO CONVERT A JUVENILE COURT CUSTODY ORDER INTO A PERMANENT CUSTODY ORDER UNDER CHAPTER 50 OF THE GENERAL STATUTES; AND TO MAKE TECHNICAL AND CONFORMING CHANGES TO THE LAW.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7B-200 is amended by adding the following new subsections to read:

"(c) When the court obtains jurisdiction over a juvenile as the result of a petition alleging that the juvenile is abused, neglected, or dependent:

(1) Any other civil action in this State in which the custody of the juvenile is an issue is automatically stayed as to that issue, unless the juvenile proceeding and the civil custody action or claim are consolidated pursuant to subsection (d) of this section or the court in the juvenile proceeding enters an order dissolving the stay.

(2) If an order entered in the juvenile proceeding and an order entered in another civil custody action conflict, the order in the juvenile proceeding controls as long as the court continues to exercise jurisdiction in the juvenile proceeding.

(d) Notwithstanding G.S. 50-13.5(f), the court in a juvenile proceeding may order that any civil action or claim for custody filed in the district be consolidated with the juvenile proceeding. If a civil action or claim for custody of the juvenile is filed in another district, the court in the juvenile proceeding, for good cause and after consulting with the court in the other district, may: (i) order that the civil action or claim for custody be transferred to the county in which the juvenile proceeding is filed; or (ii) order a change of venue in the juvenile proceeding and transfer the juvenile proceeding

to the county in which the civil action or claim is filed. The court in the juvenile proceeding may also proceed in the juvenile proceeding while the civil action or claim remains stayed or dissolve the stay of the civil action or claim and stay the juvenile proceeding pending a resolution of the civil action or claim."

SECTION 2. G.S. 7B-201 reads as rewritten:

"**§ 7B-201. Retention and termination of jurisdiction.**

(a) When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first.

(b) When the court's jurisdiction terminates, whether automatically or by court order, the court thereafter shall not modify or enforce any order previously entered in the case, including any juvenile court order relating to the custody, placement, or guardianship of the juvenile. The legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed, unless applicable law or a valid court order in another civil action provides otherwise. Termination of the court's jurisdiction in an abuse, neglect, or dependency proceeding, however, shall not affect any of the following:

(1) A civil custody order entered pursuant to G.S. 7B-911.

(2) An order terminating parental rights.

(3) A pending action to terminate parental rights, unless the court orders otherwise.

(4) Any proceeding in which the juvenile is alleged to be or has been adjudicated undisciplined or delinquent.

(5) The court's jurisdiction in relation to any new abuse, neglect, or dependency petition that is filed."

SECTION 3. G.S. 7B-402 reads as rewritten:

"**§ 7B-402. Petition.**

(a) The petition shall contain the name, date of birth, address of the juvenile, the name and last known address of the juvenile's parent, guardian, or ~~custodian~~ custodian, and ~~shall allege the facts which~~allegations of facts sufficient to invoke jurisdiction over the juvenile. A person whose actions resulted in a conviction under G.S. 14-27.2 or G.S. 14-27.3 and the conception of the juvenile need not be named in the petition. The petition may contain information on more than one juvenile when the juveniles are from the same home and are before the court for the same reason.

(b) The petition, or an affidavit attached to the petition, shall contain the information required by G.S. 50A-209.

(c) Sufficient copies of the petition shall be prepared so that copies will be available for each parent if living separate and apart, the guardian, custodian, or caretaker, the guardian ad litem, the social worker, and any person determined by the court to be a necessary party."

SECTION 4. Article 9 of Chapter 7B of the General Statutes is amended by adding a new section to read:

"**§ 7B-911. Civil child-custody order.**

(a) After making proper findings at a dispositional hearing or any subsequent hearing, the court on its own motion or the motion of a party may award custody of the juvenile to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7, as provided in this section, and terminate the court's jurisdiction in the juvenile proceeding.

(b) When the court enters a custody order under this section, the court shall either cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody.

If the order is filed in an existing civil action and the person to whom the court is awarding custody is not a party to that action, the court shall order that the person be joined as a party and that the caption of the case be changed accordingly. The order shall resolve any pending claim for custody and shall constitute a modification of any custody order previously entered in the action.

If the court's order initiates a civil action, the court shall designate the parties to the action and determine the most appropriate caption for the case. The civil filing fee is waived unless the court orders one or more of the parties to pay the filing fee for a civil action into the office of the clerk of superior court. The order shall constitute a custody determination, and any motion to enforce or modify the custody order shall be filed in the newly created civil action in accordance with the provisions of Chapter 50 of the General Statutes. The Administrative Office of the Courts may adopt rules and shall develop and make available appropriate forms for establishing a civil file to implement this section.

(c) The court may enter a civil custody order under this section and terminate the court's jurisdiction in the juvenile proceeding only if:

(1) In the civil custody order the court makes findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to G.S. 50-13.7; and

(2) In a separate order terminating the juvenile court's jurisdiction in the juvenile proceeding, the court finds:

a. That there is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding; and

b. That at least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed."

SECTION 5. G.S. 50-13.1 is amended by adding a new subsection to read:

"(i) If the child whose custody is the subject of an action under this Chapter also is the subject of a juvenile abuse, neglect, or dependency proceeding pursuant to

Subchapter 1 of Chapter 7B of the General Statutes, then the custody action under this Chapter is stayed as provided in G.S. 7B-200."

SECTION 6. This act becomes effective October 1, 2005, and applies to juvenile proceedings and civil actions pending or filed on or after that date.

HOUSE BILL 801:
Child Custody/Guardianship Jurisdiction

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Reps. Glazier, Alexander, Dickson
Date:	August 12, 2005		
Version:	2nd Edition	**Summary by:**	Kory Goldsmith Committee Counsel

SUMMARY: ***The bill would make various amendments to the juvenile code and Chapter 50 to allow the courts to address the issue of conflicting jurisdiction in cases involving juveniles.***

CURRENT LAW: Persons seeking custody of a juvenile may initiate a civil action under Chapter 50 of the General Statutes. The department of social services in each county is responsible for investigating allegations of abuse, neglect, and dependency involving juveniles and has the authority to initiate an action in court to protect the juvenile if necessary under Subpart I of Chapter 7B of the General Statutes. The two legal cases are separate and apart, even though one child may be the subject of both actions. The statutes are silent on which court takes precedence if a child is a subject of both types of cases, or what options are available when the juvenile court terminates its jurisdiction.

BILL ANALYSIS:

Section 1.: The bill would add two new subsections to G.S. 7B-200, Jurisdiction, to provide the following:

- When a juvenile petition is filed, any other civil custody action in the State is automatically stayed, unless the actions are consolidated, or the court in the juvenile proceeding lifts the stay.
- If an order entered by the court in a juvenile proceeding and an order in a civil custody action conflict, the order in the juvenile proceeding controls so long as the juvenile court continues to exercise jurisdiction in the juvenile proceeding.
- If the two actions are in the same judicial district the court in the juvenile proceeding may order that the civil action for custody be consolidated with the juvenile proceeding.
- If the two actions are in different judicial districts, the court in the juvenile proceeding, for good cause and after consulting with the court in the other district, may do any of the following:
    - Transfer the civil action to the county in which the juvenile proceeding is filed.
    - Change the venue of the juvenile proceeding to that of the civil action.
    - Proceed in the juvenile action while the civil action remains stayed.
    - Stay the juvenile proceeding and allow the civil action to proceed.

Section 2.: The bill would add a new subsection to G.S. 7B-201, Retention of Jurisdiction, to provide the following:

- The court in a juvenile proceeding may not modify or enforce any order previously entered in the proceeding after the court's jurisdiction terminates.

- That the legal status of the juvenile and the custodial rights of the parties return to pre-petition status when the court's jurisdiction terminates, unless an order if filed in a separate civil action. This termination does not affect any of the following:
    - A civil custody order entered pursuant to G.S. 7B-911.
    - An order terminating parental rights (TPR).
    - A pending action for TPR, unless the court orders otherwise.
    - An action in which the juvenile is alleged to be or has been adjudicated undisciplined or delinquent.
    - Any new petition regarding the juvenile that is filed alleging abuse/neglect/dependency.

Section 3.: The bill would clarify that the petitioner, the local department of social services, is to attach the affidavit regarding the status of the juvenile that is the subject of the petition, to any petition that is filed. This requirement is already current law under G.S. 50A. The bill would place the same requirement in the statute governing petitions. The bill also makes a drafting change to update the language.

Section 4.: The bill would add a new section to Article 9, Dispositions, of the Juvenile Code, for abuse/neglect/dependency. The new section would allow the court to enter and order that awards civil custody of the juvenile to a parent or other appropriate person, and terminates the court's jurisdiction in the juvenile proceeding. When entering such an order, the Court shall cause the order to be filed in an existing civil action relating the custody of the juvenile, or instruct the clerk to treat the order as the initiation of a civil action for custody. The court may enter the civil custody order and terminate its jurisdiction only if:

- The court makes findings and conclusions that support the entry of the custody order under Chapter 50.
- In a separate order terminating the juvenile court's jurisdiction, the court finds:
    - The juvenile's status and the issues are in the nature of a private custody agreement and there is no need for continued State involvement on behalf of the juvenile.
    - At least 6 months have passed since the court determined that the custody placement is the permanent plan for the juvenile.

Section 5.: The bill would make a conforming change to the civil custody action statutes to provide that the civil action is stayed when the juvenile that is the subject of the civil action is also the subject of an abuse/neglect/dependency proceeding.

BACKGROUND:

In 2003, the General Assembly enacted S.L. 2003-81, which directed the Administrative Office of the Courts (AOC), in consultation with the Department of Health and Human Services, to establish a pilot program in the Twelfth Judicial District to address the issue of conflicting child custody orders. The act provided that under the pilot program, when a court obtained jurisdiction over a juvenile as the result of a petition alleging that the juvenile was abused, neglected, or dependent:

- The court in the juvenile proceeding could stay any other civil action in the State in which the custody of the juvenile was an issue.
- If an order entered in the juvenile proceeding and an order entered in another civil custody action conflicted, the order in the juvenile proceeding would control as long as the court continued to retain jurisdiction in the juvenile proceeding.

- The court in the juvenile proceeding could order that any civil action or claim for custody filed in the pilot judicial district be consolidated with the juvenile proceeding.
- If a civil action or claim for custody was filed in a district other than the pilot judicial district, then the court in the juvenile proceeding could, after consulting with the court in the other district, order that the civil action or claim for custody be transferred to the pilot judicial district or could order a change of venue in the juvenile proceeding and transfer the juvenile proceeding to the other district.
- The court could establish a mechanism for determining the legal status of a juvenile after jurisdiction of the juvenile court terminated, including a determination as to who would have custody of the juvenile and under what circumstances custody could subsequently be changed.

The Act also directed the AOC to evaluate the pilot program and report its findings and recommendations to the 2005 General Assembly prior to its convening. The report dated January 27, 2005, recommended that the provisions of the S.L. 2003-381 be enacted statewide.

EFFECTIVE DATE: The act is effective October 1, 2005 and applies to juvenile proceedings and civil actions filed on or after that date.

Erika Churchill, Staff Attorney, and Jennifer McGinnis, Committee Counsel to House Judiciary IV, contributed substantially to this summary.

H801-SMRI-CSRI-5

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 3

HOUSE BILL 1120

Committee Substitute Favorable 5/4/05
Third Edition Engrossed 5/12/05

Short Title: Strengthen Neighborhood Watch Programs. (Public)

Sponsors:

Referred to:

April 6, 2005

A BILL TO BE ENTITLED

AN ACT TO OFFICIALLY ACKNOWLEDGE THE IMPORTANCE OF NEIGHBORHOOD CRIME WATCH PROGRAMS AND TO ESTABLISH A CRIMINAL PENALTY FOR HARASSMENT OF A MEMBER OF A NEIGHBORHOOD CRIME WATCH PROGRAM.

The General Assembly of North Carolina enacts:

SECTION 1. Article 10 of Chapter 153A of the General Statutes is amended by adding a new section to read:

"**§ 153A-212.2. Neighborhood crime watch programs.**

A county may establish neighborhood crime watch programs within the county to encourage residents and business owners to promote citizen involvement in securing homes, businesses, and personal property against criminal activity and to report suspicious activities to law enforcement officials."

SECTION 2. Article 13 of Chapter 160A of the General Statutes is amended by adding a new section to read:

"**§ 160A-289.2. Neighborhood crime watch programs.**

A city may establish neighborhood crime watch programs within the city to encourage residents and business owners to promote citizen involvement in securing homes, businesses, and personal property against criminal activity and to report suspicious activities to law enforcement officials."

SECTION 3. Article 30 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-226.2. Harassment of participant in neighborhood crime watch program.**

Any person who willfully threatens or intimidates an identifiable member or a resident in the same household as the member of a neighborhood crime watch program for the purpose of intimidating or retaliating against that person for the person's participation in a neighborhood crime watch program is guilty of a Class 1 misdemeanor including a fine of at least three hundred dollars ($300.00). It is a

violation of this section for a person to threaten or intimidate an identifiable member or a resident in the same household as the member of a neighborhood crime watch program while that member is traveling to or from a neighborhood crime watch meeting, actively participating in a neighborhood crime watch program activity, or actively participating in an ongoing criminal investigation."

SECTION 4. Section 3 of this act becomes effective December 1, 2005. The remainder of this act is effective when it becomes law.

HOUSE BILL 1120:
Strengthen Neighborhood Watch Programs

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 12, 2005
Introduced by:	Rep. Frye	**Summary by:**	Kory Goldsmith
Version:	Third Edition		Committee Counsel

SUMMARY: ***House Bill 1120 authorizes counties and cities to establish crime watch programs. It also creates a new crime of "harassment of participant in neighborhood crime watch program".***

The act would become effective December 1, 2005 and apply to offenses committed on or after that date.

CURRENT LAW: Cities and counties have authority under their general police powers to adopt programs to promote the health, safety and welfare of their residents. This authority probably already includes the authority to assist citizens with establishing neighborhood watch programs.

G.S. 14-227.1 (Communicating Threats) makes it a Class 1 misdemeanor for a person to willfully threaten to physically injure another person, or that other person's child, sibling, spouse, or dependents, or to willfully threaten to damage the property of another. The threat may be made orally, in writing or by any other means, and must be made in a manner and under circumstances that would and does cause a reasonable person to believe that the threat is likely to be carried.

Common law obstruction of justice is also a Class 1 misdemeanor. A person is guilty of this offense of the person (1) unlawfully and willfully (2) obstructs justice.

The presumptive minimum sentence for a Class 1 misdemeanor for a person who has no prior convictions is 1-45 days of community punishment.

BILL ANALYSIS:

Section 1 and 2 of the bill authorizes counties and cities (respectively) establish neighborhood crime watch programs. The statute does not define what constitutes a neighborhood watch program.

Section 3 of the bill creates a new Class 1 misdemeanor, "harassment of a participant in neighborhood watch program." A person could be charged with this crime for:

- willfully threatening or intimidating an identifiable member of a neighborhood crime watch program (or a resident of the same household) for the purpose of intimidating or retaliating against that person for the person's participation in the program.
- threatening or intimidating an identifiable member of a neighborhood crime watch program (or a resident of the same household) while the person is traveling to or from a crime watch program meeting, activity, or investigation.

The bill does not define the terms "neighborhood watch program" or "identifiable member".

In addition to the punishments described above for Class 1 misdemeanors, a person convicted of this crime would be fined at least $300.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1150

Committee Substitute Favorable 5/4/05

Short Title: Expedite Juv. Proceedings/Guardians ad Litem. (Public)

Sponsors:

Referred to:

April 7, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND THE JUVENILE CODE TO EXPEDITE OUTCOMES FOR CHILDREN AND FAMILIES INVOLVED IN WELFARE CASES AND APPEALS AND TO LIMIT THE APPOINTMENT OF GUARDIANS AD LITEM FOR PARENTS IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7B-507(c) reads as rewritten:

"(c) At any hearing at which the court finds that reasonable efforts to eliminate the need for the juvenile's placement are not required or shall cease, the court shall direct that a permanency planning hearing as required by G.S. 7B-907 be held within 30 calendar days after the date of the hearing and, if practicable, shall set the date and time for the permanency planning hearing. At any hearing at which the court finds and orders that reasonable efforts to reunify a family shall cease, the affected parent, guardian, or custodian or that parent, guardian, or custodian's counsel may give notice to preserve the parent, guardian, or custodian's right to appeal the finding and order in accordance with G.S. 7B-1001(a)(5). Notice may be given in open court or in writing within 10 days of the hearing at which the court orders the efforts to reunify the family to cease. The party giving notice shall be permitted to make a detailed offer of proof as to any evidence that person sought to offer in opposition to cessation of reunification that the court refused to admit as evidence or to consider."

SECTION 2. G.S. 7B-602 reads as rewritten:

"**§ 7B-602. Parent's right to counsel; guardian ad litem.**

(a) In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right. When a petition is filed alleging that a juvenile is abused, neglected, or dependent, the clerk shall appoint provisional counsel for each parent named in the petition and indicate the appointment on the juvenile summons or attached notice. At the first hearing, the court shall dismiss the provisional counsel if the respondent parent:

(1) Does not appear at the hearing;
(2) Does not qualify for court-appointed counsel;
(3) Has retained counsel; or
(4) Waives the right to counsel.

The court shall confirm the appointment of counsel if subdivisions (1) through (4) of this subsection are not applicable to the respondent parent.

The court may reconsider a parent's eligibility and desire for appointed counsel at any stage of the proceeding.

(b) In addition to the right to appointed counsel set forth above, a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent ~~in the following cases:~~

~~(1) Where it is alleged that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101 in that the parent is incapable as the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition of providing for the proper care and supervision of the juvenile; or~~

~~(2) Where the parent~~ who is under the age of 18 ~~years.~~ years and who is not married or otherwise emancipated. The appointment of a guardian ad litem under this subsection shall not affect the minor parent's entitlement to a guardian ad litem pursuant to G.S. 7B-601 in the event that the minor parent is the subject of a separate juvenile petition.

(c) On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent in accordance with G.S. 1A-1, Rule 17, if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. The parent's counsel shall not be appointed to serve as the guardian ad litem.

(d) Communications between the guardian ad litem appointed under this section and the parent and between the guardian ad litem and the parent's counsel shall be privileged and confidential to the same extent that communications between the parent and the parent's counsel are privileged and confidential.

(e) Guardians ad litem appointed under this section may engage in all of the following practices:

(1) Enable the parent to enter consent orders, if appropriate.
(2) Facilitate service of process on the parent.
(3) Assure that necessary pleadings are filed.
(4) Assist the parent and the parent's counsel, if requested by the parent's counsel, to ensure that the parent's procedural due process requirements are met."

SECTION 3. G.S. 7B-807(b) reads as rewritten:

"(b) The adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court

scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection."

SECTION 4. G.S. 7B-901 reads as rewritten:

"**§ 7B-901. Dispositional hearing.**

The dispositional hearing shall take place immediately following the adjudicatory hearing and shall be concluded within 30 days of the conclusion of the adjudicatory hearing. The dispositional hearing may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile. The juvenile and the juvenile's parent, guardian, or custodian shall have an opportunity to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition. The court may exclude the public from the hearing unless the juvenile moves that the hearing be open, which motion shall be granted."

SECTION 5. G.S. 7B-905 is amended by adding a new subsection to read:

"(d) When a county department of social services having custody or placement responsibility of a juvenile intends to change the juvenile's placement, the department shall give the guardian ad litem for the juvenile notice of its intention unless precluded by emergency circumstances from doing so. Where emergency circumstances exist, the department of social services shall notify the guardian ad litem or the attorney advocate within 72 hours of the placement change, unless local rules require notification within a shorter time period."

SECTION 6. G.S. 7B-906(d) reads as rewritten:

"(d) The court, after making findings of fact, may appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600 or may make any disposition authorized by G.S. 7B-903, including the authority to place the juvenile in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interests of the juvenile. The court may enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interests of the juvenile. The order must be reduced to writing, signed, and entered within 30 days of the completion of the hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

If at any time custody is restored to a parent, guardian, custodian, or caretaker the court shall be relieved of the duty to conduct periodic judicial reviews of the placement."

SECTION 7. G.S. 7B-907(c) reads as rewritten:

"(c) At the conclusion of the hearing, the judge shall make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time. The judge may appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600 or make any disposition authorized by G.S. 7B-903 including the authority to place the child in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interest of the juvenile. If the juvenile is not returned home, the court shall enter an order consistent with its findings that directs the department of social services to make reasonable efforts to place the juvenile in a timely manner in accordance with the permanent plan, to complete whatever steps are necessary to finalize the permanent placement of the juvenile, and to document such steps in the juvenile's case plan. Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

If at any time custody is restored to a parent, or findings are made in accordance with G.S. 7B-906(b), the court shall be relieved of the duty to conduct periodic judicial reviews of the placement.

If the court continues the juvenile's placement in the custody or placement responsibility of a county department of social services, the provisions of G.S. 7B-507 shall apply to any order entered under this section."

SECTION 8. G.S. 7B-908(b)(1) reads as rewritten:

"(1) No more than 30 days and no less than 15 days prior to each review, the clerk shall give notice of the review to the juvenile if the juvenile is at least 12 years of age, the legal custodian of the juvenile, any foster parent, relative, or preadoptive parent providing care for the juvenile, the guardian ad litem, if any, and any other person or agency the court may specify. Only the juvenile, if the juvenile is at least 12 years of age, the legal custodian of the juvenile, any foster parent, relative, or preadoptive parent providing care for the juvenile, and the guardian ad litem shall attend the review hearings, except as otherwise directed by the court. Nothing in this subdivision shall be construed to make any foster parent, relative, or preadoptive parent a party to the proceeding solely based on receiving notice and an opportunity to be heard. Any individual whose parental rights have been terminated shall not be considered a party to the proceeding unless an appeal of the order terminating parental rights is pending, and a court has stayed the order pending the appeal."

SECTION 9. G.S. 7B-909(c) reads as rewritten:

"(c) Notification of the court required under subsection (a) or (b) of this section shall be by a petition for review. The petition shall set forth the circumstances

necessitating the review under subsection (a) or (b) of this section. The review shall be conducted within 30 days following the filing of the petition for review unless the court shall otherwise direct. The court shall conduct reviews every six months until the juvenile is placed for adoption and the adoption petition is filed by the adoptive parents. The initial review and all subsequent reviews shall be conducted pursuant to G.S. 7B-908. Any individual whose parental rights have been terminated shall not be considered a party to the review unless an appeal of the order terminating parental rights is pending, and a court has stayed the order pending the appeal."

SECTION 10. G.S. 7B-1001 reads as rewritten:

"**§ 7B-1001. Right to appeal.**

~~Upon motion of a proper party as defined in G.S. 7B-1002, review of any final order of the court in a juvenile matter under this Article shall be before the Court of Appeals. Notice of appeal shall be given in writing within 10 days after entry of the order. However, if no disposition is made within 60 days after entry of the order, written notice of appeal may be given within 70 days after such entry. A final order shall include:~~

~~(1) Any order finding absence of jurisdiction;~~

~~(2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;~~

~~(3) Any order of disposition after an adjudication that a juvenile is abused, neglected, or dependent; or~~

~~(4) Any order modifying custodial rights.~~

(a) In a juvenile matter under this Subchapter, appeal of a final order of the court in a juvenile matter shall be made directly to the Court of Appeals. Only the following juvenile matters may be appealed:

(1) Any order finding absence of jurisdiction.

(2) Any order, including the involuntary dismissal of a petition, which in effect determines the action and prevents a judgment from which appeal might be taken.

(3) Any initial order of disposition and the adjudication order upon which it is based.

(4) Any order, other than a nonsecure custody order, that changes legal custody of a juvenile.

(5) An order entered under G.S. 7B-507(c) with rights to appeal properly preserved as provided in that subsection, as follows:

a. The Court of Appeals shall review the order to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:

1. A motion or petition to terminate the parent's rights is heard and granted.

2. The order terminating parental rights is appealed in a proper and timely manner.

3. The order to cease reunification is assigned as an error in the record on appeal of the termination of parental rights.

b. A party who is a parent shall have the right to appeal the order if no termination of parental rights petition or motion is filed within 180 days of the order.

c. A party who is a custodian or guardian shall have the right to immediately appeal the order.

(6) Any order that terminates parental rights or denies a petition or motion to terminate parental rights.

(b) Except for orders covered in subdivision (a)(5) of this section, notice of appeal shall be given in writing by a proper party as defined in G.S. 7B-1002 and shall be made within 30 days after entry and service of the order in accordance with G.S. 1A-1, Rule 58. Notice of appeal for orders covered in subdivision (a)(5) of this section shall be given in writing by a proper party as defined in G.S. 7B-1002.

(c) Notice of appeal shall be signed by counsel for the appealing party, if any, and shall be taken only by following direct instruction of the appealing party after the conclusion of the proceeding. In the case of an appeal by a juvenile, notice of appeal shall be signed by the guardian ad litem attorney advocate."

SECTION 11. G.S. 7B-1002 reads as rewritten:

"**§ 7B-1002. Proper parties for appeal.**

~~An appeal may be taken by the guardian ad litem or juvenile, the juvenile's parent, guardian, or custodian, the State or county agency.~~ Appeal from an order permitted under G.S. 7B-1001 may be taken by:

(1) A juvenile acting through the juvenile's guardian ad litem previously appointed under G.S. 7B-601.

(2) A juvenile for whom no guardian ad litem has been appointed under G.S. 7B-601. If such an appeal is made, the court shall appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17 for the juvenile for the purposes of that appeal.

(3) A county department of social services.

(4) A parent, a guardian appointed under G.S. 7B-600 or Chapter 35A of the General Statutes, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party.

(5) Any party that sought but failed to obtain termination of parental rights."

SECTION 12. G.S. 7B-1003 reads as rewritten:

"**§ 7B-1003. Disposition pending appeal.**

(a) During an appeal of an order entered under this Subchapter, the trial court may enforce the order unless the trial court or an appellate court orders a stay.

(b) Pending disposition of an appeal, ~~the return of the juvenile to the custody of the parent or guardian of the juvenile, with or without conditions, may issue unless the court orders otherwise.~~ unless directed otherwise by an appellate court or subsection (c) of this section applies, the trial court shall:

(1) Continue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes; and

(2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.

(c) Pending disposition of an appeal of an order entered under Article 11 of this Chapter where the petition for termination of parental rights was not filed as a motion in a juvenile matter initiated under Article 4 of this Chapter, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile. Upon the affirmation of the order of adjudication or disposition of the court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of an appeal, the court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interests of the juvenile to reflect any adjustment made by the juvenile or change in circumstances during the period of time the case on appeal was pending, provided that if the modifying order be entered ex parte, the court shall give notice to interested parties to show cause, if there be any, within 10 days thereafter, as to why the modifying order should be vacated or altered.

(d) When the court has found that a juvenile has suffered physical abuse and that the individual responsible for the abuse has a history of violent behavior, the court shall consider the opinion of the mental health professional who performed the evaluation under G.S. 7B-503(b) before returning the juvenile to the custody of that ~~individual. For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.~~ individual pending resolution of an appeal.

(e) The provisions of subsections ~~(b) and~~ (b), ~~(c)~~ (c), and (d) of G.S. 7B-905 shall apply to any order entered ~~under this section which~~ during an appeal that provides for the placement or continued placement of a juvenile in foster care."

SECTION 13. G.S. 7B-1004 reads as rewritten:

"**§ 7B-1004. Disposition after appeal.**

~~Upon the affirmation of the~~ When an order of ~~adjudication or disposition of~~ the court is affirmed by the Court of Appeals or by the Supreme ~~Court in the event of an appeal, the court shall have authority to~~ Court, the trial court may modify or alter the original order ~~of adjudication or disposition~~ as the court finds to be in the best interests of the juvenile to reflect any ~~adjustment made by the juvenile or~~ change in circumstances during the period of time the appeal was pending. If the modifying order is entered ex parte, the court shall give notice to interested parties to show cause within 10 days thereafter as to why the modifying order should be vacated or altered."

SECTION 14. G.S. 7B-1101 reads as rewritten:

"**§ 7B-1101. Jurisdiction.**

The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. ~~The parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right. The fees~~

~~of appointed counsel shall be borne by the Office of Indigent Defense Services. In addition to the right to appointed counsel set forth above, a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent in the following cases:~~

~~(1) Where it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111(6), and the incapability to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition.~~

~~(2) Where the parent is under the age of 18 years.~~

~~The fees of the guardian ad litem shall be borne by the Office of Indigent Defense Services when the court finds that the respondent is indigent. In other cases the fees of the court appointed guardian ad litem shall be a proper charge against the respondent if the respondent does not secure private legal counsel.~~ Provided, that before exercising jurisdiction under this Article, the court shall find that it ~~would have~~ has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. Provided, further, that the clerk of superior court shall have jurisdiction for adoptions under ~~the provisions of G.S. 48-2-100 and~~ Chapter 48 of the General ~~Statutes generally.~~ Statutes."

SECTION 15. Article 11 of Chapter 7B of the General Statutes is amended by adding a new section to read:

"**§ 7B-1101.1. Parent's right to counsel; guardian ad litem.**

(a) The parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right. The fees of appointed counsel shall be borne by the Office of Indigent Defense Services.

(b) In addition to the right to appointed counsel under subsection (a) of this section, a guardian ad litem shall be appointed in accordance with G.S. 1A-1, Rule 17, to represent any parent who is under the age of 18 years and who is not married or otherwise emancipated.

(c) On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. The parent's counsel shall not be appointed to serve as the guardian ad litem.

(d) Communications between the guardian ad litem appointed under this section and the parent and between the guardian ad litem and the parent's counsel shall be privileged and confidential to the same extent that communications between the parent and the parent's counsel are privileged and confidential.

(e) Guardians ad litem appointed under this section may engage in all of the following practices:

(1) Enable the parent to enter consent orders, if appropriate.

(2) Facilitate service of process on the parent.

(3) Assure that necessary pleadings are filed.

(4) Assist the parent and the parent's counsel, if requested by the parent's counsel, to ensure that the parent's procedural due process requirements are met.

(f) The fees of a guardian ad litem appointed pursuant to this section shall be borne by the Office of Indigent Defense Services when the court finds that the respondent is indigent. In other cases the fees of the court-appointed guardian ad litem shall be a proper charge against the respondent if the respondent does not secure private legal counsel. "

SECTION 16. G.S. 7B-1109(e) reads as rewritten:

"(e) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent. The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection."

SECTION 17. G.S. 7B-1110 reads as rewritten:

"**§ 7B-1110. ~~Disposition.~~ Determination of best interests of the juvenile.**

(a) ~~Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated.~~ After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. In making this determination, the court shall consider the following:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the

contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

(b) Should the court conclude that, irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the juvenile require that rights should not be terminated, the court shall dismiss the petition or deny the motion, but only after setting forth the facts and conclusions upon which the dismissal or denial is based.

(c) Should the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition or deny the motion, making appropriate findings of fact and conclusions.

(d) Counsel for the petitioner or movant shall serve a copy of the termination of parental rights order upon the guardian ad litem for the juvenile, if any, and upon the juvenile if the juvenile is 12 years of age or older.

(e) The court may tax the cost of the proceeding to any party."

SECTION 18. G.S. 7B-1113 is repealed.

SECTION 19. This act becomes effective October 1, 2005, and applies to petitions or actions filed on or after that date.

H 1

HOUSE BILL 1213

Short Title: Expunge Multiple Charges/Occur Within 1 yr. (Public)

Sponsors: Representatives Moore, Sutton (Primary Sponsors); Parmon and Womble.

Referred to: Judiciary II.

April 13, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A PERSON CHARGED WITH MULTIPLE OFFENSES MAY HAVE THOSE CHARGES EXPUNGED IF THE ALLEGED OFFENSES OCCURRED WITHIN THE SAME TWELVE-MONTH PERIOD OF TIME AND THE CHARGES ARE SUBSEQUENTLY DISMISSED OR FINDINGS OF NOT GUILTY OR NOT RESPONSIBLE ARE ENTERED AT THE SAME TERM OF COURT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-146 reads as rewritten:

"**§ 15A-146. Expunction of records when charges are dismissed or there are findings of not ~~guilty.~~guilty; expunction of records in certain circumstances for charges of multiple offenses when charges are subsequently dismissed or there are findings of not guilty at the same term of court.**

(a) If any person is charged with a crime, either a misdemeanor or a felony, or was charged with an infraction under G.S. 18B-302(i) prior to December 1, 1999, and the charge is dismissed, or a finding of not guilty or not responsible is entered, that person may apply to the court of the county where the charge was brought for an order to expunge from all official records any entries relating to his apprehension or trial. The court shall hold a hearing on the application and, upon finding that the person had not previously received an expungement under this section, G.S. 15A-145, or G.S. 90-96, and that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

(a1) Notwithstanding subsection (a) of this section, if a person is charged with multiple offenses that occurred within the same 12-month period of time and the

charges are dismissed, or findings of not guilty or not responsible are entered at the same term of court, then a person may apply to have each of those charges expunged. There is no requirement that the multiple offenses arise out of the same transaction or occurrence or that the multiple offenses were consolidated for judgment provided the offenses all occurred within the same 12-month period of time. The court shall hold a hearing on the application. If the court finds that the person had not previously received an expungement under this section except as allowed for multiple offenses under this subsection, that the person had not previously received an expungement under G.S. 15A-145 or G.S. 90-96, and that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

(b) The court may also order that the said entries shall be expunged from the records of the court, and direct all law-enforcement agencies bearing record of the same to expunge their records of the entries. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with the form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. The costs of expunging these records shall not be taxed against the petitioner.

(b1) Any person entitled to expungement under this section may also apply to the court for an order expunging DNA records when the person's case has been dismissed by the trial court and the person's DNA record or profile has been included in the State DNA Database and the person's DNA sample is stored in the State DNA Databank. A copy of the application for expungement of the DNA record or DNA sample shall be served on the district attorney for the judicial district in which the felony charges were brought not less than 20 days prior to the date of the hearing on the application. If the application for expungement is granted, a certified copy of the trial court's order dismissing the charges shall be attached to an order of expungement. The order of expungement shall include the name and address of the defendant and the defendant's attorney and shall direct the SBI to send a letter documenting expungement as required by subsection (b2) of this section.

(b2) Upon receiving an order of expungement entered pursuant to subsection (b1) of this section, the SBI shall purge the DNA record and all other identifying information from the State DNA Database and the DNA sample stored in the State DNA Databank covered by the order, except that the order shall not apply to other offenses committed by the individual that qualify for inclusion in the State DNA Database and the State DNA Databank. A letter documenting expungement of the DNA record and destruction of the DNA sample shall be sent by the SBI to the defendant and the defendant's attorney at the address specified by the court in the order of expungement.

(c) The Clerk of Superior Court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted an expungement under the provisions of this section and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted such expungement. The information contained in such files shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expungement."

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 1213:
Expunge Multiple Charges/Occur Within 1 yr

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 12, 2005
Introduced by:	Reps. Moore, Sutton	**Summary by:**	Kory Goldsmith
Version:	PCS to First Edition H1213-CSRC-91		Committee Counsel

SUMMARY: ***House Bill 1213 would allow a person charged with multiple offenses to have those charges expunged if the alleged offenses occurred within the same 12 month period of time or the charges are subsequently dismissed or findings of not guilty or not responsible are entered in the same term of court. The PCS corrects several ambiguities in the original bill, including:***

- ***the offenses must have occurred within 12 months or been disposed of at the same term of court (prior version required that both conditions be satisfied),***
- ***a person could only get one expunction under this provision in a life-time (prior version put no limit on the number of expunctions that could be obtained over time)***
- ***provides a default definition for "term of court".***

The bill would become effective October 1, 2005.

CURRENT LAW: G.S. 15A-146 provides for the expunction of records when charges are dismissed or there is finding of not guilty. A person charged with any crime, whether a misdemeanor or a felony, who is not convicted of that offense, can apply to have the charge expunged. In order to have the records expunged, the court must find that the person has not previously received an expunction under:

- this section (G.S.15A-146);
- G.S. 15A-145 (expunction of records for first offenders under the age of 18 for misdemeanor convictions); or
- G.S. 90-96 (expunction for certain drug-related offenses).

In addition, the court must also find that the person had not previously been convicted of any felony under the laws of the United States, this State or any other state before ordering the expunction.

BILL ANALYSIS: House Bill 1213 would allow a person who is charged with multiple offenses that are dismissed or findings of not guilty or not responsible to apply to have each of those charges expunged if the offenses occurred within the same 12 month time period or if the charges are dismissed or findings entered in the same term of court. The multiple offenses do not have to arise out of the same transaction or occurrence nor do the multiple offenses have to have been consolidated for judgment.

The court is required to hold a hearing on the application. The court shall order the expunction if the court finds that the person had not previously obtained any of the following:

- Received an expunction under this subsection for multiple offenses.
- Received expunctions under G.S. 15A-145 or G.S. 90-96.
- Been convicted of any felony under the laws of the United States, this State or any other state.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

HOUSE BILL 1485

Short Title:	Search Warrants/Audio & Video Transmission.	(Public)
Sponsors:	Representatives Culpepper; and Starnes.	
Referred to:	Judiciary IV.	

April 21, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT SEARCH WARRANTS MAY BE OBTAINED BY AUDIO/VIDEO TRANSMISSIONS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-245(a) reads as rewritten:

"(a) Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official. The information must be shown by one or more of the following:

(1) Affidavit; or

(2) Oral testimony under oath or affirmation before the issuing official; or

(3) Oral testimony under oath or affirmation presented by a sworn law enforcement officer to the issuing official by means of an audio and video transmission in which both parties can see and hear each other. Prior to the use of audio and video transmission pursuant to this subdivision, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge and the chief district court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts."

SECTION 2. This act becomes effective October 1, 2005.

HOUSE BILL 1485:
Search Warrants/Audio & Video Transmission

BILL ANALYSIS

Committee:	House Judiciary IV	**Date:**	August 12, 2005
Introduced by:	Rep. Culpepper	**Summary by:**	Kory Goldsmith
Version:	First Edition		Committee Counsel

SUMMARY: HB 1485 permits oral testimony by a law enforcement officer in support of a search warrant application to be received by the issuing official by means of a two-way audio and visual connection.

The act would become effective October 1, 2005.

CURRENT LAW: G.S. 15A-245(a) provides that in considering an application for a search warrant, an issuing official may examine the applicant or any other person with pertinent information. The person being examined must be under oath. In order for information beyond that which is contained in the affidavit accompanying the application to be considered, it must be recorded or contemporaneously summarized in the record or on the face of the warrant.

BILL ANALYSIS: HB 1485 provides that the additional information must be by affidavit, oral testimony under oath or affirmation, or oral testimony under oath or affirmation by a sworn law enforcement officer to the issuing officer by means of a two-way audio and visual transmission. The procedures and equipment used for the two-way transmission must be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge and the chief district court judge for a judicial district or set of districts, and must be approved by the AOC.

Steve Rose, counsel to House Judiciary IV, substantially contributed to this summary.

H1485e1-SMRC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 733*

Short Title:	Street Gang Prevention Act.	(Public)
Sponsors:	Senators Graham; Berger of Franklin, Bingham, Cowell, Dalton, Dannelly, Dorsett, Holloman, Hoyle, Kinnaird, Lucas, Malone, Rand, Swindell, and Weinstein.	
Referred to:	Judiciary II.	

March 22, 2005

A BILL TO BE ENTITLED

AN ACT TO ENACT THE NORTH CAROLINA STREET GANG PREVENTION ACT AS RECOMMENDED BY THE HOUSE SELECT COMMITTEE ON STREET GANG PREVENTION.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 14 of the General Statutes is amended by adding a new Article to read:

"Article 13A.

"North Carolina Street Gang Prevention Act.

"**§ 14-50.15. Short title.**

This Article shall be known and may be cited as the "North Carolina Street Gang Prevention Act".

"**§ 14-50.16. Legislative findings and intent.**

(a) The General Assembly finds and declares that it is the right of every person to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals. It is not the intent of this Article to interfere with the exercise of the constitutionally protected rights of freedom of expression and association. The General Assembly recognizes the constitutional right of every citizen to harbor and express beliefs on any lawful subject whatsoever, to associate lawfully with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process.

(b) The General Assembly, however, further finds that the State of North Carolina is in a state of crisis that has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected.

(c) The General Assembly finds that there are criminal street gangs operating in North Carolina and that the number of gang-related murders is increasing. It is the intent of the General Assembly in enacting this Article to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs which together are the chief source of terror created by street gangs.

(d) The General Assembly further finds that an effective means of punishing and deterring the criminal activities of street gangs is through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by street gangs.

"**§ 14-50.17. Definitions.**

The following definitions apply in this Article:

(1) "Criminal street gang" or "street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, which engages in a pattern of criminal gang activity as defined in subdivision (2) of this section. The existence of the organization, association, or group of individuals associated in fact may be established by evidence of a common name or common identifying signs, symbols, tattoos, graffiti, or attire or other distinguishing characteristics.

(2) "Pattern of criminal gang activity" means the commission, attempted commission, conspiracy to commit, or solicitation, coercion, or intimidation of another person to commit at least two of the following offenses, provided that at least one of these offenses occurred after December 1, 2005, and the last of the offenses occurred within three years, excluding any periods of imprisonment, of prior criminal gang activity:

a. Any offense under Article 5 of Chapter 90 of the General Statutes (Controlled Substances Act).

b. Any offense under Chapter 14 of the General Statutes except Articles 9, 22A, 38, 40, 43, 46, 47, 59 thereof; and further excepting G.S. 14-78.1, 14-82, 14-86, 14-145, 14-179, 14-183, 14-184, 14-186, 14-190.9, 14-195, 14-197, 14-201, 14-247, 14-248, 14-313 thereof.

"**§ 14-50.18. Participation in criminal street gang activity prohibited.**

(a) It is unlawful for any person employed by or associated with a criminal street gang to conduct or participate in the criminal street gang through a pattern of criminal gang activity.

(b) It is unlawful for any person to acquire or maintain, directly or indirectly, through a pattern of criminal gang activity or proceeds derived therefrom, any interest in or control of any real or personal property of any nature, including money.

(c) It is unlawful for any person who occupies a position of organizer, supervisory position, or any other position of management with regard to a criminal street gang to engage in, directly or indirectly, or conspire to engage in, a pattern of criminal gang activity.

(d) It is unlawful for any person to cause, encourage, solicit, or coerce another to participate in a criminal street gang.

(e) It is unlawful for any person to communicate, directly or indirectly, with another any threat of injury or damage to the person or property of the other person or to any associate or relative of the other person with the intent to deter the person from assisting a member or associate of a criminal street gang to withdraw from such criminal street gang.

(f) It is unlawful for any person to communicate, directly or indirectly, with another any threat of injury or damage to the person or property of the other person or to any associate or relative of the other person with the intent to punish or retaliate against the person for having withdrawn from a criminal street gang.

(g) Any person who violates this section shall be punished as follows:

(1) A person who violates subsection (a) or (b) of this section shall, in addition to any other penalty imposed by law, be punished as a Class E felon.

(2) A person who violates subsection (a), (b), (d), (e), or (f) of this section may, if the person also violates subsection (c) of this section in the same course of conduct, in addition to any other penalty provided by law, be punished by imprisonment for an additional 10 years which shall be served consecutively to any other sentence imposed on the person by law.

(3) A person who violates subsection (d), (e), or (f) of this section shall, in addition to any other penalty provided by law, be punished as a Class G felon.

(h) Any crime committed in violation of this section shall be considered a separate offense.

"**§ 14-50.19. Enhanced offense for criminal gang activity.**

Unless a different classification is expressly stated, a person who is convicted of an offense that is committed for the benefit of, at the direction of, or in association with, any criminal street gang, is guilty of an offense that is one class higher than the offense committed. A Class A1 misdemeanor shall be enhanced to a Class I felony under this section.

This section does not apply to the offenses set forth in G.S. 14-50.18.

"**§ 14-50.20. Reports of disposition; criminal street gang activity.**

When a defendant is found guilty of an offense, the presiding judge shall determine whether the offense was committed for the benefit of, at the direction of, or in association with, any criminal street gang. If the judge determines that the offense so qualifies, then the judge shall indicate on the form reflecting the judgment that the offense involved criminal street gang activity. The clerk of court shall ensure that the official record of the defendant's conviction includes the court's determination.

"**§ 14-50.21. Contraband, seizure, and forfeiture.**

(a) All of the following are declared to be contraband, and no person shall have a property interest in them:

(1) All property that is directly or indirectly used or intended for use in any manner to facilitate a violation of this Article.

(2) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this Article.

(b) In any action under this section, the court may enter a restraining order in connection with any interest that is subject to forfeiture.

(c) Within 60 days of the date of the seizure of contraband pursuant to this section, the district attorney or the Attorney General shall initiate a forfeiture proceeding as provided in G.S. 14-2.3.

"**§ 14-50.22. Local ordinances not preempted by State law.**

Nothing in this Article shall prevent a local governing body from adopting and enforcing ordinances relating to gangs and gang violence that are consistent with this Article. Where local laws duplicate or supplement the provisions of this Article, this Article shall be construed as providing alternative remedies and not as preempting the field.

"**§ 14-50.23. Real property used by criminal street gangs declared a public nuisance; abatement; persons injured by gangs entitled to treble damages.**

Any real property that is erected, established, maintained, owned, leased, or used by any criminal street gang for the purpose of conducting criminal gang activity shall constitute a public nuisance and may be abated as provided by Article 1 of Chapter 19 of the General Statutes. If the property is owned by a person who is not a member of the criminal street gang, this section shall apply only if the person has knowledge of the criminal gang activity.

"**§ 14-50.24. Matters proved in criminal trial court.**

A conviction of an offense defined as criminal gang activity shall preclude the defendant from contesting any factual matters determined in the criminal proceeding in any subsequent civil action or proceeding based on the same conduct."

SECTION 2. Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-34.9. Discharging a firearm from within an enclosure.**

Unless covered under some other provision of law providing greater punishment, any person who willfully or wantonly discharges or attempts to discharge a firearm from within any building, structure, motor vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure toward a person or persons not within that enclosure shall be punished as a Class E felon."

SECTION 3. G.S. 15A-533 reads as rewritten:

"**§ 15A-533. Right to pretrial release in capital and noncapital cases.**

(a) A defendant charged with any crime, whether capital or noncapital, who is alleged to have committed this crime while still residing in or subsequent to his escape or during an unauthorized absence from involuntary commitment in a mental health facility designated or licensed by the Department of Health and Human Services, and whose commitment is determined to be still valid by the judge or judicial officer authorized to determine pretrial release to be valid, has no right to pretrial release. In

lieu of pretrial release, however, the individual shall be returned to the treatment facility in which he was residing at the time of the alleged crime or from which he escaped or absented himself for continuation of his treatment pending the additional proceedings on the criminal offense.

(b) A defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534.

(c) A judge may determine in his discretion whether a defendant charged with a capital offense may be released before trial. If he determines release is warranted, the judge must authorize release of the defendant in accordance with G.S. 15A-534.

(d) ~~Subject to rebuttal by the person, it shall be presumed~~ There shall be a rebuttable presumption that no condition of release will reasonably assure the appearance of the person as required and the safety of the community if a judicial official finds the following:

(1) There is reasonable cause to believe that the person committed an offense involving trafficking in a controlled substance;

(2) The drug trafficking offense was committed while the person was on pretrial release for another offense; and

(3) The person has been previously convicted of a Class A through E felony or an offense involving trafficking in a controlled substance and not more than five years has elapsed since the date of conviction or the person's release from prison for the offense, whichever is later.

(e) There shall be a rebuttable presumption that no condition of release will reasonably assure the appearance of the person as required and the safety of the community, if a judicial official finds the following:

(1) There is reasonable cause to believe that the person committed an offense for the benefit of, at the direction of, or in association with, any criminal street gang, as defined in G.S. 14-50.17;

(2) The offense described in subdivision (1) of this subsection was committed while the person was on pretrial release for another offense; and

(3) The person has been previously convicted of an offense described in G.S. 14-50.17, and not more than five years has elapsed since the date of conviction or the person's release for the offense, whichever is later.

~~Such person~~ Persons who are considered for bond under the provisions of subsections (d) and (e) of this section may only be released by a district or superior court judge upon a finding that there is a reasonable assurance that the person will appear and release does not pose an unreasonable risk of harm to the community."

SECTION 4. G.S. 15A-1340.16(d) reads as rewritten:

"(d) Aggravating Factors. – The following are aggravating factors:

(1) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

(2) The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

(2a) The offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy. A "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of felony or violent misdemeanor offenses, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and having a common name or common identifying sign, colors, or symbols.

(3) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(4) The defendant was hired or paid to commit the offense.

(5) The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(6) The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.

(7) The offense was especially heinous, atrocious, or cruel.

(8) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(9) The defendant held public office at the time of the offense and the offense related to the conduct of the office.

(10) The defendant was armed with or used a deadly weapon at the time of the crime.

(11) The victim was very young, or very old, or mentally or physically infirm, or handicapped.

(12) The defendant committed the offense while on pretrial release on another charge.

(13) The defendant involved a person under the age of 16 in the commission of the crime.

(14) The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

(15) The defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense.

(16) The offense involved the sale or delivery of a controlled substance to a minor.

(16a) The offense is the manufacture of methamphetamine and was committed where a person under the age of 18 lives, was present, or was otherwise endangered by exposure to the drug, its ingredients, its by-products, or its waste.

(17) The offense for which the defendant stands convicted was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.

(18) The defendant does not support the defendant's family.

(18a) The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

(19) The serious injury inflicted upon the victim is permanent and debilitating.

(20) Any other aggravating factor reasonably related to the purposes of sentencing.

Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation. Evidence necessary to establish that an enhanced sentence is required under ~~G.S. 15A-1340.16A~~G.S. 15A-1340.16A, G.S. 15A-1340.16B, or G.S. 14-50.19 may not be used to prove any factor in aggravation.

The judge shall not consider as an aggravating factor the fact that the defendant exercised the right to a jury trial."

SECTION 5. Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-1340.16B. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony that was committed for the benefit of, at the direction of, or in association with, any criminal street gang, and the defendant possessed, displayed, or discharged a firearm during the commission of the felony.**

(a) Notwithstanding G.S. 15A-1340.16A, a person who is convicted of a Class A, B1, B2, C, D, or E felony that was committed for the benefit of, at the direction of, or in association with, any criminal street gang as defined in G.S. 14-50.17, and who possessed, displayed, or discharged a firearm during the commission of the felony shall be punished pursuant to one of the following subdivisions:

(1) If the person possessed a firearm during the commission of the felony, the person shall, in addition to the punishment for the underlying felony, be sentenced to a minimum term of imprisonment for 60 months.

(2) If the person displayed a firearm during the commission of the felony, the person shall, in addition to the punishment for the underlying felony, be sentenced to a minimum term of imprisonment for 84 months.

(3) If the person discharged a firearm during the commission of the felony, the person shall, in addition to the punishment for the underlying felony, be sentenced to a minimum term of imprisonment for 120 months.

(b) An indictment or information for the Class A, B1, B2, C, D, or E felony shall allege in that indictment or information or in a separate indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the felony by possessing, displaying, or discharging the firearm. One pleading is sufficient for all Class A, B1, B2, C, D, or E felonies that are tried at a single trial.

(c) The State shall prove the issues set out in subsection (a) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to the issues. If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issues set out in subsection (a) of this section, then a jury shall be impaneled to determine the issues.

(d) The enhanced punishment provided by this section for the acts of possessing or displaying a firearm applies even if the firearm is incapable of firing.

(e) The court shall not suspend any sentence imposed under this section and shall not place a person sentenced under this section on probation for the sentence imposed under this section. Sentences imposed pursuant to this section shall be consecutive to all other sentences imposed and shall begin at the expiration of any other sentence being served by the defendant."

SECTION 6. The Revisor of Statutes shall recodify the existing G.S. 15A-1340.16B and subsequent statutes accordingly.

SECTION 7. G.S. 15A-1340.16A(c) reads as rewritten:

"(c) ~~If~~ Except as provided in G.S. 15A-1340.16B, if a person is convicted of a Class A, B1, B2, C, D, or E felony and it is found as provided in this section that: (i) the person committed the felony by using, displaying, or threatening the use or display of a firearm and (ii) the person actually possessed the firearm about his or her person, then the person shall have the minimum term of imprisonment to which the person is sentenced for that felony increased by 60 months. The maximum term of imprisonment shall be the maximum term that corresponds to the minimum term after it is increased by 60 months, as specified in G.S. 15A-1340.17(e) and (e1)."

SECTION 8. There is appropriated to the State Bureau of Investigation the amount of one hundred fifty thousand dollars ($150,000) to obtain an enterprise license for purchase of software that will create a statewide criminal street gang member database. The database software shall be substantially similar to the Gang Net Program that is currently being used in Durham County.

SECTION 9. There is appropriated to the Governor's Crime Commission, the sum of twenty million dollars ($20,000,000) for the 2005-2006 fiscal year to be used to provide grants for street gang violence prevention and intervention programs.

The Governor's Crime Commission shall develop the criteria for eligibility for these funds. The criteria shall include a matching requirement of twenty-five percent (25%), one-half of which may be in in-kind contributions, and presentation of a written

plan for the services to be provided by the funds. Funds shall be available to public and private entities or agencies for juvenile or adult programs that meet the criteria established by the Governor's Crime Commission.

The Governor's Crime Commission shall report on the uses of these funds no later than April 1, 2006, to the House of Representatives Appropriations Subcommittee on Justice and Public Safety, the Senate Appropriations Subcommittee on Justice and Public Safety, and the Fiscal Research Division.

SECTION 10. Sections 8 and 9 of this act become effective July 1, 2005. The remainder of this act becomes effective December 1, 2005, and applies to offenses committed on or after that date.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. 1

H. B. No. _____ DATE 8/12/05

S. B. No. 733 Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.)
Sen.) Graham

moves to amend the bill on page 8, line 35

( ) WHICH CHANGES THE TITLE

by striking the phrase "to obtain an enterprise license";

and to delete line 36-38 on the same page;

and to substitute ~~it~~ therefore "to create a Statewide Criminal street gang member database.";

and on page 8, line 39 by deleting the phrase "There is appropriated" and ~~page~~ line 40 by deleting the amount of $20M and substituting $2M. ~~and entering those monies~~ substituting from funds appropriated

SIGNED Malcolm Graham

ADOPTED X FAILED _____ TABLED _____

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 967

Committee Substitute Favorable 5/18/05

Short Title: Health Care Power of Atty/Dispos. of Remains. (Public)

Sponsors:

Referred to:

March 29, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT IF A VALIDLY EXECUTED HEALTH CARE POWER OF ATTORNEY AUTHORIZES THE HEALTH CARE AGENT TO EXERCISE RIGHTS WITH RESPECT TO ANATOMICAL GIFTS, AUTOPSY, OR DISPOSITION OF THE PRINCIPAL'S REMAINS, THE AUTHORIZING PROVISION WILL CONTINUE IN EFFECT AFTER THE DEATH OF THE PRINCIPAL FOR PURPOSES OF EXERCISING THE AUTHORIZED RIGHTS, TO DEFINE "DISPOSITION OF REMAINS", AND TO MAKE CONFORMING CHANGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 32A-16 reads as rewritten:

"**§ 32A-16. Definitions.**

As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified:

(1) "Disposition of remains" means the decision to bury or cremate human remains as defined in G.S. 90-210.121(17).

~~(1)~~(1a) "Health care" means any care, treatment, service, or procedure to maintain, diagnose, treat, or provide for the principal's physical or mental health or personal care and comfort including, life-sustaining procedures. "Health care" includes mental health treatment as defined in subdivision (8) of this section.

(2) "Health care agent" means the person appointed as a health care attorney-in-fact.

(3) "Health care power of attorney" means a written instrument, signed in the presence of two qualified witnesses, and acknowledged before a notary public, pursuant to which an attorney-in-fact or agent is appointed to act for the principal in matters relating to the health care of the principal, and which substantially meets the requirements of this Article.

(4) "Life-sustaining procedures" are those forms of care or treatment which only serve to artificially prolong the dying process and may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and other forms of treatment which sustain, restore or supplant vital bodily functions, but do not include care necessary to provide comfort or to alleviate pain.

(5) "Principal" means the person making the health care power of attorney.

(6) "Qualified witness" means a witness in whose presence the principal has executed the health care power of attorney, who believes the principal to be of sound mind, and who states that he (i) is not related within the third degree to the principal nor to the principal's spouse, (ii) does not know nor have a reasonable expectation that he would be entitled to any portion of the estate of the principal upon the principal's death under any existing will or codicil of the principal or under the Intestate Succession Act as it then provides, (iii) is not the attending physician or mental health treatment provider of the principal, nor an employee of the attending physician or mental health treatment provider, nor an employee of a health facility in which the principal is a patient, nor an employee of a nursing home or any group-care home in which the principal resides, and (iv) does not have a claim against any portion of the estate of the principal at the time of the principal's execution of the health care power of attorney.

(7) "Advance instruction for mental health treatment" or "advance instruction" means a written instrument as defined in G.S. 122C-72(1) pursuant to which the principal makes a declaration of instructions, information, and preferences regarding mental health treatment.

(8) "Mental health treatment" means the process of providing for the physical, emotional, psychological, and social needs of the principal for the principal's mental illness. "Mental health treatment" includes, but is not limited to, electroconvulsive treatment, treatment of mental illness with psychotropic medication, and admission to and retention in a facility for care or treatment of mental illness."

SECTION 2. G.S. 32A-20(b) reads as rewritten:

"**§ 32A-20. Effectiveness and duration; revocation.**

...

(b) ~~A~~ Except for purposes of exercising authority granted by a health care power of attorney with respect to anatomical gifts, autopsy, or disposition of remains as provided in G.S. 32A-19(b), a health care power of attorney is revoked by the death of the principal. A health care power of attorney may be revoked by the principal at any time, so long as the principal is capable of making and communicating health care decisions. The principal may exercise this right of revocation by executing and acknowledging an instrument of revocation, by executing and acknowledging a subsequent health care power of attorney, or in any other manner by which the principal

is able to communicate an intent to revoke. This revocation becomes effective only upon communication by the principal to each health care agent named in the revoked health care power of attorney and to the principal's attending physician or eligible psychologist.

...."

SECTION 3. G.S. 32A-25 reads as rewritten:

"**§ 32A-25. Statutory form health care power of attorney.**

The use of the following form in the creation of a health care power of attorney is lawful and, when used, it shall meet the requirements of and be construed in accordance with the provisions of this Article:

(Notice: This document gives the person you designate your health care agent broad powers to make health care decisions, including mental health treatment decisions, for you. Except to the extent that you express specific limitations or restrictions on the authority of your health care agent, this power includes the power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive, admit you to a facility, and administer certain treatments and medications. This power exists only as to those health care decisions for which you are unable to give informed consent.

This form does not impose a duty on your health care agent to exercise granted powers, but when a power is exercised, your health care agent will have to use due care to act in your best interests and in accordance with this document. For mental health treatment decisions, your health care agent will act according to how the health care agent believes you would act if you were making the decision. Because the powers granted by this document are broad and sweeping, you should discuss your wishes concerning life-sustaining procedures, mental health treatment, and other health care decisions with your health care agent.

Use of this form in the creation of a health care power of attorney is lawful and is authorized pursuant to North Carolina law. However, use of this form is an optional and nonexclusive method for creating a health care power of attorney and North Carolina law does not bar the use of any other or different form of power of attorney for health care that meets the statutory requirements.)

1. Designation of health care agent.

I, _____, being of sound mind, hereby appoint

Name: _____

Home Address: _____

Home Telephone Number _____ Work Telephone Number _____

as my health care attorney-in-fact (herein referred to as my "health care agent") to act for me and in my name (in any way I could act in person) to make health care decisions for me as authorized in this document.

If the person named as my health care agent is not reasonably available or is unable or unwilling to act as my agent, then I appoint the following persons (each to act alone and successively, in the order named), to serve in that capacity: (Optional)

A. Name: _____

Home Address: _____

Home Telephone Number _____ Work Telephone Number_____

B. Name: _____

Home Address: _____

Home Telephone Number _____ Work Telephone Number_____

Each successor health care agent designated shall be vested with the same power and duties as if originally named as my health care agent.

2. Effectiveness of appointment.

(Notice: This health care power of attorney may be revoked by you at any time in any manner by which you are able to communicate your intent to revoke to your health care agent and your attending physician.)

Absent revocation, the authority granted in this document shall become effective when and if the physician or physicians designated below determine that I lack sufficient understanding or capacity to make or communicate decisions relating to my health care and will continue in effect during my incapacity, until my ~~death.~~death, except if I authorize my health care agent to exercise my rights with respect to anatomical gifts, autopsy, or disposition of my remains, this authority will continue after my death to the extent necessary to exercise the authority granted in this document for these purposes.

This determination shall be made by the following physician or physicians. For decisions related to mental health treatment, this determination shall be made by the following physician or eligible psychologist. (You may include here a designation of your choice, including your attending physician or eligible psychologist, or any other physician or eligible psychologist. You may also name two or more physicians or eligible psychologists, if desired, both of whom must make this determination before the authority granted to the health care agent becomes effective.):

_____

_____

_____

_____

3. General statement of authority granted.

Except as indicated in section 4 below, I hereby grant to my health care agent named above full power and authority to make health care decisions, including mental health treatment decisions, on my behalf, including, but not limited to, the following:

A. To request, review, and receive any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records, and to consent to the disclosure of this information.

B. To employ or discharge my health care providers.

C. To consent to and authorize my admission to and discharge from a hospital, nursing or convalescent home, or other institution.

D. To consent to and authorize my admission to and retention in a facility for the care or treatment of mental illness.

E. To consent to and authorize the administration of medications for mental health treatment and electroconvulsive treatment (ECT) commonly referred to as "shock treatment".

F. To give consent for, to withdraw consent for, or to withhold consent for, X ray, anesthesia, medication, surgery, and all other diagnostic and treatment procedures ordered by or under the authorization of a licensed physician, dentist, or podiatrist. This authorization specifically includes the power to consent to measures for relief of pain.

G. To authorize the withholding or withdrawal of life-sustaining procedures when and if my physician determines that I am terminally ill, permanently in a coma, suffer severe dementia, or am in a persistent vegetative state. Life-sustaining procedures are those forms of medical care that only serve to artificially prolong the dying process and may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and other forms of medical treatment which sustain, restore or supplant vital bodily functions. Life-sustaining procedures do not include care necessary to provide comfort or alleviate pain.

I DESIRE THAT MY LIFE NOT BE PROLONGED BY LIFE-SUSTAINING PROCEDURES IF I AM TERMINALLY ILL, PERMANENTLY IN A COMA, SUFFER SEVERE DEMENTIA, OR AM IN A PERSISTENT VEGETATIVE STATE.

H. To exercise any right I may have to make a disposition of any part or all of my body for medical ~~purposes,~~purposes; ~~to donate my organs,~~ to authorize an ~~autopsy,~~autopsy; to make an anatomical gift of my organs or body, or part thereof, and to direct the disposition of my remains.

I. To take any lawful actions that may be necessary to carry out these decisions, including the granting of releases of liability to medical providers.

4. Special provisions and limitations.

(Notice: The above grant of power is intended to be as broad as possible so that your health care agent will have authority to make any decisions you could make to obtain or terminate any type of health care. If you wish to limit the scope of your health care agent's powers, you may do so in this section.)

A. In exercising the authority to make health care decisions on my behalf, the authority of my health care agent is subject to the following special provisions and limitations (Here you may include any specific limitations you deem appropriate such as: your own definition of when life-sustaining treatment should be withheld or discontinued, or instructions to refuse any specific types of treatment that are inconsistent with your religious beliefs, or unacceptable to you for any other reason.):

B. In exercising the authority to make mental health decisions on my behalf, the authority of my health care agent is subject to the following special provisions and limitations. (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority to make only mental health treatment decisions, your own instructions regarding the administration or withholding of psychotropic medications and electroconvulsive treatment (ECT), instructions regarding your admission to and retention in a health care facility for mental health treatment, or instructions to refuse any specific types of treatment that are unacceptable to you):

C. (Notice: This health care power of attorney may incorporate or be combined with an advance instruction for mental health treatment, executed in accordance with Part 2 of Article 3 of Chapter 122C of the General Statutes, which you may use to state your instructions regarding mental health treatment in the event you lack sufficient understanding or capacity to make or communicate mental health treatment decisions. Because your health care agent's decisions about decisions must be consistent with any statements you have expressed in an advance instruction, you should indicate here whether you have executed an advance instruction for mental health treatment.):

D. In exercising the authority to make decisions regarding autopsy, anatomical gifts and disposition of remains on my behalf, the authority of my health care agent is subject to the following special provisions and limitations. (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority and the scope of authority, instructions regarding gifts of the body or body part, or instructions regarding burial or cremation):

5. Guardianship provision.

If it becomes necessary for a court to appoint a guardian of my person, I nominate my health care agent acting under this document to be the guardian of my person, to serve without bond or security. The guardian shall act consistently with G.S. 35A-1201(a)(5).

6. Reliance of third parties on health care agent.

A. No person who relies in good faith upon the authority of or any representations by my health care agent shall be liable to me, my estate, my heirs, successors, assigns, or personal representatives, for actions or omissions by my health care agent.

B. The powers conferred on my health care agent by this document may be exercised by my health care agent alone, and my health care agent's signature or act under the authority granted in this document may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. All acts performed in good faith by my health care agent pursuant to this power of attorney are done with my consent and shall have the same validity and effect as if I were present and exercised the powers myself, and shall inure to the benefit of and bind me, my estate, my heirs, successors, assigns, and personal representatives. The authority of my health care agent pursuant to this power of attorney shall be superior to and binding upon my family, relatives, friends, and others.

7. Miscellaneous provisions.

A. I revoke any prior health care power of attorney.

B. My health care agent shall be entitled to sign, execute, deliver, and acknowledge any contract or other document that may be necessary, desirable, convenient, or proper in order to exercise and carry out any of the powers described in this document and to incur reasonable costs on my behalf incident to the exercise of these powers; provided, however, that except as shall be necessary in order to exercise the powers described in this document relating to my health care, my health care agent shall not have any authority over my property or financial affairs.

C. My health care agent and my health care agent's estate, heirs, successors, and assigns are hereby released and forever discharged by me, my estate, my heirs, successors, and assigns and personal representatives from all liability and from all claims or demands of all kinds arising out of the acts or omissions of my health care agent pursuant to this document, except for willful misconduct or gross negligence.

D. No act or omission of my health care agent, or of any other person, institution, or facility acting in good faith in reliance on the authority of my health care agent pursuant to this health care power of attorney shall be considered suicide, nor the cause of my death for any civil or

criminal purposes, nor shall it be considered unprofessional conduct or as lack of professional competence. Any person, institution, or facility against whom criminal or civil liability is asserted because of conduct authorized by this health care power of attorney may interpose this document as a defense.

8. Signature of principal.

By signing here, I indicate that I am mentally alert and competent, fully informed as to the contents of this document, and understand the full import of this grant of powers to my health care agent.

_____ (SEAL) _____

Signature of Principal Date

9. Signatures of Witnesses.

I hereby state that the Principal, _____, being of sound mind, signed the foregoing health care power of attorney in my presence, and that I am not related to the principal by blood or marriage, and I would not be entitled to any portion of the estate of the principal under any existing will or codicil of the principal or as an heir under the Intestate Succession Act, if the principal died on this date without a will. I also state that I am not the principal's attending physician, nor an employee of the principal's attending physician, nor an employee of the health facility in which the principal is a patient, nor an employee of a nursing home or any group care home where the principal resides. I further state that I do not have any claim against the principal.

Witness: _____ Date: _____

Witness: _____ Date: _____

STATE OF NORTH CAROLINA

COUNTY OF_____

CERTIFICATE

I, _____, a Notary Public for _____ County, North Carolina, hereby certify that _____ appeared before me and swore to me and to the witnesses in my presence that this instrument is a health care power of attorney, and that he/she willingly and voluntarily made and executed it as his/her free act and deed for the purposes expressed in it.

I further certify that _____ and _____, witnesses, appeared before me and swore that they witnessed _____ sign the attached health care power of attorney, believing him/her to be of sound mind; and also swore that at the time they witnessed the signing (i) they were not related within the third degree to him/her or his/her spouse, and (ii) they did not know nor have a reasonable expectation that they would be entitled to any portion of his/her estate upon his/her death under any will or codicil thereto then

existing or under the Intestate Succession Act as it provided at that time, and (iii) they were not a physician attending him/her, nor an employee of an attending physician, nor an employee of a health facility in which he/she was a patient, nor an employee of a nursing home or any group-care home in which he/she resided, and (iv) they did not have a claim against him/her. I further certify that I am satisfied as to the genuineness and due execution of the instrument.

This the _____ day of _____, ____

_____
Notary Public

My Commission Expires:

_____

(A copy of this form should be given to your health care agent and any alternate named in this power of attorney, and to your physician and family members.)"

SECTION 4. G.S. 130A-389(b) reads as rewritten:

"(b) In deaths where the Chief Medical Examiner and the medical examiner investigating the case do not deem it advisable and in the public interest that an autopsy be performed, but the next-of-kin of the deceased requests that an autopsy be performed, the Chief Medical Examiner or a designated pathologist may perform the autopsy and the cost shall be paid by the ~~next-of-kin.~~ next-of-kin, unless the deceased's health care power of attorney granted authority for such decisions to the health care agent."

SECTION 5. G.S. 130A-398 reads as rewritten:

"**§ 130A-398. Limitation on right to perform autopsy.**

The right to perform an autopsy shall be limited to those cases in which:

(1) The Chief Medical Examiner or a county medical examiner, acting pursuant to G.S. 130A-389, directs that an autopsy be performed;

(2) The Commission of Anatomy, acting pursuant to G.S. 130A-415, has given written consent for an autopsy to be performed on an unclaimed body;

(3) A prosecuting officer or district attorney, acting pursuant to G.S. 15-7 in case of homicide, directs that an autopsy be performed;

(4) The decedent directs in writing prior to death that an autopsy be performed upon the occurrence of the decedent's death;

(4a) The health care agent under a health care power of attorney with authority to make decisions with respect to autopsies;

(5) The personal representative of the estate of the decedent requests that an autopsy be performed upon the decedent; or

(6) Any of the following persons, in order of priority, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual

opposition by a member of the same or prior class, authorizes an autopsy to be performed:

a. The spouse;
b. Any adult child or stepchild;
c. Any parent or stepparents;
d. Any adult sibling;
e. A guardian of the person of the decedent at the time of the decedent's death;
f. Any relative or person who accepts responsibility for final disposition of the body by other customary and lawful procedures;
g. Any person under obligation to dispose of the body."

SECTION 6. G.S. 130A-404(b) reads as rewritten:

"(b) If the decedent has not made a gift in the manner prescribed in G.S. 130A-406, then any of the following persons, in order of priority stated, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class, may give all or any part of the decedent's body for any purpose specified in G.S. 130A-405.

(1) ~~The spouse;~~The health care agent under a health care power of attorney with authority to make decisions with respect to anatomical gifts;
(2) ~~An adult child;~~The spouse;
(3) ~~Either parent;~~An adult child;
(4) ~~An adult sibling;~~Either parent;
(5) ~~A guardian of the person of the decedent at the time of decedent's death;~~An adult sibling;
(6) ~~Any other person authorized or under obligation to dispose of the body.~~A guardian of the person of the decedent at the time of decedent's death;
(7) Any other person authorized or under obligation to dispose of the body."

SECTION 7. This act becomes effective October 1, 2005, and applies to powers of attorney created before and after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

HOUSE BILL 1213

Short Title:	Expunge Multiple Charges/Occur Within 1 yr.	(Public)
Sponsors:	Representatives Moore, Sutton (Primary Sponsors); Parmon and Womble.	
Referred to:	Judiciary II.	

April 13, 2005

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A PERSON CHARGED WITH MULTIPLE OFFENSES MAY HAVE THOSE CHARGES EXPUNGED IF THE ALLEGED OFFENSES OCCURRED WITHIN THE SAME TWELVE-MONTH PERIOD OF TIME AND THE CHARGES ARE SUBSEQUENTLY DISMISSED OR FINDINGS OF NOT GUILTY OR NOT RESPONSIBLE ARE ENTERED AT THE SAME TERM OF COURT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-146 reads as rewritten:

"**§ 15A-146. Expunction of records when charges are dismissed or there are findings of not ~~guilty.~~guilty; expunction of records in certain circumstances for charges of multiple offenses when charges are subsequently dismissed or there are findings of not guilty at the same term of court.**

(a) If any person is charged with a crime, either a misdemeanor or a felony, or was charged with an infraction under G.S. 18B-302(i) prior to December 1, 1999, and the charge is dismissed, or a finding of not guilty or not responsible is entered, that person may apply to the court of the county where the charge was brought for an order to expunge from all official records any entries relating to his apprehension or trial. The court shall hold a hearing on the application and, upon finding that the person had not previously received an expungement under this section, G.S. 15A-145, or G.S. 90-96, and that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

(a1) Notwithstanding subsection (a) of this section, if a person is charged with multiple offenses that occurred within the same 12-month period of time and the

charges are dismissed, or findings of not guilty or not responsible are entered at the same term of court, then a person may apply to have each of those charges expunged. There is no requirement that the multiple offenses arise out of the same transaction or occurrence or that the multiple offenses were consolidated for judgment provided the offenses all occurred within the same 12-month period of time. The court shall hold a hearing on the application. If the court finds that the person had not previously received an expungement under this section except as allowed for multiple offenses under this subsection, that the person had not previously received an expungement under G.S. 15A-145 or G.S. 90-96, and that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

(b) The court may also order that the said entries shall be expunged from the records of the court, and direct all law-enforcement agencies bearing record of the same to expunge their records of the entries. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with the form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. The costs of expunging these records shall not be taxed against the petitioner.

(b1) Any person entitled to expungement under this section may also apply to the court for an order expunging DNA records when the person's case has been dismissed by the trial court and the person's DNA record or profile has been included in the State DNA Database and the person's DNA sample is stored in the State DNA Databank. A copy of the application for expungement of the DNA record or DNA sample shall be served on the district attorney for the judicial district in which the felony charges were brought not less than 20 days prior to the date of the hearing on the application. If the application for expungement is granted, a certified copy of the trial court's order dismissing the charges shall be attached to an order of expungement. The order of expungement shall include the name and address of the defendant and the defendant's attorney and shall direct the SBI to send a letter documenting expungement as required by subsection (b2) of this section.

(b2) Upon receiving an order of expungement entered pursuant to subsection (b1) of this section, the SBI shall purge the DNA record and all other identifying information from the State DNA Database and the DNA sample stored in the State DNA Databank covered by the order, except that the order shall not apply to other offenses committed by the individual that qualify for inclusion in the State DNA Database and the State DNA Databank. A letter documenting expungement of the DNA record and destruction of the DNA sample shall be sent by the SBI to the defendant and the defendant's attorney at the address specified by the court in the order of expungement.

(c) The Clerk of Superior Court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted an expungement under the provisions of this section and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted such expungement. The information contained in such files shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expungement."

SECTION 2. This act is effective when it becomes law.

Paul Harris - Trend Director Assoc Free

HOUSE BILL 967: Health Care Power of Atty/Dispos. of Remains

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	August 11, 2005
Introduced by:	Rep. Tucker	**Summary by:**	Kory Goldsmith
Version:	PCS to Second Edition H967-CSRC-85		Committee Counsel

SUMMARY: House Bill 967 would extend a health care power of attorney past death of the principal for purposes of exercising explicitly granted rights with respect to decisions of anatomical gifts, autopsy and disposition of remains. The PCS makes technical and clarifying changes.

The bill would become effective October 1, 2005, and apply to all powers of attorney whenever created.

CURRENT LAW:

Health Care Powers of Attorney. A health care power of attorney may authorize the health care agent to exercise rights the principal may have with respect to anatomical gifts, autopsies, and disposition of the remains of the principal. However, the health care power of attorney is revoked by the death of the principal.

Autopsies. Medical Examiner investigations are authorized by statute for deaths resulting from any of the following circumstances: 1) violence, poisoning, accident, suicide or homicide; 2) occurring suddenly when the deceased has been in apparent good health or when unattended by a physician; 3) occurring in jail, prison, correctional institution or in police custody; 4) occurring as a result of execution by the State; or 5) occurring under any suspicious, unusual or unnatural circumstance. The Medical Examiner may conduct an autopsy or other study if the Medical Examiner deems it advisable and in the public interest. Other autopsies may be requested by the next-of-kin of the deceased. G.S. 130-398 provides that the right to perform an autopsy shall be limited to those cases in which:

1. The Chief Medical Examiner or a county medical examiner, acting pursuant to G.S. 130A-389, directs that an autopsy be performed.
2. The Commission of Anatomy, acting pursuant to G.S. 130A-415, has given written consent for an autopsy to be performed on an unclaimed body.
3. A prosecuting officer or district attorney, acting pursuant to G.S. 15-7 in case of homicide, directs that an autopsy be performed.
4. The decedent directs in writing prior to death that an autopsy be performed upon the occurrence of the decedent's death.
5. The personal representative of the estate of the decedent requests that an autopsy be performed upon the decedent. OR
6. Any of the following persons, in order of priority, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual opposition by a member of the same or prior class, authorizes an autopsy to be performed:
    a. The spouse.
    b. Any adult child or stepchild.
    c. Any parent or stepparents.
    d. Any adult sibling.
    e. A guardian of the person of the decedent at the time of the decedent's death.

f. Any relative or person who accepts responsibility for final disposition of the body by other customary and lawful procedures.
g. Any person under obligation to dispose of the body.

Anatomical Gifts. A person of sound mind and at least 18 years old may give all or part of that individual's body upon death as an anatomical gift. If no gift has been made, then any of the following persons, in order of priority, may make the anatomical gift at the time of death (either immediately before or after):

1. The spouse.
2. An adult child.
3. Either parent.
4. An adult sibling.
5. A guardian of the person of the decedent at the time of decedent's death.
6. Any other person authorized or under obligation to dispose of the body.

Disposition of Remains. A person at 18 years of age may authorize the disposition of that person's remains in a will, in a health care power of attorney, a pre-need funeral contract, cremation authorization form, or in a written statement signed by the person and witnessed by 2 others at least 18 years old. If there is no such authorization, the following persons, in order, may authorize the disposition of the remains:

1. The surviving spouse.
2. A majority of the surviving children.
3. The surviving parents.
4. A majority of the surviving siblings.
5. A majority of the persons in the classes of the next degrees of kinship, in descending order, who, under State law, would inherit the decedent's estate if the decedent died intestate.
6. A person who has exhibited special care and concern for the decedent and is willing and able to make decisions about the disposition.

BILL ANALYSIS:

Section 1 amends the definitions applicable to the craeations of health care powers of attorney to define "disposition of remains" to mean the decision to bury or cremate human remains.

Sections 2 and 3 would allow the health care power of attorney to extend past death of the principal when the health care power of attorney authorizes the health care agent to exercise rights of the principal with respect to anatomical gifts, autopsy, or disposition of the remains so that the health care agent may exercise the rights granted. The bill would also make a conforming change in the statutory short form health care power of attorney.

Sections 4, 5, and 6 would make conforming changes to the statutes governing autopsy, anatomical gifts and disposition of remains to allow for the health care agent to make decisions with regard to those actions.

EFFECTIVE DATE: The act would become effective October 1, 2005 and apply to powers of attorney created before or after that date.

Erika Churchill, counsel to House Judiciary I, substantially contributed to this summary.

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	June 1, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 1289	Cell Phone Use by Drivers Under 18 Prohibited.	Senator Bingham
SB 1555	Revise Articles 1 and 7 of the UCC.	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, June 1, 2006, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 1289	Cell Phone Use by Drivers Under 18 Prohibited.	Senator Bingham
SB 1555	Revise Articles 1 and 7 of the UCC.	Senator Hartsell

Presentations

Other Business

Adjournment

Judiciary II Committee

Minutes

June 1, 2006

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on June 1, 2006, with twelve members present. Senator Hartsell introduced pages Brandon James Broome, Justin R. Huntley, Justin M. Foxx, Fanicia Hopper, Kelsey Murray and Claire Brown and thanked them for their services.

Senator Snow requested that HB 2358, which was not on the agenda, be accepted as time sensitive and heard by the committee. Since Kory Goldsmith, Staff Attorney, had worked on the bill and was familiar with the contents, the bill was allowed to be heard.

HB 2358 (Use of Activity Buses for Local Events.) Senator Hartsell recognized Senator Snow to introduce the bill. Senator Snow gave an explanation and then asked Representative Rapp to explain the bill. Senator Webster moved for a favorable report. All voted and the motion passed.

SB 1289 (Cell Phone Use by Drivers Under 18 Prohibited.) Senator Apodaca move to accept the Committee Substitute for purposes of discussion. All voted and the motion passed. Senator Bingham was recognized to explain the bill. Senator Bingham presented an amendment and moved that it be adopted. All voted and the amendment was accepted. Sen. Berger presented and amendment and was recognized for an explanation. Senator Berger then presented a perfecting amendment and moved for adoption. Senator Bingham accepted the perfected amendment. Senator Hartsell called for a vote on the perfecting amendment. All voted and the perfected amendment passed. The Committee then heard the amendment with the perfected amendment. All voted and the amendment passed. Senator Berger presented a second amendment. Questions from Senators Dorsett and Webster were answered by Senator Bingham and Mr. Vitaglione, representing the North Carolina Child Advocacy Institute. Mr. John Carr, representing the Alliance of Automobile Manufacturers, and Mr. Arthur Goodwin, of the Highway Safety Division of UNC spoke on the amendment. Senator Bingham opposed the amendment. All voted and the motion failed. Senator Bingham moved to accept a technical amendment. All voted and the motion passed. Senator Bingham moved for a favorable report, unfavorable as to the original bill, favorable as amended and rolled into a new committee substitute. All voted and the motion passed.

SB 1555 (Revise Articles 1 and 7 of the UCC.) As this was Senator Hartsell's bill, Senator Berger was asked to chair the Committee. Senator Hartsell presented the bill and asked Kory Goldsmith, Staff Attorney, to add additional explanation and to present an amendment. Questions by Senators Kerr, Webster and Kinnaird were answered by Senator Hartsell. Floyd Lewis from the General Statutes Commission added additional explanation. Mr. Jim Beckwith, representing the North Carolina Central University

School of Law, Uniform Commercial Code Committee of the Business Law Section of the North Carolina Bar Association, spoke on the bill. Senator Hartsell moved for a favorable adoption of the amendment. All voted and the amendment passed. Senator Berger called for a favorable report, unfavorable as to the original bill, favorable as amended and rolled into a new committee substitute. All voted and the motion passed.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, June 01, 2006

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B.(CS #1) **2358** Use of Activity Buses for Local Events.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 6-1-06

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Brenda Freeman	DMV
Martha Harris	UNC-IOG
Wayne Goodwin	DOI
Phil Kaplan	Kaplan Strategies
Sean Perry	Duke Energy
Gary Robertson	AP
AL DEITCH	DOA/YAIO
Alex Sewell	NCSBR
Carol Kerr	Action for Children

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 6-1-06

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Chip Killian	Nelson Mullins
Susan Valaun	Nationwide
Jon Carr	Jordan Price Law firm
Floyd Lewis	General Statutes Commission
James Beckwith	UCC Committee NC Bar Association
Tom Votaglune	Child Fatality Task Force
Arthur Goodwin	UNC Highway Safety Research Center
P Bly Hall	General Statutes Commission
Paul Stock	NCBA
Lu Hodge	KCCH
Jim Stewart	IFNC

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — Name of Committee

6-1-06 — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Chad Hinton	Civitas Institute
Keith Richardson	Intern for Sen. Forrester
Mandy Locke	N+O
saran owen	Sen. Jacumin
BRIAN LEWIS	Covenant w/ NC's Children
David Stoller	STATE FARM
Adam Keith	Sen D. Berger
Abigail Brack	senate Page
Jasmine Bowers	Senate Page
Hannah Welch	Senate Page
Braden Reid	Intern Sen. Dannelly

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 3

HOUSE BILL 2358

Committee Substitute Favorable 5/25/06
Third Edition Engrossed 5/31/06

Short Title: Use of Activity Buses for Local Events. (Local)

Sponsors:

Referred to:

May 23, 2006

A BILL TO BE ENTITLED

AN ACT TO ALLOW THE HAYWOOD COUNTY CONSOLIDATED SCHOOL SYSTEM BOARD OF EDUCATION TO PERMIT THE USE OF PUBLIC SCHOOL ACTIVITY BUSES TO SERVE THE TRANSPORTATION NEEDS OF THE NORTH CAROLINA INTERNATIONAL FOLK FESTIVAL, INC., AND HAYWOOD COMMUNITY COLLEGE EVENTS TO BE HELD IN HAYWOOD COUNTY.

The General Assembly of North Carolina enacts:

SECTION 1. Notwithstanding G.S. 66-58 or any other provision of law, the Haywood County Consolidated School System Board of Education may enter into a contract, under terms and conditions set by the Haywood County Consolidated School System Board of Education to permit public school activity buses to be used from June through August of each year for activities and events related to the North Carolina International Folk Festival, Inc., doing business as Folkmoot, USA, and Haywood Community College, doing business as "Mountain Echo: A Homecoming", to be held in Haywood County.

State funds shall not be used for the use and operation of activity buses under this act.

Neither the State of North Carolina nor the Haywood County Consolidated School System Board of Education shall incur any liability for any damages resulting from the use or operation of activity buses under this act. North Carolina shall require any entity entering into a contract with the Haywood County Consolidated School System Board of Education to carry sufficient liability insurance covering the use and operation of activity buses under this act.

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

S 1

SENATE BILL 1289

Short Title:	Cell Phone Use by Drivers Under 18 Prohibited.	(Public)
Sponsors:	Senators Bingham, Purcell; Allran, and Apodaca.	
Referred to:	Judiciary II.	

May 11, 2006

A BILL TO BE ENTITLED

AN ACT TO REDUCE FATALITIES AMONG NEW TEEN DRIVERS BY MAKING THE USE OF A MOBILE PHONE UNLAWFUL FOR A PERSON LESS THAN EIGHTEEN YEARS OF AGE AND WHO HOLDS A PROVISIONAL LICENSE WHILE DRIVING A MOTOR VEHICLE ON A PUBLIC STREET OR HIGHWAY, AS RECOMMENDED BY THE NC CHILD FATALITY TASK FORCE.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 20 of the General Statutes is amended by adding a new section to read:

"**§ 20-140.6. Unlawful use of a mobile phone.**

(a) Definitions. – For purposes of this section, the following terms shall mean:

(1) Mobile telephone. – A device used by subscribers and other users of wireless telephone service to access such service.

(2) Wireless telephone service. – A service that is a two-way real-time voice telecommunications service that is interconnected to a public switched telephone network and is provided by a commercial mobile radio service, as such term is defined by 47 C.F.R. § 20.3.

(3) Using. – Holding a mobile telephone to, or in the immediate proximity of, the user's ear.

(4) Handheld mobile telephone. – A mobile telephone with which a user engages in a call using at least one hand.

(5) Hands-free mobile telephone. – A mobile telephone that has an internal feature or function, or that is equipped with an attachment or addition, whether or not permanently part of such mobile telephone, by which a user engages in a call without the use of either hand, whether or not the use of either hand is necessary to activate, deactivate, or initiate a function of such telephone.

(6) Engage in a call. – Talking into or listening on a mobile, or handheld mobile telephone, but shall not include holding a mobile telephone to activate, deactivate, or initiate a function of such telephone.

(7) Immediate proximity. – That distance as permits the operator of a mobile telephone to hear telecommunications transmitted over such mobile telephone but shall not require physical contact with such operator's ear.

(8) Additional technology. – Any technology that provides access to digital media such as a camera, electronic mails, music, the Internet, or games.

(b) Offense. – Except as otherwise provided in this section, no person under the age of 18 years shall operate a motor vehicle on a public street or highway while using a mobile telephone, hands-free mobile telephone technology, or any other additional technology associated with a mobile phone that would distract the driver while the vehicle is in motion. A provisional licensee who operates a motor vehicle and who holds a mobile telephone to, or in the immediate proximity of, his or her ear while the motor vehicle is in motion is presumed to be engaging in a call within the meaning of this section. The presumption established by this subsection is rebuttable by evidence tending to show that the operator was not engaged in a call.

(c) Seizure. – The provisions of this section shall not be construed as authorizing the seizure or forfeiture of a mobile telephone, unless otherwise provided by law.

(d) Exceptions. – The provisions of subsection (b) of this section shall not apply if the use of a mobile telephone is for the sole purpose of communicating with any of the following regarding an emergency situation: an emergency response operator; a hospital, physician's office, or health clinic; a public or privately owned ambulance company or service; a fire department; or a law enforcement agency.

(e) Local Ordinances. – No local government may pass any ordinance regulating the use of mobile telephones while operating motor vehicles on public streets, highways, or public vehicular areas.

(f) Violation. – A violation of this section shall be a waivable infraction and requires payment of court costs. There shall be no fines, insurance points, or drivers license points assessed for a violation of this section. Upon waiver of responsibility, or being found responsible by a court of competent jurisdiction, the Division of Motor Vehicles shall be notified and provided with any information the Division requires to impose the penalty.

(g) Penalty. – The penalty for a violation of this section shall require a provisional licensee to remain at the licensee's current level of graduated licensing for an additional six months, or until the licensee turns 18 years of age, if that occurs before the date of the completion of the six-month penalty period."

SECTION 2. G.S. 20-11(c) reads as rewritten:

"(c) Level 1 Restrictions. – A limited learner's permit authorizes the permit holder to drive a specified type or class of motor vehicle only under the following conditions:

(1) The permit holder must be in possession of the permit.

(2) A supervising driver must be seated beside the permit holder in the front seat of the vehicle when it is in motion. No person other than the supervising driver can be in the front seat.

(3) For the first six months after issuance, the permit holder may drive only between the hours of 5:00 a.m. and 9:00 p.m.

(4) After the first six months after issuance, the permit holder may drive at any time.

(5) Every person occupying the vehicle being driven by the permit holder must have a safety belt properly fastened about his or her body, or be restrained by a child passenger restraint system as provided in G.S. 20-137.1(a), when the vehicle is in motion.

(6) The permit holder shall not use a mobile telephone or handheld mobile telephone while operating a motor vehicle except in compliance with G.S. 20-140.6."

SECTION 3. G.S. 20-11(e) reads as rewritten:

"(e) Level 2 Restrictions. – A limited provisional license authorizes the license holder to drive a specified type or class of motor vehicle only under the following conditions:

(1) The license holder shall be in possession of the license.

(2) The license holder may drive without supervision in any of the following circumstances:

a. From 5:00 a.m. to 9:00 p.m.

b. When driving to or from work.

c. When driving to or from an activity of a volunteer fire department, volunteer rescue squad, or volunteer emergency medical service, if the driver is a member of the organization.

(3) The license holder may drive with supervision at any time. When the license holder is driving with supervision, the supervising driver shall be seated beside the license holder in the front seat of the vehicle when it is in motion. The supervising driver need not be the only other occupant of the front seat, but shall be the person seated next to the license holder.

(4) When the license holder is driving the vehicle and is not accompanied by the supervising driver, there may be no more than one passenger under 21 years of age in the vehicle. This limit does not apply to passengers who are members of the license holder's immediate family or whose primary residence is the same household as the license holder. However, if a family member or member of the same household as the license holder who is younger than 21 years of age is a passenger in the vehicle, no other passengers under 21 years of age, who are not members of the license holder's immediate family or members of the license holder's household, may be in the vehicle.

(5) Every person occupying the vehicle being driven by the license holder shall have a safety belt properly fastened about his or her body, or be

restrained by a child passenger restraint system as provided in G.S. 20-137.1(a), when the vehicle is in motion.

(6) The permit holder shall not use a mobile telephone or handheld mobile telephone while operating a motor vehicle except in compliance with G.S. 20-140.6."

SECTION 4. G.S. 20-11(g) reads as rewritten:

"(g) Level 3 Restrictions. – The restrictions on Level 1 and Level 2 drivers concerning time of driving, supervision, and passenger limitations do not apply to a full provisional ~~license.~~ license; however, the restriction on the use of a mobile telephone or handheld mobile telephone while operating a motor vehicle except in compliance with G.S. 20-140.6 still applies."

SECTION 5. This act becomes effective October 1, 2006.

SENATE BILL 1289:
Cell Phone Use by Drivers Under 18 Prohibited

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	May 31, 2006
Introduced by:	Sen. Bingham	**Summary by:**	Kory Goldsmith
Version:	PCS to First Edition S1289-CSRC-97		Committee Counsel

SUMMARY: ***Senate Bill 1289 would prohibit persons under 18 years of age from using a mobile telephone while operating a motor vehicle on a public street or highway. A person who violates this law would be fined $25 and have his or her learner's permit or Level 2 provisional license extended for an additional 6 months or until the person turned 18. No insurance points, drivers license points or court costs would be assessed.***

The Proposed Committee Substitute imposes the $25 fine and removes the court costs. It also removes a provision in the original bill that would have prohibited units of local government from adopting ordinances regulating the use of mobile telephones while operating a vehicle.

The act would become effective December 1, 2006, and apply to offenses committed on or after that date.

CURRENT LAW: There are no statutory restrictions in North Carolina regarding the use of a mobile telephone while operating a motor vehicle.

In 1997, North Carolina adopted a graduated drivers license law. G.S. 20-11. It requires that if a person is under the age of 18, driving privileges are granted first on a limited basis and then expanded over time. The process involves 3 levels:

- Level 1 – Driving with a limited learner's permit.
- Level 2 – Driving with a limited provisional license.
- Level 3 – Driving with a full provisional license.

Persons who are at least 15 years of age, but not yet 18 years old must obtain a limited learner's permit. The permit allows the person to operate a motor vehicle if there is a supervising driver in the front seat of the car, the driver has the permit on his or her person while driving, and every person in the auto is wearing a safety belt. For the first 6 months of the permit, the driver may only operate an automobile between 5 a.m. and 9 p.m. The person must hold the permit for at least 12 months before being eligible to obtain a limited provisional (Level 2) license.

A person may obtain a limited provisional license if he or she has not been convicted of a moving violation or seat belt infraction during the preceding six months, passes a road test, and maintains passing grades in school or has a diploma or its equivalent. A person holding a limited provisional license may operate a motor vehicle between the hours of 5 a.m. and 9 p.m., or while driving to and from work or to and from certain volunteer EMS activities. There may be no more than one passenger under the age of 21 in the vehicle if there is no supervising driver present, although there is no limit on the number of siblings under the age of 21 who may be in the car. Finally, everyone in the vehicle must be wearing a seat belt.

If a person holds a Level 2 license for 6 months, has not been convicted of a motor vehicle moving violation or seat belt infraction during the preceding six months, and has passing grades or obtained a high school diploma, the person may obtain a full provisional (Level 3) license. There are no restrictions on a Level 3 license except that all persons in the vehicle must wear a seat belt. A person as young as 16 years and 6 months of age may obtain a Level 3 license.

BILL ANALYSIS: Senate Bill 1289 would prohibit a person under the age of 18 from using a mobile telephone while operating a motor vehicle on a public street or highway. The prohibition would not apply to a stationary vehicle. The prohibition would extend to both handheld and hands-free phones, as well as other technology associated with a mobile telephone such as emails, games, or digital cameras associated with the phone. The prohibition would not extend to the use of a mobile telephone in an emergency situation to call a 911 operator, a hospital or doctor's office, an ambulance service, a fire department or a law enforcement agency.

A violation would be an infraction and the driver would be assessed a fine of $25. The driver would not have to pay court costs, and would not be assessed insurance or drivers license points. The person would have to remain for an additional 6 months at their current level of graduated license. As a practical matter, there are no restrictions on Level 3, full provisional licenses, so a person with a Level 3 drivers license who is found responsible of violating the prohibition against using a mobile telephone would have to pay court costs, but would not experience any change in their driving privileges.

BACKGROUND: The bill is a recommendation of the North Carolina Child Fatality Task Force.

According to information provided by the Insurance Institute for Highway Safety, as of July of 2005, 10 states restrict the use of mobile telephones by teens in the states' graduated licensing system. These states include: Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Minnesota, New Jersey, Tennessee, and Texas.

S1289e1-SMRC-CSRC-97

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 1289

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S1289-ARC-54 [v.2]

Date _____,2006

Comm. Sub. [YES]
Amends Title [NO]
S1289-CSRC-97[v.4]

Senator Berger of Franklin

moves to amend the bill on page 4, lines 23-38, by rewriting the lines to read:

"(l) Violations. – It is unlawful for the holder of a limited learner's permit, a temporary permit, or a limited provisional license to drive a motor vehicle in violation of the restrictions that apply to the permit or license. Failure to comply with a restriction concerning the time of driving or the presence of a supervising driver in the vehicle constitutes operating a motor vehicle without a license. ~~Failure~~ Except as provided in G.S. 20-137.3(f), failure to comply with any other restriction, including seating and passenger limitations, is an infraction punishable by a monetary penalty as provided in G.S. 20-176. Failure to comply with the provisions of subsection (e) or (g) of this section shall not constitute negligence per se or contributory negligence by the driver or passenger in any action for the recovery of damages arising out of the operation, ownership or maintenance of a motor vehicle. Any evidence of failure to comply with the provisions of subsection (e) or (g) of this section shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section. No drivers license points or insurance surcharge shall be assessed for failure to comply with seating and occupancy limitations in subsection (e) of this section. No drivers license points or insurance surcharge shall be assessed for failure to comply with subsections (e) or (g) of this section regarding the use of a mobile telephone while operating a motor vehicle.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 1289

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S1289-ARC-53 [v.1]

Date _____,2006

Comm. Sub. [YES]
Amends Title [NO]
S1290-CSRC-97[v.4]

Senator Berger of Franklin

moves to amend the bill on page 1, by rewriting lines 16-24 to read:

"(2) Mobile telephone. – A device used by subscribers and other users of wireless telephone service to access the service. The term does not include a device that has an internal feature or function, or that is equipped with an attachment or addition, whether or not permanently part of the mobile telephone, by which a user engages in a call without the use of either hand, whether or not the use of either hand is necessary to activate, deactivate, or initiate a function of such telephone.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 1555*

Short Title:	Revise Articles 1 and 7 of the UCC.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

May 18, 2006

A BILL TO BE ENTITLED

AN ACT TO ENACT REVISED ARTICLE 1 OF THE UNIFORM COMMERCIAL CODE CONTAINING GENERAL PROVISIONS APPLICABLE TO THE ENTIRE CODE, TO MAKE CONFORMING AMENDMENTS TO OTHER ARTICLES OF THE UNIFORM COMMERCIAL CODE AND OTHER SECTIONS OF THE GENERAL STATUTES, TO ENACT REVISED ARTICLE 7 OF THE UNIFORM COMMERCIAL CODE RELATING TO WAREHOUSE RECEIPTS AND BILLS OF LADING, TO MAKE CONFORMING AMENDMENTS TO OTHER ARTICLES OF THE UNIFORM COMMERCIAL CODE AND OTHER SECTIONS OF THE GENERAL STATUTES, AND TO REPEAL OBSOLETE CRIMINAL PROVISIONS OF THE FORMER UNIFORM WAREHOUSE RECEIPTS ACT, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

PART I. REVISED ARTICLE 1 OF THE UNIFORM COMMERCIAL CODE AND CONFORMING AMENDMENTS TO THE GENERAL STATUTES.

SUBPART A. REVISED ARTICLE 1 OF THE UNIFORM COMMERCIAL CODE.

SECTION 1. Article 1 of Chapter 25 of the General Statutes is rewritten to read:

"Article 1.

"General Provisions.

"PART 1.

"GENERAL PROVISIONS.

"§ 25-1-101. Short titles.

(a) This Chapter may be cited as the Uniform Commercial Code.

(b) This Article may be cited as Uniform Commercial Code – General Provisions.

"**§ 25-1-102. Scope of Article.**

Except as provided in G.S. 25-1-301, this Article applies to a transaction to the extent that it is governed by another Article of this Chapter.

"**§ 25-1-103. Construction of this Chapter to promote its purposes and policies; applicability of supplemental principles of law.**

(a) This Chapter must be liberally construed and applied to promote its underlying purposes and policies, which are:

(1) To simplify, clarify, and modernize the law governing commercial transactions;

(2) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and

(3) To make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of this Chapter, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

"**§ 25-1-104. Construction against implied repeal.**

This Chapter being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

"**§ 25-1-105. Severability.**

If any provision or clause of this Chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Chapter that can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable.

"**§ 25-1-106. Use of singular and plural; gender.**

In this Chapter, unless the statutory context otherwise requires:

(1) Words in the singular number include the plural, and those in the plural include the singular; and

(2) Words of any gender also refer to any other gender.

"**§ 25-1-107. Section captions.**

Section captions are part of this Chapter. The subsection headings in Article 9 of this Chapter are not parts of this Chapter.

"**§ 25-1-108. Relation to Electronic Signatures in Global and National Commerce Act.**

This Article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., except that nothing in this Article modifies, limits, or supersedes Section 7001(c) of that Act or authorizes electronic delivery of any of the notices described in Section 7003(b) of that Act.

"PART 2.

"GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION.

"**§ 25-1-201. General definitions.**

(a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other Articles of this Chapter that apply to particular Articles or Parts thereof, have the meanings stated.

(b) Subject to definitions contained in other articles of this Chapter that apply to particular Articles or Parts thereof:

(1) "Action," in the sense of a judicial proceeding, includes recoupment, counterclaim, setoff, suit in equity, and any other proceeding in which rights are determined.

(2) "Aggrieved party" means a party entitled to pursue a remedy.

(3) "Agreement," as distinguished from "contract," means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in G.S. 25-1-303.

(4) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.

(5) "Bearer" means a person in possession of a negotiable instrument, document of title, or certificated security that is payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.

(9) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 of this Chapter may be a buyer in ordinary course of business. "Buyer in ordinary course of business" does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:
   a. A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
   b. Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

(11) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

(12) "Contract," as distinguished from "agreement," means the total legal obligation that results from the parties' agreement as determined by this Chapter as supplemented by any other applicable laws.

(13) "Creditor" includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate.

(14) "Defendant" includes a person in the position of defendant in a counterclaim, cross-claim, or third-party claim.

(15) "Delivery," with respect to an instrument, document of title, or chattel paper, means voluntary transfer of possession.

(16) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(17) "Fault" means a default, breach, or wrongful act or omission.

(18) "Fungible goods" means:
   a. Goods of which any unit, by nature or usage of trade, are the equivalent of any other like unit; or
   b. Goods that by agreement are treated as equivalent.

(19) "Genuine" means free of forgery or counterfeiting.

(20) "Good faith," except as otherwise provided in Article 5 of this Chapter, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(21) "Holder" means:
  a. The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; or
  b. The person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession.

(22) "Insolvency proceeding" includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.

(23) "Insolvent" means:
  a. Having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute;
  b. Being unable to pay debts as they become due; or
  c. Being insolvent within the meaning of federal bankruptcy law.

(24) "Money" means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.

(25) "Organization" means a person other than an individual.

(26) "Party," as distinguished from "third party," means a person that has engaged in a transaction or made an agreement subject to this Chapter.

(27) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(28) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.

(29) "Purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.

(30) "Purchaser" means a person that takes by purchase.

(31) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(32) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(33) "Representative" means a person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor, or administrator of an estate.

(34) "Right" includes remedy.

(35) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9 of this Chapter. "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under G.S. 25-2-401, but a buyer may also acquire a "security interest" by complying with Article 9 of this Chapter. Except as otherwise provided in G.S. 25-2-505, the right of a seller or lessor of goods under Article 2 or 2A of this Chapter to retain or acquire possession of the goods is not a "security interest," but a seller or lessor may also acquire a "security interest" by complying with Article 9 of this Chapter. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under G.S. 25-2-401 is limited in effect to a reservation of a "security interest." Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to G.S. 25-1-203.

(36) "Send" in connection with a writing, record, or notice means:

a. To deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or

b. In any other way to cause to be received any record or notice within the time it would have arrived if properly sent.

(37) "Signed" includes using any symbol executed or adopted with present intention to adopt or accept a writing.

(38) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(39) "Surety" includes a guarantor or other secondary obligor.

(40) "Term" means a portion of an agreement that relates to a particular matter.

(41) "Unauthorized signature" means a signature made without actual, implied, or apparent authority. The term includes a forgery.

(42) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.

(43) "Writing" includes printing, typewriting, or any other intentional reduction to tangible form. "Written" has a corresponding meaning.

"§ 25-1-202. Notice; knowledge.

(a) Subject to subsection (f) of this section, a person has "notice" of a fact if the person:

(1) Has actual knowledge of it;

(2) Has received a notice or notification of it; or

(3) From all the facts and circumstances known to the person at the time in question, has reason to know that it exists.

(b) "Knowledge" means actual knowledge. "Knows" has a corresponding meaning.

(c) "Discover," "learn," or words of similar import refer to knowledge rather than to reason to know.

(d) A person "notifies" or "gives" a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it.

(e) Subject to subsection (f) of this section, a person "receives" a notice or notification when:

(1) It comes to that person's attention; or

(2) It is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.

(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

"§ 25-1-203. Lease distinguished from security interest.

(a) Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.

(b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:

(1) The original term of the lease is equal to or greater than the remaining economic life of the goods;

(2) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;

(3) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or

(4) The lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.

(c) A transaction in the form of a lease does not create a security interest merely because:

(1) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;

(2) The lessee assumes risk of loss of the goods;

(3) The lessee agrees to pay, with respect to the goods, taxes, insurance, filing, recording, or registration fees, or service or maintenance costs;

(4) The lessee has an option to renew the lease or to become the owner of the goods;

(5) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or

(6) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

(d) Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised. Additional consideration is not nominal if:

(1) When the option to renew the lease is granted to the lessee, the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed; or

(2) When the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed.

(e) The "remaining economic life of the goods" and "reasonably predictable" fair market rent, fair market value, or cost of performing under the lease agreement must be determined with reference to the facts and circumstances at the time the transaction is entered into.

"**§ 25-1-204. Value.**

Except as otherwise provided in Articles 3, 4, and 5 of this Chapter, a person gives value for rights if the person acquires them:

(1) In return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection;
(2) As security for, or in total or partial satisfaction of, a preexisting claim;
(3) By accepting delivery under a preexisting contract for purchase; or
(4) In return for any consideration sufficient to support a simple contract.

"§ 25-1-205. Reasonable time; seasonableness.

(a) Whether a time for taking an action required by this Chapter is reasonable depends on the nature, purpose, and circumstances of the action.

(b) An action is taken seasonably if it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

"§ 25-1-206. Presumptions.

Whenever this Chapter creates a "presumption" with respect to a fact, or provides that a fact is "presumed," the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence.

"PART 3.

"TERRITORIAL APPLICABILITY AND GENERAL RULES.

"§ 25-1-301. Territorial applicability; parties' power to choose applicable law.

(a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this State and also to another state or nation the parties may agree that the law either of this State or of such other state or nation shall govern their rights and duties.

(b) In the absence of an agreement effective under subsection (a) of this section, and except as provided in subsection (c) of this section, this Chapter applies to transactions bearing an appropriate relation to this State.

(c) If one of the following provisions of this Chapter specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:

(1) G.S. 25-2-402;
(2) G.S. 25-2A-105 and G.S. 25-2A-106;
(3) G.S. 25-4-102;
(4) G.S. 25-4A-507;
(5) G.S. 25-5-116;
(6) G.S. 25-8-110;
(7) G.S. 25-9-301 through G.S. 25-9-307.

"§ 25-1-302. Variation by agreement.

(a) Except as otherwise provided in subsection (b) of this section or elsewhere in this Chapter, the effect of provisions of this Chapter may be varied by agreement.

(b) The obligations of good faith, diligence, reasonableness, and care prescribed by this Chapter may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever this Chapter

requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.

(c) The presence in certain provisions of this Chapter of the phrase "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.

"§ 25-1-303. Course of performance, course of dealing, and usage of trade.

(a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:

(1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and

(2) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

(b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.

(e) Except as otherwise provided in subsection (f) of this section, the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

(1) Express terms prevail over course of performance, course of dealing, and usage of trade;

(2) Course of performance prevails over course of dealing and usage of trade; and

(3) Course of dealing prevails over usage of trade.

(f) Subject to G.S. 25-2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

(g) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party.

"§ 25-1-304. Obligation of good faith.

Every contract or duty within this Chapter imposes an obligation of good faith in its performance and enforcement.

"§ 25-1-305. Remedies to be liberally administered.

(a) The remedies provided by this Chapter must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed, but neither consequential or special damages nor penal damages may be had except as specifically provided in this Chapter or by other rule of law.

(b) Any right or obligation declared by this Chapter is enforceable by action unless the provision declaring it specifies a different and limited effect.

"§ 25-1-306. Waiver or renunciation of claim or right after breach.

A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record.

"§ 25-1-307. Prima facie evidence by third-party documents.

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party is prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

"§ 25-1-308. Performance or acceptance under reservation of rights.

(a) A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest," or the like are sufficient.

(b) Subsection (a) of this section does not apply to an accord and satisfaction.

"§ 25-1-309. Option to accelerate at will.

A term providing that one party or that party's successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or when the party "deems itself insecure," or words of similar import, means that the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against which the power has been exercised.

"§ 25-1-310. Subordinated obligations.

An obligation may be issued as subordinated to performance of another obligation of the person obligated, or a creditor may subordinate its right to performance of an obligation by agreement with either the person obligated or another creditor of the person obligated. Subordination does not create a security interest as against either the common debtor or a subordinated creditor."

SUBPART B. CONFORMING AMENDMENTS TO OTHER ARTICLES OF THE UNIFORM COMMERCIAL CODE.

SECTION 2. G.S. 25-2-103(1) reads as rewritten:

"(1) In this article unless the context otherwise requires

(a) "Buyer" means a person who buys or contracts to buy goods.

(b) ~~"Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.~~

(c) "Receipt" of goods means taking physical possession of them.

(d) "Seller" means a person who sells or contracts to sell goods. Any manufacturer of self-propelled motor vehicles, as defined in G.S. 20-4.01, is also a "seller" with respect to buyers of its product to whom it makes an express warranty, notwithstanding any lack of privity between them, for purposes of all rights and remedies available to buyers under this Article."

SECTION 3. G.S. 25-2-202 reads as rewritten:

"**§ 25-2-202. Final written expression; parol or extrinsic evidence.**

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of performance, course of ~~dealing~~ dealing, or usage of trade ~~(G.S. 25-1-205) or by course of performance (G.S. 25-2-208);~~ (G.S. 25-1-303); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."

SECTION 4. G.S. 25-2-208 is repealed.

SECTION 5. G.S. 25-2A-103(3) reads as rewritten:

"(3) The following definitions in other Articles apply to this Article:

"Account". G.S. 25-9-102(a)(2).

"Between merchants". G.S. 25-2-104(3).

"Buyer". G.S. 25-2-103(1)(a).

"Chattel paper". G.S. 25-9-102(a)(11).

"Consumer goods". G.S. 25-9-102(a)(23).

"Document". G.S. 25-9-102(a)(30).

"Entrusting". G.S. 25-2-403(3).

"General intangible". G.S. 25-9-102(a)(42).

~~"Good faith". G.S. 25-2-103(1)(b).~~

"Instrument". G.S. 25-9-102(a)(47).

"Merchant". G.S. 25-2-104(1).

"Mortgage". G.S. 25-9-102(a)(55).

"Pursuant to commitment". G.S. 25-9-102(a)(68).

"Receipt". G.S. 25-2-103(1)(c).

"Sale". G.S. 25-2-106(1).

"Sale on approval". G.S. 25-2-326.

"Sale or return". G.S. 25-2-326.

"Seller". G.S. 25-2-103(1)(d)."

SECTION 6. G.S. 25-2A-207 is repealed.

SECTION 7. G.S. 25-2A-501(4) reads as rewritten:

"(4) Except as otherwise provided in ~~G.S. 25-1-106(1)~~ G.S. 25-1-305(a) or this Article or the lease agreement, the rights and remedies referred to in subsections (2) and (3) of this section are cumulative."

SECTION 8. G.S. 25-2A-518(2) reads as rewritten:

"(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (G.S. 25-2A-504) or otherwise determined pursuant to agreement of the parties (~~G.S. 25-1-102(3)~~ G.S. 25-1-302 and G.S. 25-2A-503), if a lessee's cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor's default."

SECTION 9. G.S. 25-2A-519(1) reads as rewritten:

"(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (G.S. 25-2A-504) or otherwise determined pursuant to agreement of the parties (~~G.S. 25-1-102(3)~~ G.S. 25-1-302 and G.S. 25-2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under G.S. 25-2A–518(2), or is by purchase or otherwise, the measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default."

SECTION 10. G.S. 25-2A-527(2) reads as rewritten:

"(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (G.S. 25-2A-504) or otherwise determined pursuant to agreement of the parties (~~G.S. 25-1-102(3)~~ G.S. 25-1-302 and G.S. 25-2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under G.S. 25-2A-530, less expenses saved in consequence of the lessee's default."

SECTION 11. G.S. 25-2A-528(1) reads as rewritten:

"(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (G.S. 25-2A-504) or otherwise determined pursuant to agreement of the parties (~~G.S. 25-1-102(3)~~ G.S. 25-1-302 and G.S. 25-2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under G.S. 25-2A-527(2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in G.S. 25-2A-523(1) or G.S. 25-2A-523(3)(a), or if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under ~~2A-530,~~G.S. 25-2A-530, less expenses saved in consequence of the lessee's default."

SECTION 12. G.S. 25-3-103(a)(4) is repealed.

SECTION 13. G.S. 25-3-103(a)(10) reads as rewritten:

"(10) "Prove" with respect to a fact means to meet the burden of establishing the fact ~~(G.S. 25-1-201(8)).~~ (G.S. 25-1-201(b)(8)).."

SECTION 14. G.S. 25-4-104(c) reads as rewritten:

"(c) The following definitions in other Articles apply to this Article:

"Acceptance"	G.S. 25-3-409.
"Alteration"	G.S. 25-3-407.
"Cashier's check"	G.S. 25-3-104.
"Certificate of deposit"	G.S. 25-3-104.
"Certified check"	G.S. 25-3-409.
"Check"	G.S. 25-3-104.
~~"Good faith"~~	~~G.S. 25-3-103.~~
"Draft"	G.S. 25-3-104.
"Holder in due course"	G.S. 25-3-302.
"Instrument"	G.S. 25-3-104.
"Notice of dishonor"	G.S. 25-3-503.
"Order"	G.S. 25-3-103.
"Ordinary care"	G.S. 25-3-103.
"Person entitled to enforce"	G.S. 25-3-301.
"Presentment"	G.S. 25-3-501.
"Promise"	G.S. 25-3-103.
"Prove"	G.S. 25-3-103.
"Teller's check"	G.S. 25-3-104.
"Unauthorized signature"	G.S. 25-3-403."

SECTION 15. G.S. 25-4A-105(a)(6) is repealed.

SECTION 16. G.S. 25-4A-105(a)(7) reads as rewritten:

"(7) "Prove" with respect to a fact means to meet the burden of establishing the fact ~~(G.S. 25-1-201(8)).~~ (G.S. 25-1-201(b)(8))."

SECTION 17. G.S. 25-4A-106(a) reads as rewritten:

"(a) The time of receipt of a payment order or communication cancelling or amending a payment order is determined by the rules applicable to receipt of a notice stated in ~~G.S. 25-1-201(27).~~ G.S. 25-1-202. A receiving bank may fix a cutoff time or times on a funds-transfer business day for the receipt and processing of payment orders and communications cancelling or amending payment orders. Different cutoff times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cutoff time may apply to senders generally or different cutoff times may apply to different senders or categories of payment orders. If a payment order or communication cancelling or amending a payment order is received after the close of a funds-transfer business day or after the appropriate cutoff time on a funds-transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds-transfer business day."

SECTION 18. G.S. 25-4A-204(b) reads as rewritten:

"(b) Reasonable time under subsection (a) may be fixed by agreement as stated in ~~G.S. 25-1-204(1),~~ G.S. 25-1-302(b), but the obligation of a receiving bank to refund payment as stated in subsection (a) may not otherwise be varied by agreement."

SECTION 19. G.S. 25-5-103(c) reads as rewritten:

"(c) With the exception of this subsection, subsections (a) and (d) of this section, G.S. 25-5-102(a)(9) and (10), 25-5-106(d), and 25-5-114(d), and except to the extent prohibited in ~~G.S. 25-1-102(3)~~ G.S. 25-1-302 and G.S. 25-5-117(d), the effect of this Article may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this Article."

SECTION 20. G.S. 25-8-102(a)(10) is repealed.

SECTION 21. G.S. 25-9-102(a)(43) is repealed.

SUBPART C. CONFORMING AMENDMENTS TO OTHER SECTIONS OF THE GENERAL STATUTES.

SECTION 22. G.S. 66-181 reads as rewritten:

"**§ 66-181. Usage of trade.**

The terms "utility" and "industrial," when used to refer to equipment, implements, machinery, attachments, or repair parts, shall have the meaning commonly used and understood among dealers and suppliers of farm equipment as a usage of trade in accordance with ~~G.S. 25-1-205(2).~~ G.S. 25-1-303(c)."

SECTION 23. G.S. 66-313(b) reads as rewritten:

"(b) This Article does not apply to a transaction to the extent it is governed by:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts.

(2) Chapter 25 of the General Statutes other than ~~G.S. 25-1-107~~ G.S. 25-1-306, ~~and G.S. 25-1-206,~~ Article 2, and Article 2A.

(3) Article 11A of Chapter 66 of the General Statutes."

SECTION 24. G.S. 66-326(d) reads as rewritten:

"(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in ~~G.S. 25-1-201(20),~~ G.S. 25-1-201(21), of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under Chapter 25 of the General Statutes, including, if the applicable statutory requirements under G.S. 25-3-302(a), 25-7-501, or 25-9-330 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and endorsement are not required to obtain or exercise any of the rights under this subsection."

PART II. REVISED ARTICLE 7 OF THE UNIFORM COMMERCIAL CODE AND CONFORMING AMENDMENTS TO THE GENERAL STATUTES.

SUBPART A. REVISED ARTICLE 7 OF THE UNIFORM COMMERCIAL CODE.

SECTION 25. Article 7 of Chapter 25 of the General Statutes is rewritten to read:

"Article 7.
"Documents of Title.
"PART 1.
"GENERAL.

"§ 25-7-101. Short title.

This Article may be cited as Uniform Commercial Code – Documents of Title.

"§ 25-7-102. Definitions and index of definitions.

(a) In this Article, unless the context otherwise requires:

(1) "Bailee" means a person that by a warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them.

(2) "Carrier" means a person that issues a bill of lading.

(3) "Consignee" means a person named in a bill of lading to whom or to whose order the bill promises delivery.

(4) "Consignor" means a person named in a bill of lading as the person from whom the goods have been received for shipment.

(5) "Delivery order" means a record that contains an order to deliver goods directed to a warehouse, carrier, or other person that in the ordinary course of business issues warehouse receipts or bills of lading.

(6) Reserved for future codification purposes.

(7) "Goods" means all things that are treated as movable for the purposes of a contract for storage or transportation.

(8) "Issuer" means a bailee that issues a document of title or, in the case of an unaccepted delivery order, the person that orders the possessor of goods to deliver. The term includes a person for whom an agent or employee purports to act in issuing a document if the agent or

employee has real or apparent authority to issue documents, even if the issuer did not receive any goods, the goods were misdescribed, or in any other respect the agent or employee violated the issuer's instructions.

(9) "Person entitled under the document" means the holder, in the case of a negotiable document of title, or the person to whom delivery of the goods is to be made by the terms of, or pursuant to instructions in a record under, a nonnegotiable document of title.

(10) Reserved for future codification purposes.

(11) "Sign" means, with present intent to authenticate or adopt a record:

a. To execute or adopt a tangible symbol; or

b. To attach to or logically associate with the record an electronic sound, symbol, or process.

(12) "Shipper" means a person that enters into a contract of transportation with a carrier.

(13) "Warehouse" means a person engaged in the business of storing goods for hire.

(b) Definitions in other Articles applying to this Article and the sections in which they appear are:

(1) "Contract for sale," G.S. 25-2-106.

(2) "Lessee in the ordinary course of business," G.S. 25-2A-103.

(3) "Receipt" of goods, G.S. 25-2-103.

(c) In addition, Article 1 of this Chapter contains general definitions and principles of construction and interpretation applicable throughout this Article.

"§ 25-7-103. Relation of Article to treaty or statute.

(a) This Article is subject to any treaty or statute of the United States or regulatory statute of this State to the extent the treaty, statute, or regulatory statute is applicable.

(b) This Article does not modify or repeal any law prescribing the form or content of a document of title or the services or facilities to be afforded by a bailee or otherwise regulating a bailee's business in respects not specifically treated in this Article. However, violation of such a law does not affect the status of a document of title that otherwise is within the definition of a document of title.

(c) This Article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001, et seq.) but does not modify, limit, or supersede 101(c) of that Act (15 U.S.C. § 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that Act (15 U.S.C. § 7003(b)).

(d) To the extent there is a conflict between Article 40 of Chapter 66 of the General Statutes (the Uniform Electronic Transactions Act) and this Article, this Article governs.

"§ 25-7-104. Negotiable and nonnegotiable document of title.

(a) Except as otherwise provided in subsection (c) of this section, a document of title is negotiable if by its terms the goods are to be delivered to bearer or to the order of a named person.

(b) A document of title other than one described in subsection (a) of this section is nonnegotiable. A bill of lading that states that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against an order in a record signed by the same or another named person.

(c) A document of title is nonnegotiable if, at the time it is issued, the document has a conspicuous legend, however expressed, that it is nonnegotiable.

"§ 25-7-105. Reissuance in alternative medium.

(a) Upon request of a person entitled under an electronic document of title, the issuer of the electronic document may issue a tangible document of title as a substitute for the electronic document if:

(1) The person entitled under the electronic document surrenders control of the document to the issuer; and

(2) The tangible document when issued contains a statement that it is issued in substitution for the electronic document.

(b) Upon issuance of a tangible document of title in substitution for an electronic document of title in accordance with subsection (a) of this section:

(1) The electronic document ceases to have any effect or validity; and

(2) The person that procured issuance of the tangible document warrants to all subsequent persons entitled under the tangible document that the warrantor was a person entitled under the electronic document when the warrantor surrendered control of the electronic document to the issuer.

(c) Upon request of a person entitled under a tangible document of title, the issuer of the tangible document may issue an electronic document of title as a substitute for the tangible document if:

(1) The person entitled under the tangible document surrenders possession of the document to the issuer; and

(2) The electronic document when issued contains a statement that it is issued in substitution for the tangible document.

(d) Upon issuance of an electronic document of title in substitution for a tangible document of title in accordance with subsection (c) of this section:

(1) The tangible document ceases to have any effect or validity; and

(2) The person that procured issuance of the electronic document warrants to all subsequent persons entitled under the electronic document that the warrantor was a person entitled under the tangible document when the warrantor surrendered possession of the tangible document to the issuer.

"§ 25-7-106. Control of electronic document of title.

(a) A person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred.

(b) A system satisfies subsection (a) of this section, and a person is deemed to have control of an electronic document of title, if the document is created, stored, and assigned in such a manner that:

(1) A single authoritative copy of the document exists which is unique, identifiable, and, except as otherwise provided in subdivisions (4), (5), and (6) of this subsection, unalterable;

(2) The authoritative copy identifies the person asserting control as:

a. The person to whom the document was issued; or

b. If the authoritative copy indicates that the document has been transferred, the person to whom the document was most recently transferred;

(3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) Copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

"PART 2.

"WAREHOUSE RECEIPTS: SPECIAL PROVISIONS.

"§ 25-7-201. Person that may issue a warehouse receipt; storage under bond.

(a) A warehouse receipt may be issued by any warehouse.

(b) If goods, including distilled spirits and agricultural commodities, are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods is deemed to be a warehouse receipt even if issued by a person that is the owner of the goods and is not a warehouse.

"§ 25-7-202. Form of warehouse receipt; effect of omission.

(a) A warehouse receipt need not be in any particular form.

(b) Unless a warehouse receipt provides for each of the following, the warehouse is liable for damages caused to a person injured by its omission:

(1) A statement of the location of the warehouse facility where the goods are stored;

(2) The date of issue of the receipt;

(3) The unique identification code of the receipt;

(4) A statement whether the goods received will be delivered to the bearer, to a named person, or to a named person or its order;

(5) The rate of storage and handling charges, unless goods are stored under a field warehousing arrangement, in which case a statement of that fact is sufficient on a nonnegotiable receipt;

(6) A description of the goods or the packages containing them;

(7) The signature of the warehouse or its agent;

(8) If the receipt is issued for goods that the warehouse owns, either solely, jointly, or in common with others, a statement of the fact of that ownership; and

(9) A statement of the amount of advances made and of liabilities incurred for which the warehouse claims a lien or security interest, unless the precise amount of advances made or liabilities incurred, at the time of the issue of the receipt, is unknown to the warehouse or to its agent that issued the receipt, in which case a statement of the fact that advances have been made or liabilities incurred and the purpose of the advances or liabilities is sufficient.

(c) A warehouse may insert in its receipt any terms that are not contrary to this Chapter and do not impair its obligation of delivery under G.S. 25-7-403 or its duty of care under G.S. 25-7-204. Any contrary provision is ineffective.

"§ 25-7-203. Liability for nonreceipt or misdescription.

A party to or purchaser for value in good faith of a document of title, other than a bill of lading, that relies upon the description of the goods in the document may recover from the issuer damages caused by the nonreceipt or misdescription of the goods, except to the extent that:

(1) The document conspicuously indicates that the issuer does not know whether all or part of the goods in fact were received or conform to the description, such as a case in which the description is in terms of marks or labels or kind, quantity, or condition, or the receipt or description is qualified by "contents, condition, and quality unknown," "said to contain," or words of similar import, if the indication is true; or

(2) The party or purchaser otherwise has notice of the nonreceipt or misdescription.

"§ 25-7-204. Duty of care; contractual limitation of warehouse's liability.

(a) A warehouse is liable for damages for loss of or injury to the goods caused by its failure to exercise care with regard to the goods that a reasonably careful person would exercise under similar circumstances. Unless otherwise agreed, the warehouse is not liable for damages that could not have been avoided by the exercise of that care.

(b) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage beyond which the warehouse is not liable. Such a limitation is not effective with respect to the warehouse's liability for conversion to its own use. On request of the bailor in a record at the time of signing the storage agreement or within a reasonable time after receipt of the warehouse receipt, the warehouse's liability may be increased on part or all of the goods covered by the storage agreement or the warehouse receipt. In this event, increased rates may be charged based on an increased valuation of the goods.

(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the bailment may be included in the warehouse receipt or storage agreement.

(d) This section does not modify or repeal any statute that imposes a higher responsibility upon the warehouse or invalidates a contractual limitation that would be permissible under this Article.

"§ 25-7-205. Title under warehouse receipt defeated in certain cases.

A buyer in ordinary course of business of fungible goods sold and delivered by a warehouse that is also in the business of buying and selling such goods takes the goods free of any claim under a warehouse receipt even if the receipt is negotiable and has been duly negotiated.

"§ 25-7-206. Termination of storage at warehouse's option.

(a) A warehouse, by giving notice to the person on whose account the goods are held and any other person known to claim an interest in the goods, may require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document of title or, if a period is not fixed, within a stated period not less than 30 days after the warehouse gives notice. If the goods are not removed before the date specified in the notice, the warehouse may sell them pursuant to G.S. 25-7-210.

(b) If a warehouse in good faith believes that goods are about to deteriorate or decline in value to less than the amount of its lien within the time provided in subsection (a) of this section and G.S. 25-7-210, the warehouse may specify in the notice given under subsection (a) of this section any reasonable shorter time for removal of the goods and, if the goods are not removed, may sell them at public sale held not less than one week after a single advertisement or posting.

(c) If, as a result of a quality or condition of the goods of which the warehouse did not have notice at the time of deposit, the goods are a hazard to other property, the warehouse facilities, or other persons, the warehouse may sell the goods at public or private sale without advertisement or posting on reasonable notification to all persons known to claim an interest in the goods. If the warehouse, after a reasonable effort, is unable to sell the goods, it may dispose of them in any lawful manner and does not incur liability by reason of that disposition.

(d) A warehouse shall deliver the goods to any person entitled to them under this Article upon due demand made at any time before sale or other disposition under this section.

(e) A warehouse may satisfy its lien from the proceeds of any sale or disposition under this section but shall hold the balance for delivery on the demand of any person to whom the warehouse would have been bound to deliver the goods.

"§ 25-7-207. Goods must be kept separate; fungible goods.

(a) Unless the warehouse receipt provides otherwise, a warehouse shall keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods. However, different lots of fungible goods may be commingled.

(b) If different lots of fungible goods are commingled, the goods are owned in common by the persons entitled thereto and the warehouse is severally liable to each owner for that owner's share. If, because of overissue, a mass of fungible goods is insufficient to meet all the receipts the warehouse has issued against it, the persons entitled include all holders to whom overissued receipts have been duly negotiated.

"§ 25-7-208. Altered warehouse receipts.

If a blank in a negotiable tangible warehouse receipt has been filled in without authority, a good-faith purchaser for value and without notice of the lack of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any tangible or electronic warehouse receipt enforceable against the issuer according to its original tenor.

"§ 25-7-209. Lien of warehouse.

(a) A warehouse has a lien against the bailor on the goods covered by a warehouse receipt or storage agreement or on the proceeds thereof in its possession for charges for storage or transportation, including demurrage and terminal charges, insurance, labor, or other charges, present or future, in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for similar charges or expenses in relation to other goods whenever deposited and it is stated in the warehouse receipt or storage agreement that a lien is claimed for charges and expenses in relation to other goods, the warehouse also has a lien against the goods covered by the warehouse receipt or storage agreement or on the proceeds thereof in its possession for those charges and expenses, whether or not the other goods have been delivered by the warehouse. However, as against a person to which a negotiable warehouse receipt is duly negotiated, a warehouse's lien is limited to charges in an amount or at a rate specified in the warehouse receipt or, if no charges are so specified, to a reasonable charge for storage of the specific goods covered by the receipt subsequent to the date of the receipt.

(b) A warehouse may also reserve a security interest against the bailor for the maximum amount specified on the receipt for charges other than those specified in subsection (a) of this section, such as for money advanced and interest. The security interest is governed by Article 9 of this Chapter.

(c) A warehouse's lien for charges and expenses under subsection (a) of this section or a security interest under subsection (b) of this section is also effective against any person that so entrusted the bailor with possession of the goods that a pledge of them by the bailor to a good-faith purchaser for value would have been valid. However, the lien or security interest is not effective against a person that before issuance of a document of title had a legal interest or a perfected security interest in the goods and that did not:

(1) Deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with:
   a. Actual or apparent authority to ship, store, or sell;
   b. Power to obtain delivery under G.S. 25-7-403; or
   c. Power of disposition under G.S. 25-2-403, 25-2A-304(2), 25-2A-305(2), 25-9-320, or 25-9-321(c) or other statute or rule of law; or

(2) Acquiesce in the procurement by the bailor or its nominee of any document.

(d) A warehouse's lien on household goods for charges and expenses in relation to the goods under subsection (a) of this section is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. In this subsection, "household goods" means furniture, furnishings, or personal effects used by the depositor in a dwelling.

(e) A warehouse loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver.

"**§ 25-7-210. Enforcement of warehouse's lien.**

(a) Except as otherwise provided in subsection (b) of this section, a warehouse's lien may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods. The notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a method different from that selected by the warehouse is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. The warehouse sells in a commercially reasonable manner if the warehouse sells the goods in the usual manner in any recognized market therefore, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable, except in cases covered by the preceding sentence.

(b) A warehouse may enforce its lien on goods, other than goods stored by a merchant in the course of its business, only if the following requirements are satisfied:

(1) All persons known to claim an interest in the goods must be notified.

(2) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than 10 days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(3) The sale must conform to the terms of the notification.

(4) The sale must be held at the nearest suitable place to where the goods are held or stored.

(5) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account the goods are being held, and the time and place of the sale. The sale must take place at least 15 days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must

be posted at least 10 days before the sale in not fewer than six conspicuous places in the neighborhood of the proposed sale.

(c) Before any sale pursuant to this section, any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred in complying with this section. In that event, the goods may not be sold but must be retained by the warehouse subject to the terms of the receipt and this Article.

(d) A warehouse may buy at any public sale held pursuant to this section.

(e) A purchaser in good faith of goods sold to enforce a warehouse's lien takes the goods free of any rights of persons against whom the lien was valid, despite the warehouse's noncompliance with this section.

(f) A warehouse may satisfy its lien from the proceeds of any sale pursuant to this section but shall hold the balance, if any, for delivery on demand to any person to whom the warehouse would have been bound to deliver the goods.

(g) The rights provided by this section are in addition to all other rights allowed by law to a creditor against a debtor.

(h) If a lien is on goods stored by a merchant in the course of its business, the lien may be enforced in accordance with subsection (a) or (b) of this section.

(i) A warehouse is liable for damages caused by failure to comply with the requirements for sale under this section and, in case of willful violation, is liable for conversion.

"PART 3.

"BILLS OF LADING: SPECIAL PROVISIONS.

"§ 25-7-301. Liability for nonreceipt or misdescription; "said to contain"; "shipper's weight, load, and count"; improper handling.

(a) A consignee of a nonnegotiable bill of lading which has given value in good faith, or a holder to which a negotiable bill has been duly negotiated, relying upon the description of the goods in the bill or upon the date shown in the bill, may recover from the issuer damages caused by the misdating of the bill or the nonreceipt or misdescription of the goods, except to the extent that the bill indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, such as in a case in which the description is in terms of marks or labels or kind, quantity, or condition or the receipt or description is qualified by "contents or condition of contents of packages unknown," "said to contain," "shipper's weight, load, and count," or words of similar import, if that indication is true.

(b) If goods are loaded by the issuer of a bill of lading;

(1) The issuer shall count the packages of goods if shipped in packages and ascertain the kind and quantity if shipped in bulk; and

(2) Words such as "shipper's weight, load, and count," or words of similar import indicating that the description was made by the shipper are ineffective except as to goods concealed in packages.

(c) If bulk goods are loaded by a shipper that makes available to the issuer of a bill of lading adequate facilities for weighing those goods, the issuer shall ascertain the kind and quantity within a reasonable time after receiving the shipper's request in a

record to do so. In that case, "shipper's weight" or words of similar import are ineffective.

(d) The issuer of a bill of lading, by including in the bill the words "shipper's weight, load, and count," or words of similar import, may indicate that the goods were loaded by the shipper, and, if that statement is true, the issuer is not liable for damages caused by the improper loading. However, omission of such words does not imply liability for damages caused by improper loading.

(e) A shipper guarantees to an issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition, and weight, as furnished by the shipper, and the shipper shall indemnify the issuer against damage caused by inaccuracies in those particulars. This right of indemnity does not limit the issuer's responsibility or liability under the contract of carriage to any person other than the shipper.

"§ 25-7-302. Through bills of lading and similar documents of title.

(a) The issuer of a through bill of lading, or other document of title embodying an undertaking to be performed in part by a person acting as its agent or by a performing carrier, is liable to any person entitled to recover on the bill or other document for any breach by the other person or the performing carrier of its obligation under the bill or other document. However, to the extent that the bill or other document covers an undertaking to be performed overseas or in territory not contiguous to the continental United States or an undertaking including matters other than transportation, this liability for breach by the other person or the performing carrier may be varied by agreement of the parties.

(b) If goods covered by a through bill of lading or other document of title embodying an undertaking to be performed in part by a person other than the issuer are received by that person, the person is subject, with respect to its own performance while the goods are in its possession, to the obligation of the issuer. The person's obligation is discharged by delivery of the goods to another person pursuant to the bill or other document and does not include liability for breach by any other person or by the issuer.

(c) The issuer of a through bill of lading or other document of title described in subsection (a) of this section is entitled to recover from the performing carrier, or other person in possession of the goods when the breach of the obligation under the bill or other document occurred:

(1) The amount it may be required to pay to any person entitled to recover on the bill or other document for the breach, as may be evidenced by any receipt, judgment, or transcript of judgment; and

(2) The amount of any expense reasonably incurred by the issuer in defending any action commenced by any person entitled to recover on the bill or other document for the breach.

"§ 25-7-303. Diversion; reconsignment; change of instructions.

(a) Unless the bill of lading otherwise provides, a carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods, without liability for misdelivery, on instructions from:

(1) The holder of a negotiable bill;

(2) The consignor on a nonnegotiable bill, even if the consignee has given contrary instructions;

(3) The consignee on a nonnegotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the tangible bill or in control of the electronic bill; or

(4) The consignee on a nonnegotiable bill, if the consignee is entitled as against the consignor to dispose of the goods.

(b) Unless instructions described in subsection (a) of this section are included in a negotiable bill of lading, a person to whom the bill is duly negotiated may hold the bailee according to the original terms.

"§ 25-7-304. Tangible bills of lading in a set.

(a) Except as customary in international transportation, a tangible bill of lading may not be issued in a set of parts. The issuer is liable for damages caused by violation of this subsection.

(b) If a tangible bill of lading is lawfully issued in a set of parts, each of which contains an identification code and is expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitutes one bill.

(c) If a tangible negotiable bill of lading is lawfully issued in a set of parts and different parts are negotiated to different persons, the title of the holder to which the first due negotiation is made prevails as to both the document of title and the goods even if any later holder may have received the goods from the carrier in good faith and discharged the carrier's obligation by surrendering its part.

(d) A person that negotiates or transfers a single part of a tangible bill of lading issued in a set is liable to holders of that part as if it were the whole set.

(e) The bailee shall deliver in accordance with Part 4 of this Article against the first presented part of a tangible bill of lading lawfully issued in a set. Delivery in this manner discharges the bailee's obligation on the whole bill.

"§ 25-7-305. Destination bills.

(a) Instead of issuing a bill of lading to the consignor at the place of shipment, a carrier, at the request of the consignor, may procure the bill to be issued at destination or at any other place designated in the request.

(b) Upon request of any person entitled as against a carrier to control the goods while in transit and on surrender of possession or control of any outstanding bill of lading or other receipt covering the goods, the issuer, subject to G.S. 25-7-105, may procure a substitute bill to be issued at any place designated in the request.

"§ 25-7-306. Altered bills of lading.

An unauthorized alteration or filling in of a blank in a bill of lading leaves the bill enforceable according to its original tenor.

"§ 25-7-307. Lien of carrier.

(a) A carrier has a lien on the goods covered by a bill of lading or on the proceeds thereof in its possession for charges after the date of the carrier's receipt of the goods for storage or transportation, including demurrage and terminal charges, and for expenses necessary for preservation of the goods incident to their transportation or

reasonably incurred in their sale pursuant to law. However, against a purchaser for value of a negotiable bill of lading, a carrier's lien is limited to charges stated in the bill or the applicable tariffs or, if no charges are stated, a reasonable charge.

(b) A lien for charges and expenses under subsection (a) of this section on goods that the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to those charges and expenses. Any other lien under subsection (a) of this section is effective against the consignor and any person that permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked authority.

(c) A carrier loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver.

"§ 25-7-308. Enforcement of carrier's lien.

(a) A carrier's lien on goods may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods. The notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a method different from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. The carrier sells goods in a commercially reasonable manner if the carrier sells the goods in the usual manner in any recognized market therefor, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable, except in cases covered by the preceding sentence.

(b) Before any sale pursuant to this section, any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred in complying with this section. In that event, the goods may not be sold but must be retained by the carrier, subject to the terms of the bill of lading and this Article.

(c) A carrier may buy at any public sale pursuant to this section.

(d) A purchaser in good faith of goods sold to enforce a carrier's lien takes the goods free of any rights of persons against which the lien was valid, despite the carrier's noncompliance with this section.

(e) A carrier may satisfy its lien from the proceeds of any sale pursuant to this section but shall hold the balance, if any, for delivery on demand to any person to whom the carrier would have been bound to deliver the goods.

(f) The rights provided by this section are in addition to all other rights allowed by law to a creditor against a debtor.

(g) A carrier's lien may be enforced pursuant to either subsection (a) of this section or the procedure set forth in G.S. 25-7-210(b).

(h) A carrier is liable for damages caused by failure to comply with the requirements for sale under this section and, in case of willful violation, is liable for conversion.

"§ 25-7-309. Duty of care; contractual limitation of carrier's liability.

(a) A carrier that issues a bill of lading, whether negotiable or nonnegotiable, shall exercise the degree of care in relation to the goods which a reasonably careful person would exercise under similar circumstances. This subsection does not affect any statute, regulation, or rule of law that imposes liability upon a common carrier for damages not caused by its negligence.

(b) Damages may be limited by a term in the bill of lading or in a transportation agreement that the carrier's liability may not exceed a value stated in the bill or transportation agreement if the carrier's rates are dependent upon value and the consignor is afforded an opportunity to declare a higher value and the consignor is advised of the opportunity. However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use.

(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the shipment may be included in a bill of lading or a transportation agreement.

"PART 4.

"WAREHOUSE RECEIPTS AND BILLS OF LADING: GENERAL OBLIGATIONS.

"§ 25-7-401. Irregularities in issue of receipt or bill or conduct of issuer.

The obligations imposed by this Article on an issuer apply to a document of title even if:

(1) The document does not comply with the requirements of this Article or of any other statute, rule, or regulation regarding its issuance, form, or content;

(2) The issuer violated laws regulating the conduct of its business;

(3) The goods covered by the document were owned by the bailee when the document was issued; or

(4) The person issuing the document is not a warehouse but the document purports to be a warehouse receipt.

"§ 25-7-402. Duplicate document of title; overissue.

A duplicate or any other document of title purporting to cover goods already represented by an outstanding document of the same issuer does not confer any right in the goods, except as provided in the case of tangible bills of lading in a set of parts, overissue of documents for fungible goods, substitutes for lost, stolen, or destroyed documents, or substitute documents issued pursuant to G.S. 25-7-105. The issuer is liable for damages caused by its overissue or failure to identify a duplicate document by a conspicuous notation.

"§ 25-7-403. Obligation of bailee to deliver; excuse.

(a) A bailee shall deliver the goods to a person entitled under a document of title if the person complies with subsections (b) and (c) of this section, unless and to the extent that the bailee establishes any of the following:

(1) Delivery of the goods to a person whose receipt was rightful as against the claimant;
(2) Damage to or delay, loss, or destruction of the goods for which the bailee is not liable;
(3) Previous sale or other disposition of the goods in lawful enforcement of a lien or on a warehouse's lawful termination of storage;
(4) The exercise by a seller of its right to stop delivery pursuant to G.S. 25-2-705 or by a lessor of its right to stop delivery pursuant to G.S. 25-2A-526;
(5) A diversion, reconsignment, or other disposition pursuant to G.S. 25-7-303;
(6) Release, satisfaction, or any other personal defense against the claimant; or
(7) Any other lawful excuse.

(b) A person claiming goods covered by a document of title shall satisfy the bailee's lien if the bailee so requests or if the bailee is prohibited by law from delivering the goods until the charges are paid.

(c) Unless a person claiming the goods is a person against whom the document of title does not confer a right under G.S. 25-7-503(a):

(1) The person claiming under a document shall surrender possession or control of any outstanding negotiable document covering the goods for cancellation or indication of partial deliveries; and
(2) The bailee shall cancel the document or conspicuously indicate in the document the partial delivery or the bailee is liable to any person to whom the document is duly negotiated.

"§ 25-7-404. No liability for good-faith delivery pursuant to document of title.

A bailee that in good faith has received goods and delivered or otherwise disposed of the goods according to the terms of a document of title or pursuant to this Article is not liable for the goods even if:

(1) The person from whom the bailee received the goods did not have authority to procure the document or to dispose of the goods; or
(2) The person to whom the bailee delivered the goods did not have authority to receive the goods.

"PART 5.

"WAREHOUSE RECEIPTS AND BILLS OF LADING: NEGOTIATION AND TRANSFER.

"§ 25-7-501. Form of negotiation and requirements of due negotiation.

(a) The following rules apply to a negotiable tangible document of title:

(1) If the document's original terms run to the order of a named person, the document is negotiated by the named person's indorsement and delivery. After the named person's indorsement in blank or to bearer, any person may negotiate the document by delivery alone.
(2) If the document's original terms run to bearer, it is negotiated by delivery alone.

(3) If the document's original terms run to the order of a named person and it is delivered to the named person, the effect is the same as if the document had been negotiated.

(4) Negotiation of the document after it has been indorsed to a named person requires indorsement by the named person and delivery.

(5) A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a monetary obligation.

(b) The following rules apply to a negotiable electronic document of title:

(1) If the document's original terms run to the order of a named person or to bearer, the document is negotiated by delivery of the document to another person. Indorsement by the named person is not required to negotiate the document.

(2) If the document's original terms run to the order of a named person and the named person has control of the document, the effect is the same as if the document had been negotiated.

(3) A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves taking delivery of the document in settlement or payment of a monetary obligation.

(c) Indorsement of a nonnegotiable document of title neither makes it negotiable nor adds to the transferee's rights.

(d) The naming in a negotiable bill of lading of a person to be notified of the arrival of the goods does not limit the negotiability of the bill or constitute notice to a purchaser of the bill of any interest of that person in the goods.

"**§ 25-7-502. Rights acquired by due negotiation.**

(a) Subject to G.S. 25-7-205 and G.S. 25-7-503, a holder to which a negotiable document of title has been duly negotiated acquires thereby:

(1) Title to the document;

(2) Title to the goods;

(3) All rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and

(4) The direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by the issuer except those arising under the terms of the document or under this Article, but in the case of a delivery order, the bailee's obligation accrues only upon the bailee's acceptance of the delivery

order, and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.

(b) Subject to G.S. 25-7-503, title and rights acquired by due negotiation are not defeated by any stoppage of the goods represented by the document of title or by surrender of the goods by the bailee and are not impaired even if:

(1) The due negotiation or any prior due negotiation constituted a breach of duty;

(2) Any person has been deprived of possession of a negotiable tangible document or control of a negotiable electronic document by misrepresentation, fraud, accident, mistake, duress, loss, theft, or conversion; or

(3) A previous sale or other transfer of the goods or document has been made to a third person.

"**§ 25-7-503. Document of title to goods defeated in certain cases.**

(a) A document of title confers no right in goods against a person that before issuance of the document had a legal interest or a perfected security interest in the goods and that did not:

(1) Deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with:

a. Actual or apparent authority to ship, store, or sell;

b. Power to obtain delivery under G.S. 25-7-403; or

c. Power of disposition under G.S. 25-2-403, 25-2A-304(2), 25-2A-305(2), 25-9-320, or 25-9-321(c) or other statute or rule of law; or

(2) Acquiesce in the procurement by the bailor or its nominee of any document.

(b) Title to goods based upon an unaccepted delivery order is subject to the rights of any person to whom a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. That title may be defeated under G.S. 25-7-504 to the same extent as the rights of the issuer or a transferee from the issuer.

(c) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of any person to which a bill issued by the freight forwarder is duly negotiated. However, delivery by the carrier in accordance with Part 4 of this Article pursuant to its own bill of lading discharges the carrier's obligation to deliver.

"**§ 25-7-504. Rights acquired in absence of due negotiation; effect of diversion; stoppage of delivery.**

(a) A transferee of a document of title, whether negotiable or nonnegotiable, to which the document has been delivered but not duly negotiated, acquires the title and rights that its transferor had or had actual authority to convey.

(b) In the case of a transfer of a nonnegotiable document of title, until but not after the bailee receives notice of the transfer, the rights of the transferee may be defeated:

(1) By those creditors of the transferor which could treat the transfer as void under G.S. 25-2-402 or G.S. 25-2A-308;

(2) By a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of the buyer's rights;

(3) By a lessee from the transferor in ordinary course of business if the bailee has delivered the goods to the lessee or received notification of the lessee's rights; or

(4) As against the bailee, by good-faith dealings of the bailee with the transferor.

(c) A diversion or other change of shipping instructions by the consignor in a nonnegotiable bill of lading which causes the bailee not to deliver the goods to the consignee defeats the consignee's title to the goods if the goods have been delivered to a buyer in ordinary course of business or a lessee in ordinary course of business and, in any event, defeats the consignee's rights against the bailee.

(d) Delivery of the goods pursuant to a nonnegotiable document of title may be stopped by a seller under G.S. 25-2-705 or a lessor under G.S. 25-2A-526, subject to the requirements of due notification in those sections. A bailee that honors the seller's or lessor's instructions is entitled to be indemnified by the seller or lessor against any resulting loss or expense.

"§ 25-7-505. Indorser not guarantor for other parties.

The indorsement of a tangible document of title issued by a bailee does not make the indorser liable for any default by the bailee or previous indorsers.

"§ 25-7-506. Delivery without indorsement; right to compel indorsement.

The transferee of a negotiable tangible document of title has a specifically enforceable right to have its transferor supply any necessary indorsement, but the transfer becomes a negotiation only as of the time the indorsement is supplied.

"§ 25-7-507. Warranties on negotiation or delivery of document of title.

If a person negotiates or delivers a document of title for value, otherwise than as a mere intermediary under G.S. 25-7-508, unless otherwise agreed, the transferor, in addition to any warranty made in selling or leasing the goods, warrants to its immediate purchaser only that:

(1) The document is genuine;

(2) The transferor does not have knowledge of any fact that would impair the document's validity or worth; and

(3) The negotiation or delivery is rightful and fully effective with respect to the title to the document and the goods it represents.

"§ 25-7-508. Warranties of collecting bank as to documents of title.

A collecting bank or other intermediary known to be entrusted with documents of title on behalf of another or with collection of a draft or other claim against delivery of documents warrants by the delivery of the documents only its own good faith and authority even if the collecting bank or other intermediary has purchased or made advances against the claim or draft to be collected.

"§ 25-7-509. Adequate compliance with commercial contract.

Whether a document of title is adequate to fulfill the obligations of a contract for sale, a contract for lease, or the conditions of a letter of credit is determined by Article 2, 2A, or 5 of this Chapter.

"PART 6.
"WAREHOUSE RECEIPTS AND BILLS OF LADING: MISCELLANEOUS PROVISIONS.

"§ 25-7-601. Lost, stolen, or destroyed documents of title.

(a) If a document of title is lost, stolen, or destroyed, a court may order delivery of the goods or issuance of a substitute document, and the bailee may without liability to any person comply with the order. If the document was negotiable, a court may not order delivery of the goods or issuance of a substitute document without the claimant's posting security unless it finds that any person that may suffer loss as a result of nonsurrender of possession or control of the document is adequately protected against the loss. If the document was nonnegotiable, the court may require security. The court may also order payment of the bailee's reasonable costs and attorneys' fees in any action under this subsection.

(b) A bailee that, without a court order, delivers goods to a person claiming under a missing negotiable document of title is liable to any person injured thereby. If the delivery is not in good faith, the bailee is liable for conversion. Delivery in good faith is not conversion if the claimant posts security with the bailee in an amount at least double the value of the goods at the time of posting to indemnify any person injured by the delivery that files a notice of claim within one year after the delivery.

"§ 25-7-602. Judicial process against goods covered by negotiable document of title.

Unless a document of title was originally issued upon delivery of the goods by a person that did not have power to dispose of them, a lien does not attach by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless possession or control of the document is first surrendered to the bailee or the document's negotiation is enjoined. The bailee may not be compelled to deliver the goods pursuant to process until possession or control of the document is surrendered to the bailee or to the court. A purchaser of the document for value without notice of the process or injunction takes free of the lien imposed by judicial process.

"§ 25-7-603. Conflicting claims; interpleader.

If more than one person claims title to or possession of the goods, the bailee is excused from delivery until the bailee has a reasonable time to ascertain the validity of the adverse claims or to commence an action for interpleader. The bailee may assert an interpleader either in defending an action for nondelivery of the goods or by original action."

SUBPART B. CONFORMING AMENDMENTS TO OTHER ARTICLES OF THE UNIFORM COMMERCIAL CODE.

SECTION 26. G.S. 25-1-201(b), as enacted by Part I of this act, reads as rewritten:

"(b) Subject to definitions contained in other articles of this Chapter that apply to particular articles or parts thereof:

...

(5) "Bearer" means a person in control of a negotiable electronic document of title or a person in possession of a negotiable instrument, negotiable tangible document of title, or certificated security that is payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of directly or indirectly transporting or forwarding goods. The term does not include a warehouse receipt.

...

(15) "Delivery", with respect to an electronic document of title means voluntary transfer of control and with respect to an instrument, a tangible document of title, or chattel paper, means voluntary transfer of possession.

(16) "Document of title" ~~includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which~~ means a record (i) that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of ~~it~~ the record is entitled to receive, control, hold, and dispose of the record ~~document~~ and the goods ~~it covers.~~ the record covers and (ii) that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass. The term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt, and order for delivery of goods. ~~To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.~~ An electronic document of title means a document of title evidenced by a record consisting of information stored in an electronic medium. A tangible document of title means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium.

...

(21) "Holder" means:

a. The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; ~~or~~

b. The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in ~~possession.~~ possession; or

c. The person in control of a negotiable electronic document of title.

...

(42) "Warehouse receipt" means a ~~receipt~~ document of title issued by a person engaged in the business of storing goods for hire."

SECTION 27. G.S. 25-2-103(3) reads as rewritten:

"(3) "Control" as provided in G.S. 25-7-106 and the ~~The~~ following definitions in other articles apply to this article:

"Check." G.S. 25-3-104.

"Consignee." G.S. 25-7-102.

"Consignor." G.S. 25-7-102.

"Consumer Goods." G.S. 25-9-102.

"Dishonor." G.S. 25-3-502.

"Draft." G.S. 25-3-104."

SECTION 28. G.S. 25-2-104(2) reads as rewritten:

"(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany or are associated with the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (G.S. 25-2-707)."

SECTION 29. G.S. 25-2-310 reads as rewritten:

"**§ 25-2-310. Open time for payment or running of credit; authority to ship under reservation.**

Unless otherwise agreed

(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (G.S. 25-2-513); and

(c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due regardless of where the goods are to be received (i) at the time and place at which the buyer is to receive delivery of the tangible documents or (ii) at the time the buyer is to receive delivery of the electronic documents and at the seller's place of business or if none, the seller's residence; ~~regardless of where the goods are to be received;~~ and

(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period."

SECTION 30. G.S. 25-2-323(2) reads as rewritten:

"(2) Where in a case within subsection (1) a tangible bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set

(a) due tender of a single part is acceptable within the provisions of this article on cure of improper delivery (subsection (1) of G.S.25-2-508); and

(b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate."

SECTION 31. G.S. 25-2-401(3) reads as rewritten:

"(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a tangible document of title, title passes at the time when and the place where he delivers such ~~documents;~~ documents and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document; or

(b) if the goods are at the time of contracting already identified and no documents of title are to be delivered, title passes at the time and place of contracting."

SECTION 32. G.S. 25-2-503(4) and (5) read as rewritten:

"(4) Where goods are in the possession of a bailee and are to be delivered without being moved

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

(b) tender to the buyer of a non-negotiable document of title or of a ~~written direction to~~ record directing the bailee to deliver is sufficient tender unless the buyer seasonably objects, ~~and~~ and, except as otherwise provided in Article 9 of this Chapter, receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents

(a) he must tender all such documents in correct form, except as provided in this article with respect to bills of lading in a set (subsection (2) of G.S. 25-2-323); and

(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying or associated with the documents constitutes non-acceptance or rejection."

SECTION 33. G.S. 25-2-505 reads as rewritten:

"**§ 25-2-505. Seller's shipment under reservation.**

(1) Where the seller has identified goods to the contract by or before shipment:

(a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

(b) a nonnegotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of G.S. 25-2-507) a nonnegotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession or control of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within ~~the preceding section~~ G.S. 25-2-504 but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable ~~document.~~ document of title."

SECTION 34. G.S. 25-2-506(2) reads as rewritten:

"(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently ~~regular on its face.~~ regular."

SECTION 35. G.S. 25-2-509(2) reads as rewritten:

"(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

(a) on his receipt of possession or control of a negotiable document of title covering the goods; or

(b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) after his receipt of possession or control of a nonnegotiable document of title or other ~~written~~ direction to ~~deliver,~~ deliver in a record, as provided in subsection (4)(b) of G.S. 25-2-503."

SECTION 36. G.S. 25-2-605(2) reads as rewritten:

"(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent ~~on the face of~~ in the documents."

SECTION 37. G.S. 25-2-705(2) and (3) read as rewritten:

"(2) As against such buyer the seller may stop delivery until

(a) receipt of the goods by the buyer; or

(b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as ~~warehouseman;~~ a warehouse; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

(3) (a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of possession or control of the document.

(d) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor."

SECTION 38. G.S. 25-2A-103 reads as rewritten:

"**§ 25-2A-103. Definitions and index of definitions.**

(1) In this Article unless the context otherwise requires:

(a) "Buyer in ordinary course of ~~[business",]~~ business" means a person ~~who~~ who, in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the ~~[goods,]~~ goods, buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes ~~receiving~~ acquiring goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

...

(o) "Lessee in ordinary course of business" means a person ~~who~~ who, in good faith and without knowledge that the lease to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the ~~[goods,]~~ goods, leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. "Leasing" may be for cash or by exchange of other property or on secured or unsecured credit and includes ~~receiving~~ acquiring goods or documents of title under a preexisting lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

..."

SECTION 39. G.S. 25-2A-514(2) reads as rewritten:

"(2) A lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent ~~on the face of~~ in the documents."

SECTION 40. G.S. 25-2A-526(2) reads as rewritten:

"(2) In pursuing its remedies under subsection (1) of this section, the lessor may stop delivery until

(a) receipt of the goods by the lessee;

(b) acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or

(c) such an acknowledgment to the lessee by a carrier via reshipment or as ~~warehouseman.~~ a warehouse."

SECTION 41. G.S. 25-4-104(c) reads as rewritten:

"(c) "Control" as provided in G.S. 25-7-106 and the ~~The~~ following definitions in other Articles apply to this Article:

"Acceptance"	G.S. 25-3-409.
"Alteration"	G.S. 25-3-407.
"Cashier's check"	G.S. 25-3-104.
"Certificate of deposit"	G.S. 25-3-104.
"Certified check"	G.S. 25-3-409.
"Check"	G.S. 25-3-104.
"Good faith"	G.S. 25-3-103.
"Draft"	G.S. 25-3-104.
"Holder in due course"	G.S. 25-3-302.
"Instrument"	G.S. 25-3-104.
"Notice of dishonor"	G.S. 25-3-503.
"Order"	G.S. 25-3-103.
"Ordinary care"	G.S. 25-3-103
"Person entitled to enforce"	G.S. 25-3-301.
"Presentment"	G.S. 25-3-501.
"Promise"	G.S. 25-3-103.
"Prove"	G.S. 25-3-103.
"Teller's check"	G.S. 25-3-104.
"Unauthorized signature"	G.S. 25-3-403."

SECTION 42. G.S. 25-4-208(c) reads as rewritten:

"(c) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or possession or control of the accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to Article 9, but:

(1) No security agreement is necessary to make the security interest enforceable (G.S. 25-9-203(b)(3)(a.);

(2) No filing is required to perfect the security interest; and

(3) The security interest has priority over conflicting perfected security interests in the item, accompanying ~~documents~~ documents, or proceeds."

SECTION 43. G.S. 25-8-103 reads as rewritten:

"**§ 25-8-103. Rules for determining whether certain obligations and interests are securities or financial assets.**

(a) A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.

...

(f) A commodity contract, as defined in G.S. 25-9-102(a)(15), is not a security or financial asset.

(g) A document of title is not a financial asset unless G.S. 25-8-102(a)(9)(iii) applies."

SECTION 44. G.S. 25-9-102 reads as rewritten:

"**§ 25-9-102. Definitions and index of definitions.**

(a) Article 9 definitions. – In this Article:

...

(30) "Document" means a document of title or a receipt of the type described in ~~G.S. 25-7-201(2).~~ G.S. 25-7-201(b).

...

(b) Definitions in other articles. –"Control" as provided in G.S. 25-7-106 and the ~~The~~ following definitions in other Articles of this Chapter apply to this Article:

"Applicant"	G.S. 25-5-102.
"Beneficiary"	G.S. 25-5-102.
"Broker"	G.S. 25-8-102.
"Certificated security"	G.S. 25-8-102.
"Check"	G.S. 25-3-104.
"Clearing corporation"	G.S. 25-8-102.
"Contract for sale"	G.S. 25-2-106.
"Customer"	G.S. 25-4-104.
"Entitlement holder"	G.S. 25-8-102.
"Financial asset"	G.S. 25-8-102.
"Holder in due course"	G.S. 25-3-302.
"Issuer" (with respect to a letter of credit or letter-of-credit right)	G.S. 25-5-102.
"Issuer" (with respect to a security)	G.S. 25-8-201.
"Issuer" (with respect to documents of title)	G.S. 25-7-102.
"Lease"	G.S. 25-2A-103.
"Lease agreement"	G.S. 25-2A-103.
"Lease contract"	G.S. 25-2A-103.
"Leasehold interest"	G.S. 25-2A-103.
"Lessee"	G.S. 25-2A-103.
"Lessee in ordinary course of business"	G.S. 25-2A-103.
"Lessor"	G.S. 25-2A-103.
"Lessor's residual interest"	G.S. 25-2A-103.
"Letter of credit"	G.S. 25-5-102.
"Merchant"	G.S. 25-2-104.
"Negotiable instrument"	G.S. 25-3-104.
"Nominated person"	G.S. 25-5-102.
"Note"	G.S. 25-3-104.

"Proceeds of a letter of credit"	G.S. 25-5-114.
"Prove"	G.S. 25-3-103.
"Sale"	G.S. 25-2-106.
"Securities account"	G.S. 25-8-501.
"Securities intermediary"	G.S. 25-8-102.
"Security"	G.S. 25-8-102.
"Security certificate"	G.S. 25-8-102.
"Security entitlement"	G.S. 25-8-102.
"Uncertificated security"	G.S. 25-8-102."

SECTION 45. G.S. 25-9-203 (b) reads as rewritten:

"(b) Enforceability. – Except as otherwise provided in subsections (c) through (i) of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(1) Value has been given;

(2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) One of the following conditions is met:

a. The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

b. The collateral is not a certificated security and is in the possession of the secured party under G.S. 25-9-313 pursuant to the debtor's security agreement;

c. The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under G.S. 25-8-301 pursuant to the debtor's security agreement; or

d. The collateral is deposit accounts, electronic chattel paper, investment property, ~~or~~ letter-of-credit rights, or electronic documents, and the secured party has control under G.S. 25-7-106, 25-9-104, 25-9-105, 25-9-106, or 25-9-107 pursuant to the debtor's security agreement."

SECTION 46. G.S. 25-9-207(c) reads as rewritten:

"(c) Rights and duties when secured party in possession or control. – Except as otherwise provided in subsection (d) of this section, a secured party having possession of collateral or control of collateral under G.S. 25-7-106, 25-9-104, 25-9-105, 25-9-106, or 25-9-107:

(1) May hold as additional security any proceeds, except money or funds, received from the collateral;

(2) Shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and

(3) May create a security interest in the collateral."

SECTION 47. G.S. 25-9-208(b) reads as rewritten:

"(b) Duties of secured party after receiving demand from debtor. – Within 10 days after receiving an authenticated demand by the debtor:

(1) A secured party having control of a deposit account under 25-9-104(a)(2) shall send to the bank with which the deposit account is maintained an authenticated statement that releases the bank from any further obligation to comply with instructions originated by the secured party;

(2) A secured party having control of a deposit account under G.S. 25-9-104(a)(3) shall:

a. Pay the debtor the balance on deposit in the deposit account; or

b. Transfer the balance on deposit into a deposit account in the debtor's name;

(3) A secured party, other than a buyer, having control of electronic chattel paper under G.S. 25-9-105 shall:

a. Communicate the authoritative copy of the electronic chattel paper to the debtor or its designated custodian;

b. If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic chattel paper is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and

c. Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party;

(4) A secured party having control of investment property under G.S. 25-8-106(d)(2) or G.S. 25-9-106(b) shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained an authenticated record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party; ~~and~~

(5) A secured party having control of a letter-of-credit right under G.S. 25-9-107 shall send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party an authenticated release from any further obligation to pay or deliver proceeds of the letter of credit to the secured ~~party.~~ party; and

(6) A secured party having control of an electronic document shall:

a. Give control of the electronic document to the debtor or its designated custodian;

b. If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic document is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and

c. Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party."

SECTION 48. G.S. 25-9-301(3) reads as rewritten:

"(3) Except as otherwise provided in paragraph (4) of this section, while tangible negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

a. Perfection of a security interest in the goods by filing a fixture filing;

b. Perfection of a security interest in timber to be cut; and

c. The effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral."

SECTION 49. G.S. 25-9-310(b) reads as rewritten:

"(b) Exceptions: filing not necessary. – The filing of a financing statement is not necessary to perfect a security interest:

(1) That is perfected under G.S. 25-9-308(d), (e), (f), or (g);

(2) That is perfected under G.S. 25-9-309 when it attaches;

(3) In property subject to a statute, regulation, or treaty described in G.S. 25-9-311(a);

(4) In goods in possession of a bailee which is perfected under G.S. 25-9-312(d)(1) or (2);

(5) In certificated securities, documents, goods, or instruments which is perfected without ~~filing~~ filing, control, or possession under G.S. 25-9-312(e), (f), or (g);

(6) In collateral in the secured party's possession under G.S. 25-9-313;

(7) In a certificated security which is perfected by delivery of the security certificate to the secured party under G.S. 25-9-313;

(8) In deposit accounts, electronic chattel paper, electronic documents, investment property, or letter-of-credit rights which is perfected by control under G.S. 25-9-314;

(9) In proceeds which is perfected under G.S. 25-9-315; or

(10) That is perfected under G.S. 25-9-316."

SECTION 50. G.S. 25-9-312(e) reads as rewritten:

"(e) Temporary perfection: new value. – A security interest in certificated securities, negotiable documents, or instruments is perfected without filing or the taking of possession or control for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement."

SECTION 51. G.S. 25-9-313(a) reads as rewritten:

"(a) Perfection by possession or delivery. – Except as otherwise provided in subsection (b) of this section, a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under G.S. 25-8-301."

SECTION 52. G.S. 25-9-314(a) and (b) read as rewritten:

"(a) Perfection by control. – A security interest in investment property, deposit accounts, letter-of-credit rights, ~~or~~ electronic chattel paper, or electronic documents may be perfected by control of the collateral under G.S. 25-7-106, 25-9-104, 25-9-105, 25-9-106, or 25-9-107.

(b) Specified collateral: time of perfection by control; continuation of perfection. – A security interest in deposit accounts, electronic chattel paper, ~~or~~ letter-of-credit ~~rights~~ rights, or electronic documents is perfected by control under G.S. 25-7-106, 25-9-104, 25-9-105, or 25-9-107 when the secured party obtains control and remains perfected by control only while the secured party retains control."

SECTION 53. G.S. 25-9-317(b) and (d) read as rewritten:

"(b) Buyers that receive delivery. – Except as otherwise provided in subsection (e) of this section, a buyer, other than a secured party, of tangible chattel paper, tangible documents, goods, instruments, or a security certificate takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

...

(d) Licensees and buyers of certain collateral. – A licensee of a general intangible or a buyer, other than a secured party, of accounts, electronic chattel paper, electronic documents, general intangibles, or investment property other than a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected."

SECTION 54. G.S. 25-9-338 reads as rewritten:

"**§ 25-9-338. Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information.**

If a security interest or agricultural lien is perfected by a filed financing statement providing information described in G.S. 25-9-516(b)(5) which is incorrect at the time the financing statement is filed:

(1) The security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security interest gives value in reasonable reliance upon the incorrect information; and

(2) A purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of tangible chattel paper, tangible documents, goods, instruments, or a security certificate, receives delivery of the collateral."

SECTION 55. G.S. 25-9-601(b) reads as rewritten:

"(b) Rights and duties of secured party in possession or control. – A secured party in possession of collateral or control of collateral under G.S. 25-7-106, 25-9-104, 25-9-105, 25-9-106, or 25-9-107 has the rights and duties provided in G.S. 25-9-207."

SECTION 56. G.S. 25-10-104 is repealed.

SUBPART C. OTHER CONFORMING AMENDMENTS AND REPEALS.

SECTION 57. G.S. 106-451.19 reads as rewritten:

"**§ 106-451.19. Contents of receipts.**

Every receipt issued for cotton stored in a warehouse licensed under this Article shall contain the information required under the United States Warehouse Act, 7 U.S.C. § 214, et seq., and the regulations promulgated thereunder. ~~embody within its written or printed terms:~~

~~(1) The location of the warehouse in which the cotton is stored;~~

~~(2) The date of issue of the receipt;~~

~~(3) The consecutive number of the receipt;~~

~~(4) A statement whether the cotton received will be delivered to the bearer, to a specified person, or to a specified person or his order;~~

~~(5) The rate of storage charges;~~

~~(6) A description of the cotton received, showing the quantity thereof and a description of each bale by mark, number, or other means of identification and the weight of each bale;~~

~~(7) The grade or other classification of the cotton received and the standard or description in accordance with which such classification has been made;~~

~~(8) A statement that the receipt is issued subject to this Article and the rules and regulations prescribed hereunder;~~

~~(9) If the receipt be issued for cotton of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership;~~

~~(10) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien; and~~

~~(11) Signature of the warehouseman, which may be made by his authorized agent.~~"

SECTION 58.(a) Article 5 of Chapter 27 of the General Statutes is repealed.

SECTION 58.(b) Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

PART III. MISCELLANEOUS PROVISIONS, DIRECTIONS, AND EFFECTIVE DATE.

SECTION 59. Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act.

SECTION 60. A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.

SECTION 61. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to Uniform Commercial Code Revised Article 1 and Uniform Commercial Code Revised Article 7 and all explanatory comments of the drafters of this act as the Revisor deems appropriate.

SECTION 62. This act becomes effective October 1, 2006.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 1555*

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S1555-ARC-51 [v.2]

Date 1 June ,2006

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Senator Hartsell

moves to amend the bill on page 2, line 3, by deleting the word "Article" and substituting "article";

and on page 2, line 6, by deleting the work "must" and substituting the work "shall";

and on page 3, line 2, by deleting the word "Articles" and substituting the work "articles";

and on page 11, line 4, by deleting the word "must" and substituting the word "shall";

and on page 12, lines 27- 44, by deleting those lines and substituting the following:

~~"Account". G.S. 25-9-102(a)(2).~~
~~"Between merchants". G.S. 25-2-104(3).~~
~~"Buyer". G.S. 25-2-103(1)(a).~~
~~"Chattel paper". G.S. 25-9-102(a)(11).~~
~~"Consumer goods". G.S. 25-9-102(a)(23).~~
~~"Document". G.S. 25-9-102(a)(30).~~
~~"Entrusting". G.S. 25-2-403(3).~~
~~"General intangible". G.S. 25-9-102(a)(42).~~
~~"Good faith". G.S. 25-2-103(1)(b).~~
~~"Instrument". G.S. 25-9-102(a)(47).~~
~~"Merchant". G.S. 25-2-104(1).~~
~~"Mortgage". G.S. 25-9-102(a)(55).~~
~~"Pursuant to commitment". G.S. 25-9-102(a)(68).~~
~~"Receipt". G.S. 25-2-103(1)(c).~~

~~"Sale". G.S. 25-2-106(1).~~
~~"Sale on approval". G.S. 25-2-326.~~
~~"Sale or return". G.S. 25-2-326.~~
~~"Seller". G.S. 25-2-103(1)(d).~~

"Account"	G.S. 25-9-102(a)(2).
"Between merchants"	G.S. 25-2-104(3).
"Buyer"	G.S. 25-2-103(1)(a).
"Chattel paper"	G.S. 25-9-102(a)(11).
"Consumer goods"	G.S. 25-9-102(a)(23).
"Document".	G.S. 25-9-102(a)(30).
"Entrusting"	G.S. 25-2-403(3).
"General intangible"	G.S. 25-9-102(a)(42).
"Instrument"	G.S. 25-9-102(a)(47).
"Merchant"	G.S. 25-2-104(1).
"Mortgage"	G.S. 25-9-102(a)(55).
"Pursuant to commitment"	G.S. 25-9-102(a)(68).
"Receipt"	G.S. 25-2-103(1)(c).
"Sale"	G.S. 25-2-106(1).
"Sale on approval"	G.S. 25-2-326.
"Sale or return"	G.S. 25-2-326.
"Seller"	G.S. 25-2-103(1)(d).";

and on page 15, lines 18 and 20 , by inserting "of this section: after the "(a)";

and on page 17, line 18, by deleting the word "Articles" and substituting "articles";

and on page 17, line 36, by inserting the word "Section" after the word "supersede;

and on page 27, line 31, by deleting the word "must" and substituting the word "shall";

and on page 35, lines 8-14 by deleting those lines and substituting the following:
"other articles apply to this ~~article:~~Article:

~~"Check." G.S. 25-3-104.~~

~~"Consignee." G.S. 25-7-102.~~
~~"Consignor." G.S. 25-7-102.~~
~~"Consumer Goods." G.S. 25-9-102.~~
~~"Dishonor." G.S. 25-3-502.~~
~~"Draft." G.S. 25-3-104.~~

"Check"	G.S. 25-3-104.
"Consignee"	G.S. 25-7-102.
"Consignor"	G.S. 25-7-102.
"Consumer Goods"	G.S. 25-9-102.
"Dishonor"	G.S. 25-3-502.
"Draft"	G.S. 25-3-104.";

and on page 36, line 1, by inserting the phrase "of this section" after "(1)";

and on page 36, line 6, by rewriting the line to read:
"~~article~~ Article on cure of improper delivery (subsection (1) of G.S.25-2-508);";
and on page 39, by inserting the phrase "as amended by Section 14 of this act," after the phrase "G.S. 25-4-104(c);

and on page 39, by deleting line 17;

and on page 39, by deleting line 37 and substituting:
"enforceable (G.S. 25-9-203(b)(3)a.);";

and on page 40, by deleting line 16 and substituting the following:
" ~~The~~ following definitions in other ~~Articles~~ articles of this Chapter apply to this Article:".

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 1555*

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S1555-ARC-51 [v.2]

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

State of North Carolina
General Statutes
Commission

9001 Mail Service Center
RALEIGH, NORTH CAROLINA
27699-9001

MEMORANDUM
May 24, 2006

TO: Senate Judiciary II Committee
FROM: General Statutes Commission
RE: **Senate Bill 1555 (Revise Articles 1 and 7 of the UCC)**

General Comments

This bill:

(1) Replaces current Article 1 of Chapter 25 of the General Statutes (Uniform Commercial Code) with Revised Article 1 of the Uniform Commercial Code. Article 1 contains provisions (for example, definitions) that apply throughout the UCC. The revised article reflects the substantial revisions made to other UCC articles over the last 20 years; updates the style; eliminates obsolete provisions; reorganizes in part; and makes clarifying and substantive changes as described below.

(2) Replaces current Article 7 of Chapter 25 with Revised Article 7 of the UCC. Article 7 covers bills of lading and warehouse receipts. The revision primarily reflects changes necessary to accommodate electronic documents.

(3) Makes conforming amendments to other articles in Chapter 25 and to other sections in the General Statutes.

(4) Repeals the obsolete criminal provisions in Article 5 of Chapter 27 of the General Statutes, the former Uniform Warehouse Receipts Act.

Specific Comments

Part I of this bill contains the provisions relating to Revised Article 1.

Subpart A contains Revised Article 1. In addition to the modernizing and stylistic changes noted above, Revised Article 1 contains the following:

Proposed § 25-1-102 expressly limits the scope of Revised Article 1 to transactions that are governed by Chapter 25. This section is intended to prevent the substantive provisions in Article 1 from being improperly applied to a transaction outside the scope of the UCC. The General Statutes Commission added the introductory phrase ("Except as provided in G.S. 25-1-301") to make proposed § 25-1-301's choice of law rules clearly applicable to a transaction that is not subject to Chapter 25 but is governed by the Uniform Commercial Code as enacted in one or more other states with contacts to the transaction, as to which North Carolina law would not apply.

Proposed § 25-1-201(b)(20), the definition of "good faith," has been changed to include the observance of reasonable commercial standards of fair dealing. This definition of "good faith," originally found only in Article 2 (Sales), now already applies in every other article of Chapter 25 except Article 5, which is expressly excluded from the definition in Revised Article 1.

Current G.S. 25-1-206 is not included in Revised Article 1. This section provides a statute of frauds (requirement of a writing) for contracts for the sale of personal property for more than $5,000. Effectively, it only applies to transactions that are outside the scope of Chapter 25.

Proposed § 25-1-303, which is derived from current G.S. 25-1-205, has been expanded to allow evidence of "course of performance" to be used to interpret a contract along with course of dealing and usage of trade. The course of performance provisions are derived from those in Articles 2 and 2A.

Proposed § 25-1-306 is derived from current G.S. 25-1-107, which allows a right or claim arising out of a breach of contract to be discharged without consideration if the aggrieved party agrees in writing. In addition to changes to allow for electronic documents, the revisions to this section clarify the distinction between the act of agreeing and the document or record that memorializes the act.

In addition to the change in proposed § 25-1-102 already noted, the General Statutes Commission made two changes to Revised Article 1:

First, in proposed § 25-1-107, which is equivalent to current G.S. 25-1-109, the Commission brought forward the second sentence of the current section, which provides that subsection catchlines in Article 9 are not part of the law. This sentence was added to current G.S. 25-1-109 in 2000, when Revised Article 9 was enacted in this State. This State's version of Revised Article 9 includes optional subsection catchlines that the National Conference of Commissioners on Uniform State Laws (NCCUSL) provided but did not include in its "official" Revised Article 9. The inclusion of the optional subsection catchlines necessitated the 2000 amendment to G.S. 25-1-109, and bringing the sentence forward preserves this amendment.

Second, in proposed § 25-1-301, the General Statutes Commission decided to recommend retention of current Article 1's choice of law provision (current G.S. 25-1-105) rather than enactment of Revised Article 1's choice of law provision. The new choice of law provision has been widely opposed nationally. In this State, the North Carolina Bankers Association has expressed opposition. No state that has enacted Revised Article 1 has included the new choice of law provision; rather, states are retaining the former provision. Because of (i) the desirability of uniformity with other states and (ii) expressed opposition to the new provision, the Commission concluded that retaining the current law was the better choice at this time.

Subparts B and C contain conforming amendments to other articles of Chapter 25 and to other sections in the General Statutes, respectively, needed as a result of Revised Article 1.

Part II of this bill contains the provisions relating to Revised Article 7.

Subpart A contains Revised Article 7. The revision includes updating style, organization, and terminology and eliminating obsolete provisions, for example, those relating to certain tariffs and classifications that date back to the time the transportation industry was heavily regulated and no longer apply. Changes made by Revised Article 7 also include:

Proposed § 25-7-102, the definitions section, includes some new definitions ("carrier," "record," "sign," and "shipper") and revises other definitions to take electronic documents into account (for example, in the definition of "delivery order," the reference to "written order" is changed to "record") and to update the style (for example, "warehouseman" is changed to the more gender neutral "warehouse").

Proposed § 25-7-103 contains an express provision in subsection (d) that Revised Article 7 governs if there is a conflict between it and Article 40 of Chapter 66 of the General Statutes (Uniform Electronic Transactions Act).

Proposed § 25-7-104 has been revised to make it clearer when a bill of lading or warehouse receipt is negotiable and when it is nonnegotiable.

Current G.S. 25-7-105, on interpreting Article 7, was omitted as no longer needed, because the revision of Article 7 has clarified when provisions apply to warehouse receipts but not bills of lading and vice versa. Proposed § 25-7-105 contains provisions allowing a bill of lading or a warehouse receipt to be issued in one medium and reissued in another, for example, initially issued as a paper document and reissued as an electronic document.

Proposed § 25-7-106 is new. For electronic bills of lading and warehouse receipts, Revised Article 7 substitutes the concept of control of an electronic document in place of the concept of indorsement and possession that applies with respect to a written document of title. Where a person with a written document of title delivers the document by voluntarily transferring possession, a person with an electronic document of title delivers the document by voluntarily transferring control. This section defines "control" in a way that is derived from the Uniform Electronic Transactions Act's provisions on transferrable records. A person has control of an electronic document if the system used to transfer the electronic document establishes that person as the only person who has the interests referenced in the document, for example, the system identifies this person as the person to whom the document was issued, permits only one authoritative copy to exist at a time, will permit only proper changes to be made to the document, (e.g., an assignment), and will not allow anyone else to make these changes.

Proposed § 25-7-204 deals with a warehouse's statutory duty of care and its ability to limit its damages. In Revised Article 7, this section is changed so that a limit on damages in a warehouse receipt no longer has to be set out per item. Subsection (d) brings forward current G.S. 25-7-204(4) specifying that the section does not invalidate any statute that places a greater responsibility on a warehouse than this section.

Proposed § 25-7-209 is expanded to allow a warehouse to claim a lien under a storage agreement as well as under a warehouse receipt.

Proposed § 25-7-307 expands a carrier's lien to apply to proceeds of goods when the proceeds are in the carrier's possession.

Subpart B contains conforming amendments to other articles of Chapter 25 that are needed as a result of Revised Article 7.

Subpart C contains amendments to other parts of the General Statutes recommended as a result of Revised Article 7:

Section 57 amends G.S. 106-451.19 (contents of cotton warehouse receipts) to update the language of that section by requiring that the contents of such a receipt conform to the United States Warehouse Act, 7 U.S.C. § 214 et seq.

Section 58 repeals Article 5 of Chapter 27 as obsolete. Chapter 27 is the former Uniform Warehouse Receipts Act, a predecessor to Article 7 of the UCC. Article 5 of Chapter 27 contains various criminal provisions relating to fraud and deceptive practices in connection with warehouse receipts. The former Uniform Warehouse Receipts Act was enacted in this State before the creation of the General Statutes in 1943, and the criminal provisions in Article 5 have not been amended since that time. Except for Article 5, Chapter 27 was repealed when the UCC was first enacted in this State in 1965. At that time, Article 5 was left intact, contrary to NCCUSL's recommendation either to repeal it as duplicating the general criminal law on frauds or to recodify it into the general criminal law. It appears that no one has been charged under any of the sections in Article 5 for decades. The offenses contained in Article 5 have never been classified for sentencing purposes. The General Statutes Commission is informed by the North Carolina Conference of District Attorneys that the Article is no longer needed and can be repealed.

Part III contains applicability provisions for Revised Article 7 and sets the effective date as October 1, 2006. Generally speaking, the revision of Article 7 applies to bills of lading and warehouse receipts issued after the effective date. It also authorizes the Revisor of Statutes to print official and drafters' comments.

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	June 6, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 1378	Amend the Forfeiture of Property Rights Law.	Senator Hartsell
SB 1479	Uniform Unincorporated Nonprofit Assoc. Act.	Senator Hagan

Senator Fletcher L. Hartsell, Jr., Chair

2005-2006

SENATE
JUDICIARY II

COMMITTEE
MINUTES

Senate Judiciary II Committee
Tuesday, June 6, 2006, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 1378	Amend the Forfeiture of Property Rights Law.	Senator Hartsell
SB 1479	Uniform Unincorporated Nonprofit Assoc. Act.	Senator Hagan

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

June 6, 2006

Senator Austin Allran, Vice Chairman, called the Senate Judiciary II Committee to order on June 6, 2006, with fifteen members present. Senator Hartsell, Chairman, was absent due to the birth of his third grandchild. Senator Allran introduced pages Caroline Allen, Laura Byrd, Olivia Newman and Dane Jorgensen and thanked them for serving. Senator Allran noted that Senator Hartsell had welcomed a new granddaughter, Grace Wen-Li Hartsell, on June 5, 2006.

SB 1479 (Uniform Unincorporated Nonprofit Assoc. Act.) Senator Allran recognized Senator Hagan to explain the bill. After an explanation, Senator Hagan introduced Mr. Eric Albright, Attorney at Law, of the Smith, Moore Law Firm for additional information. Questions from Senators Forrester, Goodall, Berger, Jacumin, Dannelly, Kinnaird, Kerr, Bingham and Apodaca were answered by Mr. Albright, Senator Hagan and Mr. Robert Schofield, representing the North Carolina Center for Non Profits. Senator Allran requested examples of just what the bill might address. Examples were given by Mr. Albright. Senator Berger sent forth an amendment and Senator Hagan requested that the amendment not be accepted. All voted and the amendment failed. Mr. Floyd Lewis, from the General Statutes Commission, spoke on the bill. Senator Jacumin moved for a favorable report. All voted and the motion passed. The bill will be referred to Finance.

There being no further business, the meeting was adjourned.

Austin Allran, Vice Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, June 06, 2006

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **1479** Uniform Unincorporated Nonprofit Assoc. Act.
Sequential Referral: None
Recommended Referral: Finance

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **1289** Cell Phone Use by Drivers Under 18 Prohibited.
Draft Number: PCS 55488
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

S.B. **1555** Revise Articles 1 and 7 of the UCC.
Draft Number: PCS 75534
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

TOTAL REPORTED: 3

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 6 June 2016

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Floyd Lewis	General Statutes Commission
P. Bryan Hall	ditto
[signature]	AOC
[signature]	NCCNP
Branden Reid	Intern. Sen. Donnelly
Lisa Martin	NC Home Builders
ANN LOEB	OUNS
[signature]	[illegible]
JOHN GOODMAN	NCCBE
Nick Byrne	Sen. Bingham's office - Intern
Jim Blackburn	NC Association of County Commissioners

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — June 6, 2006

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Colleen Kochanek	Smith Moore
Ed Bradley	CBS
Karen Darlington	NC Gen Assembly
Matt Willoughby	NCNN
JA Medlin	[illegible]
Doug Heron	NC BAR ASSOC.
Mark Fenny	[illegible]
Kathy Hawkins	P[illegible]
[illegible]	WMRS
Lisa Hoppenjans	NOG
Martha Harris	DAILY Bulletin

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — June 6, 2006

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Andy Romanet	NCLM
Hayden Harris	NCACC
Ben Brown	Club NOVA Orange Co
Homer Monroe	Club Nova - OC
Kurt O'Briant	Club Nova - OC
Lisa Browning	Club Nova - OC
Bob Wells	N.C. Telco Alliance
Angie Hauri	Haupt Taylor
Kathleen Edwards	UNC-CH Daily Bulletin
Richard O'Brien	AFPNC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 1479*

Short Title:	Uniform Unincorporated Nonprofit Assoc. Act.	(Public)
Sponsors:	Senators Hagan and Hartsell.	
Referred to:	Judiciary II.	

May 18, 2006

A BILL TO BE ENTITLED

AN ACT TO ENACT THE UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 59B.**

"**Uniform Unincorporated Nonprofit Association Act.**

"**§ 59B-1. Short title.**

This Chapter may be cited as the Uniform Unincorporated Nonprofit Association Act.

"**§ 59B-2. Definitions.**

In this Chapter:

(1) "Member" means a person who, under the rules or practices of a nonprofit association, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association.

(2) "Nonprofit association" means an unincorporated organization, other than one created by a trust and other than a limited liability company, consisting of two or more members joined by mutual consent for a common, nonprofit purpose. However, joint tenancy, tenancy in common, or tenancy by the entireties does not by itself establish a nonprofit association, even if the co-owners share use of the property for a nonprofit purpose.

(3) "Person" means an individual, corporation, limited liability company, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

"**§ 59B-3. Supplementary general principles of law and equity.**

Principles of law and equity supplement this Chapter unless displaced by a particular provision of it.

"**§ 59B-4. Title to property; choice of law.**

Real and personal property in this State may be acquired, held, encumbered, and transferred by a nonprofit association, whether or not the nonprofit association or a member has any other relationship to this State.

"**§ 59B-5. Real and personal property; nonprofit association as legatee, devisee, or beneficiary.**

(a) A nonprofit association is a legal entity separate from its members for the purposes of acquiring, holding, encumbering, and transferring real and personal property.

(b) A nonprofit association, in its name, may acquire, hold, encumber, or transfer an estate or interest in real or personal property.

(c) A nonprofit association may be a beneficiary of a trust or contract, a legatee, or a devisee.

(d) Any judgments and executions against a nonprofit association bind its real and personal property in like manner as if it were incorporated.

"**§ 59B-6. Statement of authority as to real property.**

(a) A nonprofit association may execute and record a statement of authority to transfer an estate or interest in real property in the name of the nonprofit association.

(b) An estate or interest in real property in the name of a nonprofit association may be transferred by a person so authorized in a statement of authority recorded in the office of the register of deeds in the county in which a transfer of the property would be recorded.

(c) A statement of authority must be set forth in a document styled "affidavit" that contains all of the following:

(1) The name of the nonprofit association.

(2) Reserved for future codification purposes.

(3) The street address, and the mailing address if different from the street address, of the nonprofit association, and the county in which it is located, or, if the nonprofit association does not have an address in this State, its address out-of-state.

(4) That the association is an unincorporated nonprofit association.

(5) The name or office of a person authorized to transfer an estate or interest in real property held in the name of the nonprofit association.

(6) That the association has duly authorized the member or agent executing the statement to do so.

(d) A statement of authority must be sworn to and subscribed in the same manner as an affidavit by a member or agent who is not the person authorized to transfer the estate or interest.

(e) The register of deeds shall collect a fee for recording a statement of authority in the amount authorized by G.S. 161-10(a)(1). The register of deeds shall index the name of the nonprofit association and the member or agent signing the statement of authority or any subsequent document relating thereto as Grantor and the name of the appointee as Grantee.

(f) An amendment, including a termination, of a statement of authority must meet the requirements for execution and recording of an original statement. Unless terminated earlier, a recorded statement of authority or its most recent amendment expires by operation of law five years after the date of the most recent recording.

(g) If the record title to real property is in the name of a nonprofit association and the statement of authority is recorded in the office of the register of deeds in the county in which a transfer of real property would be recorded, the authority of the person or officer named in a statement of authority is conclusive in favor of a person who gives value without notice that the person or officer lacks authority.

"**§ 59B-7. Liability of members or other persons.**

(a) A nonprofit association is a legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities.

(b) A person is not liable for the contract, tort, or other obligations of a nonprofit association merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is referred to as a "member" by the nonprofit association.

(c) Reserved for future codification purposes.

(d) A tortious act or omission of a member or other person for which a nonprofit association is liable is not imputed to a person merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is referred to as a "member" by the nonprofit association.

(e) A member of, or a person referred to as a "member" by, a nonprofit association may assert a claim against or on behalf of the nonprofit association. A nonprofit association may assert a claim against a member or a person referred to as a "member" by the nonprofit association.

"**§ 59B-8. Capacity to assert and defend; standing.**

(a) A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution.

(b) A nonprofit association may assert a claim in its name on behalf of its members or persons referred to as "members" by the nonprofit association if one or more of them have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member or a person referred to as a "member" by the nonprofit association.

"**§ 59B-9. Effect of judgment or order.**

A judgment or order against a nonprofit association is not by itself a judgment or order against a member, a person referred to as a "member" by the nonprofit

association, or a person authorized to participate in the management of the affairs of the nonprofit association.

"**§ 59B-10. Disposition of personal property of inactive nonprofit association.**

If a nonprofit association has been inactive for three years or longer, or a different period specified in a document of the nonprofit association, a person in possession or control of personal property of the nonprofit association may transfer custody of the property:

(1) If a document of the nonprofit association or document of gift specifies a person to whom transfer is to be made under these circumstances, to that person; or

(2) If no person is so specified, to a nonprofit association, nonprofit corporation, or other nonprofit entity pursuing broadly similar purposes, or to a government or governmental subdivision, agency, or instrumentality.

"**§ 59B-11. Appointment of agent to receive service of process.**

(a) A nonprofit association may file in the office of the Secretary of State a statement appointing an agent authorized to receive service of process, notice, or demand required or permitted by law to be served on a nonprofit association.

(b) A statement appointing an agent must set forth all of the following:

(1) The name of the nonprofit association.

(2) Reserved for future codification purposes.

(3) The street address, and the mailing address if different from the street address, of the nonprofit association, and the county in which it is located, or, if the nonprofit association does not have an address in this State, its address out-of-state.

(4) The name of the person in this State authorized to receive service of process and the person's address, including the street address, in this State.

(c) A statement appointing an agent must be signed and acknowledged by a person authorized to manage the affairs of a nonprofit association. The statement must also be signed and acknowledged by the person appointed agent, who thereby accepts the appointment. The appointed agent may resign by filing a resignation in the office of the Secretary of State and giving written notice to the nonprofit association at its last known address.

(d) The sole duty of the appointed agent to the nonprofit association is to forward to the nonprofit association at its last known address any notice, process, or demand that is served on the appointed agent.

(e) The Secretary of State is not an agent for service of any process, notice, or demand on any nonprofit association.

(f) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to the Secretary of State for filing:

	Document	Fee
(1)	Statement appointing an agent to receive service of process	$5.00
(2)	Amendment of statement appointing an agent	5.00

(3) Cancellation of statement appointing an agent 5.00
(4) Agent's statement of resignation No fee

(g) An amendment to or cancellation of a statement appointing an agent to receive service of process must meet the requirements for execution of an original statement.

"**§ 59B-12. Claim not abated by change.**

A claim for relief against a nonprofit association does not abate merely because of a change in its members or persons authorized to manage the affairs of the nonprofit association.

"**§ 59B-13. Venue.**

For purposes of venue, a nonprofit association is a resident of a county in which it has an office or maintains a place of operation or, if on due inquiry no office or place of operation can be found, in which any officer resides.

"**§ 59B-14. Uniformity of application and construction.**

This Chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among states enacting it."

SECTION 2.(a) G.S. 39-24 and G.S. 39-25 are repealed.

SECTION 2.(b) G.S. 39-26 and G.S. 39-27 are recodified as G.S. 59B-15(a) and (b), respectively. As recodified by this act, G.S. 59B-15 reads as rewritten:

"**§ 59B-15. Effect as to conveyances by ~~trustees.~~ trustees; prior deeds validated.**

(a) Nothing in this ~~Article shall be deemed in any manner to change~~ Chapter changes the law with reference to the holding and conveyance of land by the trustees of churches ~~or other voluntary organizations~~ under Chapter 61 of the General Statutes where ~~such~~ the land is conveyed to and held by ~~such~~ the trustees.

(b) All deeds ~~heretofore~~ executed ~~in conformity with this Article~~ before the effective date of this Chapter in conformity with former G.S. 39-24 and former G.S. 39-25 are declared to be sufficient to pass title to real ~~estate held by such organizations.~~ estate."

SECTION 3. G.S. 1-69.1 reads as rewritten:

"**§ 1-69.1. Unincorporated associations and partnerships; suit by or against.**

(a) Except as provided in subsection (b) of this section:

(1) All unincorporated associations, organizations or societies, or general or limited partnerships, foreign or domestic, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it.

(2) Any judgments and executions against any such association, organization or society shall bind its real and personal property in like manner as if it were incorporated.

(3) Any unincorporated association, organization, society, or general partnership bringing a suit in the name by which it is commonly known and called must allege the specific location of the recordation required by G.S. 66-68.

(b) Unincorporated nonprofit associations are subject to Chapter 59B of the General Statutes and not this section."

SECTION 4. G.S. 47C-3-101 reads as rewritten:

"**§ 47C-3-101. Organization of unit owners' association.**

A unit owners' association shall be organized no later than the date the first unit in the condominium is conveyed. The membership of the association at all times shall consist exclusively of all the unit owners, or following termination of the condominium, of all persons entitled to distributions of proceeds under G.S. 47C-2-118. The association shall be organized as a profit or nonprofit corporation or as an unincorporated nonprofit association."

SECTION 5. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect any other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 6. This act does not affect an action or proceeding commenced or right accrued before this act takes effect.

SECTION 7. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Unincorporated Nonprofit Association Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.

SECTION 8. This act becomes effective January 1, 2007.

State of North Carolina
General Statutes
Commission

9001 Mail Service Center
RALEIGH, NORTH CAROLINA
27699-9001

MEMORANDUM
May 25, 2006

TO: Senate Judiciary II Committee
FROM: General Statutes Commission
RE: **Senate Bill 1479 (Uniform Unincorporated Nonprofit Assoc. Act)**

General Comments

This bill enacts a North Carolina version of the Uniform Unincorporated Nonprofit Associations Act (UUNAA) as a new Chapter 59B of the General Statutes and makes conforming amendments to other parts of the General Statutes. In brief summary, UUNAA:

- Incorporates in one act statutory law dealing with unincorporated nonprofit associations with respect to holding property and legal obligations.
- Treats unincorporated nonprofit associations as legal entities with respect to legal obligations, including provision for limitations on liability, holding property, and standing to sue and be sued.
- Provides a procedure for disposing of the property of a defunct association.
- Permits the designation of an agent for service of process.

UUNAA does not contain provisions concerning the governance of unincorporated nonprofit associations.

Specific Comments

Section 1 enacts a version of UUNAA as a new Chapter 59B of the General Statutes.

Proposed § 59B-1 has the title ("Uniform Unincorporated Nonprofit Association Act").

Proposed § 59B-2 is a definitions section. Key terms include "member" (person who may participate in the selection of managers or in policy development) and "nonprofit association" (unincorporated organization of two or more members joined by mutual consent for a common, nonprofit purpose; excludes trusts and limited liability companies).

Proposed § 59B-3 provides for supplementation of UUNAA by principles of law and equity.

Proposed § 59B-4 expressly authorizes a nonprofit association to hold real or personal property in this State, regardless of whether it or its members have any relationship to this State.

Subsection (a) of proposed § 59B-5 is new; it provides for a nonprofit association to be treated as a legal entity separate from its members for purposes of holding and dealing with its property. Subsections (b) and (c), consistent with current law, allows a nonprofit association to hold property in its association name and to be the beneficiary of a trust, will, or contract. Subsection (d) (judgment binds property as if association were incorporated) is not in the Uniform Act. It effectively brings forward the last sentence of current G.S. 1-69.1.

Proposed § 59B-6 is new. It permits a nonprofit association to record a statement of authority setting out who may transfer real property in the nonprofit association's name. The section describes the content, form (affidavit), and execution required for a statement of authority and provides for amendments and termination. A statement of authority expires by operation of law five years after the most recent recording. Proposed § 59B-6 also requires a statement of authority to be recorded in the county in which the real property is located and requires the register of deeds to collect the fees authorized by G.S. 161-10(a)(1) (instruments in general). Finally, subsection (g) protects a good faith purchaser for value who purchases a nonprofit association's real property from the person or officer named in a statement of authority.

Proposed § 59B-7 is new. Subsection (a) treats a nonprofit association as a legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities. The next two subsections provide that a person is not liable for the contract, tort or other obligations of a nonprofit association, and that a tortious act or omission is not imputed from one person to another, merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is referred to as a "member" by the nonprofit association. Subsection (e) allows a member or a person referred to as a "member" to assert a claim against a nonprofit association, and vice versa.

Subsection (a) of proposed § 59B-8 continues the current law allowing nonprofit associations to sue and be sued in their association name. Subsection (b) codifies U.S. Supreme Court case law standing requirements for a nonprofit association to bring a suit on behalf of its members and persons it refers to as members.

Proposed § 59B-9 provides that a judgment or order against a nonprofit association is not by itself a judgment or order against a member or person referred to as "member" by the nonprofit association, consistent with proposed § 59B-7.

Proposed § 59B-10 is new. It provides a statutory procedure for disposing of a defunct nonprofit association's personal property. If the nonprofit association has been inactive for three years or more, the provision authorizes a person who has possession of personal property belonging to the association to give the property to another nonprofit entity or to a government. This is a default provision; the nonprofit association may include a different minimum inactive period, name a taker for its property, or both, in appropriate documents.

Proposed § 59B-11 is new. It permits a nonprofit association to appoint an agent for service of process. A statement appointing a process agent must be filed in the office of the Secretary of State. The requirements for the statement's contents and for filing are similar to those in Chapter 55D for nonprofit corporate and business entities, except that a statement under

this section is required to be acknowledged by a manager of the nonprofit association and by the process agent. The filing fees are the same as those for similar documents filed by nonprofit corporations and business entities. Subsection (e) expressly provides that the Secretary of State is not a default process agent for nonprofit associations.

Proposed § 59B-12 provides that a claim for relief against a nonprofit association does not abate (go away) because its members or the persons authorized to manage its affairs change.

Proposed § 59B-13 provides that, for venue purposes, a nonprofit association is a resident of a county in which it has an office or place of operation, or if none, where an officer resides.

Proposed § 59B-14 is the standard provision on uniformity in interpretation and application.

Section 2 deals with the current statutory law on ownership of real property by nonprofit unincorporated associations, found in Article 4 of Chapter 39. Subsection 2(a) repeals G.S. 39-24 and G.S. 39-25 as no longer necessary. Subsection 2(b) recodifies G.S. 39-26 and G.S. 39-27 as new § 59B-15(a) and (b), respectively. Subsection 2(b) then amends new § 59B-15 to make conforming amendments and to update the style. New § 59B-15(b) is a validating provision; subsection 2(b) expands this provision to validate any deeds executed in conformity with G.S. 39-24 and G.S. 39-25 before their repeal.

Sections 3 and 4 make conforming amendments to G.S. 1-69.1 and G.S. 47C-3-101, respectively.

Section 5 is a severability clause.

Section 6 is a savings clause for rights accrued and actions or proceedings begun before the effective date.

Section 7 authorizes the Revisor of Statutes to print official and drafters' comments.

Section 8 provides an effective date of January 1, 2007.

For more information, see the General Statutes Commission's REPORT TO THE 2005 GENERAL ASSEMBLY OF NORTH CAROLINA, 2006 REGULAR SESSION, ON THE STUDY OF THE UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT.

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	June 8, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 1432	Register of Deeds-Certifications.	Representative Ross Representative Stam
SB 1375	Notary Public Corrections.	Senator Hartsell
SB 1378	Amend the Forfeiture of Property Rights Law.	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, June 8, 2006, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 1432	Register of Deeds-Certifications.	Representative Ross Representative Stam
SB 1375	Notary Public Corrections.	Senator Hartsell
SB 1378	Amend the Forfeiture of Property Rights Law.	Senator Hartsell

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

June 8, 2006

The Senate Judiciary II Committee Meeting was called to order on June 8, 2006, by Senator Fletcher Hartsell, Chairman, with seventeen members present. Senator Hartsell introduced pages Nathan Honaker, Sarah Gillam, Sarah Nolan, Ellie Weatherly, Josh Ludwig and Olivia Newman and thanked them for their service.

HB 1432 (Register of Deeds-Certifications.) Senator Hartsell explained the purpose and reasoning of the bill and asked for a motion to adopt the proposed committee substitute for purposes of discussion. Senator Forrester so moved, all voted and the motion carried. Kory Goldsmith, Staff Attorney, continued the explanation of the bill. Questions from Senators Allran, Dalton, Bingham, Forrester, Webster, Dannelly, Kerr and Kinnaird were answered by Kory Goldsmith, Ms. Hailey Montgomery, Deputy Secretary of State, and Senator Hartsell. Persons speaking on the bill were: Mr. Leon Killian of Register of Deeds Association, Ms. Hailey Montgomery of office of the Secretary of State, Mr. Nicholas Long, representing The Title Company of North Carolina, Mr. Doug Heron and Ms. Nancy Ferguson representing the North Carolina Bar Association and Mr. Paul Stocks of the North Carolina Banking Association. No action was taken on the bill. The bill will be heard again next week.

There being no further business, the meeting was adjourned.

Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, June 14, 2006

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **1378** Amend the Forfeiture of Property Rights Law.

Draft Number:	PCS 75540
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1432** Register of Deeds-Certifications.

Draft Number:	PCS 60830
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

TOTAL REPORTED: 2

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 6-8-06

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
[signature]	AOC
Doug Heron	NC BAR ASSOCIATION
Karen Darlington, Jr.	NCGA Intern
Chip Killian	Nelson Mullins
[signature]	att
Adam Keith	NCGA Intern
Brandon Reid	Intern Sen. Dannelly
Kristy Hartman	Sen. Apodaca Intern
Jeff Wolfe	Daily Bulletin
James Creekman	First Citizens Bank
Nancy Ferguson	Chicago Title - NC BAR ASSOC

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — Name of Committee

6-8-06 — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Bill Hoyle	Dougher, Ravenel, Hardy Fairfield & Hoyle
Kimberly Rosenberg	United General Title / North Carolina Land Title Ass.
Nick Long Jr.	Title Co of NC / NC Land Title Assn / NC Bar - Real Property S
Paul Stock	NCBA
Gayle P. Holder	SOS
Deborah Montgomery	SOS
[signature]	S.O.S.
Joan Brown	S.O.S.
Floyd Lewis	General Statutes Commission
P. Gay Hall	Lite
Betty Turner	Bank of America

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 1432

Committee Substitute Favorable 5/11/05

Short Title: Register of Deeds-Certifications. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT AFFECTING CERTIFICATIONS BY REGISTERS OF DEEDS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 47-14 reads as rewritten:

"**§ 47-14. Register of deeds to ~~pass on certificate~~ verify the presence of proof or acknowledgment and register instruments; order by judge; instruments to which register of deeds is a party.**

(a) ~~When the proof or acknowledgment of the execution of any instrument, required or permitted by law to be registered, is had before any other official than the register of deeds of the county in which the instrument is offered for registration, the register of deeds shall examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears on the face of the instrument that the execution thereof by one or more of the signers has been duly proved or acknowledged and the certificate or certificates to that effect are in due form, he shall so certify, and shall register the instrument, together with the certificates. No certification is required when the proof or acknowledgment is before the register of deeds of the county in which the instrument is offered for registration.~~

The register of deeds shall not accept for recording any instrument that requires proof or acknowledgment unless the execution by one or more of the signers has been proved or acknowledged as required before an officer authorized to take proofs or acknowledgments, and that the proof or acknowledgment includes the officer's signature, commission expiration date, and official seal, if required. The register of deeds shall not file the instruments that do not require proof or acknowledgment unless that instrument meets all other statutory requirements pursuant to G.S. 161-14. Any instrument previously recorded or a certified copy of any document previously recorded may be rerecorded without a statement of explanation if it is not being recorded pursuant to G.S. 47-36.1 and does not require further certification of proof or acknowledgment.

(b) If a register of deeds denies registration pursuant to subsection (a), the person offering the instrument for registration may present the instrument to a judge, as provided in subsection (c), and ~~he~~ the court shall ~~examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears on the face of the instrument that the execution thereof by one or more of the signers has been duly proved or acknowledged and the certificates to that effect are in due form,~~ determine that if the instrument requires proof or acknowledgment and if the signature of one or more signers has been proved or acknowledged before an officer authorized to take proofs and acknowledgments, and if the proof or acknowledgment includes the officer's signature, commission expiration date, and official seal, if required, ~~he~~ the court shall so adjudge, and shall order the instrument to be registered, ~~together with the certificates,~~ and the register of deeds shall register ~~them~~ accordingly.

(c) When a district court has been established in the district including the county in which the instrument is to be registered, application for an order for registration pursuant to subsection (b) shall be made to any judge of the district court in the district including the county in which the instrument is to be registered. ~~Until a district court has been established, application for an order for registration pursuant to subsection (b) may be made to a resident judge of superior court residing in the district including the county in which the instrument is to be registered, a judge regularly holding the superior courts of the district including the county in which the instrument is to be registered, any judge holding a session of superior court, either civil or criminal, in the district including the county in which the instrument is to be registered, or a special judge of superior court residing in the district including the county in which the instrument is to be registered.~~

(d) Registration of an instrument pursuant to this section is not effective with regard to parties who have not executed the instrument or whose execution thereof has not been duly proved or acknowledged.

(e) Any instrument required or permitted by law to be registered in which the register of deeds of the county of registration is a party may be proved or acknowledged before any magistrate or any notary public. Any such instrument presented for registration shall be examined by the clerk of superior court of the county of registration and if it appears that the execution and acknowledgment are in due form he shall so certify and the instrument shall then be recorded in the office of the register of deeds."

SECTION 2. G.S. 47-37 is repealed.

SECTION 3. G.S. 45-36.2 reads as rewritten:

"**§ 45-36.2. Register of deeds includes assistants and ~~deputies.~~deputies; recording data.**

(a) The words "register of deeds" appearing in this Article shall be interpreted to mean "register of deeds, assistant register of deeds, or deputy register of deeds."

(b) The words "recording data" appearing in this Article shall be interpreted to mean the book and page or instrument number or any unique data that indicate where a document is recorded in the office of the register of deeds."

SECTION 4. G.S. 45-37 reads as rewritten:

"**§ 45-37. Discharge of record of mortgages, deeds of trust, and other instruments.**

(a) Subject to the provisions of G.S. 45-73 relating to secured instruments which secure future advances, any deed of trust or mortgage or other instrument intended to secure the payment of money or the performance of any other obligation registered as required by law may be discharged and released of record in the following manner:

(1) By acknowledgment of the satisfaction of the provisions of such deed of trust, mortgage or other instrument in the presence of the register of deeds by:

a. The trustee,
b. The mortgagee,
c. The legal representative of a trustee or mortgagee, or
d. A duly authorized agent or attorney of any of the above.

The register of deeds is not required to verify or make inquiry concerning the authority of the person acknowledging the satisfaction to do so. Upon acknowledgment of satisfaction, the register of deeds shall record a record of satisfaction as described in G.S. 45-37.2, ~~and may forthwith make upon the margin of the record of such deed of trust, mortgage or other instrument an entry of such acknowledgment of satisfaction~~ which shall be signed by the trustee, mortgagee, legal representative, agent or attorney and witnessed by the register of deeds, who shall also affix his name thereto.

(2) By ~~exhibition~~ presentation of any original deed of trust, mortgage or other instrument accompanied with the original bond, note, or other instrument thereby secured to the register of deeds, with the endorsement of payment and satisfaction appearing thereon and made by:

a. The obligee,
b. The mortgagee,
c. The trustee,
d. An assignee of the obligee, mortgagee, or trustee, or
e. Any chartered banking institution, or savings and loan association, national or state, or credit union, qualified to do business in and having an office in the State of North Carolina, when so endorsed in the name of the institution by an officer thereof.

The register of deeds is not required to verify or make inquiry concerning the authority of the person making the endorsement of payment and satisfaction to do so. ~~Upon exhibition~~ Only upon presentation of the ~~instruments,~~ original instruments with the endorsement of payment and satisfaction appearing on them shall the register of deeds ~~shall cancel the mortgage, deed of trust or other instrument by recording~~ record a record of satisfaction as described in ~~G.S. 45-37.2, and may make an entry of satisfaction on the margin of the record.~~ G.S. 45-37.2. The person so claiming satisfaction, performance or discharge of the debt or other obligation may retain

possession of all of the instruments exhibited. The ~~exhibition~~ presentation of the mortgage, deed of trust or other instrument alone to the register of deeds, with endorsement of payment, satisfaction, performance or discharge, shall be sufficient if the mortgage, deed of trust or other instrument itself sets forth the obligation secured or the performance of any other obligation and does not call for or recite any note, bond or other instrument secured by it.

(3) By ~~exhibiting~~ presentation to the register of deeds by:

a. The grantor,

b. The mortgagor, or

c. An agent, attorney or successor in title of the grantor or mortgagor

of any mortgage, deed of trust or other instrument intended to secure the payment of money or the performance of any other obligation, together with the original bond, note or other instrument secured thereby, or by ~~exhibition~~ presentation of the original mortgage, deed of trust or other instrument alone if such instrument itself sets forth the obligation secured or other obligation to be performed and does not call for or recite any note, bond or other instrument secured by it, if at the time of exhibition, all such instruments are more than 10 years old counting from the maturity date of the last obligation secured. If the instrument or instruments so ~~exhibited~~ presented have an endorsement of partial payment, satisfaction, performance or discharge within the said period of 10 years, the period of 10 years shall be counted from the date of the most recent endorsement.

~~The~~ Only upon presentation of the original instruments shall the register of deeds ~~shall cancel the mortgage, deed of trust, or other instrument by recording~~ record a record of satisfaction as described in ~~G.S. 45-37.2, and may make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not.~~G.S. 45-37.2(b)(2).

(4) By ~~exhibition~~ presentation to the register of deeds of any deed of trust given to secure the bearer or holder of any negotiable instruments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof.

Upon ~~exhibition~~ presentation of the original deed of trust, and the originals of evidences of indebtedness properly marked, the register of deeds shall ~~cancel such deed of trust by recording~~ record a record of satisfaction as described in ~~G.S. 45-37.2, and may make an entry of satisfaction upon the margin of the record, which record, or entry if made,~~ G.S. 45-37.2(b)(2), shall be valid and binding upon all persons, if no person rightfully entitled to the deed of trust or evidences of

indebtedness has previously notified the register of deeds in writing of the loss or theft of the instrument or evidences of indebtedness and has caused the register of deeds to record the notice or loss or theft in a separate document, as required by G.S. 161-14.1.

Upon receipt of ~~written notice~~ an affidavit of loss or theft of the deed of trust or evidences of indebtedness which identifies the deed of trust with names of the original parties to the document and recording data for the deed of trust, the register of deeds shall record a record of satisfaction, as described in ~~G.S. 45-37.2, which in this case shall consist of a rerecording of the record of the deed of trust containing the marginal entry and may make on the record of the deed of trust concerned a marginal entry in writing thereof, with the date of receipt of the notice.~~ G.S. 45-37.2(b)(2). The deed of trust shall not be ~~canceled~~ presented for satisfaction after such recording of a record of satisfaction ~~or marginal entry~~ until the ownership of said instrument shall have been lawfully determined. Nothing in this subdivision (4) shall be construed to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof.

Every entry of acknowledgment of satisfaction or of satisfaction made or witnessed by the register of deeds as provided in subdivision (a)(1) shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded.

(5) By ~~exhibition~~ presentation to the register of deeds of a notice of satisfaction of a deed of trust, mortgage, or other instrument which has been acknowledged by the trustee or the mortgagee before an officer authorized to take acknowledgments. The notice of satisfaction shall be substantially in the form set out in G.S. 47-46.1. The notice of satisfaction shall recite the names of all parties to the original instrument, the amount of the obligation secured, the date of satisfaction of the obligation, and a reference ~~by book and page number to the record~~ to the recording data of the instrument satisfied. ~~The notice of satisfaction shall be accompanied by the deed of trust, mortgage, or other instrument, or a copy of the instrument, for verification and indexing purposes, which shall not be recorded with the notice.~~

Upon ~~exhibition~~ presentation of the notice of satisfaction, the register of deeds shall record the notice of ~~satisfaction and cancel the deed of trust, mortgage, or other instrument as required by G.S. 45-37.2.~~ satisfaction. No fee shall be charged for recording any documents or certifying any acknowledgments pursuant to this subdivision. The register of deeds shall not be required to verify or

make inquiry concerning the authority of the person executing the notice of satisfaction to do so.

(6) By ~~exhibition~~ presentation to the register of deeds of a certificate of satisfaction of a deed of trust, mortgage, or other instrument that has been acknowledged before an officer authorized to take acknowledgments by the owner of the note, bond, or other evidence of indebtedness secured by the deed of trust or mortgage. The certificate of satisfaction shall be accompanied by the note, bond, or other evidence of indebtedness, if available, with an endorsement of payment and satisfaction by the owner of the note, bond, or other evidence of indebtedness. If such evidence of indebtedness cannot be produced, an affidavit, hereafter referred to as an "affidavit of ~~lost~~ note", signed by the owner of the note, bond, or other evidence of indebtedness, shall be delivered to the register of deeds in lieu of the evidence of indebtedness certifying that the debt has been satisfied and stating: (i) the date of satisfaction; (ii) that the note, bond, or other evidence of indebtedness cannot be ~~found;~~ produced; and (iii) that the person signing the affidavit is the current owner of the note, bond, or other evidence of indebtedness. The certificate of satisfaction shall be substantially in the form set out in G.S. 47-46.2 and shall recite the names of all parties to the original instrument, the amount of the obligation secured, the date of satisfaction of the obligation, and a reference ~~by book and page number to~~ to the recording data for the record of the instrument satisfied. The affidavit of ~~lost~~ note, if necessary, shall be substantially in the form set out in G.S. 47-46.3. ~~The certificate of satisfaction shall be accompanied by the deed of trust, mortgage, or other instrument, or a copy of the instrument, for verification and indexing purposes, which shall not be recorded with the certificate.~~

Upon ~~exhibition~~ presentation of the certificate of satisfaction and accompanying evidence of indebtedness endorsed paid and satisfied, or upon ~~exhibition~~ presentation of an affidavit of ~~lost~~ note, the register of deeds shall record the certificate of satisfaction and either the accompanying evidence of indebtedness or the affidavit of ~~lost note, and shall cancel the deed of trust, mortgage, or other instrument as required by G.S. 45-37.2.~~ note. No fee shall be charged for recording any documents or certifying any acknowledgments pursuant to this subdivision. The register of deeds shall not be required to verify or make inquiry concerning the authority of the person executing the certificate of satisfaction to do so.

(b) It shall be conclusively presumed that the conditions of any deed of trust, mortgage or other instrument securing the payment of money or securing the performance of any other obligation or obligations have been complied with or the debts secured thereby paid or obligations performed, as against creditors or purchasers for

valuable consideration from the mortgagor or grantor, from and after the expiration of 15 years from whichever of the following occurs last:

(1) The date when the conditions of such instrument were required by its terms to have been performed, or

(2) The date of maturity of the last installment of debt or interest secured thereby;

provided that the holder of the indebtedness secured by such instrument or party secured by any provision thereof may file an affidavit with the register of deeds which affidavit shall specifically state:

(1) The amount of debt unpaid, which is secured by said instrument; or

(2) In what respect any other condition thereof shall not have been complied with; or

may record a separate instrument signed by the holder or party secured and witnessed by the register of deeds stating:

(1) Any payments that have been made on the indebtedness or other obligation secured by such instrument including the date and amount of payments and

(2) The amount still due or obligations not performed under the instrument.

~~Whenever practical, the register of deeds may also enter the information contained in the separate instrument on the margin of the record of the instrument.~~ The effect of the filing of the affidavit or of the instrument recorded made as herein provided shall be to postpone the effective date of the conclusive presumption of satisfaction to a date 15 years from the filing of the affidavit or from the recording of the ~~instrument or the making of the notation.~~ instrument. There shall be only one postponement of the effective date of the conclusive presumption provided for herein. The register of deeds shall record the affidavit provided for herein and shall record a separate instrument, as required by G.S. 161-14.1, ~~making reference to the filing of such affidavit and to the book and page where the affidavit is recorded. Whenever practical, the register of deeds may also make such a reference on the margin of the record of the deed of trust, mortgage, or other instrument referred to.~~ and index the affidavit or separate instrument according to G.S. 161.14.1. This subsection shall not apply to any deed, mortgage, deed of trust or other instrument made or given by any railroad company, or to any agreement of conditional sale, equipment trust agreement, lease, chattel mortgage or other instrument relating to the sale, purchase or lease of railroad equipment or rolling stock, or of other personal property.

(c) Repealed by Session Laws 1991, c. 114, s. 4.

(d) For the purposes of this section "register of deeds" means the register of deeds, his deputies or assistants of the county in which the mortgage, deed of trust, or other instrument intended to secure the payment of money or performance of other obligation is registered.

(e) Any transaction subject to the provisions of the Uniform Commercial Code, Chapter 25 of the General Statutes, is controlled by the provisions of that act and not by this section.

(f) Whenever this section requires a signature or endorsement, that signature or endorsement shall be followed by the name of the person signing or endorsing the document printed, stamped, or typed so as to be clearly legible. ~~The register of deeds may refuse to accept any document when the provisions of this subsection have not been met.~~"

SECTION 5. G.S. 45-37.2 reads as rewritten:

"**§ 45-37.2. Recording satisfactions of deeds of trust and mortgages.**

(a) When a notice of satisfaction is recorded pursuant to G.S. 45-37(a)(5) or a certificate of satisfaction is recorded pursuant to G.S. 45-37(a)(6), the register of deeds shall ~~make an entry of satisfaction on the notice or certificate and~~ record and index the ~~instrument.~~instrument in the same manner as the deed of trust, mortgage, or other security instrument in the names of the parties stated in the notice of satisfaction or the certificate of satisfaction and reference the recording data of the original security instrument as stated in the satisfaction document to each name indexed.

(b) When a deed of trust, mortgage, or other instrument is satisfied by a method other than by means of a notice of satisfaction or certificate of satisfaction, the register of deeds shall record a record of satisfaction consisting of either a separate instrument or all or a portion of the original deed of trust or mortgage ~~rerecorded, and shall make the appropriate entry of satisfaction as provided in G.S. 45-37 on each record of satisfaction.~~ rerecorded. A separate instrument or original deed of trust or mortgage rerecorded pursuant to this subsection shall contain (i) names of all parties to the original instrument, (ii) the amount of the obligation secured, (iii) the date of satisfaction of the obligation, (iv) a reference ~~by book and page number to the record~~ to the recording data of the instrument satisfied, and (v) the date of recording the ~~notice of satisfaction.~~satisfaction, and when rerecording an original deed of trust or mortgage, the record of satisfaction shall also contain (vi) an endorsement of payment and satisfaction, and (vii) signatures of parties to the original security instrument. The register of deeds shall index the record of satisfaction in the same manner as the deed of trust, mortgage, or other instrument in the names of the parties on the satisfaction document and reference the recording data of the original security instrument as stated in the satisfaction document to each name indexed.

(b1) The following form, when properly completed, is sufficient to satisfy the requirements of this section:

"RECORD OF SATISFACTION
(G.S. 45-37.2)

This Record of Satisfaction applies to the following deed of trust, mortgage, or other security instrument.

Type of Security Instrument: (Identify type of security instrument, such as deed of trust or mortgage)

Original Grantor(s): (Identify original grantor(s), trustor(s), or mortgagor(s))

Original Trustee(s): (Identify trustee on original deed of trust)

Original Secured Party(ies): (Identify the original beneficiary(ies), mortgage(s), or secured party(ies) in the security instrument)

Recording Data: The security instrument is recorded in Book _____ at Page _____ or as document number _____ in the office of the Register of Deeds for _____ County, North Carolina.

This Record of Satisfaction is recorded pursuant to the following statutory authority: (check applicable box)

[ ] G.S. 45-37(a)(2), the original security instrument and secured obligations having been presented to me with appropriate endorsement of payment and satisfaction appearing thereon as required by law.

[ ] G.S. 45-37(a)(3), the original security instrument and secured obligations having been presented to me, each such instrument being more than 10 years old as provided by law.

[ ] G.S. 45-37(a)(4), the original security instrument and all negotiable instruments transferable by delivery secured thereby having been presented to me, each having been marked paid and satisfied in full by the bearer or holder thereof.

[ ] Other: (specify)

Date: _____

_____
(Signature of Register of Deeds)

~~(c) Whenever it is practical to do so, the register of deeds may make a marginal notation of satisfaction in addition to making the recordation required by this section.~~"

SECTION 6. G.S. 45-38 reads as rewritten:

"**§ 45-38. Recording of foreclosure.**

In case of foreclosure of any deed of trust, or mortgage, the trustee, mortgagee, or the trustee's or mortgagee's attorney shall record a notice of foreclosure ~~and, whenever it is practical to do so, may also enter upon the margin of the record of the deed of trust or mortgage of the fact that such foreclosure and~~ that includes the date when, and the person to whom, a conveyance was made by reason of the foreclosure. In the event the entire obligation secured by a mortgage or deed of trust is satisfied by a sale of only a part of the property embraced within the terms of the mortgage or deed of trust, the trustee, mortgagee, or the trustee's or mortgagee's attorney shall indicate in the notice of

foreclosure which property was sold and which was not ~~sold, and may make an additional notation indicating the same, whenever practical.~~sold.

A notice of foreclosure shall consist of a separate instrument, or that part of the original deed of trust or mortgage rerecorded, reciting the information required hereinabove, the names of all parties to the original instrument, the amount of the obligation secured, a reference ~~by book and page number~~ to the ~~record~~ recording data of the instrument foreclosed, and the date of recording the notice of foreclosure."

SECTION 7. G.S. 45-40 is repealed.

SECTION 8. G.S. 45-42.1 reads as rewritten:

"**§ 45-42.1. Corporate cancellation of lost mortgages by register of deeds.**

Upon affidavit of the secretary and treasurer of a corporation showing that the records of such corporation show that such corporation has fully paid and satisfied all of the notes secured by a mortgage or deed of trust executed by such corporation and such payment and satisfaction was made more than 25 years ago, and that such mortgage or deed of trust was made to a corporation which ceased to exist more than 25 years ago, and such affidavit shall further state that the records of such corporation show that no payments have been made on such mortgage by the corporation executing such mortgage or deed of trust for 25 years, the register of deeds of the county in which such mortgage or deed of trust is recorded ~~is authorized and empowered to file such affidavit and record the same in his office and to record a separate instrument making reference to the filing of such affidavit and to the book and page where the affidavit is recorded.~~ may record the affidavit. The register of deeds shall index the affidavit according to G.S. 161-22 using the names of parties stated in the affidavit and shall ~~may also~~ make reference to the recording data of the original security instrument as stated in the affidavit opposite each party indexed. ~~thereto on the margin of the record in which the said mortgage or deed of trust is recorded, and, upon~~ Upon recording ~~such instrument~~ an affidavit, ~~or making such entry,~~ the ~~said~~ mortgage or deed of trust shall be deemed to be cancelled and ~~satisfied and the said register of deeds is hereby authorized to cancel the same of record: Provided, that this~~ satisfied. This section shall not apply to any mortgagor corporation except those in which the State of North Carolina owns more than a majority of the capital stock and shall not apply to any mortgage or deed of trust in which the principal amount secured thereby exceeds the sum of fifteen thousand dollars ($15,000): Provided, such cancellation shall not bar any action to foreclose such mortgage or deed of trust instituted within 90 days after the same is cancelled."

SECTION 9. G.S. 161-14.1 reads as rewritten:

"**§ 161-14.1. Recording subsequent entries as separate instruments.**

(a) In all cases in which the register of deeds is authorized or directed by law to make a subsequent entry upon the margin of the record of a deed of trust, mortgage, or other instrument, the register of deeds shall, except as provided in G.S. 45-37.2 and 45-38, record all subsequent entries as separate instruments. The register of deeds shall index the parties to the original instruments as stated on the subsequent instrument and reference the recording data of the original security instrument as stated in the subsequent document to each name indexed. Such instruments shall contain the information and notations required by ~~law for the appropriate marginal entry,~~ law, a

reference ~~by book and page number~~ to the ~~record~~ recording data of the instrument modified, and the date of recording the subsequent modifying instrument. ~~There shall also be entered in the alphabetical indexes kept by the register of deeds, opposite the name of each indexed party to the original instrument, a reference by book and page to the record of the subsequent modifying instrument.~~ In the recording of satisfactions or foreclosures of deeds of trust and mortgages, the register of deeds shall comply with the provisions of G.S. 45-37.2 and 45-38. ~~Whenever it is practical to do so, the register of deeds may continue making marginal notations in addition to making the recordation required by this section.~~

(b) For the purposes of this section, "recording data" means the book and page or instrument number or any unique data that indicate where a document is recorded in the office of the register of deeds."

SECTION 10. G.S. 47-46 is repealed.

SECTION 11. G.S. 47-46.3 reads as rewritten:

"**§ 47-46.3. Affidavit of ~~lost~~ note.**

The form of an affidavit of ~~lost~~ note, if required pursuant to G.S. 45-37(a)(6), shall be substantially as follows:

AFFIDAVIT OF ~~LOST~~ NOTE

[Name of affiant] personally appeared before me in _____ County, State of _____, and having been duly sworn (or affirmed) made the following affidavit:

1. The affiant is the owner of the note or other indebtedness secured by the deed of trust, mortgage, or other instrument executed by _____ (grantor, mortgagor), _____ (trustee), and _____ (beneficiary, mortgagee), and recorded in _____ County at _____ (book and page); and
2. The note or other indebtedness ~~has been lost and after the exercise of due diligence~~ cannot be ~~located.~~produced.
3. The affiant certifies that all indebtedness secured by the deed of trust, mortgage, or other instrument was satisfied on _____, _____ (date of satisfaction), and the affiant is responsible for cancellation of the same.

_____
(Signature of affiant)

Sworn to (or affirmed) and subscribed before me this _____ day of _____, _____.

[Signature and seal of notary public or other official authorized to administer oaths]."

SECTION 12. This act becomes effective October 1, 2005.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 1432

Committee Substitute Favorable 5/11/05

PROPOSED SENATE COMMITTEE SUBSTITUTE H1432-CSRC-101 [v.6]

6/7/2006 7:54:38 PM

Short Title: Notary Public Corrections. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT TO MAKE CORRECTIONS AND OTHER AMENDMENTS TO THE NOTARY PUBLIC ACT, AND TO MAKE OTHER CONFORMING CHANGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 10B-3 reads as rewritten:

"**§ 10B-3. Definitions.**

The following definitions apply in this Chapter:

(1) ~~"Acknowledgment" means a~~ Acknowledgment. – A notarial act in which ~~an individual,~~ a notary certifies that at a single time and ~~place:~~place all of the following occurred:

a. ~~Appears~~ An individual appeared in person before the notary and ~~presents a record; and~~ presented a record.

b. ~~Is~~ The individual was personally known to the notary or identified by the notary through satisfactory ~~evidence and~~ evidence.

c. The individual did either of the following:

i. ~~indicates~~ Indicated to the notary that the signature on the record was the individual's signature.~~was voluntarily affixed by the individual for the purposes stated within the record.~~

ii. Signed the record while in the physical presence of the notary and while being personally observed signing the record by the notary.

(2) ~~"Affirmation" means a~~ Affirmation. – A notarial ~~act, or part thereof,~~ act which is legally equivalent to an oath and in which a notary certifies that ~~an individual~~ at a single time and ~~place:~~place all of the following occurred:

a. ~~Appears~~ An individual appeared in person before the ~~notary;~~notary.

b. ~~Is~~ The individual was personally known to the notary or identified by the notary through satisfactory ~~evidence; and~~evidence.

c. ~~Makes~~ The individual made a vow of truthfulness on penalty of perjury, based on personal honor and without invoking a deity or using any form of the word "swear".

(3) ~~"Attest" or "attestation" means the~~ Attest or attestation. – The ~~act of completing the written evidence of a notarial act, to wit:~~ completion of a certificate by a notary who has performed a notarial ~~act by witnessing a signature or administering an oath or affirmation.~~act.

(4) ~~"Commission" means the~~ Commission. – The empowerment to perform notarial acts and the written evidence of authority to perform those acts.

(5) ~~"Credible witness" means an honest, reliable, and impartial person~~ Credible witness. –An individual who is personally known to the notary and ~~takes an oath or affirmation fromthe notary to confirm a signer's identity.~~to whom all of the following also apply:

a. The notary believes the individual to be honest and reliable for the purpose of confirming to the notary the identity of another individual.

b. The notary believes the individual is not a party to or beneficiary of the transaction.

(6) ~~"Department" means the~~ Department. – The North Carolina Department of the Secretary of State.

(7) ~~"Director" means the~~ Director. – The Division Director for the North Carolina Department of the Secretary of State Notary Public Section.

(8) ~~"Jurat" means a~~ Jurat. – A notary's certificate evidencing the administration of an oath or affirmation. ~~certification added to an affidavit or deposition that states when and before what authority an affidavit or deposition was made, to wit, "Subscribed and sworn to before me this the ____ day of _____ 20__." The notary's signature and seal shall be affixed below the sworn or affirmed statement and signature of the affiantIn so doing, the notary shall certify the following:~~

~~a. That the person signing the affidavit or deposition did so in the notary's presence and indicates the county in which the notarial act took place;~~

~~b. That the signer appeared before the notary on the date indicated;~~

~~c. That the notary administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document.~~

(9) ~~"Moral turpitude" means conduct~~ Moral turpitude. – Conduct contrary to expected standards of honesty, morality, or integrity.

(10) ~~"Nickname" means a~~ Nickname. – A descriptive, familiar, or shortened form of a proper name.

(11) ~~"Notarial act," "notary act," and "notarization" mean the~~ Notarial act, notary act and notarization. – The act of taking an acknowledgment, taking a verification or proof or administering an oath or affirmation that a notary is empowered to perform under ~~this Chapter, as authorized by G.S. 10B-31.~~G.S. 10B-20(a).

(12) ~~"Notarial certificate" and "certificate" mean the~~ Notarial certificate and certificate. – The portion of a notarized record that is completed by the notary, bears the notary's signature and seal, and states the facts attested by the notary in a particular notarization.

(13) ~~"Notary public" and "notary" mean a~~ Notary public and notary. – A person commissioned to perform notarial acts under this Chapter. A notary is a public officer of the State of North Carolina and shall act in full and strict compliance with this act.

(14) ~~"Oath" means a~~ Oath. – A notarial ~~act, or part thereof,~~ act which is legally equivalent to an affirmation and in which a notary certifies that ~~an individual~~ at a single time and ~~place:~~place all of the following occurred:

a. ~~Appears~~ An individual appeared in person before ~~a notary;~~the notary.

b. ~~Is~~ The individual was personally known to the notary or identified by the notary through satisfactory ~~evidence; and~~evidence.

c. ~~Makes~~ The individual made a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear".

(15) ~~"Official misconduct" means either~~ Official misconduct. – Either of the following:

a. A notary's performance of a prohibited act or failure to perform a mandated act set forth in this Chapter or any other law in connection with notarization.

b. A notary's performance of a notarial act in a manner found by the Secretary to be negligent or against the public interest.

(16) ~~"Personal appearance" and "appear in person before a notary" mean an~~ Personal appearance and appear in person before a notary. – An individual and a notary are in close physical proximity to one another so that they may freely see and communicate with one another and exchange records back and forth during the notarization process.

(17) ~~"Personal knowledge of identity" means familiarity~~ Personal knowledge or personally know. – Familiarity with an individual resulting from interactions with that individual over a period of time

sufficient to eliminate every reasonable doubt that the individual has the identity claimed.

(18) ~~"Principal" means an~~ Principal. – One of the following:

a. In the case of an acknowledgement, the individual whose ~~signature is notarized; or an~~ identity and due execution of a record is being certified by the notary.

b. In the case of a verification or proof, the individual other than a ~~credible~~ subscribing witness, ~~taking an oath or affirmation from the notary.~~ whose:

i. identity and due execution of the record is being proven; or

ii. signature is being identified as genuine.

c. In the case of an oath or affirmation, the individual who makes a vow of truthfulness on penalty of perjury.

(19) ~~"Record" means information~~ Record. – Information that is inscribed on a tangible medium and called a traditional or paper record.

(20) ~~"Regular place of work or business" means a~~ Regular place of work or business. – A location, office or other workspace, where an individual regularly spends all or part of the individual's work time.

(21) ~~"Revocation" means the~~ Revocation. – The cancellation of the notary's commission stated in the order of revocation.

(22) ~~"Satisfactory evidence of a signer's identity" means identification~~ Satisfactory evidence. – Identification of an individual based on either of the following:

a. At least one current document issued by a federal, state, or federal or state-recognized tribal government agency bearing the photographic image of the individual's face and either the signature or a physical description of the individual.

b. The oath or affirmation of one credible witness ~~unaffected by the record or transaction who is personally known to the notary and~~ who personally knows the individual seeking to be identified.

(23) ~~"Seal" and "stamp" mean a~~ Seal or stamp. – A device for affixing on a paper record an image containing a notary's name, the words "notary public," and other information as required in G.S. 10B-37.

(24) ~~"Secretary" means the~~ Secretary. – The North Carolina Secretary of State or the Secretary's designee.

(25) ~~"Signature" means the act of personally signing one's name in ink by hand.~~

(26) ~~"Subscribing witness" means a~~ Subscribing witness. – A person who ~~either watches another individual sign a record or takes that individual's acknowledgment of an already signed record and appears before the notary on behalf of the principal. The subscribing witness must sign the document in addition to the principal, must be personally~~

~~known by the notary or prove identity to the notary by satisfactory evidence, and must take an oath or affirmation stating that he or she witnessed the principal sign.~~signs a record for the purpose of being a witness to the principal's execution of the record or to the principal's acknowledgement of his or her execution of the record. A subscribing witness may give proof of the execution of the record as provided in subdivision (28) of this section.

(27) ~~"Suspension" and "restriction" means the~~ Suspension and restriction. – The termination of a notary's commission for a period of time stated in an order of restriction or suspension. The terms "restriction" or "suspension" or a combination of both terms shall be used synonymously.

(28) ~~"Verification" or "proof" means a~~ Verification or proof. – A notarial act in which a notary certifies that all of the following occurred:

a. An individual appeared in person before the notary.

b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.

c. The individual was not a party to or beneficiary of the transaction.

d. ~~where a person certifies under oath or affirmation that the person witnessed the principal either execute, record, or acknowledge the principal's signature on an already executed record.~~ The individual took an oath or gave an affirmation and testified to one of the following:

i. The individual is a subscribing witness and the principal who signed the record did so while being personally observed by the subscribing witness.

ii. The individual is a subscribing witness and the principal who signed the record acknowledged his or her signature to the subscribing witness.

iii. The individual recognized either the signature on the record of the principal or the signature on the record of the subscribing witness and the signature was genuine."

SECTION 2. G.S. 10B-5(b) reads as rewritten:

"(b) A person qualified for a notarial commission shall meet all of the following requirements:

(1) Be at least 18 years of age or legally emancipated as defined in Article 35 of Chapter 7B of the General Statutes.

(2) Reside or have a regular place of work or business in this State.

(3) Reside legally in the United States.

(4) Speak, read, and write the English language.

(5) Possess a high school diploma or equivalent.

(6) Pass the course of instruction described in this Article, unless the person is a licensed member of the North Carolina State Bar.

(7) Purchase and keep as a reference the most recent manual approved by the Secretary that describes the duties and authority of notaries public.

(8) Submit an application containing no significant misstatement or omission of fact. The application form shall be provided by the Secretary and be available at the register of deeds office in each county. Every application shall include the signature of the applicant written with pen and ink, and the signature shall be acknowledged by the applicant before a person authorized to administer oaths.

(9) The applicant shall also obtain the recommendation of one publicly elected official in North Carolina and submit the recommendation with the application. ~~Except for~~ The requirement of this subdivision shall not apply to any applicant who seeks to receive the oath of office from the register of deeds of a county where more than 15,000 active notaries public are on record on January 1 of the year when the application is ~~filed, the applicant shall also obtain the recommendation of one publicly elected official in North Carolina whose recommendation shall be contained on the application.~~filed."

SECTION 3. G.S. 10B-7(b) reads as rewritten:

"(b) The information ~~contained~~ provided in an application that relates to subdivisions (2), (3), (6) and (7) of subsection (a) of this section ~~under this section is a public record as defined in G.S. 132-1. The information contained in subdivisions (2), (3), (6) and (7) of subsection (a) of this section~~ shall be considered confidential information and shall not be subject to disclosure ~~except as provided in~~ under Chapter 132 of the General Statutes."

SECTION 4. G.S. 10B-10(c) reads as rewritten:

"(c) ~~The~~ After the appointee qualifies by taking the oath of office required under subsection (b) of this section, the register of deeds shall ~~then~~ place the notary record in a book designated for that purpose, or the notary record may be recorded in the Consolidated Document Book and indexed in the Consolidated Real Property Index under the notary's name in the grantor index. The notary record may be kept in electronic format so long as the signature of the notary public may be viewed and printed. The notary record shall contain the name and the signature of the notary as commissioned, the effective date and expiration date of the commission, the date the oath was administered, and the date of any restriction, suspension, revocation, or resignation. The record shall constitute the official record of the qualification of notaries public."

SECTION 5. G.S. 10B-11(b) reads as rewritten:

"(b) A notary whose commission has not expired must comply with the following requirements to be recommissioned:

(1) Submit a new application ~~under G.S. 10B-6.~~ meeting the requirements of G.S. 10B-6, except for G.S. 10B-6(2).

(2) Meet all the requirements of ~~G.S. 10B-5(b)~~G.S. 10B-5(b), except for G.S. 10B-5(6) and (9).

(3) ~~Pass~~ Achieve a passing score on the written examination required under ~~G.S. 10B-8, unless~~ G.S. 10B-8(b). This requirement does not apply if the notary is a licensed member of the North Carolina State Bar."

SECTION 6. G.S. 10B-20(a) reads as rewritten:

"**§ 10B-20. Powers and limitations.**

(a) A notary may perform any of the following notarial acts:

(1) Acknowledgments.

(2) Oaths and affirmations.

~~(3) Execute jurats.~~

(4) Verifications or proofs."

SECTION 7. G.S. 10B-20(b) reads as rewritten:

"(b) A notarial act shall be attested by all of the following:

(1) The signature of the notary, exactly as shown on the notary's commission.

(2) The ~~readable~~ legible appearance of the notary's ~~name,~~ name exactly as shown on the notary's commission. The legible appearance of the name may be ascertained from the notary's typed or printed name near the ~~signature.~~notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible.

(3) The clear and legible appearance of the notary's stamp or seal.

(4) A statement of the date the notary's commission expires. The statement of the date of the notary's commission expires may appear in the notary's stamp or seal or elsewhere in the notarial certificate."

SECTION 8. G.S. 10B-20(c) reads as rewritten:

"(c) A notary ~~is disqualified from performing~~shall not perform a notarial act if any of the following apply:

(1) The principal or subscribing witness is not in the notary's presence at the time the notarial act is ~~to be performed; however,~~ performed. However, nothing in this Chapter shall require a notary to complete the notarial certificate attesting to the notarial act in the presence of the principal or subscribing witness.

(2) The principal or subscribing witness is not personally known to the notary or identified by the notary through satisfactory evidence.

(2a) The credible witness is not personally known to the notary.

~~(3) The principal or subscribing witness shows a demeanor that causes the notary to have a compelling doubt about whether the principal knows the consequences of the transaction requiring a notarial act.~~

~~(4) The principal or subscribing witness, in the notary's judgment, is not acting of the principal's or the subscribing witness's own free will.~~

(5) The notary is a signer ~~of or is named, other than as a trustee in a deed of trust, in the document~~ of, party to, or beneficiary of the record, that is to be notarized. However, a disqualification under this subdivision shall not apply to a notary who is named in a record solely as the

trustee in a deed of trust, the drafter of the record, the person to whom a registered document should be mailed or sent after recording, or the attorney for a party to the record, so long as the notary is not also a party to the record individually or in some other representative or fiduciary capacity.

(6) The notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in G.S. 10B-31, other than fees or other consideration paid for services rendered by a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker."

SECTION 9. G.S. 10B-20(g) reads as rewritten:

"(g) ~~Commissioned officers on active duty in the United States armed forces who are authorized to perform notarial acts and other persons~~Persons authorized by federal law or regulation to perform notarial acts may perform the acts for persons serving in or with the United States armed forces, their spouses, and their dependents."

SECTION 10. G.S. 10B-20(l) reads as rewritten:

"(l) A notary public required to comply with the provisions of subsection ~~(g)~~(i) of this section shall prominently post at the notary public's place of business a schedule of fees established by law, which a notary public may charge. The fee schedule shall be written in English and in the non-English language in which the notary services were solicited and shall contain the notice required in subsection (i) of this section, unless the notice is otherwise prominently posted at the notary public's place of business."

SECTION 11. G.S. 10B-20(m) reads as rewritten:

"(m) If notarial certificate wording is not provided or indicated for a record, a ~~nonattorney~~ notary who is not also a licensed attorney shall not determine the type of notarial act or certificate to be used. This does not prohibit a notary from offering the selection of certificate forms recognized in this Chapter or as otherwise authorized by law."

SECTION 12. G.S. 10B-20(o) reads as rewritten;

"(o) Before signing a notarial certificate and except as provided in this subsection, a notary shall cross out or mark through all blank lines or spaces in the certificate. However:

(1) Notwithstanding the provisions of this ~~section or G.S. 10B-35(b),~~ section, a notary shall not be required to complete, cross out, or mark through blank lines or spaces in the notary certificate form provided for in G.S. 47-43 indicating when and where a power of attorney is recorded if that recording information is not known to the notary at the time the notary completes and signs the certificate;

(2) A notary's failure to cross out or mark through blank lines or spaces in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the certificate or the related record; and

(3) A notary's failure to cross out or mark through blank lines or spaces in a notarial certificate shall not be grounds for a register of deeds to refuse to accept a record for registration."

SECTION 13. G.S. 10B-23 reads as rewritten:

"**§ 10B-23. Improper records.**

(a) A notary shall not notarize a signature on a record without a notarial certificate indicating what type of notarial act was performed. However, a notary may administer an oath or affirmation without completing a jurat.

(b) A notary shall neither certify, notarize, nor authenticate a photograph. A notary may notarize an affidavit regarding and attached to a photograph."

SECTION 14. G.S. 10B-31 reads as rewritten:

"**§ 10B-31. Fees for notarial acts.**

The maximum fees that may be charged by a notary for notarial acts are as follows:

(1) For acknowledgments, jurats, verifications or proofs, five dollars ($5.00) per principal signature.

(2) For oaths or affirmations without a signature, five dollars ($5.00) per person, except for an oath or affirmation administered to a credible witness to vouch for ~~a principal's identity.~~the identity of a principal or subscribing witness."

SECTION 15. G.S. 10B-22 as enacted in Section 4 of S.L. 2005-391 and as codified as G.S. 10B-35 reads as rewritten:

~~"§ 10B-22. Official signature.~~

~~(a) A notary shall keep an official seal or stamp (herein "seal") that is the exclusive property of the notary. The notary shall keep the seal in a secure location that is accessible only to the notary. A notary shall not allow another person to use or possess the seal, and shall not surrender the seal to the notary's employer upon termination of employment.~~

~~(b) The seal shall be affixed only after the notarial act is performed. The notary shall place the image or impression of the seal near the notary's signature on every paper record notarized. The seal and the signature shall appear on the same page.~~

~~(c) A notary shall do the following within 10 days of discovering that the notary's seal has been stolen, lost, damaged, or otherwise rendered incapable of affixing a legible image:~~

~~(1) Inform the appropriate law enforcement agency in the case of theft or vandalism.~~

~~(2) Notify the appropriate register of deeds and the Secretary in writing and signed in the official name in which he or she was commissioned.~~

~~(d) As soon as is reasonably practicable after resignation, revocation, or expiration of a notary commission, or death of the notary, the seal shall be delivered to the Secretary for disposal.~~

"**§ 10B-35. Official signature.**

When notarizing a paper record, a notary shall sign by hand in ink on the notarial certificate. The notary shall comply with the requirements of G.S. 10B-20(b)(1) and (b)(2). The notary shall affix the official signature only after the notarial act is

performed. The notary shall not sign a paper record using the facsimile stamp or an electronic or other printing method."

SECTION 16. G.S. 10B-36 reads as rewritten:

"**§ 10B-36. Official seal.**

(a) A notary shall keep an official seal or stamp ~~(herein "seal")~~ that is the exclusive property of the notary. The notary shall keep the seal in a secure ~~location that is accessible only to the notary.~~ location. A notary shall not allow another person to use or possess the seal, and shall not surrender the seal to the notary's employer upon termination of employment.

(b) The seal shall be affixed only after the notarial act is performed. The notary shall place the image or impression of the seal near the notary's signature on every paper record notarized. The seal and the notary's signature shall appear on the same ~~page.~~ page of a record as the text of the notarial certificate

(c) A notary shall do the following within 10 days of discovering that the notary's seal has been ~~stolen, lost, damaged, or otherwise rendered incapable of affixing a legible image:~~lost or stolen:

(1) Inform the appropriate law enforcement agency in the case of theft or vandalism.

(2) Notify the appropriate register of deeds and the Secretary in writing and signed in the official name in which he or she was commissioned.

(d) As soon as is reasonably practicable after resignation, revocation, or expiration of a notary commission, or death of the notary, the seal shall be delivered to the Secretary for disposal."

SECTION 17. G.S. 10B-37 reads as rewritten:

"**§ 10B-37. Seal image.**

(a) ~~Near~~ A notary shall affix the notary's official seal near the notary's official signature on the notarial certificate of a ~~paper record, the notary shall place a sharp, legible, permanent, and photographically reproducible image of the official seal.~~record.

(b) A notary's official seal shall include ~~only~~ all of the following elements:

(1) The notary's name exactly as ~~commissioned;~~commissioned.

(2) The words ~~"Notary Public";~~"Notary Public".

(3) The county of commissioning, including the word "County" or the abbreviation ~~"Co."; and~~"Co.".

(4) The words "North Carolina" or the abbreviation "NC".

(c) The notary seal may be either circular or rectangular in shape. Upon receiving a commission or a recommission on or after October 1, 2006, a notary shall not use a ~~The~~ circular seal ~~shall not be~~ that is less than 1 ½ inches, nor more than 2 inches in diameter. The rectangular seal shall not be over 1 inch high and 2 ½ inches long. The perimeter of the seal shall contain a border that is visible when impressed.

(c1) Alterations to any information contained within the seal as embossed or stamped on the record are prohibited.

(d) A notarial ~~seal may contain the notary's commission expiration date; however, a notarial act shall be invalid if the expiration date contained on the seal is incorrect at that time that the notarial act is performed.~~seal, as it appears on a record

may contain the permanently imprinted, handwritten, or typed date the notary's commission expires.

(e) Any reference in the General Statutes to the seal of a notary shall include the stamp of a notary, and any reference to the stamp of a notary shall include the seal of the notary.

(f) The failure of a notarial seal to comply with the requirements of this section shall not affect the sufficiency, validity, or enforceability of the notarial certificate, but shall constitute a violation of the notary's duties."

SECTION 18. G.S. 10B-40 reads as rewritten:

"**§ 10B-40. Notarial certificates in general.**

(a) A notary shall not make or give a notarial certificate unless the notary has either ~~(i)~~ personal knowledge or satisfactory evidence of the identity of the principal or, if applicable, the subscribing ~~witness, or (ii) satisfactory evidence of a signer's identity.~~witness.

(a1) By making or giving a notarial certificate, whether or not stated in the certificate, a notary certifies as follows:

(1) As to an acknowledgement, all those things described in G.S. 10B-3(1).

(2) As to an affirmation, all those things described in G.S. 10B-3(2).

(3) As to an oath, all those things described in G.S. 10B-3(14).

(4) As to a verification or proof, all those things described in G.S. 10B-3(28).

(a2) In addition to the certifications under subsection (a1) of this section, by making or giving a notarial certificate, whether or not stated in the certificate, a notary certifies to all of the following:

(1) At the time the notarial act was performed and the notarial certificate was signed by the notary, the notary was lawfully commissioned, the notary's commission had neither expired nor been suspended, the notarial act was performed within the geographic limits of the notary's commission, and the notarial act was performed in accordance with the provision of this Chapter.

(2) If the notarial certificate is for an acknowledgment or the administration of an oath or affirmation, the person whose signature was notarized did not appear in the judgment of the notary to be incompetent, lacking in understanding of the nature and consequences of the transaction requiring the notarial act, or acting involuntarily, under duress or undue influence.

(3) The notary was not prohibited from acting under G.S. 10-20(c).

(a3) The inclusion of additional information in a notarial certificate, including the representative or fiduciary capacity in which a person signed or the means a notary used to identify a principal, shall not invalidate an otherwise sufficient notarial certificate.

(b) A notarial certificate for the acknowledgment taken by a notary of a principal who is an individual acting in his or her own right or who is an individual acting in a representative or fiduciary capacity ~~taken by a notary~~ is sufficient and shall be accepted

in this State if it is substantially in the form set forth in G.S. 10B-41, if it is substantially in a form otherwise prescribed by the ~~law~~ laws of this State, or if ~~it:~~it includes all of the following:

(1) Identifies the state and county in which the acknowledgment ~~occurred;~~occurred.

(2) Names the principal who appeared in person before the ~~notary;~~notary.

~~(3) States that the notary has either (i) personal knowledge of the identity of the principal or (ii) satisfactory evidence of the principal's identity, indicating the nature of that satisfactory evidence;~~

(4) Indicates that the principal ~~who~~ appeared in person before the notary and the principal acknowledged that ~~the signature on the record presented is his or her signature, that the principal voluntarily signed the record for the purpose stated therein;~~he or she signed the record.

(5) States the date of the ~~acknowledgment;~~acknowledgment.

(6) Contains the signature and seal or stamp of the notary who took the ~~acknowledgment; and~~ acknowledgment.

(7) States the notary's commission expiration date.

(c) A notarial certificate for the verification or proof ~~of the signature of a principal by a subscribing witness~~ taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-42, if it is substantially in a form otherwise prescribed by the ~~law~~ laws of this State, or if ~~it:~~it includes all of the following:

(1) Identifies the state and county in which the verification or proof ~~occurred;~~occurred.

(2) Names the subscribing witness who appeared in person before the ~~notary;~~notary.

~~(3) States that the notary has either (i) personal knowledge of the identity of the subscribing witness or (ii) satisfactory evidence of the subscribing witness's identity, indicating the nature of that satisfactory evidence;~~

(4) Names the principal whose signature on the record is to be verified or ~~proven;~~proven.

(5) Indicates that the subscribing witness certified to the notary under oath or by affirmation that the subscribing witness is not a party to or beneficiary of the transaction, ~~named party to the record in question, has no interest in the transaction,~~ signed the record as a subscribing witness, and either (i) witnessed the principal sign the record, or (ii) witnessed the principal acknowledge the principal's signature on the ~~already signed record;~~record.

(6) States the date of the verification or ~~proof;~~proof.

(7) Contains the signature and seal or stamp of the notary who took the verification or ~~proof; and~~proof.

(8) States the notary's commission expiration date.

(d) A notarial certificate for an oath or affirmation taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-43, if it is substantially in a form otherwise prescribed by the ~~law~~ laws of this State, or if ~~it:~~it includes all of the following:

~~(1) Identifies the state and county in which the oath or affirmation occurred;~~

(2) Names the principal who appeared in person before the ~~notary;~~notary unless the name of the principal otherwise is clear from the record itself.

~~(3) States that the notary has either (i) personal knowledge of the identity of the principal or (ii) satisfactory evidence of the principal's identity, indicating the nature of that satisfactory evidence;~~

(4) Indicates that the principal who appeared in person before the notary signed the record in question and certified to the notary under oath or by affirmation as to the truth of the matters stated in the ~~record;~~record.

(5) States the date of the oath or ~~affirmation;~~affirmation.

(6) Contains the signature and seal or stamp of the notary who took the oath or ~~affirmation; and~~affirmation.

(7) States the notary's commission expiration date.

(e) Any notarial certificate made in another jurisdiction shall be sufficient in this State if it is made in accordance with federal law or the laws of the jurisdiction where the notarial certificate is made. If federal law or the laws of the jurisdiction where the notarial certificate is made do not require a notary to affix a seal to a notarial certificate or to state in a notarial certificate the date the notary's commission expires, the certificate shall be accepted in this State without requiring any separate certificate from a pubic official who has notarial oversight authority in the other jurisdiction.

(f) On records to be filed, registered, recorded, or delivered in another state or jurisdiction of the United States, a North Carolina notary may complete any notarial certificate that may be required in that other state or jurisdiction.

(g) Nothing in this Chapter shall be deemed to authorize the use of a notarial certificate authorized by this Part in place of or as an alternative to a notarial certificate required by any other provision of the General Statutes outside of Chapter 47 of the General Statutes that prescribes the specific form or content for a notarial certificate ~~(including, but not limited to,~~ including G.S. 31-11.6, Chapter 32A of the General Statutes, and ~~G.S. 90-321).~~ G.S. 90-321. However, any statute that permits or requires the use of a notarial certificate contained within Chapter 47 of the General Statutes may also be satisfied by the use of a notarial certificate permitted by this Part. Any form of acknowledgment or probate authorized under Chapter 47 of the General Statutes shall be conclusively deemed in compliance with the requirements of this section.

(h) If an individual signs a record and purports to be acting in a representative or fiduciary capacity, that individual is also deemed to represent to the notary that he or she is signing the record with proper authority to do so and also is signing the record on behalf of the person or entity represented and identified therein or in the fiduciary capacity indicated therein. In performing a notarial act in relation to an individual

described under this subsection, a notary is under no duty to verify whether the individual acted in a representative or fiduciary capacity or, if so, whether the individual was duly authorized so to do. A notarial certificate may include any of the following:

(1) A statement that an individual signed a record in a particular representative or fiduciary capacity.

(2) A statement that the individual who signed the record in a representative or fiduciary capacity had due authority so to do.

(3) A statement identifying the represented person or entity or the fiduciary capacity."

SECTION 19. G.S. 10B-41 reads as rewritten:

"**§ 10B-41. Notarial certificate for an acknowledgment.**

(a) When properly completed by a notary, a notarial certificate ~~in~~ that substantially complies with the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for the acknowledgment of a principal who is an individual acting in his or her own right or who is an individual acting in a representative or fiduciary capacity. The authorization of the form in this section does not preclude the use of other forms.

_____ County, North Carolina

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she ~~voluntarily~~ signed the foregoing ~~document for the purpose stated therein and in the capacity indicated:~~ document: name(s) of principal(s).

Date: _____ Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal) My commission expires: _____

~~(b) By signing a notarial certificate for the acknowledgment of a principal who is an individual acting in his or her own right or in a representative capacity substantially in the form set forth in subsection (a) of this section, the notary thereby certifies:~~

~~(1) That the principal acknowledging his or her signature appeared in person before the notary on the date indicated;~~

~~(2) That the principal stated to the notary that he or she voluntarily signed the record for the purpose stated therein;~~

~~(3) That, if the principal signed the record in a representative capacity, the principal stated that he or she signed the record in the particular representative capacity; and~~

~~(4) That the notary has either (i) personal knowledge of the identity of the principal or (ii) satisfactory evidence of the principal's identity.~~

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible."

SECTION 20. G.S. 10B-42 reads as rewritten:

§ 10B-42. Notarial certificate for a verification or proof.

(a) When properly completed by a notary, a notarial certificate in substantially the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for the verification or proof of the signature of a principal by a subscribing witness. The authorization of the form in this section does not preclude the use of other forms.

_____ County, North Carolina

I certify that name of subscribing witness personally appeared before me this day and certified to me under oath or by affirmation that he or she is not a ~~named party to the foregoing document, has no interest in the transaction,~~ grantee or beneficiary of the transaction, signed the foregoing document as a subscribing witness, and either (i) witnessed name of principal (the principal) sign the foregoing document or (ii) witnessed the principal acknowledge the principal's signature on the already-signed document.

Date: _____ Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal) My commission expires: _____

~~(b) By signing a notarial certificate for the verification or proof of the signature of a principal by a subscribing witness substantially in the form set forth in subsection (a) of this section, the notary thereby certifies:~~

~~(1) That the subscribing witness appeared in person before the notary on the date indicated;~~

~~(2) That the subscribing witness certified to the notary under oath or by affirmation that the subscribing witness is not a named party to the record in question, has no interest in the transaction, signed the record as a subscribing witness, and either (i) witnessed the named principal sign the record, or (ii) witnessed the named principal acknowledge the principal's signature on the already signed record; and~~

~~(3) That the notary has either (i) personal knowledge of the identity of the subscribing witness or (ii) satisfactory evidence of the subscribing witness's identity.~~

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible."

SECTION 21. G.S. 10B-43 reads as rewritten:

§ 10B-43. Notarial certificate for an oath or affirmation.

(a) When properly completed by a notary, a notarial certificate ~~in~~ that substantially complies with either of the following forms may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for an oath or affirmation. The authorization of the forms in this section does not preclude the use of other forms.

_____ County, North Carolina

Signed and sworn to ~~(or affirmed)~~ before me this day by name of principal.

Date: _____ Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal) My commission expires: _____

-OR-

_____ County, North Carolina

Sworn to ~~(or affirmed)~~ and ~~ascribed~~ subscribed before me this day by name of principal.

Date: _____ Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal) My commission expires: _____

~~(b) By signing a notarial certificate for an oath or affirmation substantially in the form set forth in subsection (a) of this section, the notary thereby certifies:~~

~~(1) That the principal appeared in person before the notary on the date indicated;~~

~~(2) That either (i) the notary witnessed the principal sign the record or (ii) the principal stated to the notary that he or she voluntarily signed the record for the purpose stated therein;~~

~~(3) That the principal certified to the notary under oath or by affirmation as to the truth of the matters stated in the record; and~~record.

~~(4) That the notary has either (i) personal knowledge of the identity of the principal or (ii) satisfactory evidence of the principal's identity.~~

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible.

(d) In either of the forms provided under subsection (a) of this section all of the following shall apply:

(1) The name of the principal may be omitted if the name of the principal is located near the jurat and the principal who so appeared before the notary is clear from the record itself.

(2) The words "affirmed" or "sworn to or affirmed" may be substituted for the words "sworn to"."

SECTION 22. G.S 10B-60 reads as rewritten:

"**§ 10B-60. Enforcement and penalties.**

(a) The Secretary may ~~warn,~~ issue a warning to a notary or restrict, suspend, or revoke a notarial commission for a violation of this Chapter and on any ground for which an application for a commission may be denied under this Chapter. Any period of restriction, suspension, or revocation shall not extend the expiration date of a commission.

(b) Except as otherwise permitted by law, a person who commits any of the following acts is guilty of a Class 1 misdemeanor:

(1) Holding one's self out to the public as a notary if the person does not have a commission.

(2) Performing a notarial act if the person's commission has expired or been ~~suspended.~~suspended or restricted.

(3) Performing a notarial act before the person had taken the oath of office.

(c) A notary shall be guilty of a Class 1 misdemeanor if the notary does any of the following:

(1) Takes an ~~acknowledgment, performs~~ acknowledgement or administers an ~~oath, affirmation, or jurat~~ oath or affirmation without the principal ~~personally~~ appearing in person before the ~~notary;~~notary.

(2) Takes a verification or proof ~~of a~~ without the subscribing witness ~~without personal knowledge of the subscribing witness's identity, or without satisfactory evidence of the subscribing witness's identity;~~appearing in person before the notary.

(3) Takes an acknowledgment or administers an oath or affirmation without personal knowledge or satisfactory evidence of the identity of the principal.

(4) Takes a verification or proof without personal knowledge or satisfactory evidence of the identity of the principal.

(d) A notary shall be guilty of a Class I felony if the notary does any of the following:

(1) Takes an ~~acknowledgment, verification, proof, or jurat,~~acknowledgement or a verification or a proof, or ~~performs~~ administers an oath or affirmation if the notary knows it is false or fraudulent.

(2) Takes an ~~acknowledgment, or jurat~~ acknowledgement or administers and oath or affirmation without the principal appearing in person before the notary if the notary does so with the intent to commit fraud.

(3) Takes a verification or proof without the subscribing witness appearing in person before the notary if the notary does so with the intent to commit fraud.

(e) It is a Class I felony for any person to perform notarial acts in this State with the knowledge that the person is not commissioned under this Chapter.

(f) Any person who without authority obtains, uses, conceals, defaces, or destroys the seal or notarial records of a notary is guilty of a Class I felony.

(g) For purposes of enforcing this Chapter and Article 34 of Chapter 66 of the General Statutes, the law enforcement agents of the Department of the Secretary of State have statewide jurisdiction and have all of the powers and authority of law enforcement officers. The agents have the authority to assist local law enforcement agencies in their investigations and to initiate and carry out, on their own or in coordination with local law enforcement agencies, investigations of violations.

(h) Resignation or expiration of a notarial commission does not terminate or preclude an investigation into a notary's conduct by the Secretary, who may pursue the investigation to a conclusion, whereupon it may be a matter of public record whether or not the finding would have been grounds for disciplinary action.

(i) The Secretary may seek injunctive relief against any person who violates the provisions of this Chapter. Nothing in this Chapter diminishes the authority of the North Carolina State Bar.

(j) Any person who knowingly solicits, coerces, or in any material way influences a notary to commit official misconduct, is guilty as an aider and abettor and is subject to the same level of punishment as the notary.

(k) The sanctions and remedies of this Chapter supplement other sanctions and remedies provided by law, including, but not limited to, forgery and aiding and abetting."

SECTION 23. Part 9 of Article 1 of Chapter 10B of the General Statutes is amended by adding the following new sections to read:

"**§ 10B-67. Erroneous commission date cured.**

An erroneous statement of the date of the notary's commission expires shall not affect the sufficiency, validity or enforceability of the notarial certificate or the related record if the notary is, in fact, lawfully commissioned at the time of the notarial act.

"**§ 10B-68. Technical defects cured.**

(a) Technical defects, errors, or omissions in a form of a notarial certificate shall not affect the sufficiency, validity, or enforceability of the notarial certificate or the related instrument or document.

(b) As used in this section, a technical defect includes those cured under G.S. 10B-37(f) and G.S. 10B-67. Other technical defects include the absence of the legible appearance of the notary's name exactly as shown on the notary's commission as required in G.S. 10B-20(b) and defects in the commissioning or recommissioning of the notary that were approved by the Department under this Chapter.

"**§ 10B-69. Official forms cured.**

(a) The notarial certificate contained in a form issued by a State agency prior to October 1, 2006, is deemed to be a valid certificate provided the certificate complied with the law at the time the form was issued.

(b) The notarization using a certificate under subsection (a) of this section shall be deemed valid if executed in compliance with the law at the time the form was issued.

"**§ 10B-99. Presumption of regularity.**

(a) In the absence of evidence of fraud on the part of the notary or evidence of a knowing and deliberate violation of Article by the notary, the courts shall grant a presumption of regularity to notarial acts so that those acts may be upheld, provided there has been substantial compliance with the law. Technical defects, errors, or omissions in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the notarial act or the related instrument or record. Nothing in this Chapter modifies or repeals the common law doctrine of substantial compliance in effect on November 30, 2005.

(b) A notarial act performed before October 1, 2006 shall be deemed valid if it complies with the law as it existed on or before December 1, 2005."

SECTION 24. G.S. 10B-106(d) reads as rewritten:

"(d) An electronic form shall be used by an electronic notary in registering with the Secretary and it shall include, at least all of the following:

(1) The applicant's full legal name and the name to be used for commissioning, excluding nicknames.
(2) The state and county of commissioning of the registrant.
(3) The expiration date of the registrant's notary commission.
(4) Proof of successful completion of the course of instruction on electronic notarization as required by this Article.
(5) A description of the technology the registrant will use to create an electronic signature in performing official acts.
(6) If the device used to create the registrant's electronic signature was issued or registered through a licensed certification authority, the name of that authority, the source of the license, the starting and expiration dates of the device's term of registration, and any revocations, annulments, or other premature terminations of any registered device of the registrant that was due to misuse or compromise of the device, with the date, cause, and nature of each termination explained in detail.
(7) The e-mail address of the registrant.

The information contained in a registration under this section is a public record as defined in G.S. 132-1, except for information contained in ~~subsection (7),~~ subdivision (7), which shall be considered confidential information and shall not be subject to disclosure except as provided in Chapter 132 of the General Statutes or as provided by rule."

SECTION 25. G.S. 47-2.2 reads as rewritten;

"**§ 47-2.2. Notary public of sister state; lack of seal or stamp or expiration date of commission.**

If the proof or acknowledgment of any instrument is had before a notary public of any state other than North Carolina and the instrument does not show the seal or stamp of the notary public and the expiration date of the commission of the notary public, the certificate of proof or acknowledgment made by ~~such~~ the notary public ~~shall~~ may be accompanied by the certificate of the county official before whom the notary qualifies for office, stating that ~~such~~ the notary public was at the time his or her certificate bears date an acting notary public of ~~such~~ the state, and that ~~such~~ the notary's genuine signature is set to his or her certificate. The certificate of the official herein provided for shall be under his or her hand and official seal."

SECTION 26. G.S. 47-14 is amended by adding a new subsection to read:

"(f) The acceptance of a record for registration by the register of deeds shall give rise to a presumption that, at the time the record was presented for registration, a clear and legible image of the notary's official seal was affixed or embossed on the record near the notary's official signature. This presumption shall apply regardless of whether the image is legible or photographically reproduced in the records maintained by the

register of deeds. A register of deeds may not refuse to accept a record for registration because a notarial seal does not satisfy the requirements of G.S. 10B-37. "

SECTION 27. G.S. 47-37.1 reads as rewritten:

"**§ 47-37.1. Other forms of proof.**

(a) The proof and acknowledgment forms set forth in this Article are not exclusive. Without regard to whether an instrument presented for registration was signed by an individual acting in his or her own right or by an individual acting in a representative or fiduciary capacity, a notarial certificate that complies with the provisions of Part 6 of Article 1 of Chapter 10B.~~(G.S. 10B-25 et. seq.)~~ shall be deemed a sufficient form of probate or acknowledgment for purposes of this Chapter. Use of a notarial certificate that satisfies the requirements of Part 6 of Article 1 of Chapter 10B shall not be grounds for a register of deeds to refuse to accept a record for registration.

(b) When an instrument presented for registration purports to be signed by an individual in a representative or fiduciary capacity, the acknowledgment or proof of that individual's signature ~~may, but is not required to:~~may:

(1) State that the individual signed the instrument in a representative or fiduciary capacity.

(2) State that the individual who signed the instrument in a representative or fiduciary capacity had due authority to do so.

(3) Identify the represented person or ~~entity.~~ the fiduciary capacity

(c) This section relates only to the form of proof or acknowledgment. The capacity and authority of the individual who signs an instrument presented for registration are governed by other provisions of law.

(d) This section applies to proofs and acknowledgments made before, on, or after December 1, 2005."

SECTION 28. G.S. 47-38 reads as rewritten:

"**§ 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:~~

When properly completed, a certificate in substantially the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for one or more individuals, acing in his, her, or their own right or, whether or not so stated in the notarial certificate, in a representative or fiduciary capacity, including one or more individuals acting on behalf of an unincorporated association, as an officer or director of a corporation, as a partner of a general or limited partnership, as a manager or member of a limited liability company, as the trustee of a trust, as the personal representative of a decedent's estate, as an agent or attorney in fact for another, as the guardian of a minor or an incompetent, or as a public official. The authorization of the form in this section does not preclude the use of other forms. This section applies to notarial certificates made before, on, and after December 1, 2005.

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)~~ individual whose acknowledgment is being taken) 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.)
(Title)"

SECTION 29. G.S. 47-41.01 is amended by adding a new subsection to read:

"(e) The forms of probate set forth in this section may be modified and adopted for use in the probate of deeds and other conveyances and instruments executed by entities other than corporations, including general and limited partnerships, limited liability companies, trusts, and unincorporated associations. This subsection applies to notarial certificates and forms of probate made before, on, or after December 1, 2005."

SECTION 31. G.S. 47-41.02 is amended by adding a new subsection to read:

"(h) The forms of probate set forth in this section may be modified and adopted for use in the probate of deeds and other conveyances and instruments executed by entities other than corporations, including general and limited partnership, limited liability companies, trusts, and unincorporated associations. This subsection applies to notarial certificates and forms of probate made before, on, or after December 1, 2005."

SECTION 32. Chapter 47 of the General Statutes is amended by adding a new section to read:

"**§ 47-41.2. Technical defects.**

Technical defects under G.S. 10B-68 and errors or omissions in a form of probate or other notarial certificate shall not affect the sufficiency, validity, or enforceability of the form of probate or the notarial certificate or the related instrument or document. A register of deeds may not refuse to accept an instrument or document for registration because of technical defects, errors, or omissions in a form of probate or other notarial certificate."

SECTION 33. G.S. 47-45 reads as rewritten:

"**§ 47-45. Clerk's certificate upon probate by nonresident official without seal.**

When the proof or acknowledgment of any instrument is had before any official of some other state, territory or country and ~~such~~ the official has no official seal, then the certificate of ~~such~~ the official ~~shall~~ may be accompanied by the certificate of a clerk of a court of record of the state, territory or country in which the official taking the proof or acknowledgment resides, of the official position and signature of ~~such~~ the official; ~~such~~ the certificate of the clerk shall be under his or her hand and official seal and shall be in substance as follows:

_____County.

I, A.B. (here give name and official title of the clerk of a court of record as provided herein), do hereby certify that C.D. (here give name of the official taking the proof, etc.) was at the time of signing the foregoing (or annexed) certificate (here give the official title of the officer taking proof, etc.) in and for the county of _____ and state of

_____ (or other political division of the state, territory or country, as the case may be), and that his or her signature thereto is in his or her own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this _____day of_____, A.D._____

(Official seal.)

_____

(Signature of Clerk.)"

SECTION 34. This act becomes effective October 1, 2006, and except as otherwise set forth in this act, applies to notarial acts performed on or after that date.

HOUSE BILL 1432:
Notary Public Corrections.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 8, 2006
Introduced by:	Reps. Stam, Ross	**Summary by:**	Kory Goldsmith Committee Co-Counsel O. Walker Reagan, Staff Attorney
Version:	PCS to Second Edition H1432-CSRC-101		

SUMMARY: ***The Proposed Senate Committee Substitute for House Bill 1432 makes technical, conforming, and other changes to the new Notary Public Act, and conforming changes to other related laws.***

CURRENT LAW: The current law was enacted in 2005, effective December 1, 2005, as part of Senate Bill 671. The 2005 act recodified the existing notary law and made extensive changes governing notary commissioning, notarial acts, powers and limitations, fees, signatures and seals, and certification forms.

BACKGROUND: As a result of difficulties and questions that arose regarding the implementation and compliance with the new law from the legal community representing various affected parties including real estate closing attorneys, lending institutions, title insurance companies, registers of deeds, clerks of court, the Division of Motor Vehicles, wills and estate administrators and other people who deal with and rely on a reliable, dependable notary system, the General Assembly was encouraged to reexamine the new law to provide additional clarity.

One of the goals of the new law was to add additional details to the notary statutes to improve the integrity of the notary system and to give the Secretary of State's Office, as the administrator of the law, the necessary tools to insure compliance. But a result of strengthening the notarization requirements, questions arose concerning the validity of the execution and recording of documents where notarizations did not technically comply with all the requirements of the new law.

As a result of our analysis of the various issues and concerns raised by all the parties, fundamental goals were identified that lead to the changes proposed in the proposed committee substitute. One goal was to clarify and protect the integrity of the notary system and strengthen the authority of the Secretary of State in insure compliance by notaries. The other goal was to protect the rights of parties who relied on documents which on their face appeared to be properly notarized.

As a result of these two goals, the proposed committee substitute was drafted to separate out these two purposes so that the Secretary of State could enforce strict compliance with notary standards designed to prevent fraud and insure the integrity of notarized documents, while not causing the underlying documents that were signed by the person whose name appeared on the document to be declared invalid because of a technical notary defect.

The primary effect of the bill is to uncouple the technical notary requirements from the validity and enforceability of documents on which it appears that the person who executed the document actually appeared before the notary, established his or her identity, and voluntarily executed the document in the notary's presence.

BILL ANALYSIS:

Section 1 makes technical and clarifying changes and corrections to the definitions used throughout the act.

Section 2 is a technical change to the notary qualifications statute.

Section 3 clarifies the exemption from the public records of certain personal identity information on the statement of personal qualification including the applicant's date of birth, residence address and telephone number, last four digits of the social security number, and personal and business email address.

Section 4 clarifies that the notary's commission is recorded by the register of deeds only after the oath of office is administered.

Section 5 clarifies the notary recommission requirements to eliminate the requirement that the notary retake the notary course and obtain another recommendation from a public official.

Sections 6, 7, 8, 9, 10, 11 and 12 amend the notary's power and limitation statute in the following ways:

- Expands the ways the notary's name can be legibly shown in a notarial certificate and permits the statement of the expiration of the commission to be in the notary stamp or seal.
- Prohibits the notary from acting when the credible witness is not personally known to the notary and clarifies when a notary named on the document being notarized is not disqualified.
- Permits both commissioned and non-commissioned members of the Armed Forces to notarize documents as permitted under federal law.
- Makes other technical and conforming changes.

Section 13 allows the notary to administer an oath or affirmation without completing a certification.

Section 14 makes a conforming change to the permissible notary fee statute.

Section 15 repeals a redundant section and substitutes language originally intended to be included last year to specify the requirements for the notary's official signature, including the requirement to only sign after the principal signs and prohibiting notary signatures other than by hand.

Section 16 relaxes the requirements for storing a notary's seal to only be a secured location and limits the circumstances when law enforcement and/or the Secretary of State need to be notified about the condition of a seal to when the seal is lost or stolen.

Section 17 allows a notary to continue to use his or her old notary seal obtained prior to October 1, 2006, that does not comply with the new law, until the notary is recommissioned. This section also prohibits the notary from altering the appearance of the notary seal once the seal is placed on the record. This section clarifies that the failure of a notary seal to comply with the technical requirements for a seal does not invalidate a notarial certificate.

Section 18 creates a legal presumption that by executing a notary certificate the notary certifies that all the requirements for the type of notarial act performed have been complied with, that at the time the notary was lawfully commissioned, the notary's commission had not expired, the notarial act was performed within the State and performed in compliance with the law. The notary also is deemed to certify that the person whose signature is notarized did not appear to be incompetent, lacking in understanding of the nature and consequences of the transaction, or acting involuntarily, under duress or undue influence. This section also clarifies that a person who purports to be acting in a representative capacity when signing has the authority to do so.

Sections 19, 20 and 21 make technical changes to the statutory forms of notary certificates for acknowledgements, verifications or proofs, and oaths or affirmations.

Section 22 restores in the law a Class 1 misdemeanor offense for a notary who performs a notarial act without verification or proof of the identity of the person signing.

Section 23 adds the following new sections to the Notary Public Act:

- **G.S. 10B-67** cures erroneous commission expiration dates when the notary was lawfully commissioned at that time of the notarial act.
- **G.S. 10B-68** cures technical defects in notarial certificates including use of a noncompliant notary seal, an erroneous commission expiration date, a notary's name inconsistent with the name shown of the notary commission, and defects in the notary's commissioning or recommissioning.
- **G.S. 10B-68** cures the use of an outdated notarial certificate form on a State issued document, such as a DMV title, when the execution of the certificate conformed to the law at the time the document was issued.
- **G.S. 10B-99** preserves the common law doctrine of substantial compliance for notarial acts and validates notarial acts performed prior to October 1, 2006 that conformed to either the law as it existed prior to the 2005 changes or after the 2005 changes.

Section 24 makes a conforming change to the electronic notarization statute restricting the disclosure of the registrant's email address.

Sections 25 and 33 make conforming changes to no longer require the register of deeds to require proof of acknowledgement on an out-of-state notarization without a seal.

Section 26 creates a legal presumption under the registration statutes that at the time a document was accepted by the register of deeds for recording, the notary seal was clear and legible.

Section 27 clarifies and cures forms for proofs and acknowledgements on recorded documents.

Section 28 cures and clarifies that the acknowledgement for a grantor can be used generically for multiple persons or persons acting in a representative capacity, including for any form of business entity.

Sections 29 and 31 cure and clarify that the statutory corporate conveyance notary forms can also be modified and adopted for use by other business entities.

Section 32 adds a conforming change to the probate and registration law curing technical defects in notarial certifications.

EFFECTIVE DATE: The bill becomes effective October 1, 2006, and except as otherwise set out in the act, applies to notarial acts performed on or after that date.

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	June 13, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 1432	Register of Deeds-Certifications.	Representative Ross Representative Stam
SB 1378	Amend the Forfeiture of Property Rights Law.	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, June 13, 2006, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 1432	Register of Deeds-Certifications.	Representative Ross Representative Stam
SB 1378	Amend the Forfeiture of Property Rights Law.	Senator Hartsell

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

June 13, 2006

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on June 13, 2006, with eleven members present. Senator Hartsell introduced pages Lindsey Huckabee, Cameron Burroughs, Candace Carter, Meredith Hughes, Chad Bond and Sara Cashman and thanked them for their service.

HB 1432 (Register of Deeds-Certifications.) Senator Apodaca moved to adopt the Proposed Committee Substitute for purposes of discussion. All voted and the motion carried. Senator Hartsell recognized Representative Ross to explain the bill. Mr. Pete Powell, of the General Statutes Commission, and Ms. Ann Shaw, Register of Deeds from Randolph County spoke on the bill. Senator Hartsell presented an amendment and he and Kory Goldsmith, Staff Attorney gave explanations. Senator Apodaca moved to adopt the amendment. All voted and the motion passed. Senator Apodaca then moved for a favorable report, unfavorable to the original bill, favorable to the proposed committee substitute as amended, and rolled into a new bill. All voted and the motion carried.

SB 1378 (Amend the Forfeiture of Property Rights Laws.) As this was Senator Hartsell's bill, Senator Berger chaired and recognized Senator Hartsell to explain the bill. Mr. Floyd Lewis of the General Statutes Commission, spoke on the bill and gave additional explanation. Questions from Senators Apodaca and Bingham were answered by Senator Berger, Floyd Lewis and Senator Hartsell. Senator Bingham moved for a favorable report, unfavorable to the original bill, favorable to the committee substitute. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

VISITOR REGISTRATION SHEET 6-13-06

Sen. Goodall

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
[illegible]	[illegible]
[illegible]	SOS
[illegible]	SOS
[illegible]	AOC
Floyd Lewis	General Statutes Commission
Nicholas Long Jr	Title Co of NC / NC Bar - Real Property Sect
Nancy Ferguson	Chicago Title / NC Bar Assoc
Wm R. Hoyle	Attorney
Ann Shaw	NCARD
Chip Kullman	Nelson Mullins
Kim Rosenberg	United General Title / NC Land Title Assoc
David Carter	NC BAR Assoc.
Joe Brown	NC SOS

Rules Sen. Gov't

VISITOR REGISTRATION SHEET 6-13-16

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Paul Stack	NC Bankers Assn.
Ally McGuigan	First Citizens Bank
Bev Hall	General Statutes Commission
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
Rick Zechini	NCAR
[illegible]	N.C.B.A.
Jeff Wolfe	Daily Bulletin

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 1432

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

H1432-ARC-56 [v.2]

Date 6-13 ,2006

Comm. Sub. [YES]
Amends Title [NO]
H1432-CSRC-101[v.11]

Senator _____

moves to amend the bill on page 13, lines 42-44, and page 14, lines 1-2, by deleting the underlined language;

and on page 20, by deleting Section 26;

and on pages 22-23, by deleting Section 33;

and by renumbering the remaining Sections accordingly.

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED X FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 1432

Committee Substitute Favorable 5/11/05

PROPOSED SENATE COMMITTEE SUBSTITUTE H1432-CSRC-101 [v.11]

6/12/2006 9:23:50 PM

Short Title: Notary Public Corrections. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT TO MAKE CORRECTIONS AND OTHER AMENDMENTS TO THE NOTARY PUBLIC ACT, AND TO MAKE OTHER CONFORMING CHANGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 10B-3 reads as rewritten:

"**§ 10B-3. Definitions.**

The following definitions apply in this Chapter:

(1) ~~"Acknowledgment" means a~~ Acknowledgment. – A notarial act in which ~~an individual, a~~ a notary certifies that at a single time and ~~place:~~place all of the following occurred:

a. ~~Appears~~ An individual appeared in person before the notary and ~~presents a record; and~~ presented a record.

b. ~~Is~~ The individual was personally known to the notary or identified by the notary through satisfactory ~~evidence and~~ evidence.

c. The individual did either of the following:

i. ~~indicates~~ Indicated to the notary that the signature on the record was the individual's signature.~~was voluntarily affixed by the individual for the purposes stated within the record.~~

ii. Signed the record while in the physical presence of the notary and while being personally observed signing the record by the notary.

(2) ~~"Affirmation" means a~~ Affirmation. – A notarial ~~act, or part thereof,~~ act which is legally equivalent to an oath and in which a notary certifies that ~~an individual~~ at a single time and ~~place:~~place all of the following occurred:

a. ~~Appears~~ An individual appeared in person before the ~~notary;~~notary.

b. ~~Is~~ The individual was personally known to the notary or identified by the notary through satisfactory ~~evidence; and~~evidence.

c. ~~Makes~~ The individual made a vow of truthfulness on penalty of perjury, based on personal honor and without invoking a deity or using any form of the word "swear".

(3) ~~"Attest" or "attestation" means the~~ Attest or attestation. – The ~~act of completing the written evidence of a notarial act, to wit:~~ completion of a certificate by a notary who has performed a notarial ~~act by witnessing a signature or administering an oath or affirmation.~~act.

(4) ~~"Commission" means the~~ Commission. – The empowerment to perform notarial acts and the written evidence of authority to perform those acts.

(5) ~~"Credible witness" means an honest, reliable, and impartial person~~ Credible witness. –An individual who is personally known to the notary and ~~takes an oath or affirmation fromthe notary to confirm a signer's identity.~~to whom all of the following also apply:

a. The notary believes the individual to be honest and reliable for the purpose of confirming to the notary the identity of another individual.

b. The notary believes the individual is not a party to or beneficiary of the transaction.

(6) ~~"Department" means the~~ Department. – The North Carolina Department of the Secretary of State.

(7) ~~"Director" means the~~ Director. – The Division Director for the North Carolina Department of the Secretary of State Notary Public Section.

(8) ~~"Jurat" means a~~ Jurat. – A notary's certificate evidencing the administration of an oath or affirmation. ~~certification added to an affidavit or deposition that states when and before what authority an affidavit or deposition was made, to wit, "Subscribed and sworn to before me this the ____ day of _____ 20__." The notary's signature and seal shall be affixed below the sworn or affirmed statement and signature of the affiantIn so doing, the notary shall certify the following:~~

~~a. That the person signing the affidavit or deposition did so in the notary's presence and indicates the county in which the notarial act took place;~~

~~b. That the signer appeared before the notary on the date indicated;~~

~~c. That the notary administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document.~~

(9) ~~"Moral turpitude" means conduct~~ Moral turpitude. – Conduct contrary to expected standards of honesty, morality, or integrity.

(10) ~~"Nickname" means a~~ Nickname. – A descriptive, familiar, or shortened form of a proper name.

(11) ~~"Notarial act," "notary act," and "notarization" mean the~~ Notarial act, notary act and notarization. – The act of taking an acknowledgment, taking a verification or proof or administering an oath or affirmation that a notary is empowered to perform under ~~this Chapter, as authorized by G.S. 10B-31.~~G.S. 10B-20(a).

(12) ~~"Notarial certificate" and "certificate" mean the~~ Notarial certificate and certificate. – The portion of a notarized record that is completed by the notary, bears the notary's signature and seal, and states the facts attested by the notary in a particular notarization.

(13) ~~"Notary public" and "notary" mean a~~ Notary public and notary. – A person commissioned to perform notarial acts under this Chapter. A notary is a public officer of the State of North Carolina and shall act in full and strict compliance with this act.

(14) ~~"Oath" means a~~ Oath. – A notarial ~~act, or part thereof,~~ act which is legally equivalent to an affirmation and in which a notary certifies that ~~an individual~~ at a single time and ~~place:~~place all of the following occurred:

a. ~~Appears~~ An individual appeared in person before ~~a notary;~~the notary.

b. ~~Is~~ The individual was personally known to the notary or identified by the notary through satisfactory ~~evidence; and~~evidence.

c. ~~Makes~~ The individual made a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear".

(15) ~~"Official misconduct" means either~~ Official misconduct. – Either of the following:

a. A notary's performance of a prohibited act or failure to perform a mandated act set forth in this Chapter or any other law in connection with notarization.

b. A notary's performance of a notarial act in a manner found by the Secretary to be negligent or against the public interest.

(16) ~~"Personal appearance" and "appear in person before a notary" mean an~~ Personal appearance and appear in person before a notary. – An individual and a notary are in close physical proximity to one another so that they may freely see and communicate with one another and exchange records back and forth during the notarization process.

(17) ~~"Personal knowledge of identity" means familiarity~~ Personal knowledge or personally know. – Familiarity with an individual resulting from interactions with that individual over a period of time

sufficient to eliminate every reasonable doubt that the individual has the identity claimed.

(18) ~~"Principal" means an~~ Principal. – One of the following:

a. In the case of an acknowledgement, the individual whose ~~signature is notarized; or an~~ identity and due execution of a record is being certified by the notary.

b. In the case of a verification or proof, the individual other than a ~~credible~~ subscribing witness, ~~taking an oath or affirmation from the notary.~~ whose:

i. identity and due execution of the record is being proven; or

ii. signature is being identified as genuine.

c. In the case of an oath or affirmation, the individual who makes a vow of truthfulness on penalty of perjury.

(19) ~~"Record" means information~~ Record. – Information that is inscribed on a tangible medium and called a traditional or paper record.

(20) ~~"Regular place of work or business" means a~~ Regular place of work or business. – A location, office or other workspace, where an individual regularly spends all or part of the individual's work time.

(21) ~~"Revocation" means the~~ Revocation. – The cancellation of the notary's commission stated in the order of revocation.

(22) ~~"Satisfactory evidence of a signer's identity" means identification~~ Satisfactory evidence. – Identification of an individual based on either of the following:

a. At least one current document issued by a federal, state, or federal or state-recognized tribal government agency bearing the photographic image of the individual's face and either the signature or a physical description of the individual.

b. The oath or affirmation of one credible witness ~~unaffected by the record or transaction who is personally known to the notary and~~ who personally knows the individual seeking to be identified.

(23) ~~"Seal" and "stamp" mean a~~ Seal or stamp. – A device for affixing on a paper record an image containing a notary's name, the words "notary public," and other information as required in G.S. 10B-37.

(24) ~~"Secretary" means the~~ Secretary. – The North Carolina Secretary of State or the Secretary's designee.

(25) ~~"Signature" means the act of personally signing one's name in ink by hand.~~

(26) ~~"Subscribing witness" means a~~ Subscribing witness. – A person who ~~either watches another individual sign a record or takes that individual's acknowledgment of an already signed record and appears before the notary on behalf of the principal. The subscribing witness must sign the document in addition to the principal, must be personally~~

~~known by the notary or prove identity to the notary by satisfactory evidence, and must take an oath or affirmation stating that he or she witnessed the principal sign.~~signs a record for the purpose of being a witness to the principal's execution of the record or to the principal's acknowledgement of his or her execution of the record. A subscribing witness may give proof of the execution of the record as provided in subdivision (28) of this section.

(27) ~~"Suspension" and "restriction" means the~~ Suspension and restriction. – The termination of a notary's commission for a period of time stated in an order of restriction or suspension. The terms "restriction" or "suspension" or a combination of both terms shall be used synonymously.

(28) ~~"Verification" or "proof" means a~~ Verification or proof. – A notarial act in which a notary certifies that all of the following occurred:

a. An individual appeared in person before the notary.

b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.

c. The individual was not a party to or beneficiary of the transaction.

d. ~~where a person certifies under oath or affirmation that the person witnessed the principal either execute, record, or acknowledge the principal's signature on an already executed record.~~ The individual took an oath or gave an affirmation and testified to one of the following:

i. The individual is a subscribing witness and the principal who signed the record did so while being personally observed by the subscribing witness.

ii. The individual is a subscribing witness and the principal who signed the record acknowledged his or her signature to the subscribing witness.

iii. The individual recognized either the signature on the record of the principal or the signature on the record of the subscribing witness and the signature was genuine."

SECTION 2. G.S. 10B-5(b) reads as rewritten:

"(b) A person qualified for a notarial commission shall meet all of the following requirements:

(1) Be at least 18 years of age or legally emancipated as defined in Article 35 of Chapter 7B of the General Statutes.

(2) Reside or have a regular place of work or business in this State.

(3) Reside legally in the United States.

(4) Speak, read, and write the English language.

(5) Possess a high school diploma or equivalent.

(6) Pass the course of instruction described in this Article, unless the person is a licensed member of the North Carolina State Bar.

(7) Purchase and keep as a reference the most recent manual approved by the Secretary that describes the duties and authority of notaries public.

(8) Submit an application containing no significant misstatement or omission of fact. The application form shall be provided by the Secretary and be available at the register of deeds office in each county. Every application shall include the signature of the applicant written with pen and ink, and the signature shall be acknowledged by the applicant before a person authorized to administer oaths.

(9) Obtain the recommendation of one publicly elected official in North Carolina and submit the recommendation with the application. ~~Except for~~ The requirement of this subdivision shall not apply to any applicant who seeks to receive the oath of office from the register of deeds of a county where more than 15,000 active notaries public are on record on January 1 of the year when the application is ~~filed, the applicant shall also obtain the recommendation of one publicly elected official in North Carolina whose recommendation shall be contained on the application.~~filed."

SECTION 3. G.S. 10B-7(b) reads as rewritten:

"(b) The information ~~contained~~ provided in an application that relates to subdivisions (2), (3), (6) and (7) of subsection (a) of this section ~~under this section is a public record as defined in G.S 132-1. The information contained in subdivisions (2), (3), (6) and (7) of subsection (a) of this section~~ shall be considered confidential information and shall not be subject to disclosure ~~except as provided in~~ under Chapter 132 of the General Statutes."

SECTION 4. G.S. 10B-10(c) reads as rewritten:

"(c) ~~The~~ After the appointee qualifies by taking the oath of office required under subsection (b) of this section, the register of deeds shall ~~then~~ place the notary record in a book designated for that purpose, or the notary record may be recorded in the Consolidated Document Book and indexed in the Consolidated Real Property Index under the notary's name in the grantor index. The notary record may be kept in electronic format so long as the signature of the notary public may be viewed and printed. The notary record shall contain the name and the signature of the notary as commissioned, the effective date and expiration date of the commission, the date the oath was administered, and the date of any restriction, suspension, revocation, or resignation. The record shall constitute the official record of the qualification of notaries public."

SECTION 5. G.S. 10B-11(b) reads as rewritten:

"(b) A notary whose commission has not expired must comply with the following requirements to be recommissioned:

(1) Submit a new application ~~under G.S. 10B-6.~~ meeting the requirements of G.S. 10B-6, except for G.S. 10B-6(2).

(2) Meet all the requirements of ~~G.S. 10B-5(b)~~G.S. 10B-5(b), except for G.S. 10B-5(b)(5), (6) and (9).

(3) ~~Pass~~ Achieve a passing score on the written examination required under ~~G.S. 10B-8, unless~~ G.S. 10B-8(b). This requirement does not apply if the notary is a licensed member of the North Carolina State Bar."

SECTION 6. G.S. 10B-20(a) reads as rewritten:

"**§ 10B-20. Powers and limitations.**

(a) A notary may perform any of the following notarial acts:

(1) Acknowledgments.

(2) Oaths and affirmations.

~~(3) Execute jurats.~~

(4) Verifications or proofs."

SECTION 7. G.S. 10B-20(b) reads as rewritten:

"(b) A notarial act shall be attested by all of the following:

(1) The signature of the notary, exactly as shown on the notary's commission.

(2) The ~~readable~~ legible appearance of the notary's ~~name,~~ name exactly as shown on the notary's commission. The legible appearance of the name may be ascertained from the notary's typed or printed name near the ~~signature.~~notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible.

(3) The clear and legible appearance of the notary's stamp or seal.

(4) A statement of the date the notary's commission expires. The statement of the date that the notary's commission expires may appear in the notary's stamp or seal or elsewhere in the notarial certificate."

SECTION 8. G.S. 10B-20(c) reads as rewritten:

"(c) A notary ~~is disqualified from performing~~shall not perform a notarial act if any of the following apply:

(1) The principal or subscribing witness is not in the notary's presence at the time the notarial act is ~~to be performed; however,~~ performed. However, nothing in this Chapter shall require a notary to complete the notarial certificate attesting to the notarial act in the presence of the principal or subscribing witness.

(2) The principal or subscribing witness is not personally known to the notary or identified by the notary through satisfactory evidence.

(2a) The credible witness is not personally known to the notary.

~~(3) The principal or subscribing witness shows a demeanor that causes the notary to have a compelling doubt about whether the principal knows the consequences of the transaction requiring a notarial act.~~

~~(4) The principal or subscribing witness, in the notary's judgment, is not acting of the principal's or the subscribing witness's own free will.~~

(5) The notary is a signer ~~of or is named, other than as a trustee in a deed of trust, in the document~~ of, party to, or beneficiary of the record, that is to be notarized. However, a disqualification under this subdivision shall not apply to a notary who is named in a record solely as the

trustee in a deed of trust, the drafter of the record, the person to whom a registered document should be mailed or sent after recording, or the attorney for a party to the record, so long as the notary is not also a party to the record individually or in some other representative or fiduciary capacity.

(6) The notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in G.S. 10B-31, other than fees or other consideration paid for services rendered by a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker."

SECTION 9. G.S. 10B-20(g) reads as rewritten:

"(g) ~~Commissioned officers on active duty in the United States armed forces who are authorized to perform notarial acts and other persons~~Persons authorized by federal law or regulation to perform notarial acts may perform the acts for persons serving in or with the United States armed forces, their spouses, and their dependents."

SECTION 10. G.S. 10B-20(l) reads as rewritten:

"(l) A notary public required to comply with the provisions of subsection ~~(g)~~(i) of this section shall prominently post at the notary public's place of business a schedule of fees established by law, which a notary public may charge. The fee schedule shall be written in English and in the non-English language in which the notary services were solicited and shall contain the notice required in subsection (i) of this section, unless the notice is otherwise prominently posted at the notary public's place of business."

SECTION 11. G.S. 10B-20(m) reads as rewritten:

"(m) If notarial certificate wording is not provided or indicated for a record, a ~~nonattorney~~ notary who is not also a licensed attorney shall not determine the type of notarial act or certificate to be used. This does not prohibit a notary from offering the selection of certificate forms recognized in this Chapter or as otherwise authorized by law."

SECTION 12. G.S. 10B-20(o) reads as rewritten;

"(o) Before signing a notarial certificate and except as provided in this subsection, a notary shall cross out or mark through all blank lines or spaces in the certificate. However:

(1) Notwithstanding the provisions of this ~~section or G.S. 10B-35(b),~~ section, a notary shall not be required to complete, cross out, or mark through blank lines or spaces in the notary certificate form provided for in G.S. 47-43 indicating when and where a power of attorney is recorded if that recording information is not known to the notary at the time the notary completes and signs the certificate;

(2) A notary's failure to cross out or mark through blank lines or spaces in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the certificate or the related record; and

(3) A notary's failure to cross out or mark through blank lines or spaces in a notarial certificate shall not be grounds for a register of deeds to refuse to accept a record for registration."

SECTION 13. G.S. 10B-23 reads as rewritten:

"**§ 10B-23. Improper records.**

(a) A notary shall not notarize a signature on a record without a notarial certificate indicating what type of notarial act was performed. However, a notary may administer an oath or affirmation without completing a jurat.

(b) A notary shall neither certify, notarize, nor authenticate a photograph. A notary may notarize an affidavit regarding and attached to a photograph."

SECTION 14. G.S. 10B-31 reads as rewritten:

"**§ 10B-31. Fees for notarial acts.**

The maximum fees that may be charged by a notary for notarial acts are as follows:

(1) For acknowledgments, jurats, verifications or proofs, five dollars ($5.00) per principal signature.

(2) For oaths or affirmations without a signature, five dollars ($5.00) per person, except for an oath or affirmation administered to a credible witness to vouch for ~~a principal's identity.~~the identity of a principal or subscribing witness."

SECTION 15. G.S. 10B-22 as enacted in Section 4 of S.L. 2005-391 and as codified as G.S. 10B-35 reads as rewritten:

~~"§ 10B-22. Official signature.~~

~~(a) A notary shall keep an official seal or stamp (herein "seal") that is the exclusive property of the notary. The notary shall keep the seal in a secure location that is accessible only to the notary. A notary shall not allow another person to use or possess the seal, and shall not surrender the seal to the notary's employer upon termination of employment.~~

~~(b) The seal shall be affixed only after the notarial act is performed. The notary shall place the image or impression of the seal near the notary's signature on every paper record notarized. The seal and the signature shall appear on the same page.~~

~~(c) A notary shall do the following within 10 days of discovering that the notary's seal has been stolen, lost, damaged, or otherwise rendered incapable of affixing a legible image:~~

~~(1) Inform the appropriate law enforcement agency in the case of theft or vandalism.~~

~~(2) Notify the appropriate register of deeds and the Secretary in writing and signed in the official name in which he or she was commissioned.~~

~~(d) As soon as is reasonably practicable after resignation, revocation, or expiration of a notary commission, or death of the notary, the seal shall be delivered to the Secretary for disposal.~~

"**§ 10B-35. Official signature.**

When notarizing a paper record, a notary shall sign by hand in ink on the notarial certificate. The notary shall comply with the requirements of G.S. 10B-20(b)(1) and (b)(2). The notary shall affix the official signature only after the notarial act is

performed. The notary shall not sign a paper record using the facsimile stamp or an electronic or other printing method."

SECTION 16. G.S. 10B-36 reads as rewritten:

"**§ 10B-36. Official seal.**

(a) A notary shall keep an official seal or stamp ~~(herein "seal")~~ that is the exclusive property of the notary. The notary shall keep the seal in a secure ~~location that is accessible only to the notary.~~ location. A notary shall not allow another person to use or possess the seal, and shall not surrender the seal to the notary's employer upon termination of employment.

(b) The seal shall be affixed only after the notarial act is performed. The notary shall place the image or impression of the seal near the notary's signature on every paper record notarized. The seal and the notary's signature shall appear on the same ~~page.~~ page of a record as the text of the notarial certificate.

(c) A notary shall do the following within 10 days of discovering that the notary's seal has been ~~stolen, lost, damaged, or otherwise rendered incapable of affixing a legible image:~~lost or stolen:

(1) Inform the appropriate law enforcement agency in the case of theft or vandalism.

(2) Notify the appropriate register of deeds and the Secretary in writing and signed in the official name in which he or she was commissioned.

(d) As soon as is reasonably practicable after resignation, revocation, or expiration of a notary commission, or death of the notary, the seal shall be delivered to the Secretary for disposal."

SECTION 17. G.S. 10B-37 reads as rewritten:

"**§ 10B-37. Seal image.**

(a) ~~Near~~ A notary shall affix the notary's official seal near the notary's official signature on the notarial certificate of a ~~paper record, the notary shall place a sharp, legible, permanent, and photographically reproducible image of the official seal.~~record.

(b) A notary's official seal shall include ~~only~~ all of the following elements:

(1) The notary's name exactly as ~~commissioned;~~commissioned.

(2) The words ~~"Notary Public";~~"Notary Public".

(3) The county of commissioning, including the word "County" or the abbreviation ~~"Co."; and~~"Co.".

(4) The words "North Carolina" or the abbreviation "NC".

(c) The notary seal may be either circular or rectangular in shape. Upon receiving a commission or a recommission on or after October 1, 2006, a notary shall not use a ~~The~~ circular seal ~~shall not be~~ that is less than 1 ½ inches, nor more than 2 inches in diameter. The rectangular seal shall not be over 1 inch high and 2 ½ inches long. The perimeter of the seal shall contain a border that is visible when impressed.

(c1) Alterations to any information contained within the seal as embossed or stamped on the record are prohibited.

(d) A notarial ~~seal may contain the notary's commission expiration date; however, a notarial act shall be invalid if the expiration date contained on the seal is incorrect at that time that the notarial act is performed.~~seal, as it appears on a record

may contain the permanently imprinted, handwritten, or typed date the notary's commission expires.

(e) Any reference in the General Statutes to the seal of a notary shall include the stamp of a notary, and any reference to the stamp of a notary shall include the seal of the notary.

(f) The failure of a notarial seal to comply with the requirements of this section shall not affect the sufficiency, validity, or enforceability of the notarial certificate, but shall constitute a violation of the notary's duties."

SECTION 18. G.S. 10B-40 reads as rewritten:

"**§ 10B-40. Notarial certificates in general.**

(a) A notary shall not make or give a notarial certificate unless the notary has either ~~(i)~~ personal knowledge or satisfactory evidence of the identity of the principal or, if applicable, the subscribing ~~witness, or (ii) satisfactory evidence of a signer's identity.~~witness.

(a1) By making or giving a notarial certificate, whether or not stated in the certificate, a notary certifies as follows:

(1) As to an acknowledgement, all those things described in G.S. 10B-3(1).

(2) As to an affirmation, all those things described in G.S. 10B-3(2).

(3) As to an oath, all those things described in G.S. 10B-3(14).

(4) As to a verification or proof, all those things described in G.S. 10B-3(28).

(a2) In addition to the certifications under subsection (a1) of this section, by making or giving a notarial certificate, whether or not stated in the certificate, a notary certifies to all of the following:

(1) At the time the notarial act was performed and the notarial certificate was signed by the notary, the notary was lawfully commissioned, the notary's commission had neither expired nor been suspended, the notarial act was performed within the geographic limits of the notary's commission, and the notarial act was performed in accordance with the provision of this Chapter.

(2) If the notarial certificate is for an acknowledgment or the administration of an oath or affirmation, the person whose signature was notarized did not appear in the judgment of the notary to be incompetent, lacking in understanding of the nature and consequences of the transaction requiring the notarial act, or acting involuntarily, under duress or undue influence.

(3) The notary was not prohibited from acting under G.S. 10-20(c).

(a3) The inclusion of additional information in a notarial certificate, including the representative or fiduciary capacity in which a person signed or the means a notary used to identify a principal, shall not invalidate an otherwise sufficient notarial certificate.

(b) A notarial certificate for the acknowledgment taken by a notary of a principal who is an individual acting in his or her own right or who is an individual acting in a representative or fiduciary capacity ~~taken by a notary~~ is sufficient and shall be accepted

in this State if it is substantially in the form set forth in G.S. 10B-41, if it is substantially in a form otherwise prescribed by the ~~law~~ laws of this State, or if ~~it:~~it includes all of the following:

(1) Identifies the state and county in which the acknowledgment ~~occurred;~~occurred.

(2) Names the principal who appeared in person before the ~~notary;~~notary.

~~(3) States that the notary has either (i) personal knowledge of the identity of the principal or (ii) satisfactory evidence of the principal's identity, indicating the nature of that satisfactory evidence;~~

(4) Indicates that the principal ~~who~~ appeared in person before the notary and the principal acknowledged that ~~the signature on the record presented is his or her signature, that the principal voluntarily signed the record for the purpose stated therein;~~he or she signed the record.

(5) States the date of the ~~acknowledgment;~~acknowledgment.

(6) Contains the signature and seal or stamp of the notary who took the ~~acknowledgment; and~~ acknowledgment.

(7) States the notary's commission expiration date.

(c) A notarial certificate for the verification or proof of the signature of a principal by a subscribing witness taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-42, if it is substantially in a form otherwise prescribed by the ~~law~~ laws of this State, or if ~~it:~~it includes all of the following:

(1) Identifies the state and county in which the verification or proof ~~occurred;~~occurred.

(2) Names the subscribing witness who appeared in person before the ~~notary;~~notary.

~~(3) States that the notary has either (i) personal knowledge of the identity of the subscribing witness or (ii) satisfactory evidence of the subscribing witness's identity, indicating the nature of that satisfactory evidence;~~

(4) Names the principal whose signature on the record is to be verified or ~~proven;~~proven.

(5) Indicates that the subscribing witness certified to the notary under oath or by affirmation that the subscribing witness is not a party to or beneficiary of the transaction, ~~named party to the record in question, has no interest in the transaction,~~ signed the record as a subscribing witness, and either (i) witnessed the principal sign the record, or (ii) witnessed the principal acknowledge the principal's signature on the ~~already signed record;~~record.

(6) States the date of the verification or ~~proof;~~proof.

(7) Contains the signature and seal or stamp of the notary who took the verification or ~~proof; and~~proof.

(8) States the notary's commission expiration date.

(c1) A notarial certificate for the verification or proof of the signature of a principal or a subscribing witness by a non-subscribing witness taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-42.1, if it is substantially in a form otherwise prescribed by the laws of this State, or if it includes all of the following:

(1) Identifies the state and county in which the verification or proof occurred.

(2) Names the non-subscribing witness who appeared in person before the notary.

(3) Names the principal or subscribing witness whose signature on the record is to be verified or proven.

(4) Indicates that the non-subscribing witness certified to the notary under oath or by affirmation that the non-subscribing witness is not a party to or beneficiary of the transaction and that the non-subscribing witness recognizes the signature of either the principal or the subscribing witness and that the signature is genuine.

(5) States the date of the verification or proof.

(6) Contains the signature and seal or stamp of the notary who took the verification or proof.

(7) States the notary's commission expiration date.

(d) A notarial certificate for an oath or affirmation taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-43, if it is substantially in a form otherwise prescribed by the ~~law~~ laws of this State, or if ~~it:~~it includes all of the following:

~~(1) Identifies the state and county in which the oath or affirmation occurred;~~

(2) Names the principal who appeared in person before the ~~notary;~~notary unless the name of the principal otherwise is clear from the record itself.

~~(3) States that the notary has either (i) personal knowledge of the identity of the principal or (ii) satisfactory evidence of the principal's identity, indicating the nature of that satisfactory evidence;~~

(4) Indicates that the principal who appeared in person before the notary signed the record in question and certified to the notary under oath or by affirmation as to the truth of the matters stated in the ~~record;~~record.

(5) States the date of the oath or ~~affirmation;~~affirmation.

(6) Contains the signature and seal or stamp of the notary who took the oath or ~~affirmation; and~~affirmation.

(7) States the notary's commission expiration date.

(e) Any notarial certificate made in another jurisdiction shall be sufficient in this State if it is made in accordance with federal law or the laws of the jurisdiction where the notarial certificate is made. If federal law or the laws of the jurisdiction where the notarial certificate is made do not require a notary to affix a seal to a notarial certificate or to state in a notarial certificate the date the notary's commission expires, the

certificate shall be accepted in this State without requiring any separate certificate from a pubic official who has notarial oversight authority in the other jurisdiction.

(f) On records to be filed, registered, recorded, or delivered in another state or jurisdiction of the United States, a North Carolina notary may complete any notarial certificate that may be required in that other state or jurisdiction.

(g) Nothing in this Chapter shall be deemed to authorize the use of a notarial certificate authorized by this Part in place of or as an alternative to a notarial certificate required by any other provision of the General Statutes outside of Chapter 47 of the General Statutes that prescribes the specific form or content for a notarial certificate ~~(including, but not limited to,~~ including G.S. 31-11.6, Chapter 32A of the General Statutes, and ~~G.S. 90-321).~~ G.S. 90-321. However, any statute that permits or requires the use of a notarial certificate contained within Chapter 47 of the General Statutes may also be satisfied by the use of a notarial certificate permitted by this Part. Any form of acknowledgment or probate authorized under Chapter 47 of the General Statutes shall be conclusively deemed in compliance with the requirements of this section.

(h) If an individual signs a record and purports to be acting in a representative or fiduciary capacity, that individual is also deemed to represent to the notary that he or she is signing the record with proper authority to do so and also is signing the record on behalf of the person or entity represented and identified therein or in the fiduciary capacity indicated therein. In performing a notarial act in relation to an individual described under this subsection, a notary is under no duty to verify whether the individual acted in a representative or fiduciary capacity or, if so, whether the individual was duly authorized so to do. A notarial certificate may include any of the following:

(1) A statement that an individual signed a record in a particular representative or fiduciary capacity.

(2) A statement that the individual who signed the record in a representative or fiduciary capacity had due authority so to do.

(3) A statement identifying the represented person or entity or the fiduciary capacity."

SECTION 19. G.S. 10B-41 reads as rewritten:

"**§ 10B-41. Notarial certificate for an acknowledgment.**

(a) When properly completed by a notary, a notarial certificate ~~in~~ that substantially complies with the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for the acknowledgment of a principal who is an individual acting in his or her own right or who is an individual acting in a representative or fiduciary capacity. The authorization of the form in this section does not preclude the use of other forms.

_____ County, North Carolina

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she ~~voluntarily~~ signed the foregoing ~~document for the purpose stated therein and in the capacity indicated:~~ document: name(s) of principal(s).

Date: _____ Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal) My commission expires: _____

~~(b) By signing a notarial certificate for the acknowledgment of a principal who is an individual acting in his or her own right or in a representative capacity substantially in the form set forth in subsection (a) of this section, the notary thereby certifies:~~

~~(1) That the principal acknowledging his or her signature appeared in person before the notary on the date indicated;~~

~~(2) That the principal stated to the notary that he or she voluntarily signed the record for the purpose stated therein;~~

~~(3) That, if the principal signed the record in a representative capacity, the principal stated that he or she signed the record in the particular representative capacity; and~~

~~(4) That the notary has either (i) personal knowledge of the identity of the principal or (ii) satisfactory evidence of the principal's identity.~~

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible."

SECTION 20. G.S. 10B-42 reads as rewritten:

§ 10B-42. Notarial certificate for a verification or ~~proof.~~ of subscribing witness

(a) When properly completed by a notary, a notarial certificate in substantially the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for the verification or proof of the signature of a principal by a subscribing witness. The authorization of the form in this section does not preclude the use of other forms.

_____ County, North Carolina

I certify that name of subscribing witness personally appeared before me this day and certified to me under oath or by affirmation that he or she is not a ~~named party to the foregoing document, has no interest in the transaction,~~ grantee or beneficiary of the transaction, signed the foregoing document as a subscribing witness, and either (i) witnessed name of principal (the principal) sign the foregoing document or (ii) witnessed the principal acknowledge the principal's signature on the already-signed document.

Date: _____ Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal) My commission expires: _____

~~(b) By signing a notarial certificate for the verification or proof of the signature of a principal by a subscribing witness substantially in the form set forth in subsection (a) of this section, the notary thereby certifies:~~

~~(1) That the subscribing witness appeared in person before the notary on the date indicated;~~

~~(2) That the subscribing witness certified to the notary under oath or by affirmation that the subscribing witness is not a named party to the~~

~~record in question, has no interest in the transaction, signed the record as a subscribing witness, and either (i) witnessed the named principal sign the record, or (ii) witnessed the named principal acknowledge the principal's signature on the already signed record; and~~

~~(3) That the notary has either (i) personal knowledge of the identity of the subscribing witness or (ii) satisfactory evidence of the subscribing witness's identity.~~

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible."

SECTION 21. Article 1 of Chapter 10B is amended by adding a new section to read:

§ 10B-42. Notarial certificate for a verification of non-subscribing witness

(a) When properly completed by a notary, a notarial certificate in substantially the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for the verification or proof of the signature of a principal or subscribing witness by a non-subscribing witness. The authorization of the form in this section does not preclude the use of other forms.

_____ County, North Carolina

I certify name of non-scribing witness personally appeared before me this day and certified to me under oath or by affirmation that he or she is not a grantee or beneficiary of the transaction, that name of non-subscribing witness recognizes the signature of name of the principal or the subscribing witness and that the signature is genuine.

Date: _____ Official Signature of Notary

_____ Notary's printed or typed name, Notary Public

_____ (Official Seal) My commission expires: _____

(b) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible."

SECTION 22. G.S. 10B-43 reads as rewritten:

§ 10B-43. Notarial certificate for an oath or affirmation.

(a) When properly completed by a notary, a notarial certificate ~~in~~ that substantially complies with either of the following forms may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for an oath or affirmation. The authorization of the forms in this section does not preclude the use of other forms.

_____ County, North Carolina

Signed and sworn to ~~(or affirmed)~~ before me this day by name of principal.

Date: _____ Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal) My commission expires: _____

-OR-

_____ County, North Carolina

Sworn to ~~(or affirmed)~~ and ~~ascribed~~ subscribed before me this day by name of principal.

Date: _____ Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal) My commission expires: _____

~~(b) By signing a notarial certificate for an oath or affirmation substantially in the form set forth in subsection (a) of this section, the notary thereby certifies:~~

~~(1) That the principal appeared in person before the notary on the date indicated;~~

~~(2) That either (i) the notary witnessed the principal sign the record or (ii) the principal stated to the notary that he or she voluntarily signed the record for the purpose stated therein;~~

~~(3) That the principal certified to the notary under oath or by affirmation as to the truth of the matters stated in the record; and~~record.

~~(4) That the notary has either (i) personal knowledge of the identity of the principal or (ii) satisfactory evidence of the principal's identity.~~

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible.

(d) In either of the forms provided under subsection (a) of this section all of the following shall apply:

(1) The name of the principal may be omitted if the name of the principal is located near the jurat and the principal who so appeared before the notary is clear from the record itself.

(2) The words "affirmed" or "sworn to or affirmed" may be substituted for the words "sworn to"."

SECTION 23. G.S 10B-60 reads as rewritten:

"**§ 10B-60. Enforcement and penalties.**

(a) The Secretary may ~~warn,~~ issue a warning to a notary or restrict, suspend, or revoke a notarial commission for a violation of this Chapter and on any ground for which an application for a commission may be denied under this Chapter. Any period of restriction, suspension, or revocation shall not extend the expiration date of a commission.

(b) Except as otherwise permitted by law, a person who commits any of the following acts is guilty of a Class 1 misdemeanor:

(1) Holding one's self out to the public as a notary if the person does not have a commission.
(2) Performing a notarial act if the person's commission has expired or been ~~suspended.~~suspended or restricted.
(3) Performing a notarial act before the person had taken the oath of office.

(c) A notary shall be guilty of a Class 1 misdemeanor if the notary does any of the following:
(1) Takes an ~~acknowledgment, performs~~ acknowledgement or administers an ~~oath, affirmation, or jurat~~ oath or affirmation without the principal ~~personally~~ appearing in person before the ~~notary;~~notary.
(2) Takes a verification or proof ~~of a~~ without the subscribing witness ~~without personal knowledge of the subscribing witness's identity, or without satisfactory evidence of the subscribing witness's identity;~~appearing in person before the notary.
(3) Takes an acknowledgment or administers an oath or affirmation without personal knowledge or satisfactory evidence of the identity of the principal.
(4) Takes a verification or proof without personal knowledge or satisfactory evidence of the identity of the subscribing witness.

(d) A notary shall be guilty of a Class I felony if the notary does any of the following:
(1) Takes an ~~acknowledgment, verification, proof, or jurat;~~acknowledgement or a verification or a proof, or ~~performs~~ administers an oath or affirmation if the notary knows it is false or fraudulent.
(2) Takes an ~~acknowledgment, or jurat~~ acknowledgement or administers and oath or affirmation without the principal appearing in person before the notary if the notary does so with the intent to commit fraud.
(3) Takes a verification or proof without the subscribing witness appearing in person before the notary if the notary does so with the intent to commit fraud.

(e) It is a Class I felony for any person to perform notarial acts in this State with the knowledge that the person is not commissioned under this Chapter.

(f) Any person who without authority obtains, uses, conceals, defaces, or destroys the seal or notarial records of a notary is guilty of a Class I felony.

(g) For purposes of enforcing this Chapter and Article 34 of Chapter 66 of the General Statutes, the law enforcement agents of the Department of the Secretary of State have statewide jurisdiction and have all of the powers and authority of law enforcement officers. The agents have the authority to assist local law enforcement agencies in their investigations and to initiate and carry out, on their own or in coordination with local law enforcement agencies, investigations of violations.

(h) Resignation or expiration of a notarial commission does not terminate or preclude an investigation into a notary's conduct by the Secretary, who may pursue the

investigation to a conclusion, whereupon it may be a matter of public record whether or not the finding would have been grounds for disciplinary action.

(i) The Secretary may seek injunctive relief against any person who violates the provisions of this Chapter. Nothing in this Chapter diminishes the authority of the North Carolina State Bar.

(j) Any person who knowingly solicits, coerces, or in any material way influences a notary to commit official misconduct, is guilty as an aider and abettor and is subject to the same level of punishment as the notary.

(k) The sanctions and remedies of this Chapter supplement other sanctions and remedies provided by law, including, but not limited to, forgery and aiding and abetting."

SECTION 24. Part 9 of Article 1 of Chapter 10B of the General Statutes is amended by adding the following new sections to read:

"**§ 10B-67. Erroneous commission expiration date cured.**

An erroneous statement of the date of the notary's commission expires shall not affect the sufficiency, validity or enforceability of the notarial certificate or the related record if the notary is, in fact, lawfully commissioned at the time of the notarial act.

"**§ 10B-68. Technical defects cured.**

(a) Technical defects, errors, or omissions in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the notarial certificate or the related instrument or document.

(b) As used in this section, a technical defect includes those cured under G.S. 10B-37(f) and G.S. 10B-67. Other technical defects include the absence of the legible appearance of the notary's name exactly as shown on the notary's commission as required in G.S. 10B-20(b) and defects in the commissioning or recommissioning of the notary that were approved by the Department under this Chapter.

"**§ 10B-69. Official forms cured.**

(a) The notarial certificate contained in a form issued by a State agency prior to October 1, 2006, is deemed to be a valid certificate provided the certificate complied with the law at the time the form was issued.

(b) The notarization using a certificate under subsection (a) of this section shall be deemed valid if executed in compliance with the law at the time the form was issued.

"**§ 10B-99. Presumption of regularity.**

(a) In the absence of evidence of fraud on the part of the notary or evidence of a knowing and deliberate violation of Article by the notary, the courts shall grant a presumption of regularity to notarial acts so that those acts may be upheld, provided there has been substantial compliance with the law. Nothing in this Chapter modifies or repeals the common law doctrine of substantial compliance in effect on November 30, 2005.

(b) A notarial act performed before October 1, 2006 shall be deemed valid if it complies with the law as it existed on or before December 1, 2005."

SECTION 25. G.S. 10B-106(d) reads as rewritten:

"(d) An electronic form shall be used by an electronic notary in registering with the Secretary and it shall include, at least all of the following:

(1) The applicant's full legal name and the name to be used for commissioning, excluding nicknames.
(2) The state and county of commissioning of the registrant.
(3) The expiration date of the registrant's notary commission.
(4) Proof of successful completion of the course of instruction on electronic notarization as required by this Article.
(5) A description of the technology the registrant will use to create an electronic signature in performing official acts.
(6) If the device used to create the registrant's electronic signature was issued or registered through a licensed certification authority, the name of that authority, the source of the license, the starting and expiration dates of the device's term of registration, and any revocations, annulments, or other premature terminations of any registered device of the registrant that was due to misuse or compromise of the device, with the date, cause, and nature of each termination explained in detail.
(7) The e-mail address of the registrant.

The information ~~contained~~ provided in a registration that relates to subdivision (7) of this section ~~under this section is a public record as defined in G.S. 132-1, except for information contained in subsection (7), which~~ shall be considered confidential information and shall not be subject to disclosure ~~except as provided in~~under Chapter 132 of the General ~~Statutes or~~Statutes, except as provided by rule."

SECTION 26. G.S. 47-2.2 reads as rewritten;

"**§ 47-2.2. Notary public of sister state; lack of seal or stamp or expiration date of commission.**

If the proof or acknowledgment of any instrument is had before a notary public of any state other than North Carolina and the instrument does not show the seal or stamp of the notary public and the expiration date of the commission of the notary public, the certificate of proof or acknowledgment made by ~~such~~ the notary public ~~shall~~ may be accompanied by the certificate of the county official before whom the notary qualifies for office, stating that ~~such~~ the notary public was at the time his or her certificate bears date an acting notary public of ~~such~~ the state, and that ~~such~~ the notary's genuine signature is set to his or her certificate. The certificate of the official herein provided for shall be under his or her hand and official seal."

SECTION 27. G.S. 47-14 is amended by adding a new subsection to read:

"(f) The acceptance of a record for registration by the register of deeds shall give rise to a presumption that, at the time the record was presented for registration, a clear and legible image of the notary's official seal was affixed or embossed on the record near the notary's official signature. This presumption shall apply regardless of whether the image is legible or photographically reproduced in the records maintained by the register of deeds. A register of deeds may not refuse to accept a record for registration because a notarial seal does not satisfy the requirements of G.S. 10B-37."

SECTION 28. G.S. 47-37.1 reads as rewritten:

"**§ 47-37.1. Other forms of proof.**

(a) The proof and acknowledgment forms set forth in this Article are not exclusive. Without regard to whether an instrument presented for registration was signed by an individual acting in his or her own right or by an individual acting in a representative or fiduciary capacity, a notarial certificate that complies with the provisions of Part 6 of Article 1 of Chapter 10B ~~(G.S. 10B-25 et. seq.)~~ shall be deemed a sufficient form of probate or acknowledgment for purposes of this Chapter. Use of a notarial certificate that satisfies the requirements of Part 6 of Article 1 of Chapter 10B shall not be grounds for a register of deeds to refuse to accept a record for registration.

(b) When an instrument presented for registration purports to be signed by an individual in a representative or fiduciary capacity, the acknowledgment or proof of that individual's signature ~~may, but is not required to:~~may:

(1) State that the individual signed the instrument in a representative or fiduciary capacity.

(2) State that the individual who signed the instrument in a representative or fiduciary capacity had due authority to do so.

(3) Identify the represented person or ~~entity.~~ the fiduciary capacity

(c) This section relates only to the form of proof or acknowledgment. The capacity and authority of the individual who signs an instrument presented for registration are governed by other provisions of law.

(d) This section applies to proofs and acknowledgments made before, on, or after December 1, 2005."

SECTION 29. G.S. 47-38 reads as rewritten:

"**§ 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:~~

When properly completed, a certificate in substantially the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for one or more individuals, acing in his, her, or their own right or, whether or not so stated in the notarial certificate, in a representative or fiduciary capacity, including one or more individuals acting on behalf of an unincorporated association, as an officer or director of a corporation, as a partner of a general or limited partnership, as a manager or member of a limited liability company, as the trustee of a trust, as the personal representative of a decedent's estate, as an agent or attorney in fact for another, as the guardian of a minor or an incompetent, or as a public official. The authorization of the form in this section does not preclude the use of other forms. This section applies to notarial certificates made before, on, and after December 1, 2005.

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)~~ individual whose acknowledgment is being taken) 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.)
(Title)"

SECTION 30. G.S. 47-41.01 is amended by adding a new subsection to read:

"(e) The forms of probate set forth in this section may be modified and adopted for use in the probate of deeds and other conveyances and instruments executed by entities other than corporations, including general and limited partnerships, limited liability companies, trusts, and unincorporated associations. This subsection applies to notarial certificates and forms of probate made before, on, or after December 1, 2005."

SECTION 31. G.S. 47-41.02 is amended by adding a new subsection to read:

"(h) The forms of probate set forth in this section may be modified and adopted for use in the probate of deeds and other conveyances and instruments executed by entities other than corporations, including general and limited partnership, limited liability companies, trusts, and unincorporated associations. This subsection applies to notarial certificates and forms of probate made before, on, or after December 1, 2005."

SECTION 32. Chapter 47 of the General Statutes is amended by adding a new section to read:

"**§ 47-41.2. Technical defects.**

(a) Technical defects, including technical defects under G.S. 10B-68, and errors or omissions in a form of probate or other notarial certificate, shall not affect the sufficiency, validity, or enforceability of the form of probate or the notarial certificate or the related instrument or document. A register of deeds may not refuse to accept an instrument or document for registration because of technical defects, errors, or omissions in a form of probate or other notarial certificate.

(b) This section does not apply to the requirements for registration contained in G.S. 47-14(a) and a register of deeds shall not accept for registration an instrument that does not comply with the requirements of G.S. 47-14(a)."

SECTION 33. G.S. 47-45 reads as rewritten:

"**§ 47-45. Clerk's certificate upon probate by nonresident official without seal.**

When the proof or acknowledgment of any instrument is had before any official of some other state, territory or country and ~~such~~ the official has no official seal, then the certificate of ~~such~~ the official ~~shall~~ may be accompanied by the certificate of a clerk of a court of record of the state, territory or country in which the official taking the proof or acknowledgment resides, of the official position and signature of ~~such~~ the official; ~~such~~ the certificate of the clerk shall be under his or her hand and official seal and shall be in substance as follows:

_____County.

I, A.B. (here give name and official title of the clerk of a court of record as provided herein), do hereby certify that C.D. (here give name of the official taking the proof, etc.) was at the time of signing the foregoing (or annexed) certificate (here give the official title of the officer taking proof, etc.) in and for the county of _____ and state of _____ (or other political division of the state, territory or country, as the case may be), and that his or her signature thereto is in his or her own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this _____day of_____, A.D._____

(Official seal.)

_____

(Signature of Clerk.)"

SECTION 34. The General Statutes Commission shall study the need for additional changes to laws relating to notaries public, the notarization of documents and the registration of instruments notarized in other jurisdictions. The Commission shall determine whether there is a need for additional conforming changes in the law that arise from changes made by this Act, and recommend to the General Assembly any legislation to address the needs identified by this study. The General Statutes Commission shall report the results of its study to either the 2007 or 2009 General Assembly.

SECTION 35. This act becomes effective October 1, 2006, and except as otherwise set forth in this act, applies to notarial acts performed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 1432

Committee Substitute Favorable 5/11/05

PROPOSED SENATE COMMITTEE SUBSTITUTE H1432-CSRC-101 [v.6]

6/7/2006 7:54:38 PM

Short Title: Notary Public Corrections. (Public)

Sponsors:

Referred to:

April 21, 2005

A BILL TO BE ENTITLED

AN ACT TO MAKE CORRECTIONS AND OTHER AMENDMENTS TO THE NOTARY PUBLIC ACT, AND TO MAKE OTHER CONFORMING CHANGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 10B-3 reads as rewritten:

"**§ 10B-3. Definitions.**

The following definitions apply in this Chapter:

(1) ~~"Acknowledgment" means a~~ Acknowledgment. – A notarial act in which ~~an individual,~~ a notary certifies that at a single time and ~~place:~~place all of the following occurred:

a. ~~Appears~~ An individual appeared in person before the notary and ~~presents a record; and~~ presented a record.

b. ~~Is~~ The individual was personally known to the notary or identified by the notary through satisfactory ~~evidence and~~ evidence.

c. The individual did either of the following:

i. ~~indicates~~ Indicated to the notary that the signature on the record was the individual's signature.~~was voluntarily affixed by the individual for the purposes stated within the record.~~

ii. Signed the record while in the physical presence of the notary and while being personally observed signing the record by the notary.

(2) ~~"Affirmation" means a~~ Affirmation. – A notarial ~~act, or part thereof,~~ act which is legally equivalent to an oath and in which a notary certifies that ~~an individual~~ at a single time and ~~place:~~place all of the following occurred:

a. ~~Appears~~ An individual appeared in person before the ~~notary;~~notary.

b. ~~Is~~ The individual was personally known to the notary or identified by the notary through satisfactory ~~evidence;~~ ~~and~~evidence.

c. ~~Makes~~ The individual made a vow of truthfulness on penalty of perjury, based on personal honor and without invoking a deity or using any form of the word "swear".

(3) ~~"Attest" or "attestation" means the~~ Attest or attestation. – The ~~act of completing the written evidence of a notarial act, to wit:~~ completion of a certificate by a notary who has performed a notarial ~~act by witnessing a signature or administering an oath or affirmation.~~act.

(4) ~~"Commission" means the~~ Commission. – The empowerment to perform notarial acts and the written evidence of authority to perform those acts.

(5) ~~"Credible witness" means an honest, reliable, and impartial person~~ Credible witness. –An individual who is personally known to the notary and ~~takes an oath or affirmation fromthe notary to confirm a signer's identity.~~to whom all of the following also apply:

a. The notary believes the individual to be honest and reliable for the purpose of confirming to the notary the identity of another individual.

b. The notary believes the individual is not a party to or beneficiary of the transaction.

(6) ~~"Department" means the~~ Department. – The North Carolina Department of the Secretary of State.

(7) ~~"Director" means the~~ Director. – The Division Director for the North Carolina Department of the Secretary of State Notary Public Section.

(8) ~~"Jurat" means a~~ Jurat. – A notary's certificate evidencing the administration of an oath or affirmation. ~~certification added to an affidavit or deposition that states when and before what authority an affidavit or deposition was made, to wit, "Subscribed and sworn to before me this the ____ day of _____ 20__." The notary's signature and seal shall be affixed below the sworn or affirmed statement and signature of the affiantIn so doing, the notary shall certify the following:~~

~~a. That the person signing the affidavit or deposition did so in the notary's presence and indicates the county in which the notarial act took place;~~

~~b. That the signer appeared before the notary on the date indicated;~~

~~c. That the notary administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document.~~

(9) ~~"Moral turpitude" means conduct~~ Moral turpitude. – Conduct contrary to expected standards of honesty, morality, or integrity.

(10) ~~"Nickname" means a~~ Nickname. – A descriptive, familiar, or shortened form of a proper name.

(11) ~~"Notarial act," "notary act," and "notarization" mean the~~ Notarial act, notary act and notarization. – The act of taking an acknowledgment, taking a verification or proof or administering an oath or affirmation that a notary is empowered to perform under ~~this Chapter, as authorized by G.S. 10B-31.~~G.S. 10B-20(a).

(12) ~~"Notarial certificate" and "certificate" mean the~~ Notarial certificate and certificate. – The portion of a notarized record that is completed by the notary, bears the notary's signature and seal, and states the facts attested by the notary in a particular notarization.

(13) ~~"Notary public" and "notary" mean a~~ Notary public and notary. – A person commissioned to perform notarial acts under this Chapter. A notary is a public officer of the State of North Carolina and shall act in full and strict compliance with this act.

(14) ~~"Oath" means a~~ Oath. – A notarial ~~act, or part thereof,~~ act which is legally equivalent to an affirmation and in which a notary certifies that ~~an individual~~ at a single time and ~~place:~~place all of the following occurred:

a. ~~Appears~~ An individual appeared in person before ~~a notary;~~the notary.

b. ~~Is~~ The individual was personally known to the notary or identified by the notary through satisfactory ~~evidence; and~~evidence.

c. ~~Makes~~ The individual made a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear".

(15) ~~"Official misconduct" means either~~ Official misconduct. – Either of the following:

a. A notary's performance of a prohibited act or failure to perform a mandated act set forth in this Chapter or any other law in connection with notarization.

b. A notary's performance of a notarial act in a manner found by the Secretary to be negligent or against the public interest.

(16) ~~"Personal appearance" and "appear in person before a notary" mean an~~ Personal appearance and appear in person before a notary. – An individual and a notary are in close physical proximity to one another so that they may freely see and communicate with one another and exchange records back and forth during the notarization process.

(17) ~~"Personal knowledge of identity" means familiarity~~ Personal knowledge or personally know. – Familiarity with an individual resulting from interactions with that individual over a period of time

sufficient to eliminate every reasonable doubt that the individual has the identity claimed.

(18) ~~"Principal" means an~~ Principal. – One of the following:

a. In the case of an acknowledgement, the individual whose ~~signature is notarized; or an~~ identity and due execution of a record is being certified by the notary.

b. In the case of a verification or proof, the individual other than a ~~credible~~ subscribing witness, ~~taking an oath or affirmation from the notary.~~ whose:

i. identity and due execution of the record is being proven; or

ii. signature is being identified as genuine.

c. In the case of an oath or affirmation, the individual who makes a vow of truthfulness on penalty of perjury.

(19) ~~"Record" means information~~ Record. – Information that is inscribed on a tangible medium and called a traditional or paper record.

(20) ~~"Regular place of work or business" means a~~ Regular place of work or business. – A location, office or other workspace, where an individual regularly spends all or part of the individual's work time.

(21) ~~"Revocation" means the~~ Revocation. – The cancellation of the notary's commission stated in the order of revocation.

(22) ~~"Satisfactory evidence of a signer's identity" means identification~~ Satisfactory evidence. – Identification of an individual based on either of the following:

a. At least one current document issued by a federal, state, or federal or state-recognized tribal government agency bearing the photographic image of the individual's face and either the signature or a physical description of the individual.

b. The oath or affirmation of one credible witness ~~unaffected by the record or transaction who is personally known to the notary and~~ who personally knows the individual seeking to be identified.

(23) ~~"Seal" and "stamp" mean a~~ Seal or stamp. – A device for affixing on a paper record an image containing a notary's name, the words "notary public," and other information as required in G.S. 10B-37.

(24) ~~"Secretary" means the~~ Secretary. – The North Carolina Secretary of State or the Secretary's designee.

(25) ~~"Signature" means the act of personally signing one's name in ink by hand.~~

(26) ~~"Subscribing witness" means a~~ Subscribing witness. – A person who ~~either watches another individual sign a record or takes that individual's acknowledgment of an already signed record and appears before the notary on behalf of the principal. The subscribing witness must sign the document in addition to the principal, must be personally~~

~~known by the notary or prove identity to the notary by satisfactory evidence, and must take an oath or affirmation stating that he or she witnessed the principal sign.~~signs a record for the purpose of being a witness to the principal's execution of the record or to the principal's acknowledgement of his or her execution of the record. A subscribing witness may give proof of the execution of the record as provided in subdivision (28) of this section.

(27) ~~"Suspension" and "restriction" means the~~ Suspension and restriction. – The termination of a notary's commission for a period of time stated in an order of restriction or suspension. The terms "restriction" or "suspension" or a combination of both terms shall be used synonymously.

(28) ~~"Verification" or "proof" means a~~ Verification or proof. – A notarial act in which a notary certifies that all of the following occurred:

a. An individual appeared in person before the notary.

b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.

c. The individual was not a party to or beneficiary of the transaction.

d. ~~where a person certifies under oath or affirmation that the person witnessed the principal either execute, record, or acknowledge the principal's signature on an already executed record.~~ The individual took an oath or gave an affirmation and testified to one of the following:

i. The individual is a subscribing witness and the principal who signed the record did so while being personally observed by the subscribing witness.

ii. The individual is a subscribing witness and the principal who signed the record acknowledged his or her signature to the subscribing witness.

iii. The individual recognized either the signature on the record of the principal or the signature on the record of the subscribing witness and the signature was genuine."

SECTION 2. G.S. 10B-5(b) reads as rewritten:

"(b) A person qualified for a notarial commission shall meet all of the following requirements:

(1) Be at least 18 years of age or legally emancipated as defined in Article 35 of Chapter 7B of the General Statutes.

(2) Reside or have a regular place of work or business in this State.

(3) Reside legally in the United States.

(4) Speak, read, and write the English language.

(5) Possess a high school diploma or equivalent.

(6) Pass the course of instruction described in this Article, unless the person is a licensed member of the North Carolina State Bar.

(7) Purchase and keep as a reference the most recent manual approved by the Secretary that describes the duties and authority of notaries public.

(8) Submit an application containing no significant misstatement or omission of fact. The application form shall be provided by the Secretary and be available at the register of deeds office in each county. Every application shall include the signature of the applicant written with pen and ink, and the signature shall be acknowledged by the applicant before a person authorized to administer oaths.

(9) The applicant shall also obtain the recommendation of one publicly elected official in North Carolina and submit the recommendation with the application. ~~Except for~~ The requirement of this subdivision shall not apply to any applicant who seeks to receive the oath of office from the register of deeds of a county where more than 15,000 active notaries public are on record on January 1 of the year when the application is ~~filed, the applicant shall also obtain the recommendation of one publicly elected official in North Carolina whose recommendation shall be contained on the application.~~filed."

SECTION 3. G.S. 10B-7(b) reads as rewritten:

"(b) The information ~~contained~~ provided in an application that relates to subdivisions (2), (3), (6) and (7) of subsection (a) of this section ~~under this section is a public record as defined in G.S. 132-1. The information contained in subdivisions (2), (3), (6) and (7) of subsection (a) of this section~~ shall be considered confidential information and shall not be subject to disclosure ~~except as provided in~~ under Chapter 132 of the General Statutes."

SECTION 4. G.S. 10B-10(c) reads as rewritten:

"(c) ~~The~~ After the appointee qualifies by taking the oath of office required under subsection (b) of this section, the register of deeds shall ~~then~~ place the notary record in a book designated for that purpose, or the notary record may be recorded in the Consolidated Document Book and indexed in the Consolidated Real Property Index under the notary's name in the grantor index. The notary record may be kept in electronic format so long as the signature of the notary public may be viewed and printed. The notary record shall contain the name and the signature of the notary as commissioned, the effective date and expiration date of the commission, the date the oath was administered, and the date of any restriction, suspension, revocation, or resignation. The record shall constitute the official record of the qualification of notaries public."

SECTION 5. G.S. 10B-11(b) reads as rewritten:

"(b) A notary whose commission has not expired must comply with the following requirements to be recommissioned:

(1) Submit a new application ~~under G.S. 10B-6.~~ meeting the requirements of G.S. 10B-6, except for G.S. 10B-6(2).

(2) Meet all the requirements of ~~G.S. 10B-5(b)~~G.S. 10B-5(b), except for G.S. 10B-5(6) and (9).

(3) ~~Pass~~ Achieve a passing score on the written examination required under ~~G.S. 10B-8, unless~~ G.S. 10B-8(b). This requirement does not apply if the notary is a licensed member of the North Carolina State Bar."

SECTION 6. G.S. 10B-20(a) reads as rewritten:

"**§ 10B-20. Powers and limitations.**

(a) A notary may perform any of the following notarial acts:

(1) Acknowledgments.

(2) Oaths and affirmations.

~~(3) Execute jurats.~~

(4) Verifications or proofs."

SECTION 7. G.S. 10B-20(b) reads as rewritten:

"(b) A notarial act shall be attested by all of the following:

(1) The signature of the notary, exactly as shown on the notary's commission.

(2) The ~~readable~~ legible appearance of the notary's ~~name,~~ name exactly as shown on the notary's commission. The legible appearance of the name may be ascertained from the notary's typed or printed name near the ~~signature.~~notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible.

(3) The clear and legible appearance of the notary's stamp or seal.

(4) A statement of the date the notary's commission expires. The statement of the date of the notary's commission expires may appear in the notary's stamp or seal or elsewhere in the notarial certificate."

SECTION 8. G.S. 10B-20(c) reads as rewritten:

"(c) A notary ~~is disqualified from performing~~shall not perform a notarial act if any of the following apply:

(1) The principal or subscribing witness is not in the notary's presence at the time the notarial act is ~~to be performed; however,~~ performed. However, nothing in this Chapter shall require a notary to complete the notarial certificate attesting to the notarial act in the presence of the principal or subscribing witness.

(2) The principal or subscribing witness is not personally known to the notary or identified by the notary through satisfactory evidence.

(2a) The credible witness is not personally known to the notary.

~~(3) The principal or subscribing witness shows a demeanor that causes the notary to have a compelling doubt about whether the principal knows the consequences of the transaction requiring a notarial act.~~

~~(4) The principal or subscribing witness, in the notary's judgment, is not acting of the principal's or the subscribing witness's own free will.~~

(5) The notary is a signer ~~of or is named, other than as a trustee in a deed of trust, in the document~~ of, party to, or beneficiary of the record, that is to be notarized. However, a disqualification under this subdivision shall not apply to a notary who is named in a record solely as the

trustee in a deed of trust, the drafter of the record, the person to whom a registered document should be mailed or sent after recording, or the attorney for a party to the record, so long as the notary is not also a party to the record individually or in some other representative or fiduciary capacity.

(6) The notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in G.S. 10B-31, other than fees or other consideration paid for services rendered by a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker."

SECTION 9. G.S. 10B-20(g) reads as rewritten:

"(g) ~~Commissioned officers on active duty in the United States armed forces who are authorized to perform notarial acts and other persons~~Persons authorized by federal law or regulation to perform notarial acts may perform the acts for persons serving in or with the United States armed forces, their spouses, and their dependents."

SECTION 10. G.S. 10B-20(l) reads as rewritten:

"(l) A notary public required to comply with the provisions of subsection ~~(g)~~(i) of this section shall prominently post at the notary public's place of business a schedule of fees established by law, which a notary public may charge. The fee schedule shall be written in English and in the non-English language in which the notary services were solicited and shall contain the notice required in subsection (i) of this section, unless the notice is otherwise prominently posted at the notary public's place of business."

SECTION 11. G.S. 10B-20(m) reads as rewritten:

"(m) If notarial certificate wording is not provided or indicated for a record, a ~~nonattorney~~ notary who is not also a licensed attorney shall not determine the type of notarial act or certificate to be used. This does not prohibit a notary from offering the selection of certificate forms recognized in this Chapter or as otherwise authorized by law."

SECTION 12. G.S. 10B-20(o) reads as rewritten;

"(o) Before signing a notarial certificate and except as provided in this subsection, a notary shall cross out or mark through all blank lines or spaces in the certificate. However:

(1) Notwithstanding the provisions of this ~~section or G.S. 10B-35(b),~~ section, a notary shall not be required to complete, cross out, or mark through blank lines or spaces in the notary certificate form provided for in G.S. 47-43 indicating when and where a power of attorney is recorded if that recording information is not known to the notary at the time the notary completes and signs the certificate;

(2) A notary's failure to cross out or mark through blank lines or spaces in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the certificate or the related record; and

(3) A notary's failure to cross out or mark through blank lines or spaces in a notarial certificate shall not be grounds for a register of deeds to refuse to accept a record for registration."

SECTION 13. G.S. 10B-23 reads as rewritten:

"**§ 10B-23. Improper records.**

(a) A notary shall not notarize a signature on a record without a notarial certificate indicating what type of notarial act was performed. However, a notary may administer an oath or affirmation without completing a jurat.

(b) A notary shall neither certify, notarize, nor authenticate a photograph. A notary may notarize an affidavit regarding and attached to a photograph."

SECTION 14. G.S. 10B-31 reads as rewritten:

"**§ 10B-31. Fees for notarial acts.**

The maximum fees that may be charged by a notary for notarial acts are as follows:

(1) For acknowledgments, jurats, verifications or proofs, five dollars ($5.00) per principal signature.

(2) For oaths or affirmations without a signature, five dollars ($5.00) per person, except for an oath or affirmation administered to a credible witness to vouch for ~~a principal's identity.~~the identity of a principal or subscribing witness."

SECTION 15. G.S. 10B-22 as enacted in Section 4 of S.L. 2005-391 and as codified as G.S. 10B-35 reads as rewritten:

~~"§ 10B-22. Official signature.~~

~~(a) A notary shall keep an official seal or stamp (herein "seal") that is the exclusive property of the notary. The notary shall keep the seal in a secure location that is accessible only to the notary. A notary shall not allow another person to use or possess the seal, and shall not surrender the seal to the notary's employer upon termination of employment.~~

~~(b) The seal shall be affixed only after the notarial act is performed. The notary shall place the image or impression of the seal near the notary's signature on every paper record notarized. The seal and the signature shall appear on the same page.~~

~~(c) A notary shall do the following within 10 days of discovering that the notary's seal has been stolen, lost, damaged, or otherwise rendered incapable of affixing a legible image:~~

~~(1) Inform the appropriate law enforcement agency in the case of theft or vandalism.~~

~~(2) Notify the appropriate register of deeds and the Secretary in writing and signed in the official name in which he or she was commissioned.~~

~~(d) As soon as is reasonably practicable after resignation, revocation, or expiration of a notary commission, or death of the notary, the seal shall be delivered to the Secretary for disposal.~~

"**§ 10B-35. Official signature.**

When notarizing a paper record, a notary shall sign by hand in ink on the notarial certificate. The notary shall comply with the requirements of G.S. 10B-20(b)(1) and (b)(2). The notary shall affix the official signature only after the notarial act is

performed. The notary shall not sign a paper record using the facsimile stamp or an electronic or other printing method."

SECTION 16. G.S. 10B-36 reads as rewritten:

"**§ 10B-36. Official seal.**

(a) A notary shall keep an official seal or stamp ~~(herein "seal")~~ that is the exclusive property of the notary. The notary shall keep the seal in a secure ~~location that is accessible only to the notary.~~ location. A notary shall not allow another person to use or possess the seal, and shall not surrender the seal to the notary's employer upon termination of employment.

(b) The seal shall be affixed only after the notarial act is performed. The notary shall place the image or impression of the seal near the notary's signature on every paper record notarized. The seal and the notary's signature shall appear on the same ~~page.~~ page of a record as the text of the notarial certificate

(c) A notary shall do the following within 10 days of discovering that the notary's seal has been ~~stolen, lost, damaged, or otherwise rendered incapable of affixing a legible image:~~lost or stolen:

(1) Inform the appropriate law enforcement agency in the case of theft or vandalism.

(2) Notify the appropriate register of deeds and the Secretary in writing and signed in the official name in which he or she was commissioned.

(d) As soon as is reasonably practicable after resignation, revocation, or expiration of a notary commission, or death of the notary, the seal shall be delivered to the Secretary for disposal."

SECTION 17. G.S. 10B-37 reads as rewritten:

"**§ 10B-37. Seal image.**

(a) ~~Near~~ A notary shall affix the notary's official seal near the notary's official signature on the notarial certificate of a ~~paper record, the notary shall place a sharp, legible, permanent, and photographically reproducible image of the official seal.~~record.

(b) A notary's official seal shall include ~~only~~ all of the following elements:

(1) The notary's name exactly as ~~commissioned;~~commissioned.

(2) The words ~~"Notary Public";~~"Notary Public".

(3) The county of commissioning, including the word "County" or the abbreviation ~~"Co."; and~~"Co.".

(4) The words "North Carolina" or the abbreviation "NC".

(c) The notary seal may be either circular or rectangular in shape. Upon receiving a commission or a recommission on or after October 1, 2006, a notary shall not use a ~~The~~ circular seal ~~shall not be~~ that is less than 1 ½ inches, nor more than 2 inches in diameter. The rectangular seal shall not be over 1 inch high and 2 ½ inches long. The perimeter of the seal shall contain a border that is visible when impressed.

(c1) Alterations to any information contained within the seal as embossed or stamped on the record are prohibited.

(d) A notarial ~~seal may contain the notary's commission expiration date; however, a notarial act shall be invalid if the expiration date contained on the seal is incorrect at that time that the notarial act is performed.~~seal, as it appears on a record

may contain the permanently imprinted, handwritten, or typed date the notary's commission expires.

(e) Any reference in the General Statutes to the seal of a notary shall include the stamp of a notary, and any reference to the stamp of a notary shall include the seal of the notary.

(f) The failure of a notarial seal to comply with the requirements of this section shall not affect the sufficiency, validity, or enforceability of the notarial certificate, but shall constitute a violation of the notary's duties."

SECTION 18. G.S. 10B-40 reads as rewritten:

"**§ 10B-40. Notarial certificates in general.**

(a) A notary shall not make or give a notarial certificate unless the notary has either ~~(i)~~ personal knowledge or satisfactory evidence of the identity of the principal or, if applicable, the subscribing ~~witness, or (ii) satisfactory evidence of a signer's identity.~~witness.

(a1) By making or giving a notarial certificate, whether or not stated in the certificate, a notary certifies as follows:

(1) As to an acknowledgement, all those things described in G.S. 10B-3(1).

(2) As to an affirmation, all those things described in G.S. 10B-3(2).

(3) As to an oath, all those things described in G.S. 10B-3(14).

(4) As to a verification or proof, all those things described in G.S. 10B-3(28).

(a2) In addition to the certifications under subsection (a1) of this section, by making or giving a notarial certificate, whether or not stated in the certificate, a notary certifies to all of the following:

(1) At the time the notarial act was performed and the notarial certificate was signed by the notary, the notary was lawfully commissioned, the notary's commission had neither expired nor been suspended, the notarial act was performed within the geographic limits of the notary's commission, and the notarial act was performed in accordance with the provision of this Chapter.

(2) If the notarial certificate is for an acknowledgment or the administration of an oath or affirmation, the person whose signature was notarized did not appear in the judgment of the notary to be incompetent, lacking in understanding of the nature and consequences of the transaction requiring the notarial act, or acting involuntarily, under duress or undue influence.

(3) The notary was not prohibited from acting under G.S. 10-20(c).

(a3) The inclusion of additional information in a notarial certificate, including the representative or fiduciary capacity in which a person signed or the means a notary used to identify a principal, shall not invalidate an otherwise sufficient notarial certificate.

(b) A notarial certificate for the acknowledgment taken by a notary of a principal who is an individual acting in his or her own right or who is an individual acting in a representative or fiduciary capacity ~~taken by a notary~~ is sufficient and shall be accepted

in this State if it is substantially in the form set forth in G.S. 10B-41, if it is substantially in a form otherwise prescribed by the ~~law~~ laws of this State, or if ~~it:~~it includes all of the following:

(1) Identifies the state and county in which the acknowledgment ~~occurred;~~occurred.

(2) Names the principal who appeared in person before the ~~notary;~~notary.

~~(3) States that the notary has either (i) personal knowledge of the identity of the principal or (ii) satisfactory evidence of the principal's identity, indicating the nature of that satisfactory evidence;~~

(4) Indicates that the principal ~~who~~ appeared in person before the notary and the principal acknowledged that ~~the signature on the record presented is his or her signature, that the principal voluntarily signed the record for the purpose stated therein;~~he or she signed the record.

(5) States the date of the ~~acknowledgment;~~acknowledgment.

(6) Contains the signature and seal or stamp of the notary who took the ~~acknowledgment; and~~ acknowledgment.

(7) States the notary's commission expiration date.

(c) A notarial certificate for the verification or proof ~~of the signature of a principal by a subscribing witness~~ taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-42, if it is substantially in a form otherwise prescribed by the ~~law~~ laws of this State, or if ~~it:~~it includes all of the following:

(1) Identifies the state and county in which the verification or proof ~~occurred;~~occurred.

(2) Names the subscribing witness who appeared in person before the ~~notary;~~notary.

~~(3) States that the notary has either (i) personal knowledge of the identity of the subscribing witness or (ii) satisfactory evidence of the subscribing witness's identity, indicating the nature of that satisfactory evidence;~~

(4) Names the principal whose signature on the record is to be verified or ~~proven;~~proven.

(5) Indicates that the subscribing witness certified to the notary under oath or by affirmation that the subscribing witness is not a party to or beneficiary of the transaction, ~~named party to the record in question, has no interest in the transaction,~~ signed the record as a subscribing witness, and either (i) witnessed the principal sign the record, or (ii) witnessed the principal acknowledge the principal's signature on the ~~already signed record;~~record.

(6) States the date of the verification or ~~proof;~~proof.

(7) Contains the signature and seal or stamp of the notary who took the verification or ~~proof; and~~proof.

(8) States the notary's commission expiration date.

(d) A notarial certificate for an oath or affirmation taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-43, if it is substantially in a form otherwise prescribed by the ~~law~~ laws of this State, or if ~~it:~~it includes all of the following:

~~(1) Identifies the state and county in which the oath or affirmation occurred;~~

(2) Names the principal who appeared in person before the ~~notary;~~notary unless the name of the principal otherwise is clear from the record itself .

~~(3) States that the notary has either (i) personal knowledge of the identity of the principal or (ii) satisfactory evidence of the principal's identity, indicating the nature of that satisfactory evidence;~~

(4) Indicates that the principal who appeared in person before the notary signed the record in question and certified to the notary under oath or by affirmation as to the truth of the matters stated in the ~~record;~~record.

(5) States the date of the oath or ~~affirmation;~~affirmation.

(6) Contains the signature and seal or stamp of the notary who took the oath or ~~affirmation; and~~affirmation.

(7) States the notary's commission expiration date.

(e) Any notarial certificate made in another jurisdiction shall be sufficient in this State if it is made in accordance with federal law or the laws of the jurisdiction where the notarial certificate is made. If federal law or the laws of the jurisdiction where the notarial certificate is made do not require a notary to affix a seal to a notarial certificate or to state in a notarial certificate the date the notary's commission expires, the certificate shall be accepted in this State without requiring any separate certificate from a pubic official who has notarial oversight authority in the other jurisdiction.

(f) On records to be filed, registered, recorded, or delivered in another state or jurisdiction of the United States, a North Carolina notary may complete any notarial certificate that may be required in that other state or jurisdiction.

(g) Nothing in this Chapter shall be deemed to authorize the use of a notarial certificate authorized by this Part in place of or as an alternative to a notarial certificate required by any other provision of the General Statutes outside of Chapter 47 of the General Statutes that prescribes the specific form or content for a notarial certificate ~~(including, but not limited to,~~ including G.S. 31-11.6, Chapter 32A of the General Statutes, and ~~G.S. 90-321).~~ G.S. 90-321. However, any statute that permits or requires the use of a notarial certificate contained within Chapter 47 of the General Statutes may also be satisfied by the use of a notarial certificate permitted by this Part. Any form of acknowledgment or probate authorized under Chapter 47 of the General Statutes shall be conclusively deemed in compliance with the requirements of this section.

(h) If an individual signs a record and purports to be acting in a representative or fiduciary capacity, that individual is also deemed to represent to the notary that he or she is signing the record with proper authority to do so and also is signing the record on behalf of the person or entity represented and identified therein or in the fiduciary capacity indicated therein. In performing a notarial act in relation to an individual

described under this subsection, a notary is under no duty to verify whether the individual acted in a representative or fiduciary capacity or, if so, whether the individual was duly authorized so to do. A notarial certificate may include any of the following:

(1) A statement that an individual signed a record in a particular representative or fiduciary capacity.

(2) A statement that the individual who signed the record in a representative or fiduciary capacity had due authority so to do.

(3) A statement identifying the represented person or entity or the fiduciary capacity."

SECTION 19. G.S. 10B-41 reads as rewritten:

"**§ 10B-41. Notarial certificate for an acknowledgment.**

(a) When properly completed by a notary, a notarial certificate ~~in~~ that substantially complies with the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for the acknowledgment of a principal who is an individual acting in his or her own right or who is an individual acting in a representative or fiduciary capacity. The authorization of the form in this section does not preclude the use of other forms.

_____ County, North Carolina

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she ~~voluntarily~~ signed the foregoing ~~document for the purpose stated therein and in the capacity indicated:~~ document: name(s) of principal(s).

Date: _____ Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal) My commission expires: _____

~~(b) By signing a notarial certificate for the acknowledgment of a principal who is an individual acting in his or her own right or in a representative capacity substantially in the form set forth in subsection (a) of this section, the notary thereby certifies:~~

~~(1) That the principal acknowledging his or her signature appeared in person before the notary on the date indicated;~~

~~(2) That the principal stated to the notary that he or she voluntarily signed the record for the purpose stated therein;~~

~~(3) That, if the principal signed the record in a representative capacity, the principal stated that he or she signed the record in the particular representative capacity; and~~

~~(4) That the notary has either (i) personal knowledge of the identity of the principal or (ii) satisfactory evidence of the principal's identity.~~

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible."

SECTION 20. G.S. 10B-42 reads as rewritten:

§ 10B-42. Notarial certificate for a verification or proof.

(a) When properly completed by a notary, a notarial certificate in substantially the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for the verification or proof of the signature of a principal by a subscribing witness. The authorization of the form in this section does not preclude the use of other forms.

_____ County, North Carolina

I certify that name of subscribing witness personally appeared before me this day and certified to me under oath or by affirmation that he or she is not a ~~named party to the foregoing document, has no interest in the transaction,~~ grantee or beneficiary of the transaction, signed the foregoing document as a subscribing witness, and either (i) witnessed name of principal (the principal) sign the foregoing document or (ii) witnessed the principal acknowledge the principal's signature on the already-signed document.

Date: _____ Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal) My commission expires: _____

~~(b) By signing a notarial certificate for the verification or proof of the signature of a principal by a subscribing witness substantially in the form set forth in subsection (a) of this section, the notary thereby certifies:~~

~~(1) That the subscribing witness appeared in person before the notary on the date indicated;~~

~~(2) That the subscribing witness certified to the notary under oath or by affirmation that the subscribing witness is not a named party to the record in question, has no interest in the transaction, signed the record as a subscribing witness, and either (i) witnessed the named principal sign the record, or (ii) witnessed the named principal acknowledge the principal's signature on the already-signed record; and~~

~~(3) That the notary has either (i) personal knowledge of the identity of the subscribing witness or (ii) satisfactory evidence of the subscribing witness's identity.~~

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible."

SECTION 21. G.S. 10B-43 reads as rewritten:

§ 10B-43. Notarial certificate for an oath or affirmation.

(a) When properly completed by a notary, a notarial certificate ~~in~~ that substantially complies with either of the following forms may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for an oath or affirmation. The authorization of the forms in this section does not preclude the use of other forms.

_____ County, North Carolina

Signed and sworn to ~~(or affirmed)~~ before me this day by name of principal.

Date: _____ Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal) My commission expires: _____

-OR-

_____ County, North Carolina

Sworn to ~~(or affirmed)~~ and ~~ascribed~~ subscribed before me this day by name of principal.

Date: _____ Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal) My commission expires: _____

~~(b) By signing a notarial certificate for an oath or affirmation substantially in the form set forth in subsection (a) of this section, the notary thereby certifies:~~

~~(1) That the principal appeared in person before the notary on the date indicated;~~

~~(2) That either (i) the notary witnessed the principal sign the record or (ii) the principal stated to the notary that he or she voluntarily signed the record for the purpose stated therein;~~

~~(3) That the principal certified to the notary under oath or by affirmation as to the truth of the matters stated in the record; and~~record.

~~(4) That the notary has either (i) personal knowledge of the identity of the principal or (ii) satisfactory evidence of the principal's identity.~~

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible.

(d) In either of the forms provided under subsection (a) of this section all of the following shall apply:

(1) The name of the principal may be omitted if the name of the principal is located near the jurat and the principal who so appeared before the notary is clear from the record itself.

(2) The words "affirmed" or "sworn to or affirmed" may be substituted for the words "sworn to"."

SECTION 22. G.S 10B-60 reads as rewritten:

"**§ 10B-60. Enforcement and penalties.**

(a) The Secretary may ~~warn,~~ issue a warning to a notary or restrict, suspend, or revoke a notarial commission for a violation of this Chapter and on any ground for which an application for a commission may be denied under this Chapter. Any period of restriction, suspension, or revocation shall not extend the expiration date of a commission.

(b) Except as otherwise permitted by law, a person who commits any of the following acts is guilty of a Class 1 misdemeanor:

(1) Holding one's self out to the public as a notary if the person does not have a commission.

(2) Performing a notarial act if the person's commission has expired or been ~~suspended.~~suspended or restricted.

(3) Performing a notarial act before the person had taken the oath of office.

(c) A notary shall be guilty of a Class 1 misdemeanor if the notary does any of the following:

(1) Takes an ~~acknowledgment, performs~~ acknowledgement or administers an ~~oath, affirmation, or jurat~~ oath or affirmation without the principal ~~personally~~ appearing in person before the ~~notary;~~notary.

(2) Takes a verification or proof ~~of a~~ without the subscribing witness ~~without personal knowledge of the subscribing witness's identity, or without satisfactory evidence of the subscribing witness's identity;~~appearing in person before the notary.

(3) Takes an acknowledgment or administers an oath or affirmation without personal knowledge or satisfactory evidence of the identity of the principal.

(4) Takes a verification or proof without personal knowledge or satisfactory evidence of the identity of the principal.

(d) A notary shall be guilty of a Class I felony if the notary does any of the following:

(1) Takes an ~~acknowledgment, verification, proof, or jurat,~~acknowledgement or a verification or a proof, or ~~performs~~ administers an oath or affirmation if the notary knows it is false or fraudulent.

(2) Takes an ~~acknowledgment, or jurat~~ acknowledgement or administers and oath or affirmation without the principal appearing in person before the notary if the notary does so with the intent to commit fraud.

(3) Takes a verification or proof without the subscribing witness appearing in person before the notary if the notary does so with the intent to commit fraud.

(e) It is a Class I felony for any person to perform notarial acts in this State with the knowledge that the person is not commissioned under this Chapter.

(f) Any person who without authority obtains, uses, conceals, defaces, or destroys the seal or notarial records of a notary is guilty of a Class I felony.

(g) For purposes of enforcing this Chapter and Article 34 of Chapter 66 of the General Statutes, the law enforcement agents of the Department of the Secretary of State have statewide jurisdiction and have all of the powers and authority of law enforcement officers. The agents have the authority to assist local law enforcement agencies in their investigations and to initiate and carry out, on their own or in coordination with local law enforcement agencies, investigations of violations.

(h) Resignation or expiration of a notarial commission does not terminate or preclude an investigation into a notary's conduct by the Secretary, who may pursue the investigation to a conclusion, whereupon it may be a matter of public record whether or not the finding would have been grounds for disciplinary action.

(i) The Secretary may seek injunctive relief against any person who violates the provisions of this Chapter. Nothing in this Chapter diminishes the authority of the North Carolina State Bar.

(j) Any person who knowingly solicits, coerces, or in any material way influences a notary to commit official misconduct, is guilty as an aider and abettor and is subject to the same level of punishment as the notary.

(k) The sanctions and remedies of this Chapter supplement other sanctions and remedies provided by law, including, but not limited to, forgery and aiding and abetting."

SECTION 23. Part 9 of Article 1 of Chapter 10B of the General Statutes is amended by adding the following new sections to read:

"**§ 10B-67. Erroneous commission date cured.**

An erroneous statement of the date of the notary's commission expires shall not affect the sufficiency, validity or enforceability of the notarial certificate or the related record if the notary is, in fact, lawfully commissioned at the time of the notarial act.

"**§ 10B-68. Technical defects cured.**

(a) Technical defects, errors, or omissions in a form of a notarial certificate shall not affect the sufficiency, validity, or enforceability of the notarial certificate or the related instrument or document.

(b) As used in this section, a technical defect includes those cured under G.S. 10B-37(f) and G.S. 10B-67. Other technical defects include the absence of the legible appearance of the notary's name exactly as shown on the notary's commission as required in G.S. 10B-20(b) and defects in the commissioning or recommissioning of the notary that were approved by the Department under this Chapter.

"**§ 10B-69. Official forms cured.**

(a) The notarial certificate contained in a form issued by a State agency prior to October 1, 2006, is deemed to be a valid certificate provided the certificate complied with the law at the time the form was issued.

(b) The notarization using a certificate under subsection (a) of this section shall be deemed valid if executed in compliance with the law at the time the form was issued.

"**§ 10B-99. Presumption of regularity.**

(a) In the absence of evidence of fraud on the part of the notary or evidence of a knowing and deliberate violation of Article by the notary, the courts shall grant a presumption of regularity to notarial acts so that those acts may be upheld, provided there has been substantial compliance with the law. Technical defects, errors, or omissions in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the notarial act or the related instrument or record. Nothing in this Chapter modifies or repeals the common law doctrine of substantial compliance in effect on November 30, 2005.

(b) A notarial act performed before October 1, 2006 shall be deemed valid if it complies with the law as it existed on or before December 1, 2005."

SECTION 24. G.S. 10B-106(d) reads as rewritten:

"(d) An electronic form shall be used by an electronic notary in registering with the Secretary and it shall include, at least all of the following:

(1) The applicant's full legal name and the name to be used for commissioning, excluding nicknames.
(2) The state and county of commissioning of the registrant.
(3) The expiration date of the registrant's notary commission.
(4) Proof of successful completion of the course of instruction on electronic notarization as required by this Article.
(5) A description of the technology the registrant will use to create an electronic signature in performing official acts.
(6) If the device used to create the registrant's electronic signature was issued or registered through a licensed certification authority, the name of that authority, the source of the license, the starting and expiration dates of the device's term of registration, and any revocations, annulments, or other premature terminations of any registered device of the registrant that was due to misuse or compromise of the device, with the date, cause, and nature of each termination explained in detail.
(7) The e-mail address of the registrant.

The information contained in a registration under this section is a public record as defined in G.S. 132-1, except for information contained in ~~subsection (7),~~ subdivision (7), which shall be considered confidential information and shall not be subject to disclosure except as provided in Chapter 132 of the General Statutes or as provided by rule."

SECTION 25. G.S. 47-2.2 reads as rewritten;

"**§ 47-2.2. Notary public of sister state; lack of seal or stamp or expiration date of commission.**

If the proof or acknowledgment of any instrument is had before a notary public of any state other than North Carolina and the instrument does not show the seal or stamp of the notary public and the expiration date of the commission of the notary public, the certificate of proof or acknowledgment made by ~~such~~ the notary public ~~shall~~ may be accompanied by the certificate of the county official before whom the notary qualifies for office, stating that ~~such~~ the notary public was at the time his or her certificate bears date an acting notary public of ~~such~~ the state, and that ~~such~~ the notary's genuine signature is set to his or her certificate. The certificate of the official herein provided for shall be under his or her hand and official seal."

SECTION 26. G.S. 47-14 is amended by adding a new subsection to read:

"(f) The acceptance of a record for registration by the register of deeds shall give rise to a presumption that, at the time the record was presented for registration, a clear and legible image of the notary's official seal was affixed or embossed on the record near the notary's official signature. This presumption shall apply regardless of whether the image is legible or photographically reproduced in the records maintained by the

register of deeds. A register of deeds may not refuse to accept a record for registration because a notarial seal does not satisfy the requirements of G.S. 10B-37. "

SECTION 27. G.S. 47-37.1 reads as rewritten:

"**§ 47-37.1. Other forms of proof.**

(a) The proof and acknowledgment forms set forth in this Article are not exclusive. Without regard to whether an instrument presented for registration was signed by an individual acting in his or her own right or by an individual acting in a representative or fiduciary capacity, a notarial certificate that complies with the provisions of Part 6 of Article 1 of Chapter 10B ~~(G.S. 10B-25 et. seq.)~~ shall be deemed a sufficient form of probate or acknowledgment for purposes of this Chapter. Use of a notarial certificate that satisfies the requirements of Part 6 of Article 1 of Chapter 10B shall not be grounds for a register of deeds to refuse to accept a record for registration.

(b) When an instrument presented for registration purports to be signed by an individual in a representative or fiduciary capacity, the acknowledgment or proof of that individual's signature ~~may, but is not required to:~~may:

(1) State that the individual signed the instrument in a representative or fiduciary capacity.

(2) State that the individual who signed the instrument in a representative or fiduciary capacity had due authority to do so.

(3) Identify the represented person or ~~entity.~~ the fiduciary capacity

(c) This section relates only to the form of proof or acknowledgment. The capacity and authority of the individual who signs an instrument presented for registration are governed by other provisions of law.

(d) This section applies to proofs and acknowledgments made before, on, or after December 1, 2005."

SECTION 28. G.S. 47-38 reads as rewritten:

"**§ 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:~~

When properly completed, a certificate in substantially the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for one or more individuals, acing in his, her, or their own right or, whether or not so stated in the notarial certificate, in a representative or fiduciary capacity, including one or more individuals acting on behalf of an unincorporated association, as an officer or director of a corporation, as a partner of a general or limited partnership, as a manager or member of a limited liability company, as the trustee of a trust, as the personal representative of a decedent's estate, as an agent or attorney in fact for another, as the guardian of a minor or an incompetent, or as a public official. The authorization of the form in this section does not preclude the use of other forms. This section applies to notarial certificates made before, on, and after December 1, 2005.

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)~~ individual whose acknowledgment is being taken) 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.)
(Title)"

SECTION 29. G.S. 47-41.01 is amended by adding a new subsection to read:

"(e) The forms of probate set forth in this section may be modified and adopted for use in the probate of deeds and other conveyances and instruments executed by entities other than corporations, including general and limited partnerships, limited liability companies, trusts, and unincorporated associations. This subsection applies to notarial certificates and forms of probate made before, on, or after December 1, 2005."

SECTION 31. G.S. 47-41.02 is amended by adding a new subsection to read:

"(h) The forms of probate set forth in this section may be modified and adopted for use in the probate of deeds and other conveyances and instruments executed by entities other than corporations, including general and limited partnership, limited liability companies, trusts, and unincorporated associations. This subsection applies to notarial certificates and forms of probate made before, on, or after December 1, 2005."

SECTION 32. Chapter 47 of the General Statutes is amended by adding a new section to read:

"**§ 47-41.2. Technical defects.**

Technical defects under G.S. 10B-68 and errors or omissions in a form of probate or other notarial certificate shall not affect the sufficiency, validity, or enforceability of the form of probate or the notarial certificate or the related instrument or document. A register of deeds may not refuse to accept an instrument or document for registration because of technical defects, errors, or omissions in a form of probate or other notarial certificate."

SECTION 33. G.S. 47-45 reads as rewritten:

"**§ 47-45. Clerk's certificate upon probate by nonresident official without seal.**

When the proof or acknowledgment of any instrument is had before any official of some other state, territory or country and ~~such~~ the official has no official seal, then the certificate of ~~such~~ the official ~~shall~~ may be accompanied by the certificate of a clerk of a court of record of the state, territory or country in which the official taking the proof or acknowledgment resides, of the official position and signature of ~~such~~ the official; ~~such~~ the certificate of the clerk shall be under his or her hand and official seal and shall be in substance as follows:

_____County.

I, A.B. (here give name and official title of the clerk of a court of record as provided herein), do hereby certify that C.D. (here give name of the official taking the proof, etc.) was at the time of signing the foregoing (or annexed) certificate (here give the official title of the officer taking proof, etc.) in and for the county of _____ and state of

_____ (or other political division of the state, territory or country, as the case may be), and that his or her signature thereto is in his or her own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this _____day of_____, A.D._____

(Official seal.)

_____

(Signature of Clerk.)"

SECTION 34. This act becomes effective October 1, 2006, and except as otherwise set forth in this act, applies to notarial acts performed on or after that date.

HOUSE BILL 1432:
Notary Public Corrections.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 12, 2006
Introduced by:	Reps. Stam, Ross	**Summary by:**	Kory Goldsmith Committee Co-Counsel O. Walker Reagan, Staff Attorney
Version:	PCS to Second Edition H1432-CSRC-101		

SUMMARY: ***The Proposed Senate Committee Substitute for House Bill 1432 makes technical, conforming, and other changes to the new Notary Public Act, and conforming changes to other related laws.***

This PCS differs from the one previously presented to the committee as follows:

1. Exempts notaries who are being recommissioned from the requirement that they have a high school diploma or the equivalent.

2. Includes the minimum requirements and a statutory certificate for a proof or verification taken by a notary of a non-subscribing witness.

3. Clarifies that the failure of a notary to include his or her signature, the date the notary's commission expires and a seal is not considered a technical defect under Chapter 47 and that a register of deeds shall not register an instrument that must be notarized if those elements are required but missing from the certificate.

4. Directs the General Statutes Commission to study issues related to notary laws and the registration of notarized instruments and to make recommendations for any changes to the 2007 or 2009 General Assembly.

CURRENT LAW: The current law was enacted in 2005, effective December 1, 2005, as part of Senate Bill 671. The 2005 act recodified the existing notary law and made extensive changes governing notary commissioning, notarial acts, powers and limitations, fees, signatures and seals, and certification forms.

BACKGROUND: As a result of difficulties and questions that arose regarding the implementation and compliance with the new law from the legal community representing various affected parties including real estate closing attorneys, lending institutions, title insurance companies, registers of deeds, clerks of court, the Division of Motor Vehicles, wills and estate administrators and other people who deal with and rely on a reliable, dependable notary system, the General Assembly was encouraged to reexamine the new law to provide additional clarity.

One of the goals of the new law was to add additional details to the notary statutes to improve the integrity of the notary system and to give the Secretary of State's Office, as the administrator of the law, the necessary tools to insure compliance. But a result of strengthening the notarization requirements, questions arose concerning the validity of the execution and recording of documents where notarizations did not technically comply with all the requirements of the new law.

As a result of our analysis of the various issues and concerns raised by all the parties, fundamental goals were identified that lead to the changes proposed in the proposed committee substitute. One goal was to clarify and protect the integrity of the notary system and strengthen the authority of the Secretary of

State in insure compliance by notaries. The other goal was to protect the rights of parties who relied on documents which on their face appeared to be properly notarized.

As a result of these two goals, the proposed committee substitute was drafted to separate out these two purposes so that the Secretary of State could enforce strict compliance with notary standards designed to prevent fraud and insure the integrity of notarized documents, while not causing the underlying documents that were signed by the person whose name appeared on the document to be declared invalid because of a technical notary defect.

The primary effect of the bill is to uncouple the technical notary requirements from the validity and enforceability of documents on which it appears that the person who executed the document actually appeared before the notary, established his or her identity, and voluntarily executed the document in the notary's presence.

BILL ANALYSIS:

Section 1 makes technical and clarifying changes and corrections to the definitions used throughout the act.

Section 2 is a technical change to the notary qualifications statute.

Section 3 clarifies the exemption from the public records of certain personal identity information on the statement of personal qualification including the applicant's date of birth, residence address and telephone number, last four digits of the social security number, and personal and business email address.

Section 4 clarifies that the notary's commission is recorded by the register of deeds only after the oath of office is administered.

Section 5 clarifies the notary recommission requirements to eliminate the requirement that the notary retake the notary course, have a high school diploma, or obtain another recommendation from a public official.

Sections 6, 7, 8, 9, 10, 11 and 12 amend the notary's power and limitation statute in the following ways:

- Expands the ways the notary's name can be legibly shown in a notarial certificate and permits the statement of the expiration of the commission to be in the notary stamp or seal.
- Prohibits the notary from acting when the credible witness is not personally known to the notary and clarifies when a notary named on the document being notarized is not disqualified.
- Permits both commissioned and non-commissioned members of the Armed Forces to notarize documents as permitted under federal law.
- Makes other technical and conforming changes.

Section 13 allows the notary to administer an oath or affirmation without completing a certification.

Section 14 makes a conforming change to the permissible notary fee statute.

Section 15 repeals a redundant section and substitutes language originally intended to be included last year to specify the requirements for the notary's official signature, including the requirement to only sign after the principal signs and prohibiting notary signatures other than by hand.

Section 16 relaxes the requirements for storing a notary's seal to only be a secured location and limits the circumstances when law enforcement and/or the Secretary of State need to be notified about the condition of a seal to when the seal is lost or stolen.

Section 17 allows a notary to continue to use his or her old notary seal obtained prior to October 1, 2006, that does not comply with the new law, until the notary is recommissioned. This section also prohibits the notary from altering the appearance of the notary seal once the seal is placed on the record. This section clarifies that the failure of a notary seal to comply with the technical requirements for a seal does not invalidate a notarial certificate.

Section 18 creates a legal presumption that by executing a notary certificate the notary certifies that all the requirements for the type of notarial act performed have been complied with, that at the time the notary was lawfully commissioned, the notary's commission had not expired, the notarial act was performed within the State and performed in compliance with the law. The notary also is deemed to certify that the person whose signature is notarized did not appear to be incompetent, lacking in understanding of the nature and consequences of the transaction, or acting involuntarily, under duress or undue influence. This section also clarifies that a person who purports to be acting in a representative capacity when signing has the authority to do so.

Sections 19, 20 and 22 make technical changes to the statutory forms of notary certificates for acknowledgements, verifications or proofs, and oaths or affirmations. **Section 21** creates a statutory certificate form for the verification or proof of a non-subscribing witness.

Section 23 restores in the law a Class 1 misdemeanor offense for a notary who performs a notarial act without verification or proof of the identity of the person signing.

Section 24 adds the following new sections to the Notary Public Act:

- **G.S. 10B-67** cures erroneous commission expiration dates when the notary was lawfully commissioned at that time of the notarial act.
- **G.S. 10B-68** cures technical defects in notarial certificates including use of a noncompliant notary seal, an erroneous commission expiration date, a notary's name inconsistent with the name shown of the notary commission, and defects in the notary's commissioning or recommissioning.
- **G.S. 10B-68** cures the use of an outdated notarial certificate form on a State issued document, such as a DMV title, when the execution of the certificate conformed to the law at the time the document was issued.
- **G.S. 10B-99** preserves the common law doctrine of substantial compliance for notarial acts and validates notarial acts performed prior to October 1, 2006 that conformed to either the law as it existed prior to the 2005 changes or after the 2005 changes.

Section 25 makes a conforming change to the electronic notarization statute restricting the disclosure of the registrant's email address.

Sections 26 and 33 make conforming changes to no longer require the register of deeds to require proof of acknowledgement on an out-of-state notarization without a seal.

Section 27 creates a legal presumption under the registration statutes that at the time a document was accepted by the register of deeds for recording, the notary seal was clear and legible.

Section 28 clarifies and cures forms for proofs and acknowledgements on recorded documents.

Section 29 cures and clarifies that the acknowledgement for a grantor can be used generically for multiple persons or persons acting in a representative capacity, including for any form of business entity.

Sections 30 and 31 cure and clarify that the statutory corporate conveyance notary forms can also be modified and adopted for use by other business entities.

Section 32 adds a conforming change to the probate and registration law curing technical defects in notarial certifications.

Section 34 directs the General Statutes Commission to study the need for additional changes to laws relating to notaries public, the notarization of documents, and the registration of documents notarized in other jurisdictions. The Commission shall report its findings and recommendations to the 2007 or the 2009 General Assembly.

EFFECTIVE DATE: The bill becomes effective October 1, 2006, and except as otherwise provided, applies to notarial acts performed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 1378*
PROPOSED COMMITTEE SUBSTITUTE S1378-CSRD-44 [v.1]

6/6/2006 5:10:25 PM

Short Title: Amend the Forfeiture of Property Rights Law. (Public)

Sponsors:

Referred to:

May 16, 2006

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW RELATING TO THE FORFEITURE OF PROPERTY RIGHTS BY SLAYERS, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 31A-3 reads as rewritten:

"**§ 31A-3. Definitions.**

As used in this Article, unless the context otherwise requires, the term –

(1) "Decedent" means the person whose life is taken by the slayer as defined in subdivision ~~(3).~~ (3) of this section.

(2) "Property" means any real or personal property and any right or interest therein.

(3) "Slayer" means any of the following:

a. ~~Any~~ A person ~~who~~ who, by a court of competent ~~jurisdiction~~ jurisdiction, ~~shall have been~~ is convicted as a principal or accessory before the fact of the willful and unlawful killing of another ~~person; or~~ person.

b. ~~Any~~ A person who ~~shall have~~ has entered a plea of guilty in open court as a principal or accessory before the fact of the willful and unlawful killing of another ~~person; or~~ person.

c. ~~Any~~ A person who, upon indictment or information as a principal or accessory before the fact of the willful and unlawful killing of another person, ~~shall have~~ has tendered a plea of nolo contendere which was accepted by the court and judgment entered ~~thereon; or~~ thereon.

d. ~~Any person who shall have been found in a civil action or proceeding brought within one year after the death of the decedent to have willfully and unlawfully killed the decedent or~~

~~procured his killing, and who shall have died or committed suicide before having been tried for the offense and before the settlement of the estate.~~ A person who is found by a preponderance of the evidence in a civil action brought within two years after the death of the decedent to have willfully and unlawfully killed the decedent or procured the killing of the decedent. If a criminal proceeding is brought against the person to establish the person's guilt as a principal or accessory before the fact of the willful and unlawful killing of the decedent within two years after the death of the decedent, the civil action may be brought within 90 days after a final determination is made by a court of competent jurisdiction in that criminal proceeding or within the original two years after the death of the decedent, whichever is later. The burden of proof in the civil action is on the party seeking to establish that the killing was willful and unlawful for the purposes of this Article.

e. A juvenile who is adjudicated delinquent by reason of committing an act that, if committed by an adult, would make the adult a principal or accessory before the fact of the willful and unlawful killing of another person.

The term "slayer" does not include a person who is found not guilty by reason of insanity of being a principal or accessory before the fact of the willful and unlawful killing of another person."

SECTION 2. Article 3 of Chapter 31A of the General Statutes is amended by adding a new section to read:

"**§ 31A-12.1. Remedies to be exclusive.**

This Article wholly supplants the common law rule preventing a person whose culpable negligence causes the death of a decedent from succeeding to any property passing by reason of the death of the decedent."

SECTION 3. This act is effective when it becomes law and applies to property passing from decedents dying on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 1378*

Short Title:	Amend the Forfeiture of Property Rights Law.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

May 16, 2006

A BILL TO BE ENTITLED

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(2) "Property" means any real or personal property and any right or interest therein.

(3) "Slayer" means any of the following:

a. ~~Any~~ A person ~~who~~ who, by a court of competent ~~jurisdiction~~ jurisdiction, ~~shall have been~~ is convicted as a principal or accessory before the fact of the willful and unlawful killing of another ~~person; or~~ person.

b. ~~Any~~ A person who ~~shall have~~ has entered a plea of guilty in open court as a principal or accessory before the fact of the willful and unlawful killing of another ~~person; or~~ person.

c. ~~Any~~ A person who, upon indictment or information as a principal or accessory before the fact of the willful and unlawful killing of another person, ~~shall have~~ has tendered a plea of nolo contendere which was accepted by the court and judgment entered ~~thereon; or~~ thereon.

d. ~~Any person who shall have been found in a civil action or proceeding brought within one year after the death of the decedent to have willfully and unlawfully killed the decedent or procured his killing, and who shall have died or committed~~

~~suicide before having been tried for the offense and before the settlement of the estate.~~ A person who is found by a preponderance of the evidence in a civil action brought within two years after the death of the decedent to have willfully and unlawfully killed the decedent or procured the killing of the decedent. If a criminal proceeding is brought against the person to establish the person's guilt as a principal or accessory before the fact of the willful and unlawful killing of the decedent within two years after the death of the decedent, the civil action may be brought within 90 days after a final determination is made by a court of competent jurisdiction in that criminal proceeding or within the original two years after the death of the decedent, whichever is later. The burden of proof in the civil action is on the party seeking to establish that the killing was willful and unlawful for the purposes of this Article.

e. A juvenile who is adjudicated to be delinquent by reason of committing an act that, if committed by an adult, would make the adult a principal or accessory before the fact of the willful and unlawful killing of another person.

The term "slayer" does not include a person who is found not guilty by reason of insanity of being a principal or accessory before the fact of the willful and unlawful killing of another person."

SECTION 2. Article 3 of Chapter 31A of the General Statutes is amended by adding a new section to read:

"**§ 31A-12.1. Remedies to be exclusive.**

This Article wholly supplants the common law rule preventing a person whose culpable negligence causes the death of a decedent from succeeding to any property passing by reason of the death of the decedent."

SECTION 3. This act is effective when it becomes law and applies to property passing from decedents dying on or after that date.

State of North Carolina
General Statutes
Commission

9001 Mail Service Center
RALEIGH, NORTH CAROLINA
27699-9001

MEMORANDUM
June 2, 2006

TO: Senate Judiciary II Committee
FROM: General Statutes Commission
RE: **Senate Bill 1378 (Amend the Forfeiture of Property Rights Law)**

This bill amends Article 3 of Chapter 31A of the General Statutes, the "slayer" statute, which bars a person from taking property by reason of the death of the decedent if that person is adjudicated to have willfully and unlawfully killed or procured the killing of the decedent. A "slayer" is treated as having predeceased the decedent for purposes of property disposition.

Section 1 amends the definition of "slayer" in G.S. 31A-3(3):

(1) To include a person who is found by a preponderance of the evidence in a civil action brought within two years after the death of the decedent to have willfully and unlawfully killed the decedent or procured the killing. The two-year period is tolled by any criminal action. Currently, the civil action must be brought within one year of the death of the decedent and may only be brought if the alleged slayer dies before being tried for the killing and before settlement of the decedent's estate. The amendment also clarifies that the burden of proof is on the party seeking to establish that the killing was willful and unlawful.

(2) To include a juvenile who is adjudicated delinquent by reason of committing an act that, if committed by an adult, would make the adult a principal or accessory before the fact of the willful and unlawful killing of another person.

(3) To clarify that the term "slayer" excludes a person who is found not guilty by reason of insanity of being a principal or accessory before the fact of the willful and unlawful killing of another person.

(4) To make minor stylistic changes.

Section 2 adds a new § 31A-12.1 to expressly provide that Article 3 wholly replaces the common law rule preventing a person whose culpable negligence causes the death of a decedent from succeeding to any property passing by reason of the death of the decedent (as a result of the holding in Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975), which is inconsistent with decisions in other states). Accordingly, a conviction for involuntary manslaughter would not result in a forfeiture of property rights.

Section 3 provides that the act is effective when it becomes law and applies to property passing from decedents dying on or after that date.

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	June 22, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 2098	Protection of Animals.	Representative Ross Representative Insko

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, June 22, 2006, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 2098	Protection of Animals.	Representative Ross Representative Insko

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

June 22, 1006

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on June 22, 2006, with twelve members present. Senator Hartsell introduced pages Marie Taylor, Daladier Miller, Ashleigh Stephens, Chris Morgan, Julia Taylor, Shamika Hodge, Eric Melton, Stephen Kouba and Rebekah Jewell and thanked them for assisting the committee.

HB 2098 (Protection of Animals.) Senator Hartsell noted that there was a Committee Substitute that had been distributed on June 21, 2006. Senator Bingham moved that the Proposed Committee Substitute be accepted for purposes of discussion. All voted and the motion passed. Senator Hartsell then recognized Representative Ross to explain the bill. Question from Senators Forrester, Apodaca, Bingham, Snow and Webster, Jacumin Swindell and Allran were answered by Representative Ross, Senator Hartsell and Ms. Bly Hall, representing the General Statutes Commission. Ms. Hall and Paul Myers, representing the County Commissioners Association spoke on the bill. Senator Bingham moved for a favorable report, unfavorable to the original bill. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Monday, June 26, 2006

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **2098** Protection of Animals.

Draft Number:	PCS 60836
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

June 22, 2016
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John Sauls	Chatham County Animal Control
R. Bry Hall	General Statutes Commission
Floyd Lewis	General Statutes Commission
McClees Joe	McClees Consulting
[signature]	AOC
Cameron Contrizano	Daily Bulletin
Chip Kullian	Nelson Mullins
mia Shaw	nelson Mullins
Kathryn Pomeroy	Gov's Office
Steve Wall	DENR
Brandon Reid	NCGA Intern

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

June 22, 2006
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Adam Keith	NCGA Raleigh
James Satterwhite	Intern (Kinnaird)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 2098*
Committee Substitute Favorable 6/8/06

Short Title: Protection of Animals. (Public)

Sponsors:

Referred to:

May 18, 2006

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW RELATING TO THE PROTECTION OF ANIMALS, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

PART I. CIVIL REMEDY FOR CRUELTY AMENDMENTS.

SECTION 1.1. G.S. 19A-3 reads as rewritten:

"**§ 19A-3. Preliminary ~~injunction.~~injunction; care of animal pending hearing on the merits.**

(a) Upon the filing of a verified complaint in the district court in the county in which cruelty to an animal has allegedly occurred, the judge may, as a matter of discretion, issue a preliminary injunction in accordance with the procedures set forth in G.S. 1A-1, Rule 65. Every such preliminary injunction, if the ~~complainant~~ plaintiff so requests, may give the ~~complainant~~ plaintiff the right to provide suitable care for the animal. If it appears on the face of the complaint that the condition giving rise to the cruel treatment of an animal requires the animal to be removed from its owner or other person who possesses it, then it shall be proper for the court in the preliminary injunction to allow the ~~complainant~~ plaintiff to take possession of the ~~animal.~~ animal as custodian.

(b) The plaintiff as custodian may employ a veterinarian or other health provider to provide necessary medical care for the animal without any additional court order. Prior to taking such action, the plaintiff as custodian shall consult with, or attempt to consult with, the defendant in the action, but the plaintiff as custodian may authorize such care without the defendant's consent. Notwithstanding the provisions of this subsection, the plaintiff as custodian may not have an animal euthanized without written consent of the defendant or a court order that authorizes euthanasia upon the court's finding that the animal is suffering due to terminal illness or terminal injury.

(c) The plaintiff as custodian may place an animal with a foster care provider. The foster care provider shall return the animal to the plaintiff as custodian on demand."

SECTION 1.2. G.S. 19A-4 reads as rewritten:

"**§ 19A-4. Permanent injunction.**

(a) In accordance with G.S. 1A-1, Rule 65, a district court judge in the county in which the original action was brought shall determine the merits of the action by trial without a jury, and upon hearing such evidence as may be presented, shall enter orders as the court deems appropriate, including a permanent injunction and dismissal of the action along with dissolution of any preliminary injunction that had been issued.

(b) If the plaintiff prevails, the court in its discretion may include the costs of food, water, shelter, and care, including medical care, provided to the animal, less any amounts deposited by the defendant under G.S. 19A-70, as part of the costs allowed to the plaintiff under G.S. 6-18. In addition, if the court finds by a preponderance of the evidence that even if a permanent injunction were issued there would exist a substantial risk that the animal would be subjected to further cruelty if returned to the possession of the defendant, the court may terminate the defendant's ownership and right of possession of the animal and transfer ownership and right of possession to the plaintiff or other appropriate successor owner. For good cause shown, the court may also enjoin the defendant from acquiring new animals for a specified period of time or limit the number of animals the defendant may own or possess during a specified period of time.

(c) If the final judgment entitles the defendant to regain possession of the animal, the custodian shall return the animal, including taking any necessary steps to retrieve the animal from a foster care provider.

(d) The court shall consider and may provide for custody and care of the animal until the time to appeal expires or all appeals have been exhausted."

PART II. DEPOSIT REQUIREMENT WHEN COUNTY OR MUNICIPAL ANIMAL SHELTER TAKES CUSTODY OF ANIMAL PENDING LITIGATION.

SECTION 2.1. Article 6 of Chapter 19A of the General Statutes reads as rewritten:

"Article 6.

"Care of ~~Dogs Illegally Used for Fighting.~~ Animal Subjected to Illegal Treatment.

"**§ 19A-70. Care of ~~dogs illegally used for fighting.~~ animal subjected to illegal treatment.**

(a) In every arrest under ~~G.S. 14-362.2,~~ any provision of Article 47 of Chapter 14 of the General Statutes or under G.S. 67-4.3 or upon the commencement of an action under Article 1 of this Chapter by a county or municipality, by a county-approved animal cruelty investigator, by other county or municipal official, or by an organization operating a county or municipal shelter under contract, if an animal shelter takes custody of ~~dogs illegally used for fighting,~~ an animal, the ~~animal~~ operator of the shelter may file a petition with the court requesting that the defendant be ordered to deposit funds in an amount sufficient to secure payment of all the reasonable expenses expected to be incurred by the animal shelter in caring for and providing for the ~~dogs~~ animal pending the disposition of the ~~charges.~~ litigation. For purposes of this section, "reasonable expenses" includes the cost of providing food, water, shelter, and care, including medical care, for at least 30 days.

(b) Upon receipt of a petition, the court shall set a hearing on the ~~petition.~~ petition to determine the need to care for and provide for the animal pending the disposition of the litigation. The hearing shall be conducted no less than 10 and no more than 15 business days after the petition is filed. The operator of the animal shelter shall mail written notice of the hearing and a copy of the petition to the defendant at the address contained in the criminal ~~charges.~~ charges or the complaint or summons by which a civil action was initiated. If the defendant is in a local detention facility at the time the petition is filed, the operator of the animal shelter shall also provide notice to the custodian of the detention facility.

(c) The court shall set the amount of funds necessary for 30 days' care after taking into consideration all of the facts and circumstances of the case, including the need to care for and provide for the animal pending the disposition of the litigation, the recommendation of the operator of the animal ~~shelter and~~shelter, the estimated cost of caring for and providing for the ~~dogs~~ animal, ~~as well as~~and the defendant's ability to pay. If the court determines that the defendant is unable to deposit funds, the court may consider issuing an order under subsection (f) of this section.

Any order for funds to be deposited pursuant to this section shall state that if the operator of the animal shelter files an affidavit with the clerk of superior court, at least two business days prior to the expiration of a 30-day period, stating that, to the best of the ~~shelter's~~ affiant's knowledge, the ~~criminal~~ case against the defendant has not yet been resolved, the order shall be automatically renewed every 30 days until the ~~criminal~~ case is resolved.

(d) If the court orders that funds be deposited, the amount of funds necessary for 30 days shall be posted with the clerk of superior court. The defendant shall also deposit the same amount with the clerk of superior court every 30 days thereafter until the ~~criminal charges are~~ litigation is resolved, unless the defendant requests a hearing no less than five business days prior to the expiration of a 30-day period. If the defendant fails to deposit the funds within five business days of the initial hearing, or five business days of the expiration of a 30-day period, the ~~dogs are~~ animal is forfeited by operation of law. If funds have been deposited in accordance with this section, the operator of the animal shelter may draw from the funds the actual costs incurred in caring for the ~~dogs.~~ animal.

In the event of forfeiture, the animal shelter may determine whether ~~any of the dogs are~~ the animal is suitable for adoption and whether adoption can be arranged for ~~any of the dogs.~~ the animal. The ~~dogs~~ animal may not be adopted by the defendant or by any person residing in the defendant's ~~household, and~~ household. If the adopted animal is a dog used for fighting, the animal shelter shall notify any persons adopting the ~~dogs~~ dog of the liability provisions for owners of dangerous dogs under Article 1A of Chapter 67 of the General Statutes. If no adoption can be arranged after the forfeiture, or ~~the dogs are~~ animal is unsuitable for adoption, the shelter shall humanely euthanize the ~~dogs.~~ animal.

(e) The deposit of funds shall not prevent the animal shelter from disposing of the ~~dogs~~ animal prior to the expiration of the 30-day period covered by the deposit if the court makes a final determination of the charges or claims against the defendant. Upon

~~the adjudication of the charges,~~ determination, the defendant is entitled to a refund for any portion of the deposit not incurred as expenses by the animal shelter. ~~A person who is adjudicated not guilty of the charges under G.S. 14-362.2 shall be entitled to a full refund of the deposit.~~ A person who is acquitted of all criminal charges or not found to have committed animal cruelty in a civil action under Article 1 of this Chapter is entitled to a refund of the deposit remaining after any draws from the deposit in accordance with subsection (d) of this section.

(f) Pursuant to subsection (c) of this section, the court may order a defendant to provide necessary food, water, shelter, and care, including any necessary medical care, for any ~~dogs that are~~ animal that is the basis of the charges or claims against the defendant without the removal of the ~~dogs~~ animal from the existing location and until the charges or claims against the defendant are adjudicated. If the court issues such an order, the court shall provide for an animal control officer or other law enforcement officer to make regular visits to the location to ensure that the ~~dogs are~~ animal is receiving necessary food, water, shelter, and care, including any necessary medical care, and to impound the ~~animals if they are~~ animal if it is not receiving those necessities."

PART III. CLARIFY THAT THE PROHIBITION AGAINST DOGFIGHTING INCLUDES FIGHTS BETWEEN DOGS AND OTHER ANIMALS.

SECTION 3.1. G.S. 14-362.2 reads as rewritten:

"**§ 14-362.2. Dog fighting and baiting.**

(a) A person who instigates, promotes, conducts, is employed at, provides a dog for, allows property under ~~his~~ the person's ownership or control to be used for, gambles on, or profits from an exhibition featuring the ~~fighting or~~ baiting of a dog or the fighting of a dog with another dog or with another animal is guilty of a Class H felony. A lease of property that is used or is intended to be used for an exhibition featuring the ~~fighting or~~ baiting of a dog or the fighting of a dog with another dog or with another animal is void, and a lessor who knows this use is made or is intended to be made of ~~his~~ the lessor's property is under a duty to evict the lessee immediately.

(b) A person who owns, possesses, or trains a dog with the intent that the dog be used in an exhibition featuring the ~~fighting or~~ baiting of that dog or the fighting of that dog with another dog or with another animal is guilty of a Class H felony.

(c) A person who participates as a spectator at an exhibition featuring the ~~fighting or~~ baiting of a dog or the fighting of a dog with another dog or with another animal is guilty of a Class H felony."

PART IV. EFFECTIVE DATE.

SECTION 4.1. This act becomes effective December 1, 2006, and applies to actions commenced on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 2098*

Committee Substitute Favorable 6/8/06

PROPOSED SENATE COMMITTEE SUBSTITUTE H2098-CSRC-111 [v.1]

6/21/2006 6:19:23 PM

Short Title: Protection of Animals. (Public)

Sponsors:

Referred to:

May 18, 2006

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW RELATING TO THE PROTECTION OF ANIMALS, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

PART I. CIVIL REMEDY FOR CRUELTY AMENDMENTS.

SECTION 1.1. G.S. 19A-3 reads as rewritten:

"**§ 19A-3. Preliminary ~~injunction.~~injunction; care of animal pending hearing on the merits.**

(a) Upon the filing of a verified complaint in the district court in the county in which cruelty to an animal has allegedly occurred, the judge may, as a matter of discretion, issue a preliminary injunction in accordance with the procedures set forth in G.S. 1A-1, Rule 65. Every such preliminary injunction, if the ~~complainant~~ plaintiff so requests, may give the ~~complainant~~ plaintiff the right to provide suitable care for the animal. If it appears on the face of the complaint that the condition giving rise to the cruel treatment of an animal requires the animal to be removed from its owner or other person who possesses it, then it shall be proper for the court in the preliminary injunction to allow the ~~complainant~~ plaintiff to take possession of the ~~animal.~~ animal as custodian.

(b) The plaintiff as custodian may employ a veterinarian to provide necessary medical care for the animal without any additional court order. Prior to taking such action, the plaintiff as custodian shall consult with, or attempt to consult with, the defendant in the action, but the plaintiff as custodian may authorize such care without the defendant's consent. Notwithstanding the provisions of this subsection, the plaintiff as custodian may not have an animal euthanized without written consent of the defendant or a court order that authorizes euthanasia upon the court's finding that the animal is suffering due to terminal illness or terminal injury.

(c) The plaintiff as custodian may place an animal with a foster care provider. The foster care provider shall return the animal to the plaintiff as custodian on demand."

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"**§ 19A-4. Permanent injunction.**

(a) In accordance with G.S. 1A-1, Rule 65, a district court judge in the county in which the original action was brought shall determine the merits of the action by trial without a jury, and upon hearing such evidence as may be presented, shall enter orders as the court deems appropriate, including a permanent injunction and dismissal of the action along with dissolution of any preliminary injunction that had been issued.

(b) If the plaintiff prevails, the court in its discretion may include the costs of food, water, shelter, and care, including medical care, provided to the animal, less any amounts deposited by the defendant under G.S. 19A-70, as part of the costs allowed to the plaintiff under G.S. 6-18. In addition, if the court finds by a preponderance of the evidence that even if a permanent injunction were issued there would exist a substantial risk that the animal would be subjected to further cruelty if returned to the possession of the defendant, the court may terminate the defendant's ownership and right of possession of the animal and transfer ownership and right of possession to the plaintiff or other appropriate successor owner. For good cause shown, the court may also enjoin the defendant from acquiring new animals for a specified period of time or limit the number of animals the defendant may own or possess during a specified period of time.

(c) If the final judgment entitles the defendant to regain possession of the animal, the custodian shall return the animal, including taking any necessary steps to retrieve the animal from a foster care provider.

(d) The court shall consider and may provide for custody and care of the animal until the time to appeal expires or all appeals have been exhausted."

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"reasonable expenses" includes the cost of providing food, water, shelter, and care, including medical care, for at least 30 days.

(b) Upon receipt of a petition, the court shall set a hearing on the ~~petition.~~ petition to determine the need to care for and provide for the animal pending the disposition of the litigation. The hearing shall be conducted no less than 10 and no more than 15 business days after the petition is filed. The operator of the animal shelter shall mail written notice of the hearing and a copy of the petition to the defendant at the address contained in the criminal ~~charges.~~ charges or the complaint or summons by which a civil action was initiated. If the defendant is in a local detention facility at the time the petition is filed, the operator of the animal shelter shall also provide notice to the custodian of the detention facility.

(c) The court shall set the amount of funds necessary for 30 days' care after taking into consideration all of the facts and circumstances of the case, including the need to care for and provide for the animal pending the disposition of the litigation, the recommendation of the operator of the animal ~~shelter and~~shelter, the estimated cost of caring for and providing for the ~~dogs~~ animal, ~~as well as~~and the defendant's ability to pay. If the court determines that the defendant is unable to deposit funds, the court may consider issuing an order under subsection (f) of this section.

Any order for funds to be deposited pursuant to this section shall state that if the operator of the animal shelter files an affidavit with the clerk of superior court, at least two business days prior to the expiration of a 30-day period, stating that, to the best of the ~~shelter's~~ affiant's knowledge, the ~~criminal~~ case against the defendant has not yet been resolved, the order shall be automatically renewed every 30 days until the ~~criminal~~ case is resolved.

(d) If the court orders that funds be deposited, the amount of funds necessary for 30 days shall be posted with the clerk of superior court. The defendant shall also deposit the same amount with the clerk of superior court every 30 days thereafter until the ~~criminal charges are~~ litigation is resolved, unless the defendant requests a hearing no less than five business days prior to the expiration of a 30-day period. If the defendant fails to deposit the funds within five business days of the initial hearing, or five business days of the expiration of a 30-day period, the ~~dogs are~~ animal is forfeited by operation of law. If funds have been deposited in accordance with this section, the operator of the animal shelter may draw from the funds the actual costs incurred in caring for the ~~dogs.~~ animal.

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(f) Pursuant to subsection (c) of this section, the court may order a defendant to provide necessary food, water, shelter, and care, including any necessary medical care, for any ~~dogs that are~~ animal that is the basis of the charges or claims against the defendant without the removal of the ~~dogs~~ animal from the existing location and until the charges or claims against the defendant are adjudicated. If the court issues such an order, the court shall provide for an animal control officer or other law enforcement officer to make regular visits to the location to ensure that the ~~dogs are~~ animal is receiving necessary food, water, shelter, and care, including any necessary medical care, and to impound the ~~animals if they are~~ animal if it is not receiving those necessities."

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(b) A person who owns, possesses, or trains a dog with the intent that the dog be used in an exhibition featuring the ~~fighting or~~ baiting of that dog or the fighting of that dog with another dog or with another animal is guilty of a Class H felony.

(c) A person who participates as a spectator at an exhibition featuring the ~~fighting or~~ baiting of a dog or the fighting of a dog with another dog or with another animal is guilty of a Class H felony."

PART IV. EFFECTIVE DATE.

SECTION 4.1. This act becomes effective December 1, 2006, and applies to actions commenced on or after that date.

State of North Carolina
General Statutes
Commission

9001 Mail Service Center
RALEIGH, NORTH CAROLINA
27699-9001

MEMORANDUM
June 21, 2006

TO: Senate Judiciary II Committee
FROM: General Statutes Commission
RE: **House Bill 2098 (Protection of Animals)**

Part I of this bill amends two statutes in Article 1 of Chapter 19A of the General Statutes, which provides a civil remedy for animal cruelty.

Section 1.1 amends G.S. 19A-3 ("Preliminary injunction") to clarify several potential questions. It clarifies that a plaintiff in a civil action under Article 1 who obtains a preliminary injunction giving the plaintiff possession of an animal takes possession as custodian, not as an owner. It clarifies that a grant of temporary custody under this section includes authority for the custodian to provide medical care for the animal without the need for an additional court order and without the defendant's permission, although the amendment requires the custodian to consult or try to consult with the defendant beforehand. The "medical care" authorized by this section does not include euthanasia. The amendments specify that before having an animal euthanized, a custodian must obtain either the defendant's written consent or a court order that (i) finds that the animal is suffering due to a terminal illness or injury and (ii) authorizes euthanasia. The amendments also expressly permit the custodian to place the animal with a foster care provider, who is required to return the animal to the custodian on demand.

Section 1.2 amends G.S. 19A-4 ("Permanent injunction") to allow a court to include reimbursement for the costs of caring for an animal during the litigation as part of the costs awarded to a plaintiff who prevails. It also clarifies that (i) a court can enjoin a defendant from acquiring new animals or having more than a certain number of animals for a specified time period, and (ii) if the defendant prevails, the plaintiff must return the animal. The amendment also expressly allows a court to provide for custody and care of an animal pending any appeals.

Part II of this bill amends Article 6 of Chapter 19A, which requires the owner of dogs seized in connection with an arrest for dog fighting to deposit funds for the dogs' care if a county or municipal animal shelter takes custody of them pending litigation. The amendment expands the deposit requirement so that it also applies to any animal that is in the custody of a county or municipal animal shelter as the result of the owner's arrest under Article 47 of Chapter 14 of the General Statutes (animal cruelty) or G.S. 67-4.3 (owning a dangerous dog that attacked someone and caused more than $100 in damage) or the commencement of a civil action for animal cruelty brought by a county or municipality or its agent.

The House Committee on Agriculture amended the first sentence of G.S. 19A-70(b) to clarify that the hearing required in that subsection is to determine the need to provide for the animal during the litigation. The Committee made a similar amendment to G.S. 19A-70(c). The

Committee also amended the last sentence of G.S. 19A-70(e) to provide that the refund to a defendant who prevails is net of any draws from it pursuant to G.S. 19A-70(d).

Part III amends the dog fighting criminal statute, G.S. 14-362.2, to clarify that it applies to fights between dogs and other animals as well as fights between two or more dogs.

Part IV provides an effective date of December 1, 2006.

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	June 27, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 2000	Cert. of Merit/Civil Act./Engineer/Architect.	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, June 27, 2006, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 2000	Cert. of Merit/Civil Act./Engineer/Architect.	Senator Hartsell

Presentations

Other Business

Adjournment

Senate Judiciary II committee

Minutes

June 27, 2006

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II to order on June 27, 2006, with fifteen members present. Senator Hartsell introduced pages Molly Hassell, Melissa Bell, Ginny Hughes, Elizabeth Borden and Josh Snyder and thanked them for their assistance.

SB 2000 (Cert. of Merit/Civil Act./Engineer/Architect.) As this was Senator Hartsell's bill, he asked Senator Berger to chair the committee. Senator Berger then recognized Senator Hartsell to explain the bill. After an explanation, Senator Hartsell indicated that the bill would only be discussed and no vote would be taken at this meeting. Kathryn Sawyer, Executive Director, of the American Council of Engineering Companies of North Carolina was recognized to introduce Mr. Richard Wells, President/CEO of Trigon Engineering Consultants, Inc. and Mr. Stuart Thomas, of Professional Liability Agents Network, to speak in favor of the bill. Mr. David Crawford, representing the American Institute of Architects, also spoke in favor or the bill. Mr. Paul Wilms, representing the Homeowners Association and Mr. Paul Pulley, from the Academy of Trial Lawyers, spoke in opposition to the bill. Mr. Pete Powell, of the Office of the Courts, spoke indicating that the Office of the Courts was neutral in regard to the bill. Questions from Senators Allran, Apodaca, Dorsett, Atwater, Goodall, Bingham and Webster were answered by Senator Hartsell, Mr. Crawford, Mr. Thomas Mr. Wilms, Ms. Kory Goldsmith, Staff Attorney, Mr. Pulley, and Senator Berger.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

June 27, 2006
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
BRUCE THOMPSON	PARKER POE
R. Paul Wiggins	NCHBA
[illegible]	AOC
Richard C. Wells	ACEC/NC
Kathryn Sawyer	ACEC/NC
Paul Pulley	NCATA
David Crawford	AIA NC
Stuart Thomas	ACEC/NC
Jack Gorr	Womble
Doug Acom	NC Bar Assoc.
Chip Kellam	Nelson Mullins

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

June 27, 2006
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Ami Bthak	sen. Kinaird office
James Satterwhite	Intern: Sen. Kinnaird
Lisa Martin	NC Home Builders
Adam C. Keith	Sen. D. Berger - Intern
Angie Harris	Marpia Taylor
Len Hulf	KC/AV

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 2000

Short Title:	Cert. of Merit/Civil Act./Engineer/Architect.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

May 26, 2006

A BILL TO BE ENTITLED

AN ACT REQUIRING A CERTIFICATE OF MERIT ON CIVIL ACTIONS FILED AGAINST A PERSON OR FIRM PROVIDING ARCHITECTURE OR ENGINEERING SERVICES IN THIS STATE.

The General Assembly of North Carolina enacts:

SECTION 1. Subchapter VI of Chapter 1 of the General Statutes is amended by adding the following new Article to read:

"Article 12A.

"Certificate of Merit for Civil Actions Against Design Professionals.

"**§ 1-123.1. Definitions.**

The following definitions shall apply in this Article:

(1) Certificate of merit. – A certification from a third-party licensed professional engineer or licensed architect that a civil action filed against a design professional has merit.

(2) Design professional. – A professional engineer licensed pursuant to Chapter 89C of the General Statutes, an architect licensed pursuant to Chapter 83A of the General Statutes, or any firm in which the licensed engineer or architect practices, including a corporation, professional corporation, limited liability corporation, partnership, limited liability partnership, sole proprietorship, joint venture, or any other business entity.

(3) Practice of architecture. – The same as defined by G.S. 83A-1(7).

(4) Practice of engineering. – The same as defined by G.S. 89C-3(6).

"**§ 1-123.2. Certificate of merit for civil actions against design professionals.**

(a) In any civil action or arbitration proceeding for damages arising out of the provision of professional services performed by a design professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed professional engineer or licensed architect. The third-party licensed professional engineer or licensed architect shall be competent to testify and hold the same professional license and

practice in the same area of practice as the defendant design professional. The affidavit shall specifically state at least one negligent act, error, or omission claimed to exist and the factual basis for that claim. The third-party licensed professional engineer or licensed architect shall be licensed in this State and actively engaged in the practice of engineering or architecture respectively.

(b) The contemporaneous filing requirement of subsection (a) of this section shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing the action, and because of these time constraints, the plaintiff has alleged that an affidavit of a third-party licensed professional engineer or licensed architect could not be prepared. In these instances, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The court may, on motion, after hearing and for good cause, extend the time within which the affidavit is to be filed, as justice requires.

(c) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of the affidavit.

(d) The plaintiff's failure to file the affidavit in accordance with subsection (a) or (b) of this section shall result in a dismissal of the complaint against the defendant. In the court's discretion, the dismissal may be with prejudice.

(e) An order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.

(f) This section shall not be construed to extend any applicable period of limitation or repose.

(g) This section does not apply to any suit or action for the payment of fees arising out of the provision of professional services performed by a design professional."

SECTION 2. G.S. 1A-1, Rule 9, is amended by adding the following new subsection to read:

"(j1) Civil Actions Against Design Professionals. – Any complaint alleging damages arising out of the provision of professional services performed by a design professional, as defined by G.S. 1-123.1(2), shall be filed in accordance with Article 12A of Chapter 1 of the General Statutes."

SECTION 3. G.S. 89C-10 is amended by adding the following new subsection to read:

"(j) The Board shall have the power to adopt rules to discipline professional engineers licensed under this Chapter who certify a civil action that is without merit in violation of Article 12A of Chapter 1 of the General Statutes."

SECTION 4. G.S. 83A-6(a) is amended by adding the following new subdivision to read:

"(a) The Board shall have the power to adopt bylaws, rules, and standards of professional conduct to carry out the purposes of this Chapter, including, but not limited to:

...

(6) The disciplining of architects licensed under this Chapter who certify a civil action that is without merit in violation of Article 12A of Chapter 1 of the General Statutes."

SECTION 5. G.S. 89C-14(c) reads as rewritten:

"(c) The certification fee for a corporation is the amount set by the Board but shall not exceed one hundred dollars ($100.00). The fee shall accompany the application. The certification fee for a business firm is the same as the fee for a corporation. The fee for renewal of a certificate of licensure of a corporation is the amount set by the Board but shall not exceed ~~seventy-five dollars ($75.00).~~ninety-five dollars ($95.00). The fee for renewal of a certificate of licensure for a business firm is the same as the renewal fee for a corporation."

SECTION 6. G.S. 89C-17 reads as rewritten:

"**§ 89C-17. Expirations and renewals of certificates.**

Certificates for licensure of corporations and business firms that engage in the practice of engineering or land surveying shall expire on the last day of the month of June following their issuance or renewal and shall become invalid on that date unless renewed. All other certificates for licensure shall expire on the last day of the month of December next following their issuance or renewal, and shall become invalid on that date unless renewed. When necessary to protect the public health, safety, or welfare, the Board shall require any evidence necessary to establish the continuing competency of engineers and land surveyors as a condition of renewal of licenses. When the Board is satisfied as to the continuing competency of an applicant, it shall issue a renewal of the certificate upon payment by the applicant of a fee fixed by the Board but not to exceed ~~seventy-five dollars ($75.00).~~ninety-five dollars ($95.00). The secretary of the Board shall notify by mail every person licensed under this Chapter of the date of expiration of the certificate, the amount of the fee required for its renewal for one year, and any requirement as to evidence of continued competency. The notice shall be mailed at least one month in advance of the expiration date of the certificate. Renewal shall be effected at any time during the month immediately following the month of expiration, by payment to the secretary of the Board of a renewal fee, as determined by the Board, which shall not exceed ~~seventy-five dollars ($75.00).~~ninety-five dollars ($95.00). Failure on the part of any licensee to renew the certificate annually in the month immediately following the month of expiration, as required above, shall deprive the licensee of the right to practice until reinstatement of the license. The license may be reinstated at anytime during the first 12 months immediately following the date the license became invalid by payment of a reinstatement fee of one hundred dollars ($100.00) in addition to the established renewal fee. Failure of a licensee to reinstate the license during the first 12 months immediately following the date the license became invalid shall require the individual, prior to resuming practice in North Carolina, to submit an application on the prescribed form, and to meet all other requirements for licensure as set forth in Chapter 89C. The secretary of the Board is instructed to remove from the official roster of engineers and land surveyors the names of all licensees who have not effected their renewal by the first day of the month immediately following the renewal period. The Board may adopt rules to provide for renewals in distress or

hardship cases due to military service, prolonged illness, or prolonged absence from the State, where the applicant for renewal demonstrates to the Board that the applicant has maintained active knowledge and professional status as an engineer or land surveyor, as the case may be. It shall be the responsibility of each licensee to inform the Board promptly concerning change in address. A licensee may request and be granted inactive status. No inactive licensee may practice in this State unless otherwise exempted in this Chapter. A licensee granted inactive status shall pay annual renewal fees but shall not be subject to annual continuing professional competency requirements. A licensee granted inactive status may return to active status by meeting all requirements of the Board, including demonstration of continuing professional competency as a condition of reinstatement."

SECTION 7. This act is effective when it becomes law.

SENATE BILL 2000:
Cert. of Merit/Civil Act./Engineer/Architect

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	June 26, 2006
Introduced by:	Sen. Hartsell	**Summary by:**	Kory Goldsmith
Version:	First Edition		Committee Counsel

SUMMARY: SB2000 would require that a person who files a civil lawsuit for negligence against a professional engineer or an architect must also file with the complaint an affidavit stating that the civil action has merit and stating at least one negligent act, error or omission by the defendant and the factual basis for the claim. Failure to file the affidavit would be grounds for dismissal of the action.

The bill also increases the maximum amount the boards that license professional engineers and architects may charge for renewal fees.

The act is effective when it becomes law.

CURRENT LAW: Currently, there are no special rules regarding the procedural requirements for filing a malpractice action against either professional engineers or architects. However, in 1995, the General Assembly did adopt laws that protect architects and professional engineers from liability if they voluntarily provide professional services at the scene of a declared disaster or emergency at the request of public officials. G.S. 89C-19.1 and G.S. 83C-13.1. This legislation, as it relates to professional engineers, came as a recommendation of the Legislative Research Commission, Immunity from Negligence study committee.

Rule 9(j) of the North Carolina Rules of Civil Procedure do require that any complaint alleging medical malpractice by a health care provider will be dismissed unless the pleading specifically asserts that the medical care has been reviewed by a person who will qualify as an expert witness and that person is willing to testify that the medical care did not comply with the applicable standard of care. This requirement does not apply if the pleading alleges negligence under the doctrine of *res ipsa loquitar*, i.e., the facts speak for themselves.

BILL ANALYSIS:

Section 1 creates a new Article 12A in Chapter 1 of the General Statutes. It would require that a plaintiff who files a civil action for negligence against an architect or professional engineer licensed under North Carolina law ("design professional")[1] must also file an affidavit by a third-party licensed design professional. The affidavit would be known as a certificate of merit. The third-party licensed design professional must be competent to testify, must hold the same professional license in the same are of practice as the defendant design professional, must be licensed in this State and actively engaged in the practice of engineering or architecture, respectively. The certificate of merit must specifically state at least one negligent act, error, or omission claimed to exist and the factual basis for that claim.

The requirement to file the affidavit with the complaint does not apply if the statute of limitations will expire within 10 days of the date of filing the complaint and the plaintiff alleges that because of the time constraints, the affidavit of the third-party licensed design professional could not be prepared. In these situations, the plaintiff has 30 days after filing the complaint to supplement the pleadings. The

[1] The definition of "design professional" includes persons or firms that are licensed under Chapter 89C (professional engineers) or Chapter 83A (architects) of the General Statutes.

defendant does not have to answer the complaint until 30 days after the filing of the certificate of merit. The failure of a plaintiff to file the certificate of merit shall result in the dismissal of the complaint. Any order granting or denying a motion for dismissal would be immediately appealable as an interlocutory order.

Section 2 amends Rule 9 of the Rules of Civil Procedure to provide that any complaint alleging damages arising out of the provision of professional services performed by a design professional must be filed according to the requirements of Article 12A of Chapter 1 of the General Statutes.

Sections 3 and 4 authorize the licensing boards for architects and professional engineers to discipline individuals who certify a civil action that is without merit in violation of Article 12A of Chapter 1 of the General Statutes.

Sections 5 and 6 increases, from $75 to $95, the maximum renewal fee the licensure boards for architects and professional engineers.

AIA North Carolina

ACEC
American Council of Engineering Companies of North Carolina

Professional Engineers of North Carolina
A state society of the National Society of Professional Engineers

Certificate of Merit Legislation
Clearing the Judicial System of Meritless Claims

An analysis of claims for the past 5 years against construction-related professional firms insured by two leading carriers in North Carolina illustrates the cost and effort spent by firms in defending themselves against meritless claims. (Figure 1). These findings indicate that the inefficiencies of the judicial system diminish the ability of firms to effectively provide design services to protect public heath, safety, and welfare.

Time Period 2001-2005
Total Claims Cost in North Carolina - $50 Million

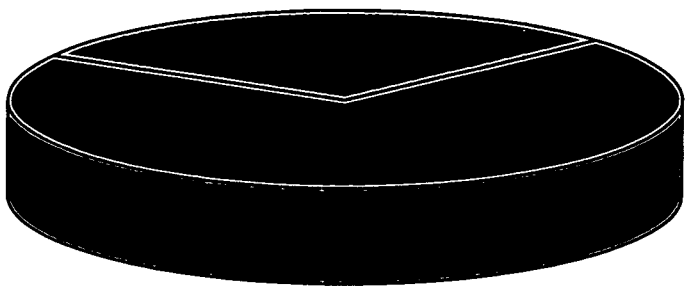


Figure 1

Most claims are meritless leaving design professionals to defend their professional practice against unfounded allegations of negligence. These claims appear to result in:

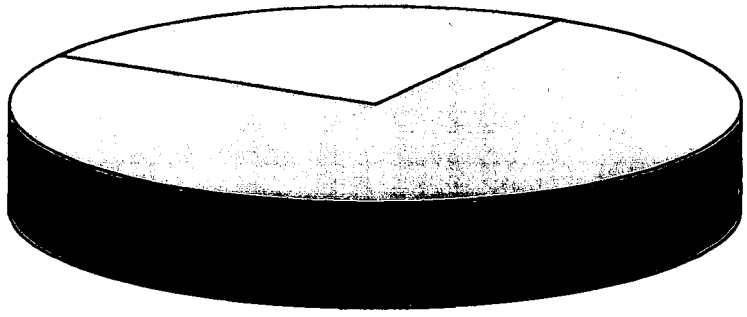
- Unnecessary judicial administrative costs;
- Defense costs to those design professionals alleged to be negligent – costs that must be covered by increasing fees to all public and private clients;
- A loss of productivity because of the time that such claims consume;
- Groundless damage to the reputation of the firm and its profession; and
- Wasted effort by attorneys representing plaintiffs.

A Certificate of Merit system would obligate the person initiating a civil claim for negligence or a violation of the Standard of Care to file a "Certificate of Merit" by a North Carolina registered expert qualified in that specific field of practice. This would help prevent parities that were not negligent from being named as a defendant. *

The economic implications for businesses in North Carolina are significant. Without realistic reforms, the cost of Errors and Omissions insurance, including larger deductibles, will increase tremendously over the next several years. Most of these costs will be passed along to the design professional's client base.

Conversely, with a Certificate of Merit (COM) law in place, North Carolina design professionals would likely see a ***reduction*** in their premiums, assuming only a 50% success rate in eliminating meritless claims (see Figure 2).

Time Period 2006-2010 - Next 5 Years
E & O Premium Costs



- With 50% Success in the Reduction of Meritless Claims, Premium Reduction - $25 Million
- Total Premiums for North Carolina Design Professionals - $50 Million with COM

Figure 2

North Carolina needs to be a good place to do business, and Certificate of Merit is needed to achieve this goal.

** This legislation would not limit the ability to file a claim for negligence or limit the Standard of Care.*

ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES
of North Carolina

Certificate of Merit and Other Liability Reform Initiatives

American Council of Engineering Companies of North Carolina (ACEC-NC)
Spring 2006

The cost of defense and the possibility of large dollar awards for frivolous civil actions are spiraling out of control. In order to keep North Carolina businesses viable and to create an environment conducive to innovation in the engineering profession, ACEC of North Carolina supports legislative initiatives that help control the economic impact of civil actions.

ACEC of North Carolina strongly supports the measures put forward by Senate Bill 2000, sponsored by Senator Fletcher Hartsell. SB 2000, if enacted, would obligate the person initiating a civil claim against and engineer or architect in North Carolina to file a "Certificate of Merit" signed by a design professional registered in North Carolina to perform work in the same area of expertise as the defendant. Further, the Bill would allow the respective licensure boards governing design professionals in North Carolina to adopt rules to penalize any design professional who signs off on a claim that is then deemed by the Court to lack merit. The end result, we believe, would be fewer frivolous claims being filed, and those claims that *are* filed, complete with a Certificate of Merit, would likely proceed faster to settlement due to the weight of another professional staking their license on the merits of the case. To-date, 12 states have enacted similar Certificate of Merit laws.

This initiative is good for the residents of North Carolina, since it will help maintain the well being and sustainability of the design community that results in the following for their clients:

1. Professional fees at reasonable level not inflated by insurance premiums
2. Continued insurability of the design community, which is a safeguard to clients & citizens
3. An environment that fosters innovation, which all clients should be able to expect from a design professional

ACEC of North Carolina also supports efforts to reform North Carolina's current system of Joint and Several Liability. Sometimes referred to as the "deep pocket" approach, this system allows that anyone involved with a large project can be named in a civil suit in order to obtaining the largest dollar award possible. Since engineering firms are often the best insured or financially strong, even when an engineering firm has only been responsible for a small portion of the work, it can end up paying the lion's share of the award. ACEC of North Carolina would welcome the opportunity to participate in future discussions on this subject in order to encourage the adoption of a system that would make each defendant in a claim "severally" liable, or only required to pay its proportionate share of the plaintiff's loss.

Questions on these or other issues related to the business interests of the engineering profession? Please feel free to contact Kathryn Sawyer, ACEC/NC Executive Director, at 919-781-7934 or via email at ksawyer@acecnc.org.

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	June 29, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 2060	Victims' Compensation Changes.	Representative Kiser Representative Haire

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, June 29, 2006, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

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HB 2060	Victims' Compensation Changes.	Representative Kiser Representative Haire

Presentations

Other Business

Adjournment

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

HOUSE BILL 2060*

Short Title:	Victims' Compensation Changes.	(Public)
Sponsors:	Representatives Haire, Kiser (Primary Sponsors); and Daughtridge.	
Referred to:	Judiciary IV.	

May 18, 2006

A BILL TO BE ENTITLED

AN ACT TO MAKE CHANGES TO THE LAWS CONCERNING VICTIMS' COMPENSATION, AS RECOMMENDED BY THE JOINT LEGISLATIVE CORRECTIONS, CRIME CONTROL, AND JUVENILE JUSTICE OVERSIGHT COMMITTEE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15B-2(1) reads as rewritten:

"(1) "Allowable expense" means reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation, medically-related property, and other remedial treatment and care.

Allowable expense includes a total charge not in excess of ~~three thousand five hundred dollars ($3,500)~~ five thousand dollars ($5,000) for expenses related to funeral, cremation, and burial, including transportation of a body, but excluding expenses for flowers, gravestone, and other items not directly related to the funeral service.

Allowable expense for medical care, counseling, rehabilitation, medically-related property, and other remedial treatment and care of a victim shall be limited to sixty-six and two-thirds percent (66 2/3%) of the amount usually charged by the provider for the treatment or care. If the provider is one that accepts Medicare, Medicaid, or similar government funding, then the provider shall accept the compensation paid under such program as allowable expense pursuant to this subdivision. By accepting the compensation paid as allowable expense pursuant to this subdivision, the provider agrees that the compensation is payment in full for the treatment or care and shall not charge or otherwise hold a claimant financially responsible for the cost of services in addition to the amount of allowable expense."

SECTION 2. G.S. 15B-4(a) reads as rewritten:

"(a) Subject to the limitations in G.S. 15B-22, compensation for criminally injurious conduct shall be awarded to a claimant if substantial evidence establishes that the requirements for an award have been met. Compensation shall only be paid for economic loss and not for noneconomic detriment or loss. The Commission shall follow the rules of liability applicable to civil tort law in North Carolina."

SECTION 3. G.S. 15B-11(c) reads as rewritten:

"(c) A claim may be denied, an award of compensation may be reduced, and a claim that has already been decided may be reconsidered upon finding that the claimant or victim, without good cause, has not fully cooperated with appropriate law enforcement agencies or in the prosecution of criminal cases with regard to the criminally injurious conduct that is the basis for the award."

SECTION 4. This act becomes effective July 1, 2006, and applies to claims filed on or after that date.

Principal Clerk ____
Reading Clerk ____

CORRECTED NOTICE – SB 1833 ADDED

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Friday	July 7, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 2060	Victims' Compensation Changes.	Representative Kiser Representative Haire
SB 1833	Military Funeral/Unlawful Protest.	Senator Jacumin

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Friday, July 7, 2006, 10:00 AM
1124 LB

AGENDA

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Bills

HB 2060	Victims' Compensation Changes.	Representative Kiser Representative Haire
SB 1833	Military Funeral/Unlawful Protest.	Senator Jacumin

Presentations

Other Business

Adjournment

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Friday	July 7, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 2060	Victims' Compensation Changes.	Representative Kiser Representative Haire

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Friday, July 7, 2006, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

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Bills

HB 2060	Victims' Compensation Changes.	Representative Kiser Representative Haire

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

July 7, 2006

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on July 7, 2006, with sixteen members present. Senator Hartsell introduced pages Meredith Potter, Annsley Stroup, Caroline Fraley, Caitlin Phillips and Lindsay Fulcher and thanked them for their service.

HB 2060 (Victims' Compensation Changes.) Senator Hartsell asked for a motion to accept the Proposed Committee Substitute for purposes of discussion. Senator Bingham so moved, all voted and the motion carried. As the House was not in Session and Senator Kinnaird sponsored the Senate companion bill, she was recognized to explain the bill. Ms. Kory Goldsmith, Staff Attorney, added additional explanation. Ms. Janice Carmichael, representing Victims' Compensation, spoke in favor of the bill. Questions from Senators Bingham, Goodall, Allran, Snow and Swindell, were answered by Senator Kinnaird, Ms. Carmichael, Ms. Goldsmith, Senator Hartsell, Senator Snow and Denise Thomas from Fiscal Research. Senator Bingham moved for a favorable report, unfavorable to the original bill but favorable to the committee substitute. All voted and the motion carried.

SB 1833 (Military Funeral/Unlawful Protest.) Senator Hartsell recognized Senator Jacumin to explain the bill. Questions from Senators Bingham, Goodall, Kinnaird and Dalton were answered by Senator Jacumin and Ms. Kory Goldsmith, Staff Attorney. Paula Wolfe, representing the ACLU, spoke in opposition to the bill. Senator Bland moved for a favorable report. All voted and the motion passed. As the bill needed a fiscal report, Senator Hartsell noted that the Committee would hear the bill again at the next meeting.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — July 7, 2006
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jamie Carmichael	CCPS
J Bottum	CCPS
CASANDRA WHITE	CCPS
Jon Carr	NC Funeral Directors Assn.
Jami Fitzgerald	N.C. Family Policy Council
Lauren Rogers	N.C. Family Policy Council
Bryan Ball	Fiscal Research
Paula A Wolf	ACLU-NC
Carly Wyckoff	GOV'S office
	Gov's office

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

July 7, 2006
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jeff Mixon	civitas
	RANC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

HOUSE BILL 2060*

Short Title:	Victims' Compensation Changes.	(Public)
Sponsors:	Representatives Haire, Kiser (Primary Sponsors); and Daughtridge.	
Referred to:	Judiciary IV.	

May 18, 2006

A BILL TO BE ENTITLED

AN ACT TO MAKE CHANGES TO THE LAWS CONCERNING VICTIMS' COMPENSATION, AS RECOMMENDED BY THE JOINT LEGISLATIVE CORRECTIONS, CRIME CONTROL, AND JUVENILE JUSTICE OVERSIGHT COMMITTEE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15B-2(1) reads as rewritten:

"(1) "Allowable expense" means reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation, medically-related property, and other remedial treatment and care.

Allowable expense includes a total charge not in excess of ~~three thousand five hundred dollars ($3,500)~~ five thousand dollars ($5,000) for expenses related to funeral, cremation, and burial, including transportation of a body, but excluding expenses for flowers, gravestone, and other items not directly related to the funeral service.

Allowable expense for medical care, counseling, rehabilitation, medically-related property, and other remedial treatment and care of a victim shall be limited to sixty-six and two-thirds percent (66 2/3%) of the amount usually charged by the provider for the treatment or care. If the provider is one that accepts Medicare, Medicaid, or similar government funding, then the provider shall accept the compensation paid under such program as allowable expense pursuant to this subdivision. By accepting the compensation paid as allowable expense pursuant to this subdivision, the provider agrees that the compensation is payment in full for the treatment or care and shall not charge or otherwise hold a claimant financially responsible for the cost of services in addition to the amount of allowable expense."

SECTION 2. G.S. 15B-4(a) reads as rewritten:

"(a) Subject to the limitations in G.S. 15B-22, compensation for criminally injurious conduct shall be awarded to a claimant if substantial evidence establishes that the requirements for an award have been met. Compensation shall only be paid for economic loss and not for noneconomic detriment or loss. The Commission shall follow the rules of liability applicable to civil tort law in North Carolina."

SECTION 3. G.S. 15B-11(c) reads as rewritten:

"(c) A claim may be denied, an award of compensation may be reduced, and a claim that has already been decided may be reconsidered upon finding that the claimant or victim, without good cause, has not fully cooperated with appropriate law enforcement agencies or in the prosecution of criminal cases with regard to the criminally injurious conduct that is the basis for the award."

SECTION 4. This act becomes effective July 1, 2006, and applies to claims filed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 2060*
PROPOSED SENATE COMMITTEE SUBSTITUTE H2060-CSRC-115 [v.2]

7/6/2006 7:11:08 PM

Short Title: Victims' Compensation Changes. (Public)

Sponsors:

Referred to:

May 18, 2006

A BILL TO BE ENTITLED

AN ACT TO MAKE CHANGES TO THE LAWS CONCERNING VICTIMS' COMPENSATION, AS RECOMMENDED BY THE JOINT LEGISLATIVE CORRECTIONS, CRIME CONTROL, AND JUVENILE JUSTICE OVERSIGHT COMMITTEE, AND TO MAKE OTHER CHANGES TO THE LAWS CONCERNING VICTIMS' COMPENSATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15B-2(1) reads as rewritten:

"(1) "Allowable expense" means reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation, medically-related property, and other remedial treatment and care.

Allowable expense includes a total charge not in excess of ~~three thousand five hundred dollars ($3,500)~~ five thousand dollars ($5,000) for expenses related to funeral, cremation, and burial, including transportation of a body, but excluding expenses for flowers, gravestone, and other items not directly related to the funeral service.

Allowable expense for medical care, counseling, rehabilitation, medically-related property, and other remedial treatment and care of a victim shall be limited to sixty-six and two-thirds percent (66 2/3%) of the amount usually charged by the provider for the treatment or care. By accepting the compensation paid as allowable expense pursuant to this subdivision, the provider agrees that the compensation is payment in full for the treatment or care and shall not charge or otherwise hold a claimant financially responsible for the cost of services in addition to the amount of allowable expense."

SECTION 2. G.S. 15B-2(3) reads as rewritten:

"(3) "Collateral source" means a source of benefits or advantages for economic loss otherwise compensable that the victim or claimant has received or that is readily available to ~~him~~ the victim or the claimant from any of the following sources:

a. The ~~offender;~~offender.

b. The government of the United States or any of its agencies, a state or any of its political subdivisions, or an instrumentality of two or more ~~states;~~states.

c. Social ~~security, medicare, and medicaid;~~Security, Medicare, or Medicaid.

d. State-required, temporary, nonoccupational disability ~~insurance;~~insurance.

e. Worker's ~~compensation;~~compensation.

f. Wage continuation programs of any ~~employer;~~employer.

g. Proceeds of a contract of insurance payable to the victim for loss that ~~he~~ the victim sustained because of the criminally injurious ~~conduct;~~conduct.

h. A contract providing prepaid hospital and other health care services, or benefits for disability.

i. A contract of insurance that will pay for expenses directly related to a funeral, cremation, and burial, including transportation of a body."

SECTION 3. G.S. 15B-4(a) reads as rewritten:

"(a) Subject to the limitations in G.S. 15B-22, compensation for criminally injurious conduct shall be awarded to a claimant if substantial evidence establishes that the requirements for an award have been met. Compensation shall only be paid for economic loss and not for noneconomic ~~loss.~~ detriment. The Commission shall follow the rules of liability applicable to civil tort law in North Carolina."

SECTION 4. G.S. 15B-11(c) reads as rewritten:

"(c) A claim may be denied, an award of compensation may be reduced, and a claim that has already been decided may be reconsidered upon finding that the claimant or victim, without good cause, has not fully cooperated with appropriate law enforcement agencies or in the prosecution of criminal cases with regard to the criminally injurious conduct that is the basis for the award."

SECTION 5. G.S. 15B-11(d) reads as rewritten:

"(d) After reaching a decision to approve an award of compensation, but before notifying the claimant, the Director shall require the claimant to submit current information as to collateral sources on forms prescribed by the Commission.

An award that has been approved shall nevertheless be denied or reduced to the extent that the economic loss upon which the claim is based is or will be recouped from a collateral source. If an award is reduced or a claim is denied because of the expected recoupment of all or part of the economic loss of the claimant from a collateral source, the amount of the award or the denial of the claim shall be conditioned upon the claimant's economic loss being recouped by the collateral source. If it is thereafter

determined that the claimant will not receive all or part of the expected recoupment, the claim shall be reopened and an award shall be approved in an amount equal to the amount of expected recoupment that it is determined the claimant will not receive from the collateral source, subject to the limitations set forth in subsections (f) and (g). ~~The existence of a collateral source that would pay expenses directly related to a funeral, cremation, and burial, including transportation of a body, shall not constitute grounds for the denial or reduction of an award of compensation.~~"

SECTION 6. This act becomes effective July 1, 2006, and applies to claims filed on or after that date.

HOUSE BILL 2060:
Victims' Compensation Changes

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	July 6, 2006
Introduced by:	Reps. Haire, Kiser	**Summary by:**	Kory Goldsmith
Version:	PCS to First Edition H2060-CSRC-115		Committee Counsel

SUMMARY: House Bill 2060 would make several changes to the laws governing the State's Victims' Compensation program. The changes were recommended by the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee.

BILL ANALYSIS:

Section 1. – Amends G.S.15B-2 to increase from $3,500 to $5,000 the total allowable expenses related to funerals.

Section 2. – Amends the definition of "collateral source" to include a contract or insurance that will pay for funeral expenses, including transportation of the body.

Section 3. - Amends G.S. 15B-4 to add language clarifying that compensation under the victims' compensation program will not be paid for "noneconomic detriment". The term, which is defined in G.S. 15B-2(11), includes pain, suffering, inconvenience, physical impairment, and other non-pecuniary damage.

Section 4. – Amends G.S. 15B-11, to add language giving the victims' compensation program the discretion to deny, reduce, or reconsider an award where the victim, without good cause, fails to cooperate with the prosecution of a criminal case arising out of the criminally injurious conduct that is the basis of the award.

Section 5: – Amends G.S. 15B-11(d) regarding adjustments to awards to claimants. Under current law, the Director must reduce or deny an award to the extent the loss is recouped from a collateral source. However, this requirement does not apply to a collateral source that would pay expenses directly related to a funeral, cremation, and burial, including transportation of the body. The PCS to HB2080 deletes this language. This will result in awards being reduced or denied to the extent the claimant is able to recoup the costs of a funeral from insurance or a contract.

EFFECTIVE DATE: The bill would become effective July 1, 2006, and apply to victims' compensation claims filed on or after that date.

Jennifer McGinnis, counsel to House Judiciary VI, substantially contributed to this summary.

H2060e1-SMRC-CSRC-115

GENERAL ASSEMBLY OF NORTH CAROLINA
Session 2005

FISCAL ANALYSIS MEMORANDUM

[This confidential fiscal memorandum is a fiscal analysis of a draft bill, amendment, committee substitute, or conference committee report that has not been formally introduced or adopted on the chamber floor or in committee. This is not an official fiscal note. If upon introduction of the bill you determine that a formal fiscal note is needed, please make a fiscal note request to the Fiscal Research Division, and one will be provided under the rules of the House and the Senate.]

DATE: July 6, 2006

TO: Rep. Haire, Rep. Kiser, and Sen. Kinnaird

FROM: Denise Thomas
Fiscal Research Division

RE: House Bill 2060 (H2060-CSRC-115 [v.1])

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10	FY 2010-11
REVENUES:					
EXPENDITURES:	**$868,500**	**$868,500**	**$868,500**	**$868,500**	**$868,500**
POSITIONS (cumulative):					

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Crime Control and Public Safety; Victim Compensation Services Division

EFFECTIVE DATE: Applies to all claims filed on or after July 1, 2006.

BILL SUMMARY: Makes changes to the victims' compensation statutes as recommended by the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee. The changes include increasing the maximum allowable funeral expense from $3,500 to $5,000. Amends definition of "collateral source" to include insurance coverage that pays for burial, funerals, cremation, and transportation of a body. Amends statute to allow the consideration of burial policies, life insurance, or other collateral sources when determining the amount of compensation to be awarded for funeral claims. Adds clarifying language to limit compensation

payments to economic loss only. Adds clarifying language to indicate that the Victims' Compensation Section has discretion to deny, reduce, or reconsider an award where the victim fails to cooperate with the prosecution of a criminal case arising out of the criminally injurious conduct that is the subject of the award.

ASSUMPTIONS AND METHODOLOGY: The Crime Victims' Compensation Program is administered by the Victims' Compensation Services (VCS) Division within the Department of Crime Control and Public Safety. The program pays innocent persons up to $30,000 to cover medical costs, lost income, and other costs incurred as a result of being a victim of a crime. If the victim dies as a result of the crime, an additional amount up to $3,500 may be paid to survivors for funeral expenses. Victims' compensation payments are granted only after all other resources available to the victim (insurance, Medicaid, Worker's Compensation, court-ordered restitution) have been exhausted. Funding for victims' compensation comes from three sources: a recurring general fund appropriation of $4.5 million, federal block grant funds, and receipts from the Department of Correction's Prison Enterprise Fund. In FY 2005-06, the amount budgeted from these three sources to pay victims' compensation claims is $6,606,492. For the past five years, increases in both the number of claims and the amounts requested have resulted in a large backlog of approved but unpaid claims at the end of each year. The backlogged claims are then carried forward and paid from the next year's budget. As a result, the amount available to pay new claims in the following year is insufficient. For example, from the $6.6 million budgeted for FY05-06, $1.7 million was used to pay approved, outstanding claims from the prior fiscal year.

Section 1 increases the maximum compensation for funeral expenses from $3,500 to $5,000. The table below shows the number of claims and the amount of funeral compensation payments for the past five years. Note that according to VCS staff, the annual number of funeral claims reported in the table is less than the actual number of funeral compensation payments. When a claim is first submitted, the victim may be alive and VCS will classify the case as a medical claim. However, subsequent to establishing the case in the VCS system, the victim may die as a result of the injuries received during the crime. In such cases, VCS does not reclassify the original claim as a homicide nor will it enter the case into the system a second time as a funeral claim. However, VCS would provide funeral compensation to the victim's survivors. For example, the table shows that there were 519 funeral claims in FY 2004-05. However, in addition to that number, VCS paid funeral compensation for 45 DUI and 15 domestic violence victims who later died from their injuries, for a total of 579 payments. While these 60 cases are not included in the 519 figure, the payments are included in the $2,203,117 total.

FISCAL YEAR	# FUNERAL CLAIMS	$ PAID FOR FUNERAL COMPENSATION
2000-01	298	$1,217,722
2001-02	336	$1,448,989
2002-03	328	$1,559,757
2003-04	388	$1,758,946
2004-05	519	$2,023,117

At a minimum, assuming no change in the annual number of funeral compensation payments, the proposal would increase victims' compensation funeral costs by $868,500 (579 x $1,500) in FY 2006-07 and future years. However, as the table indicates, there have been significant annual increases in the number of funeral payments. If this trend continues, the fiscal impact would be much higher. Because the victims' compensation program is not fully funded, the impact of the proposed bill would be to increase the backlog of approved unpaid claims that must be carried forward to be paid from the following year's budget.

Section 2 amends the definition of "collateral source" to include contracts or insurance that pays for the cost of the funeral, burial or cremation.

Section 3 adds statutory language clarifying that compensation shall not be paid for "non-economic detriment" as is defined in G.S. 15B-2(11).

Section 4 adds language to give VCS the discretion to deny, reduce or reconsider an award where the victim fails to cooperate with the prosecution of a criminal case arising out of the criminally injurious conduct that is the subject of the award.

The fiscal impact of the Sections 3 and 4 is indeterminate; however, they would appear to have minimal impact on the number of future claims submitted or the amount of compensation to be paid.

Under the existing statute, for funeral claims only, the existence of a collateral source cannot constitute grounds for reducing or denying an award for funeral compensation. Section 5 requires that collateral funding sources be considered when determining the amount of compensation to award for funeral claims. If the victim had life insurance, burial policies, or similar types of coverage for funeral expenses, the program can reduce or deny a compensation payment. There is no available data to determine the number of claims that would be affected by this change. Therefore, Fiscal Research is unable to estimate the impact of Sections 2 and 5. However, VCS staff report that such collateral sources existed in only a small percentage of claims for which funeral compensation payments were made in the past.

SOURCES OF DATA: Department of Crime Control and Public Safety, Victims' Compensation Services Section

TECHNICAL CONSIDERATIONS: None

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 1833

Short Title:	Military Funeral/Unlawful Protest.	(Public)
Sponsors:	Senators Jacumin; Albertson, Allran, Apodaca, Atwater, Berger of Rockingham, Brown, Cowell, Dorsett, Goodall, Hagan, Hartsell, Hoyle, Hunt, Lucas, Malone, Nesbitt, Pittenger, Presnell, Purcell, Smith, Soles, Tillman, Webster, and Weinstein.	
Referred to:	Rules and Operations of the Senate.	

May 24, 2006

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT DISORDERLY CONDUCT AT A MILITARY FUNERAL OR MEMORIAL SERVICE.

The General Assembly of North Carolina enacts:

SECTION 1. Article 35 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-277.5. Prohibit disorderly conduct at military funeral or memorial service.**

(a) It is unlawful for a person to do any of the following within 300 feet of the building or other location where a military funeral or memorial service is being conducted, or within 300 hundred feet of a military funeral procession or burial:

(1) Make a loud and raucous noise that causes unreasonable distress to the persons attending the funeral or memorial service, or participating in the funeral procession.

(2) Direct abusive epithets or make any threatening gesture that the person knows or reasonably should know is likely to provoke a violent reaction by another.

(3) Disturb or disrupt the funeral, memorial service, funeral procession, or burial by conduct intended to disturb or disrupt the funeral, memorial service, funeral procession, or burial.

(b) This section applies to conduct within one hour preceding, during, and within one hour after a military funeral, memorial service, funeral procession, or burial. A person who commits a violation of this section is guilty of:

(1) A Class 2 misdemeanor for a first offense.

(2) A Class 1 misdemeanor for a second offense.

(3) A Class I felony for a third or subsequent offense."

SECTION 2. This act becomes effective December 1, 2006, and applies to offenses committed on or after that date.

SENATE BILL 1833:
Military Funeral/Unlawful Protest

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	July 6, 2006
Introduced by:	Sen. Jacumin	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	First Edition		

SUMMARY: SB 1833 would make it unlawful to engage in certain conduct within 300 feet of a military funeral, military memorial service, military funeral procession or military burial. The conduct is prohibited during, one hour preceding and one hour following the funeral, memorial service, funeral procession, or burial. The first violation would be a Class 2 misdemeanor, a second offense would be a Class 1 misdemeanor, and a third or subsequent offense would be a Class I felony.

The act would become effective December 1, 2006, and apply to offenses committed on or after that date.

CURRENT LAW: G.S. 14-288.4 prohibits disorderly conduct under any of the following circumstances: by fighting; by abusive language provoking retaliation; by seizing or blocking a school building; by disrupting students; or by disrupting a religious service or assembly. A person who willfully engages in disorderly conduct is guilty of a Class 2 misdemeanor.[1]

The U.S. Congress recently passed legislation (the "Respect for America's Fallen Heroes Act") that prohibits the following:

- A demonstration on the property of a cemetery under the control of the Nation Cemetery Administration or on the property of Arlington National Cemetery unless the demonstration has been approved the cemetery director; or
- With respect to the same cemetery, a demonstration during the period beginning 60 minutes before and ending 60 minutes after a funeral, memorial service, or ceremony, any part of which demonstration:

  1. takes place within 150 feet of a road, pathway or other route of ingress to or egress from the cemetery; and includes any individual willfully making any noise or diversion that disturbs or tends to disturb the peace or good order of the service or ceremony; or

  2. Is within 300 feet of the cemetery and impedes the access to or egress from the cemetery.

The Act defines a demonstration as any of the following:

- Picketing or similar conduct.
- Oration, speech, use of sound amplification equipment, or similar conduct that is not part of a funeral service.
- The display of any placard, banner, flag, or similar devise, unless the display is part of a funeral service.

[1] The presumptive sentence for a Class 2 misdemeanor for a person with no prior convictions is 1-30 days of community punishment.

- The distribution of any handbill, pamphlet, leaflet, or other written or printed matter other than a program distributed as part of a funeral service.

The penalty for violating the Act is a fine, imprisonment for not more than one year, or both.

There are four cemeteries in North Carolina under the control of the Nation Cemetery Administration.

BILL ANALYSIS: SB 1833 amends Chapter 14 of the General Statutes by creating a new offense to prohibit disorderly conduct at military funerals or memorial services. It would make it unlawful for a person to engage in certain conduct within 300 feet of the building or other location where a military funeral or memorial service is being conducted, or within 300 feet of a military funeral procession or burial.

The type of conduct that would be prohibited includes:

- Making loud and raucous noise that causes unreasonable distress to the persons attending the funeral or memorial services or participating in the funeral procession.
- Directing abusive epithets or making any threatening gesture that the person knows or reasonably should know is likely to provoke a violent reaction by another.
- Disturbing or disrupting the funeral, memorial service, funeral process or burial by conduct intended to disturb or disrupt the funeral service.

The prohibition extends to conduct engaged in 1 hour before, during, and up to 1 hour following the service, procession, or burial. The first violation would be a Class 2 misdemeanor.[2] A second violation would be Class 1 misdemeanor.[3] A third violation would be a Class I felony.[4]

BACKGROUND: According to information provided by NCSL, as of May 16, 2006, 31 states have introduced legislation regarding military funeral protests. Of those, Georgia, Indiana, Iowa, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Virginia, and Wisconsin have enacted laws related to this issue. SB1833 is modeled after the Iowa law. The laws are in response to demonstrations led by Fred Phelps, the pastor of Westboro Baptist Church in Topeka, Kansas. Mr. Phelps and members of his family have picketed and heckled military families at funerals. They say the soldiers are fighting for an army that represents a country that accepts homosexuality.

CONSTITUTIONAL CONSIDERATIONS: At least two constitutional issues are raised by the legislation; restrictions on speech and whether the statute may be void for vagueness.[5]

First Amendment considerations: Communication of political, economic, social, and other views is not accomplished solely by face-to-face speech or communications through various media. There is also "expressive conduct," which includes picketing, patrolling, and marching, distribution of leaflets and pamphlets and addresses to publicly assembled audiences, door-to-door solicitation and many forms of "sit-ins." Because all these ways of expressing oneself involve conduct--action--rather than mere speech, they are more subject to regulation and restriction than is simple speech. However, the degree that these

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[2] The presumptive sentence for a Class 2 misdemeanor for a person with no prior convictions is 1-30 days of community punishment.

[3] The presumptive sentence for a Class 1 misdemeanor for a person with no prior convictions is 1-45 days of community punishment.

[4] The presumptive sentence for a Class I felony for a person with no prior convictions is 4-6 months of community punishment.

[5] The information contained in this discussion is pulled from articles published at the Constitutional Law Center of Findlaw for Legal Professionals, http://supreme.lp.findlaw.com/index.html.

actions are intended to communicate a point of view the First Amendment is relevant and protects some of them to a great extent.

- **The Public Forum** - Public streets and parks, including those adjacent to courthouses and foreign embassies, as well as public libraries and the grounds of legislative bodies, are open to public demonstrations, although the uses to which public areas are dedicated may shape the range of permissible expression and conduct that may occur there.[6] Moreover, not all public properties are thereby public forums. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[7] "The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time."[8] Thus, by the nature of the use to which the property is put or by tradition, some sites are simply not as open for expression as streets and parks are.[9]

- **Public Issue Picketing and Parading** – The U.S. Supreme Court has declined to extent the same kind of freedom to those "who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as those amendments afford to those who communicate ideas by pure speech."[10] The conduct which is the subject to this statute--picketing and parading--is subject to regulation even though intertwined with expression and association.

Procedural Due Process considerations: Statutes which lack the requisite definiteness or specificity are commonly held "void for vagueness. "Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."[11] Acts which are made criminal "must be defined with appropriate definiteness."[12] Generally, a vague statute that regulates in the area of First Amendment guarantees will be pronounced wholly void,[13] while one

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[6] .g., Grayned v. City of Rockford, 408 U.S. 104 (1972) (sustaining ordinance prohibiting noisemaking adjacent to school if that noise disturbs or threatens to disturb the operation of the school); Brown v. Louisiana, 383 U.S. 131 (1966) (silent vigil in public library protected while noisy and disruptive demonstration would not be); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) (wearing of black armbands as protest protected but not if it results in disruption of school); Cameron v. Johnson, 390 U.S. 611 (1968) (preservation of access to courthouse); Frisby v. Schultz, 487 U.S. 474 (1988) (ordinance prohibiting picketing "before or about" any residence or dwelling, narrowly construed as prohibiting only picketing that targets a particular residence, upheld as furthering significant governmental interest in protecting the privacy of the home).

[7] United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981).

[8] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[9] E.g., Adderley v. Florida, 385 U.S. 39 (1966) (jails); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (advertising space in city rapid transit cars); Greer v. Spock, 424 U.S. 828 (1976) (military bases); United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (private mail boxes); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (interschool mail system); ISKCON v. Lee, 112 S. Ct. 2701 (1992) (publicly owned airport terminal).

[10] Cox v. Louisiana, 379 U.S. 536, 555 (1965).

[11] Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[12] Musser v. Utah, 333 U.S. 95, 97 (1948). "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972), quoted in Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 498 (1982).

[13] Palmer v. City of Euclid, 402 U.S. 544 (1971); Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 494-95 (1982).

that does not reach such protected conduct will either be upheld because it is applied to clearly proscribable conduct, or voided as applied when the conduct is marginal and the proscription is unclear.[14]

S1833e1-SMRC

[14] Winters v. New York, 333 U.S. 507, 509-10 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940).

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	July 11, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 1295	Junk Faxes.	Senator Dorsett
SB 1833	Military Funeral/Unlawful Protest.	Senator Jacumin

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, July 11, 2006, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 1295	Junk Faxes.	Senator Dorsett
SB 1833	Military Funeral/Unlawful Protest.	Senator Jacumin

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

July 11, 2006

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on July 11, 2006, with fifteen members present. Senator Hartsell introduced pages Kirby Frenney, Matt Southern, Ryan Keen, Bennett Evans, Will Jordon, Maggie Reardon and Alex Lowe, and thanked them for their service.

SB 1833 (Military Funeral/Unlawful Protest.) Senator Hartsell asked for a motion to reconsider this bill. Senator Forrester so moved, all voted and the motion carried. Senator Jacumin was recognized to explain the bill. Paula Wolfe, representing the ACLU spoke on the bill. Questions by Senators Bingham, Dannelly, Dorsett and Forrester were answered by Ms. Kory Goldsmith, Staff Attorney, and Senator Hartsell. Senator Bingham moved for a favorable report, unfavorable to the original bill but favorable to the Committee Substitute. All voted and the motion carried.

SB 1295 (Junk Faxes.) Senator Dorsett was recognized to explain the bill. Senator Dannelly moved for a favorable report. All voted and the motion carried.

HB 2880 (No Prayer for Judgment/Bus Stop Arm Violation.) Senator Hartsell asked for a motion to accept the bill for purposes of discussion since the bill had not been calendared. Senator Kerr so moved, all voted and the motion carried. Senator Hartsell recognized Representative Folwell to explain the bill. Representative Folwell presented two sixty second videos featuring the passing of stopped school buses in North Carolina and Greensboro respectively. Questions by Senators Dannelly and Bingham were answered by Representative Folwell. Mr. Derek S. Graham, Section Chief, Transportation Services with North Carolina Public Schools, spoke in favor of the bill. Senator Kerr moved for a favorable report. All voted and the motion carried.

SB 1375 (Notary Public Corrections.) Senator Kinnaird moved to accept the Proposed Committee Substitute for purposes of discussion. Senator Hartsell recognized Ms. Kory Goldsmith to explain the proposed technical corrections amendments. Senator Kerr moved for a favorable report, unfavorable to the original bill, but favorable to the committee substitute. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, July 11, 2006

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **1295** Junk Faxes.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **2880** No Prayer for Judgment/Bus Stop Arm Violation.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **1833** Military Funeral/Unlawful Protest.
Draft Number: PCS 65624
Sequential Referral: None
Recommended Referral: None
Long Title Amended: Yes

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B. **2060** Victims' Compensation Changes.
Draft Number: PCS 10640
Sequential Referral: None
Recommended Referral: None
Long Title Amended: Yes

TOTAL REPORTED: 4

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, July 11, 2006

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **1375** Notary Public Corrections.

Draft Number:	PCS 75561
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

TOTAL REPORTED: 1

Committee Clerk Comments:

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — **Name of Committee**

Date July 11, 2016

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Paula A. Wolf	ACLU-NC
Barry Smith	Freedom Newspapers
JAY DAWKINS	Civitas
Derek Graham	DOI
Molly Ryan	NCSBA
Cam Cree	BPD152
Jonathan Ducote	Staff
Brandon Reid	NCGA Intern
Rob Schofield	NCC MF
Chad Hunter	Civitas
Patrick Gaffney	Alley Assoc Inc

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee

July 11, 2006
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Rick Zechini	NAR
Jon Carr	Jordan Price
Adam S. Keith	NCGA Staff Intern
Bryce Ball	Fiscal Research
P. Bly Hall	Sentencing Commission
Jill Shotzberger	ACLU-NC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 1833

Short Title:	Military Funeral/Unlawful Protest.	(Public)
Sponsors:	Senators Jacumin; Albertson, Allran, Apodaca, Atwater, Berger of Rockingham, Brown, Cowell, Dorsett, Goodall, Hagan, Hartsell, Hoyle, Hunt, Lucas, Malone, Nesbitt, Pittenger, Presnell, Purcell, Smith, Soles, Tillman, Webster, and Weinstein.	
Referred to:	Rules and Operations of the Senate.	

May 24, 2006

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT DISORDERLY CONDUCT AT A MILITARY FUNERAL OR MEMORIAL SERVICE.

The General Assembly of North Carolina enacts:

SECTION 1. Article 35 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-277.5. Prohibit disorderly conduct at military funeral or memorial service.**

(a) It is unlawful for a person to do any of the following within 300 feet of the building or other location where a military funeral or memorial service is being conducted, or within 300 hundred feet of a military funeral procession or burial:

(1) Make a loud and raucous noise that causes unreasonable distress to the persons attending the funeral or memorial service, or participating in the funeral procession.

(2) Direct abusive epithets or make any threatening gesture that the person knows or reasonably should know is likely to provoke a violent reaction by another.

(3) Disturb or disrupt the funeral, memorial service, funeral procession, or burial by conduct intended to disturb or disrupt the funeral, memorial service, funeral procession, or burial.

(b) This section applies to conduct within one hour preceding, during, and within one hour after a military funeral, memorial service, funeral procession, or burial. A person who commits a violation of this section is guilty of:

(1) A Class 2 misdemeanor for a first offense.

(2) A Class 1 misdemeanor for a second offense.

(3) A Class I felony for a third or subsequent offense."

SECTION 2. This act becomes effective December 1, 2006, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 1833
PROPOSED COMMITTEE SUBSTITUTE S1833-PCS65624-RC-116

Short Title: Disorderly Conduct/Funeral/Military Services. (Public)

Sponsors:

Referred to:

May 24, 2006

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT DISORDERLY CONDUCT AT A MILITARY FUNERAL OR MEMORIAL SERVICE OR ANY OTHER FUNERAL OR MEMORIAL SERVICE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-288.4 reads as rewritten:

"**§ 14-288.4. Disorderly conduct.**

(a) Disorderly conduct is a public disturbance intentionally caused by any person ~~who:~~ who does any of the following:

(1) Engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other ~~violence; or~~ violence.

(2) Makes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the ~~peace; or~~ peace.

(3) Takes possession of, exercises control over, or seizes any building or facility of any public or private educational institution without the specific authority of the chief administrative officer of the institution, or his authorized ~~representative; or~~ representative.

(4) Refuses to vacate any building or facility of any public or private educational institution in obedience ~~to:~~ to any of the following:

a. An order of the chief administrative officer of the institution, or ~~his~~ the officer's representative, who shall include for colleges and universities the vice chancellor for student affairs or ~~his~~ the vice-chancellor's equivalent for the institution, the dean of students or ~~his~~ the dean's equivalent for the institution, the director of the law enforcement or security department for the institution, and the chief of the law enforcement or security department for the ~~institution; or~~ institution.

b. An order given by any fireman or public health officer acting within the scope of ~~his authority; or~~the fireman's or officer's authority.

c. If a state of emergency is occurring or is imminent within the institution, an order given by any law-enforcement officer acting within the scope of ~~his authority; or~~ the officer's authority.

(5) Shall, after being forbidden to do so by the chief administrative officer, or ~~his~~ the officer's authorized representative, of any public or private educational institution:

a. Engage in any sitting, kneeling, lying down, or inclining so as to obstruct the ingress or egress of any person entitled to the use of any building or facility of the institution in its normal and intended use; or

b. Congregate, assemble, form groups or formations (whether organized or not), block, or in any manner otherwise interfere with the operation or functioning of any building or facility of the institution so as to interfere with the customary or normal use of the building or ~~facility; or~~facility.

(6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent ~~thereto; or~~thereto.

(6a) Engages in conduct which disturbs the peace, order, or discipline on any public school bus or public school activity ~~bus; or~~ bus.

(7) ~~Disrupts,~~Except as provided in subdivision (8) of this subsection, disrupts, disturbs, or interferes with a religious service or assembly or engages in conduct which disturbs the peace or order at any religious service or assembly.

(8) Engages in conduct with the intent to impede, disrupt, disturb, or interfere with the orderly administration of any funeral, memorial service, or family processional to the funeral or memorial service, including a military funeral, service, or family processional, or with the normal activities and functions occurring in the facilities or buildings where a funeral or memorial service, including a military funeral or memorial service, is taking place. Any of the following conduct that occurs within one hour preceding, during, or within one hour after a funeral or memorial service shall constitute disorderly conduct under this subdivision:

a. Displaying, within 300 feet of the ceremonial site, location being used for the funeral or memorial, or the family's processional route to the funeral or memorial service, any visual image that conveys fighting words or actual or imminent threats

of harm directed to any person or property associated with the funeral, memorial service, or processional route.

b. Uttering, within 300 feet of the ceremonial site, location being used for the funeral or memorial service, or the family's processional route to the funeral or memorial service, loud, threatening, or abusive language or singing, chanting, whistling, or yelling with or without noise amplification in a manner that would tend to impede, disrupt, disturb, or interfere with a funeral, memorial service, or processional route.

c. Attempting to block or blocking pedestrian or vehicular access to the ceremonial site or location being used for a funeral or memorial.

As used in this section the term "building or facility" includes the surrounding grounds and premises of any building or facility used in connection with the operation or functioning of such building or facility.

(b) ~~Any~~ Except as provided in subsection (c) of this section, any person who willfully engages in disorderly conduct is guilty of a Class 2 misdemeanor.

(c) A person who commits a violation of subdivision (8) of subsection (a) of this section is guilty of:

(1) A Class 2 misdemeanor for a first offense.

(2) A Class 1 misdemeanor for a second offense.

(3) A Class I felony for a third or subsequent offense."

SECTION 2. This act becomes effective December 1, 2006, and applies to offenses committed on or after that date.

SENATE BILL 1833:
Disorderly Conduct/Funeral/Military Services

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	July 10, 2006
Introduced by:	Sen. Jacumin	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	PCS to First Edition S1833-CSRC-116		

SUMMARY: ***The PCS to SB 1833 amends the law of disorderly conduct to make it unlawful to engage in certain conduct within 300 feet of a funeral, memorial service, a family's funeral procession. The conduct is prohibited during, one hour preceding and one hour following the funeral, memorial service, funeral procession, or burial. The first violation would be a Class 2 misdemeanor, a second offense would be a Class 1 misdemeanor, and a third or subsequent offense would be a Class I felony.***

The act would become effective December 1, 2006, and apply to offenses committed on or after that date.

CURRENT LAW: G.S. 14-288.4 prohibits disorderly conduct under any of the following circumstances: by fighting; by abusive language provoking retaliation[1]; by seizing or blocking a school building; by disrupting students; or by disrupting a religious service or assembly. A person who willfully engages in disorderly conduct is guilty of a Class 2 misdemeanor.[2]

The U.S. Congress recently passed legislation (the "Respect for America's Fallen Heroes Act") that prohibits the following:

- A demonstration on the property of a cemetery under the control of the Nation Cemetery Administration or on the property of Arlington National Cemetery unless the demonstration has been approved the cemetery director; or
- With respect to the same cemetery, a demonstration during the period beginning 60 minutes before and ending 60 minutes after a funeral, memorial service, or ceremony, any part of which demonstration:

  1. takes place within 150 feet of a road, pathway or other route of ingress to or egress from the cemetery; and includes any individual willfully making any noise or diversion that disturbs or tends to disturb the peace or good order of the service or ceremony; or

  2. Is within 300 feet of the cemetery and impedes the access to or egress from the cemetery.

The Act defines a demonstration as any of the following:

- Picketing or similar conduct.

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[1] The North Carolina Supreme Court has held that the 1st Amendment protection of free speech does not bar punishment for use of insulting or fighting words that are likely to cause an immediate breach of the peace. State v. Summell, 282 N.C. 157 (1972), overruled on other grounds, 324 N.C. 539.

[2] The presumptive sentence for a Class 2 misdemeanor for a person with no prior convictions is 1-30 days of community punishment.

- Oration, speech, use of sound amplification equipment, or similar conduct that is not part of a funeral service.
- The display of any placard, banner, flag, or similar devise, unless the display is part of a funeral service.
- The distribution of any handbill, pamphlet, leaflet, or other written or printed matter other than a program distributed as part of a funeral service.

The penalty for violating the Act is a fine, imprisonment for not more than one year, or both.

There are four cemeteries in North Carolina under the control of the Nation Cemetery Administration.

BILL ANALYSIS: SB 1833 amends G.S. 14-288.4 (Disorderly Conduct) to prohibit disorderly conduct within 300 feet of a funeral, memorial service, or the family's processional route to the funeral or memorial service. It would make it unlawful for a person to engage in certain conduct within 300 feet of the building or other location where a military funeral or memorial service. The prohibition extends to conduct engaged in 1 hour before, during, and up to 1 hour following the service, procession, or burial.

The type of conduct that would be prohibited includes:

- Displaying any visual image that conveys fighting words or actual or imminent treats of harm directed to any person or property associated with the funeral, memorial service, or family's processional to the funeral or memorial service.
- Uttering loud, threatening or abusive language, or singing, chanting or yelling in a manner that would tend to impede, disrupt, disturb, or interfere with a funeral, memorial service, or the family's processional to the funeral or memorial service
- Attempting to block or blocking access to the ceremonial site or location where the funeral or memorial service is being held.

The first violation would be a Class 2 misdemeanor.[3] A second violation would be Class 1 misdemeanor.[4] A third violation would be a Class I felony.[5]

BACKGROUND: According to information provided by NCSL, as of May 16, 2006, 31 states have introduced legislation regarding military funeral protests. Of those, Georgia, Indiana, Iowa, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Virginia, and Wisconsin have enacted laws related to this issue. SB1833 is modeled after the Iowa law. The laws are in response to demonstrations led by Fred Phelps, the pastor of Westboro Baptist Church in Topeka, Kansas. Mr. Phelps and members of his family have picketed and heckled military families at funerals. They say the soldiers are fighting for an army that represents a country that accepts homosexuality.

CONSTITUTIONAL CONSIDERATIONS: At least two constitutional issues are raised by the legislation; restrictions on speech and whether the statute may be void for vagueness.[6]

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[3] The presumptive sentence for a Class 2 misdemeanor for a person with no prior convictions is 1-30 days of community punishment.

[4] The presumptive sentence for a Class 1 misdemeanor for a person with no prior convictions is 1-45 days of community punishment.

[5] The presumptive sentence for a Class I felony for a person with no prior convictions is 4-6 months of community punishment.

First Amendment considerations: Communication of political, economic, social, and other views is not accomplished solely by face-to-face speech or communications through various media. There is also "expressive conduct," which includes picketing, patrolling, and marching, distribution of leaflets and pamphlets and addresses to publicly assembled audiences, door-to-door solicitation and many forms of "sit-ins." Because all these ways of expressing oneself involve conduct--action--rather than mere speech, they are more subject to regulation and restriction than is simple speech. However, the degree that these actions are intended to communicate a point of view the First Amendment is relevant and protects some of them to a great extent.

- **The Public Forum** - Public streets and parks, including those adjacent to courthouses and foreign embassies, as well as public libraries and the grounds of legislative bodies, are open to public demonstrations, although the uses to which public areas are dedicated may shape the range of permissible expression and conduct that may occur there.[7] Moreover, not all public properties are thereby public forums. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[8] "The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time."[9] Thus, by the nature of the use to which the property is put or by tradition, some sites are simply not as open for expression as streets and parks are.[10]

- **Public Issue Picketing and Parading** – The U.S. Supreme Court has declined to extent the same kind of freedom to those "who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as those amendments afford to those who communicate ideas by pure speech."[11] The conduct which is the subject to this statute—picketing and demonstrating -- is subject to some regulation even though intertwined with expression and association.

Procedural Due Process considerations: Statutes which lack the requisite definiteness or specificity are commonly held "void for vagueness. "Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."[12] Acts

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[6] The information contained in this discussion is pulled from articles published at the Constitutional Law Center of Findlaw for Legal Professionals, http://supreme.lp.findlaw.com/index.html.

[7] .g., Grayned v. City of Rockford, 408 U.S. 104 (1972) (sustaining ordinance prohibiting noisemaking adjacent to school if that noise disturbs or threatens to disturb the operation of the school); Brown v. Louisiana, 383 U.S. 131 (1966) (silent vigil in public library protected while noisy and disruptive demonstration would not be); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) (wearing of black armbands as protest protected but not if it results in disruption of school); Cameron v. Johnson, 390 U.S. 611 (1968) (preservation of access to courthouse); Frisby v. Schultz, 487 U.S. 474 (1988) (ordinance prohibiting picketing "before or about" any residence or dwelling, narrowly construed as prohibiting only picketing that targets a particular residence, upheld as furthering significant governmental interest in protecting the privacy of the home).

[8] United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981).

[9] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[10] E.g., Adderley v. Florida, 385 U.S. 39 (1966) (jails); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (advertising space in city rapid transit cars); Greer v. Spock, 424 U.S. 828 (1976) (military bases); United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (private mail boxes); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (interschool mail system); ISKCON v. Lee, 112 S. Ct. 2701 (1992) (publicly owned airport terminal).

[11] Cox v. Louisiana, 379 U.S. 536, 555 (1965).

[12] Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

which are made criminal "must be defined with appropriate definiteness."[13] Generally, a vague statute that regulates in the area of First Amendment guarantees will be pronounced wholly void,[14] while one that does not reach such protected conduct will either be upheld because it is applied to clearly proscribable conduct, or voided as applied when the conduct is marginal and the proscription is unclear.[15]

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[13] Musser v. Utah, 333 U.S. 95, 97 (1948). "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972), quoted in Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 498 (1982).

[14] Palmer v. City of Euclid, 402 U.S. 544 (1971); Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 494-95 (1982).

[15] Winters v. New York, 333 U.S. 507, 509-10 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940).

American Civil Liberties Union of North Carolina

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Phone: (919) 834-3466 Fax: (919) 828-3265 Email: aclunc@nc.rr.com

Statement Regarding Senate Bill 1833: Military Funeral/Unlawful Protest

To: Senator Jacumin
CC: Senators Hartsell, Allran, Berger, Webster, Apodaca, Atwater, Bingham, Bland, Dalton, Dannelly, Dorsett, Forrester, Goodall, Graham, Holloman, Kerr, Kinnaird, Snow, and Swindell
From: Jennifer Rudinger, Executive Director
Rebekah Goncarovs, Legislative Clerk
Date: July 10, 2006

The ACLU-NC is a nonprofit, nonpartisan organization with approx. 9,000 members in North Carolina, dedicated to preserving the guarantees of individual liberty found in the Bill of Rights, the Post-Civil War (Thirteenth, Fourteenth and Fifteenth) Amendments, and the Nineteenth Amendment to the U.S. Constitution and corresponding provisions of the North Carolina Constitution. We appreciate the opportunity to comment on S. 1833. **While we are opposed in principle to any restrictions on activity protected by the First Amendment, we are particularly troubled by the vagueness and overbreadth problems in the language of subsections (a)(1) and (a)(2), and we respectfully urge that these two subsections be deleted from the bill.**

Subsections (a)(1) and (a)(2) of S. 1833 are both unconstitutionally vague and overbroad. To be constitutional, a penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). Under subsections (a)(1) and (a)(2), an individual who is mowing his lawn, unaware of a nearby funeral, could be charged with a misdemeanor or felony if such noise "causes unreasonable distress to the persons attending the funeral or memorial service, or participating in the funeral procession." Someone driving by, unaware that a funeral is taking place, who honks her horn at another driver could be charged under this legislation.

Furthermore, subsections (a)(1) and (a)(2) are unnecessary because the conduct that legislators intend to prevent is fully covered by subsection (a)(3). If one was to intentionally "disturb or disrupt the funeral," be it via loud and raucous noises, threatening gestures, or other conduct aimed at the service taking place, such behavior would be included in the scope of subsection (a)(3). Subsections (a)(1) and (a)(2) are unnecessary, unfair and unconstitutional.

For the above reasons, the ACLU-NC encourages Senators to oppose the bill in its entirety or, in the alternative, to remove subsections (a)(1) and (a)(2) from S. 1833. Please feel free to contact us at (919) 834-3466 if you wish to discuss this matter further. Thank you for your consideration of our concerns.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 1295

Short Title:	Junk Faxes.	(Public)
Sponsors:	Senators Dorsett; Albertson, Allran, Apodaca, Atwater, Berger of Rockingham, Blake, Bland, Clodfelter, Dalton, Dannelly, East, Forrester, Garrou, Garwood, Goodall, Graham, Hagan, Hartsell, Holloman, Hoyle, Jenkins, Lucas, Malone, Nesbitt, Presnell, Purcell, Stevens, Swindell, Tillman, and Weinstein.	
Referred to:	Rules and Operations of the Senate.	

May 11, 2006

A BILL TO BE ENTITLED

AN ACT TO INCREASE PROTECTIONS FOR CONSUMERS WHO RECEIVE UNSOLICITED FACSIMILES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 75 of the General Statutes is amended by adding a new Article to read:

"Article 5.

"Unsolicited Facsimiles.

"**§ 75-115.** The following definitions apply in this Article:

(1) Established business relationship. – A prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential or business subscriber, with or without an exchange of consideration, on the basis of an inquiry, application, purchase, membership, or transaction by the residential or business subscriber regarding products or services offered by the person or entity, and the relationship has not been previously terminated by either party.

(2) Telephone facsimile machine. – Equipment that has the capacity to do either or both of the following:

a. Transcribe text or images or both from paper into an electronic signal and to transmit that signal over a regular telephone line.

b. Transcribe text or images or both from an electronic signal received over a regular telephone line onto paper.

(3) Unsolicited advertisement. – Any material advertising the commercial availability or quality of any property, goods, or services that is

transmitted to any person or entity without that person's or entity's prior express invitation or permission. Prior express invitation or permission may be obtained for a specific or unlimited number of advertisements and may be obtained for a specific or unlimited period of time.

"**§ 75-116. Prohibition of unsolicited facsimiles; exception.**

(a) No person or entity, if either the person or entity or the recipient is located within the State of North Carolina, shall (i) use any telephone facsimile machine, computer, or other device to send or (ii) cause another person or entity to use a telephone facsimile machine to send an unsolicited advertisement to a telephone facsimile machine.

(b) This section shall not apply to a person or entity that has an established business relationship with the recipient of the facsimile. However, the person or entity who sends an unsolicited advertisement under this subsection shall provide a notice in the unsolicited advertisement that: (i) is clear and conspicuous and on the first page of the unsolicited advertisement; (ii) states that the recipient may make a request to the sender to "do not send" any future unsolicited advertisements to a telephone facsimile machine and that the sender's failure to comply with the request is unlawful; and (iii) includes a toll-free domestic telephone number or facsimile machine number that the recipient may call at any time on any day of the week to transmit a request to "do not send" future facsimiles.

"**§ 75-117. Facsimiles to contain identifying material.**

(a) It shall be a violation of this Article for any person or entity, if either the person or entity or the recipient is located in the State of North Carolina, to do either of the following:

(1) Initiate any communication using a telephone facsimile machine that does not clearly mark in a margin at the top or bottom of each transmitted page or on the first page of each transmission the date and time sent; an identification of the business, other entity, or person sending the message, and the telephone number of the sending machine or of the business, other entity, or person.

(2) Use a computer or other electronic device to send any message via a telephone facsimile machine unless it is clearly marked in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission the date and time it is sent, the identification of the business, other entity, or person sending the message, and the telephone number of the sending machine or of the business, other entity, or person.

(b) This section shall not apply to a facsimile sent by or on behalf of a professional or trade association that is a tax-exempt nonprofit organization and in furtherance of the association's tax-exempt purpose to a member of the association if all of the following conditions are met:

(1) The member voluntarily provided the association the facsimile number to which the facsimile was sent.

(2) The facsimile is not primarily for the purpose of advertising the commercial availability or quality of any property, goods, or services of one or more third parties.

(3) The member who is sent the facsimile has not requested that the association stop sending facsimiles for the purpose of advertising the commercial availability or quality of any property, goods, or services of one or more third parties.

"**§ 75-118. Enforcement.**

(a) A person or entity who receives an unsolicited advertisement in violation of this Article may bring any of the following actions in civil court:

(1) An action to enjoin further violations of this Article by the person or entity who sent the unsolicited advertisement.

(2) An action to recover five hundred dollars ($500.00) for the first violation, one thousand dollars ($1,000) for the second violation, and five thousand dollars ($5,000) for the third and any other violation that occurs within two years of the first violation.

(b) In an action brought pursuant to this Article, the court may award a prevailing plaintiff reasonable attorneys' fees if the court finds the defendant willfully engaged in the act or practice, and the court may award reasonable attorneys' fees to a prevailing defendant if the court finds that the plaintiff knew, or should have known, that the action was frivolous and malicious.

(c) Actions brought by a person or entity pursuant to this section shall be tried in the county where the plaintiff resides at the time of the commencement of the action.

(d) This section shall not be construed to alter or restrict any remedy a person may have under federal law, including the Junk Fax Prevention Act of 2005, against a person or entity who sends an unsolicited advertisement."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 1295: Junk Faxes

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	July 10, 2006
Introduced by:	Sen. Dorsett	**Summary by:**	Ben Popkin
Version:	First Edition		Committee Counsel

SUMMARY: Senate Bill 1295 would enact a new Article in Chapter 75 of the General Statutes. The bill would prohibit the sending of unsolicited transmissions to telephone facsimile machines in certain situations. Violation of the provisions of the act would provide the basis for civil actions to enjoin the sending of further unsolicited transmissions and to allow for recovery of awards in increasing dollar amounts, based on the number of offenses committed.

CURRENT LAW: Unsolicited facsimile transmissions are not directly addressed under current North Carolina General Statute.

BILL ANALYSIS:

Prohibition of unsolicited facsimiles - Senate Bill 1295 would create a new Article that would prohibit the sending of unsolicited facsimile transmissions to a person with whom the sender did not already have an 'established business relationship'. The act would define what would constitute an 'established business relationship'.

The act would not prohibit unsolicited transmissions when the sender and the recipient of the facsimile already have an 'established business relationship' but the transmission would still be required to include the following: clear and conspicuous notice of the advertisement on the first page, along with directions for the recipient to place a request not to be sent similar advertisements and a toll-free telephone or facsimile number to voice their "do not send" request.

Requirement for identifying information - The act would require that the following identifying information be contained in the margin of all transmissions: the date and time sent, an identification of the sender of the message, and a telephone number of the sending business or person.

The act would exempt certain non-profit professional or trade association transmissions from these identifying information requirements.

Enforcement – Any person or entity receiving an unsolicited advertisement in violation of this Article would be provided with the following actions in civil court:

1) An action to enjoin further violations by the sender; and

2) An action to recover the following amounts from the sender - $500 for the first violation, $1,000 for the second violation, and $5,000 for the third and subsequent violations, within a two year period.

EFFECTIVE DATE: The act would be effective when it becomes law.

BACKGROUND: Three states currently address the sending of unsolicited facsimile transmissions as sections of their "Do Not Call" laws – Oregon, Massachusetts, and Colorado.

On July 9, 2005, Congress enacted The Junk Fax Prevention Act of 2005 to amend the unsolicited fax advertisement provisions of the Telephone Consumer Protection Act of 1991 (TCPA) and directed the Federal Communications Commission (FCC) to issue rules to implement the act. The new rules are scheduled to take effect on August 1, 2006.

S1295e1-SMRD

Fax Advertising: What You Need to Know

FCC Consumer Facts

Background

In April 2006, the Federal Communications Commission (FCC) implemented changes to the facsimile (fax) advertising rules of the Telephone Consumer Protection Act of 1991 (TCPA). The new rules: (1) codify an established business relationship (EBR) exemption to the prohibition on sending unsolicited fax advertisements; (2) define EBR as used in the context of unsolicited fax advertisements; (3) require the sender of fax advertisements to provide specified notice and contact information on the fax that allows recipients to "opt-out" of any future transmissions from the sender; and (4) specify the circumstances under which a request to "opt-out" complies with the Act. The new rules are scheduled to take effect on August 1, 2006.

Definitions

An "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise."

An "established business relationship" (EBR) means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration (payment), on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

Junk Fax Prevention Act of 2005

On July 9, 2005, Congress enacted the Junk Fax Prevention Act to amend the unsolicited fax advertisement provisions of the TCPA and directed the FCC to issue regulations to implement the statute.

(More)

Amended Fax Rules and Established Business Relationship Exemption

The rules provide that it is unlawful to send unsolicited advertisements to any fax machine, including those at both businesses and residences, without the recipient's prior express invitation or permission. However, under the amended rules, fax advertisements may be sent to recipients with whom the sender has an EBR, as long as the fax number was provided voluntarily by the recipient. Specifically, a fax advertisement may be sent to an EBR customer if the sender also:

- Obtains the fax number directly from the recipient, through, for example, an application, contact information form, or membership renewal form; or
- Obtains the fax number from the recipient's *own* directory, advertisement, or site on the Internet, unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the fax number in question; or
- For directories and other sources of information compiled by third parties, the sender must take reasonable steps to verify that the recipient consented to have the number listed.

(More)

Federal Communications Commission • Consumer & Governmental Affairs Bureau • 445 12th St., SW • Washington, DC 20554
1-888-CALL-FCC (1-888-225-5322) • TTY: 1-888-TELL-FCC (1-888-835-5322) • Fax: 1-866-418-0232 • www.fcc.gov/cgb

Amended Fax Rules and Established Business Relationship Exemption (cont'd.)

- If the EBR existed before July 9, 2005, and the sender also possessed the fax number before July 9, 2005, the sender may send the fax advertisements without demonstrating how the number was obtained.

Fax advertisements sent with the recipient's prior express permission must include an opt-out notice as described below.

Opt-out Notice Requirements

The rules require senders of permissible fax advertisements (those sent under an EBR or with the recipient's prior express permission) to provide specified notice and contact information on the fax that allow recipients to "opt-out" of future faxes from the sender. The notice must:

- Be clear and conspicuous and on the first page of the advertisement;
- State that the recipient may make a request to the sender not to send any future faxes and that failure to comply with the request within 30 days is unlawful; and
- Include a telephone number, fax number, and cost-free mechanism (including a toll-free telephone number, local number for local recipients, toll-free fax number, Web site address, or e-mail address) to opt-out of faxes. These numbers and cost-free mechanism must permit consumers to make opt-out requests 24 hours a day, 7 days a week.

Senders that receive a request not to send further faxes that meets the requirements listed in the next section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days. They are also prohibited from sending future fax advertisements to the consumer unless the consumer subsequently provides prior express permission to the sender.

(More)

Opt-out Requests By Consumers

To stop unwanted fax advertisements, consumers' "opt-out" requests must:

- Identify the fax number or numbers to which the request relates; and
- Be sent to the telephone number, fax number, Web site address or e-mail address identified on the fax advertisement.

The consumer can subsequently grant express permission to receive faxes from a particular sender, in writing or orally.

Fax Broadcasters

The person or business on whose behalf a fax is sent or whose goods or services are advertised is liable for a violation of these rules even if they did not physically send the fax themselves. A fax broadcaster (the person or entity transmitting messages to a fax machine on another person's behalf) may also be liable for violations of the rules if it has a "high degree of involvement" in the sender's fax messages, such as supplying the fax numbers to which a message is sent; providing a source of fax numbers; making representations about the legality of faxing to those numbers; or advising a client about how to comply with the fax advertising rules.

If a fax broadcaster is "highly involved" in the sender's fax messages, the fax broadcaster must provide its name on the fax.

Fax Numbers and the National Do-Not-Call Registry

The National Do-Not-Call Registry applies only to telephone solicitations, not to faxes. Nevertheless, the FCC's fax rules prohibit fax advertisements unless the sender has an EBR with you or your permission to send the fax.

(More)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 2

HOUSE BILL 2880
Committee Substitute Favorable 6/28/06

Short Title: No Prayer for Judgment/Bus Stop Arm Violation. (Public)

Sponsors:

Referred to:

June 19, 2006

A BILL TO BE ENTITLED

AN ACT TO PREVENT A PERSON WHO IS GUILTY OF PASSING A STOPPED SCHOOL BUS FROM RECEIVING A PRAYER FOR JUDGMENT CONTINUED.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-217(e) reads as rewritten:

"(e) Except as provided in subsection (g) of this section, any person violating this section shall be guilty of a Class 1 misdemeanor. A person who violates subsection (a) of this section shall not receive a prayer for judgment continued under any circumstances."

SECTION 2. This act becomes effective September 1, 2006, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: House Bill 2880 (Second Edition)

SHORT TITLE: No Prayer for Judgment/Bus Stop Arm Violation.

SPONSOR(S): Representative Folwell

FISCAL IMPACT

Yes (X) No ( ) No Estimate Available ( )

	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10	FY 2010-11
GENERAL FUND					
Correction	No significant impact anticipated. See "Assumptions and Methodology," pp. 2-3.				
Recurring					
Nonrecurring					
Judicial	Fiscal impact possible, but amount cannot be determined. See "Assumptions and Methodology," p.2.				
Recurring					
Nonrecurring					
TOTAL EXPENDITURES:	Amount cannot be determined.				
LOCAL GOVERNMENT	Small population increase possible for local jails statewide. See "Assumptions and Methodology," p.2.				
ADDITIONAL PRISON BEDS*	None anticipated.				
POSITIONS: (cumulative)	None anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch.

EFFECTIVE DATE: September 1, 2006.

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: Amends G.S. 20-217(e) to prohibit a person convicted of passing a stopped school bus from receiving a prayer for judgment continued under any circumstances, thereby subjecting each violator to the existing Class 1 misdemeanor penalty.

ASSUMPTIONS AND METHODOLOGY:

General

Under current G.S. 20-4.01(4a), a "conviction" is defined as a third or subsequent Prayer for Judgment Continued (PJC) within any five-year period, or any PJC if the offender holds a commercial drivers license or if the offense occurs in a commercial motor vehicle. A driver of a non-commercial motor vehicle who is granted a PJC for violating G.S. 20-217 would be convicted of a Class 1 misdemeanor upon accruing at least three such PJCs within a five-year period.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of a specific bill. For such bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks, and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

H.B. 2880 would restrict current sentencing practice, and subject a defendant to a Class 1 misdemeanor sentence for each and every violation of G.S. 20-217. This is also possible under current law when a defendant's request for a PJC is denied. Calendar year 2005 data indicate that there were approximately 1,160 charges and 520 convictions for failing to stop for a stopped school bus – 330 of these 520 convictions resulted in a PJC verdict.

In response to the proposed sentencing enhancement, the AOC anticipates more rigorous defense and prosecution for each case, thereby increasing court time and the costs of disposal. *For example, if 28% of the 1,160 cases (330 cases) that resulted in PJCs in 2005 were to require an additional half hour of in-court time, this increase could result in an additional $32,500 in court costs.*[1] However, the number of additional charges and the methods of disposition (trial, plea, dismissal, other) that would result under this bill are unknown. Presently, the AOC estimates total court costs of $3,153 and $224 per single Class 1 misdemeanor trial and plea, respectively.

Department of Correction – Division of Prisons

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume savings due to deterrent effects for this bill or any criminal penalty bill.

In FY 2004/05, 19% of Class 1 misdemeanor convictions resulted in active sentences, with an average estimated term served of 30.7 days; 79% of convictions resulted in community sentences and 2% resulted in intermediate sentences. The number of additional convictions for this offense

[1] Assumes cost of $1,187 per day in court (6 hour day).

cannot be determined, but could potentially increase relative to prior year totals due to this sentencing restriction. FY 2004/05 data suggests that most new convictions (approximately 79%) would result in community sentences; however, the number of active sentences imposed for this offense could also increase. *Any additional active sentences are not expected to impact the prison population, since offenders serving active sentences of 90 days or less are housed in local jails.*

Local Government

Assuming some additional active sentences as a result of this bill, local jail populations could increase. For example, if 19% of the 330 PJCs granted in 2005 were to result in active jail sentences under H.B. 2880, local jails would experience a net increase in population of 63 persons statewide. However, without reliable estimates of additional convictions and cost per bed data from local jails, the impact on jail populations and the associated fiscal impacts for local units cannot be determined.

Department of Correction – Division of Community Corrections

If additional convictions and community sentences occur for this offense, additional costs for probation supervision could also be incurred, though unlikely. Division of Community Corrections data indicates that there are currently no offenders under supervision for this offense. In addition, DCC anticipates that any new sentences are likely to only require unsupervised probation with community service, and would not have a significant fiscal impact.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission; and Office of State Construction.

TECHNICAL CONSIDERATIONS: None.

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Bryce Ball and Jim Mills

APPROVED BY: Lynn Muchmore, Director
Fiscal Research Division

DATE: June 29, 2006

Official
Fiscal Research Division
Publication

Signed Copy Located in the NCGA Principal Clerk's Offices

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2005

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: House Bill 2880 (Second Edition)

SHORT TITLE: No Prayer for Judgment/Bus Stop Arm Violation.

SPONSOR(S): Representative Folwell

FISCAL IMPACT

Yes (X) No ( ) No Estimate Available ( )

	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10	FY 2010-11
GENERAL FUND	No significant impact anticipated. See "Assumptions and Methodology," pp. 2-3.				
Correction					
Recurring					
Nonrecurring					
	Fiscal impact possible, but amount cannot be determined. See "Assumptions and Methodology," p.2.				
Judicial					
Recurring					
Nonrecurring					
TOTAL EXPENDITURES:	Amount cannot be determined.				
LOCAL GOVERNMENT	Small population increase possible for local jails statewide. See "Assumptions and Methodology," p.2.				
ADDITIONAL PRISON BEDS*	None anticipated.				
POSITIONS: (cumulative)	None anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch.

EFFECTIVE DATE: September 1, 2006.

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: Amends G.S. 20-217(e) to prohibit a person convicted of passing a stopped school bus from receiving a prayer for judgment continued under any circumstances, thereby subjecting each violator to the existing Class 1 misdemeanor penalty.

ASSUMPTIONS AND METHODOLOGY:

General

Under current G.S. 20-4.01(4a), a "conviction" is defined as a third or subsequent Prayer for Judgment Continued (PJC) within any five-year period, or any PJC if the offender holds a commercial drivers license or if the offense occurs in a commercial motor vehicle. A driver of a non-commercial motor vehicle who is granted a PJC for violating G.S. 20-217 would be convicted of a Class 1 misdemeanor upon accruing at least three such PJCs within a five-year period.

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For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of a specific bill. For such bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks, and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

H.B. 2880 would restrict current sentencing practice, and subject a defendant to a Class 1 misdemeanor sentence for each and every violation of G.S. 20-217. This is also possible under current law when a defendant's request for a PJC is denied. Calendar year 2005 data indicate that there were approximately 1,160 charges and 520 convictions for failing to stop for a stopped school bus – 330 of these 520 convictions resulted in a PJC verdict.

In response to the proposed sentencing enhancement, the AOC anticipates more rigorous defense and prosecution for each case, thereby increasing court time and the costs of disposal. *For example, if 28% of the 1,160 cases (330 cases) that resulted in PJCs in 2005 were to require an additional half hour of in-court time, this increase could result in an additional $32,500 in court costs.*[1] However, the number of additional charges and the methods of disposition (trial, plea, dismissal, other) that would result under this bill are unknown. Presently, the AOC estimates total court costs of $3,153 and $224 per single Class 1 misdemeanor trial and plea, respectively.

Department of Correction – Division of Prisons

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In FY 2004/05, 19% of Class 1 misdemeanor convictions resulted in active sentences, with an average estimated term served of 30.7 days; 79% of convictions resulted in community sentences and 2% resulted in intermediate sentences. The number of additional convictions for this offense

[1] Assumes cost of $1,187 per day in court (6 hour day).

cannot be determined, but could potentially increase relative to prior year totals due to this sentencing restriction. FY 2004/05 data suggests that most new convictions (approximately 79%) would result in community sentences; however, the number of active sentences imposed for this offense could also increase. *Any additional active sentences are not expected to impact the prison population, since offenders serving active sentences of 90 days or less are housed in local jails.*

Local Government

Assuming some additional active sentences as a result of this bill, local jail populations could increase. For example, if 19% of the 330 PJCs granted in 2005 were to result in active jail sentences under H.B. 2880, local jails would experience a net increase in population of 63 persons statewide. However, without reliable estimates of additional convictions and cost per bed data from local jails, the impact on jail populations and the associated fiscal impacts for local units cannot be determined.

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If additional convictions and community sentences occur for this offense, additional costs for probation supervision could also be incurred, though unlikely. Division of Community Corrections data indicates that there are currently no offenders under supervision for this offense. In addition, DCC anticipates that any new sentences are likely to only require unsupervised probation with community service, and would not have a significant fiscal impact.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission; and Office of State Construction.

TECHNICAL CONSIDERATIONS: None.

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Bryce Ball and Jim Mills

APPROVED BY: Lynn Muchmore, Director
Fiscal Research Division

DATE: June 29, 2006

Official
Fiscal Research Division
Publication

Signed Copy Located in the NCGA Principal Clerk's Offices

§ 20-217. Motor vehicles to stop for properly marked and designated school buses in certain instances; evidence of identity of driver.

(a) When a school bus is displaying its mechanical stop signal or flashing red lights and the bus is stopped for the purpose of receiving or discharging passengers, the driver of any other vehicle that approaches the school bus from any direction on the same street, highway, or public vehicular area shall bring that other vehicle to a full stop and shall remain stopped. The driver of the other vehicle shall not proceed to move, pass, or attempt to pass the school bus until after the mechanical stop signal has been withdrawn, the flashing red stoplights have been turned off, and the bus has started to move.

(b) For the purpose of this section, a school bus includes a public school bus transporting children or school personnel, a public school bus transporting senior citizens under G.S. 115C-243, or a privately owned bus transporting children. This section applies only in the event the school bus bears upon the front and rear a plainly visible sign containing the words "school bus."

(c) Notwithstanding subsection (a) of this section, the driver of a vehicle traveling in the opposite direction from the school bus, upon any road, highway or city street that has been divided into two roadways, so constructed as to separate vehicular traffic between the two roadways by an intervening space (including a center lane for left turns if the roadway consists of at least four more lanes) or by a physical barrier, need not stop upon meeting and passing any school bus that has stopped in the roadway across the dividing space or physical barrier.

(d) It shall be unlawful for any school bus driver to stop and receive or discharge passengers or for any principal or superintendent of any school, routing a school bus, to authorize the driver of any school bus to stop and receive or discharge passengers upon any roadway described by subsection (c) of this section where passengers would be required to cross the roadway to reach their destination or to board the bus; provided, that passengers may be discharged or received at points where pedestrians and vehicular traffic are controlled by adequate stop-and-go traffic signals.

(e) Except as provided in subsection (g) of this section, any person violating this section shall be guilty of a Class 1 misdemeanor.

(f) Expired.

(g) Any person who violates subsection (a) of this section and willfully strikes any person causing serious bodily injury to that person shall be guilty of a Class I felony. (1925, c. 265; 1943, c. 767; 1947, c. 527; 1955, c. 1365; 1959, c. 909; 1965, c. 370; 1969, c. 952; 1971, c. 245, s. 1; 1973, c. 1330, s. 35; 1977, 2nd Sess., c. 1280, s. 4; 1979, 2nd Sess., c. 1323; 1983, c. 779, s. 1; 1985, c. 700, s. 1; 1991, c. 290, s. 1; 1993, c. 539, s. 382; 1994, Ex. Sess., c. 24, s. 14(c); 1998-149, s. 10; 2005-204, s. 1.)

SUPPORTERS of HB 2880
NO PJC/BUS STOP-ARM VIOLATIONS
sponsored by
Representative Dale R. Folwell

- Chief Justice I. Beverly Lake
- NC Department of Crime Control and Public Safety
- NC Insurance Commissioner Long
- NC Highway Patrol
- NC Sheriffs' Association

WINSTON-SALEM JOURNAL Monday, July 10, 2006

Editorials

Full Stop

School buses are pretty hard to miss.

They're big, ugly and yellow. They're also noisy and fully of even noisier kids. And when they are either taking on, or dropping off, school children, they have big red lights flashing and an extended stop arm.

Drivers who don't see school buses simply don't want to see them. They don't stop and exercise adequate caution because they are in a hurry, or they can't be bothered, or they simply aren't paying attention.

These people should not be tolerated.

School buses carry our most precious loved ones, our children. On today's city streets and rural roads, traffic is so heavy and moves so fast that the laws requiring all vehicles to stop for school buses are more necessary than ever. Yet motorists continue to speed by school buses, both as they slow down and when they are stopped.

Society isn't ready to use on-site firing squads on drivers who pass school buses, of course — although a few roadside executions might be one way to get the attention of the self-absorbed drivers who are too focused on getting where they must get to stop and keep our children safe.

Legislation before the General Assembly this week stops well short of summary execution, but it will lead to better compliance with the school-bus safety laws. A bill sponsored by Rep. Dale Folwell of Forsyth County has already passed the House and is before a Senate committee. It would significantly increase the penalties for those convicted of passing a stopped school bus.

Motorists may not pay attention to the school-bus law because the state doesn't do a great job of enforcing it, prosecuting it or of punishing those few people who are convicted of violating it. Though the N.C. Department of Public Instruction estimates that there are 440,000 violations of the law each year, there were only 1,139 convictions in 2005.

If Folwell's bill passes, courts will no longer be able to issue prayers for judgment continued — "PJCs" — for those charged with passing a school bus. That will mean more prosecutions. Those convicted could get up to 45 days of community service. And, if anyone is injured because of the illegal passing, the driver could face a felony prosecution with the possibility of a four-month jail sentence. That's the kind of punishment that will get motorists' attention.

This is a good bill, one that will force the system to come down harder on those who endanger children with their reckless lack of interest in state law and human lives. It is our best hope that the law won't get much use.

But it probably will, and when employed it should certainly get the attention of all motorists and eventually reduce the passing of stopped school buses.

The legislature, which is near the end of its 2006 session, should not adjourn until it passes Folwell's bill.

Supporters of HB 2880
NO PJC/BUS STOP-ARM VIOLATIONS

Sponsored by
Representative Dale Folwell

- **Chief Justice I. Beverly Lake**
- **NC Department of Crime Control and Public Safety**
- **NC Insurance Commissioner Long**
- **NC Highway Patrol**
- **NC Sheriffs' Association**

(over)

Thanks for your vote!
Representative Dale Folwell

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 1375

Short Title:	Notary Public Corrections.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

May 16, 2006

A BILL TO BE ENTITLED

AN ACT TO MAKE TECHNICAL CORRECTIONS TO THE NOTARY PUBLIC ACT, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 10B-20(l) reads as rewritten:

"(l) A notary public required to comply with the provisions of ~~subsection (g)~~ subsection (i) of this section shall prominently post at the notary public's place of business a schedule of fees established by law, which a notary public may charge. The fee schedule shall be written in English and in the non-English language in which the notary services were solicited and shall contain the notice required in subsection (i) of this section, unless the notice is otherwise prominently posted at the notary public's place of business."

SECTION 2. G.S. 10B-106(d) reads as rewritten:

"(d) An electronic form shall be used by an electronic notary in registering with the Secretary and it shall include, at least all of the following:

(1) The applicant's full legal name and the name to be used for commissioning, excluding nicknames.

(2) The state and county of commissioning of the registrant.

(3) The expiration date of the registrant's notary commission.

(4) Proof of successful completion of the course of instruction on electronic notarization as required by this Article.

(5) A description of the technology the registrant will use to create an electronic signature in performing official acts.

(6) If the device used to create the registrant's electronic signature was issued or registered through a licensed certification authority, the name of that authority, the source of the license, the starting and expiration dates of the device's term of registration, and any revocations, annulments, or other premature terminations of any registered device

of the registrant that was due to misuse or compromise of the device, with the date, cause, and nature of each termination explained in detail.

(7) The e-mail address of the registrant.

The information contained in a registration under this section is a public record as defined in G.S. 132-1, except for information contained in ~~subsection (7),~~ subdivision (7), which shall be considered confidential information and shall not be subject to disclosure except as provided in Chapter 132 of the General Statutes or as provided by rule."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 1375
PROPOSED COMMITTEE SUBSTITUTE S1375-CSRC-117 [v.2]

7/11/2006 9:42:18 AM

Short Title: Notary Public Corrections. (Public)

Sponsors:

Referred to:

May 16, 2006

A BILL TO BE ENTITLED

AN ACT TO MAKE TECHNICAL CORRECTIONS TO THE NOTARY PUBLIC ACT, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION, AND TO MAKE OTHER CORRECTIONS TO SESSION LAW 2006-59.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 10B-20(l) reads as rewritten:

"(l) A notary public required to comply with the provisions of ~~subsection (g)~~ subsection (i) of this section shall prominently post at the notary public's place of business a schedule of fees established by law, which a notary public may charge. The fee schedule shall be written in English and in the non-English language in which the notary services were solicited and shall contain the notice required in subsection (i) of this section, unless the notice is otherwise prominently posted at the notary public's place of business."

SECTION 2 G.S. 10B-68, as enacted in Section 24 of S.L. 2006-59, reads as rewritten:

"**§ 10B-68. Technical defects cured.**

(a) Technical defects, errors, or omissions in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the notarial certificate or the related instrument or document. This subsection applies to notarial certificates made on or after December 1, 2005."

(b) Defects in the commissioning or recommissioning of a notary that are approved by the Department are cured. This subsection applies to commissions and recommissions issued on or after December 1, 2005.

(c) As used in this section, a technical defect includes those cured under G.S. 10B-37(f) and G.S. 10B-67. Other technical defects include the absence of the legible appearance of the notary's name exactly as shown on the notary's commission as required in ~~G.S. 10B-20(b) and defects in the commissioning or recommissioning of the notary that were approved by the Department under this Chapter.~~G.S. 10B-20(b). This subsection applies to notarial certificates made on or after December 1, 2005."

SECTION 3 G.S. 47-41.2, as enacted in Section 31 of S.L. 2006-59, reads as rewritten:

"**§ 47-41.2. Technical defects.**

(a) Technical defects, including technical defects under G.S. 10B-68, and errors or omissions in a form of probate or other notarial certificate, shall not affect the sufficiency, validity, or enforceability of the form of probate or the notarial certificate or the related instrument or document. A register of deeds may not refuse to accept an instrument or document for registration because of technical defects, errors, or omissions in a form of probate or other notarial certificate. This subsection applies to notarial certificates and forms of probate made on or after December 1, 2005.

(b) This section does not apply to the requirements for registration contained in G.S. 47-14(a) and a register of deeds shall not accept for registration an instrument that does not comply with the requirements of G.S. 47-14(a)."

SECTION 4 Section 33 of S.L. 2006-59 reads as rewritten;

"**SECTION 33.** G.S. 10B-11(b)(3) as amended in Section 5 of this act becomes effective July 1, 2006. G.S. 10B-99 as enacted in Section 24 of this act is effective when this act becomes law. The remainder of this act becomes effective October 1, 2006, and except as otherwise set forth in this act, applies to notarial acts performed on or after that date."

SECTION 5 G.S. 10B-68(a) and (b), as enacted in Section 24 of S.L. 2006-59, and as amended in Section 2 of this act become effective July 1, 2006. G.S. 47-41.2, as enacted in Section 31 of S.L. 2006-59, and as amended in Section 3 of this act becomes effective July 1, 2006. Section 1 of this Act becomes effective October 1, 2006. The remainder of this act is effective when the act becomes law."

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 1375

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S1375-ARC-73 [v.2]

omissions in a form of probate or other notarial certificate. This subsection applies to notarial certificates and forms of probate made on or after December 1, 2005.

(b) This section does not apply to the requirements for registration contained in G.S. 47-14(a) and a register of deeds shall not accept for registration an instrument that does not comply with the requirements of G.S. 47-14(a)."

SECTION 4 Section 33 of S.L. 2006-59 reads as rewritten;

"SECTION 33. G.S. 10B-11(b)(3) as amended in Section 5 of this act becomes effective July 1, 2006. G.S. 10B-99 as enacted in Section 24 of this act is effective when this act becomes law. The remainder of this act becomes effective October 1, 2006, and except as otherwise set forth in this act, applies to notarial acts performed on or after that date."

SECTION 5 G.S. 10B-68(a) and (b), as enacted in Section 24 of S.L. 2006-59, and as amended in Section 2 of this act become effective July 1, 2006. G.S. 47-41.2, as enacted in Section 31 of S.L. 2006-59, and as amended in Section 3 of this act becomes effective July 1, 2006. Section 1 of this Act becomes effective October 1, 2006. The remainder of this act is effective when the act becomes law.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 1375

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S1375-ARC-73 [v.2]

Date _____,2006

Comm. Sub. [NO]
Amends Title [YES]
First Edition

Senator _____

moves to amend the bill on page 1, line3, by rewriting the line to read:
"ACT, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION, AND TO MAKE OTHER CORRECTIONS TO SESSION LAW 2006-59.";

and on page 1, lines 13-28, and page 2, lines 1-9, by rewriting the lines to read:

"**SECTION 2** G.S. 10B-68, as enacted in Section 24 of S.L. 2006-59, reads as rewritten:

"**§ 10B-68. Technical defects cured.**

(a) Technical defects, errors, or omissions in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the notarial certificate or the related instrument or document. This subsection applies to notarial certificates made on or after December 1, 2005."

(b) Defects in the commissioning or recommissioning of a notary that are approved by the Department are cured. This subsection applies to commissions and recommissions issued on or after December 1, 2005.

(c) As used in this section, a technical defect includes those cured under G.S. 10B-37(f) and G.S. 10B-67. Other technical defects include the absence of the legible appearance of the notary's name exactly as shown on the notary's commission as required in ~~G.S. 10B-20(b) and defects in the commissioning or recommissioning of the notary that were approved by the Department under this Chapter.~~G.S. 10B-20(b). This subsection applies to notarial certificates made on or after December 1, 2005."

SECTION 3 G.S. 47-41.2, as enacted in Section 31 of S.L. 2006-59, reads as rewritten:

"**§ 47-41.2. Technical defects.**

(a) Technical defects, including technical defects under G.S. 10B-68, and errors or omissions in a form of probate or other notarial certificate, shall not affect the sufficiency, validity, or enforceability of the form of probate or the notarial certificate or the related instrument or document. A register of deeds may not refuse to accept an instrument or document for registration because of technical defects, errors, or

Principal Clerk
Reading Clerk

MEETING IS CANCELLED

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	July 13, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 2002	UNC Students/ Criminal Background Checks.	Senator Hunt

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

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Senate Judiciary II Committee
Thursday, July 13, 2006, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 2002	UNC Students/ Criminal Background Checks.	Senator Hunt

Presentations

Other Business

Adjournment

Principal Clerk
Reading Clerk

Corrected Notice --- HB 449 Removed

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	July 18, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 2894	Prohibit Various Lending Subterfuges.	Representative Howard
SB 2002	UNC Students/ Criminal Background Checks.	Senator Hunt

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk
Reading Clerk

2nd CORRECTED NOTICE

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	July 18, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 2002	UNC Students/ Criminal Background Checks.	Senator Hunt
HB 2894	Prohibit Various Lending Subterfuges.	Representative Howard
HB 449	Gift Tax Changes.	Representative Stam Representative Gibson, III

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk ____
Reading Clerk ____

Corrected Notice – Bill Added

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

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Tuesday	July 18, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 2002	UNC Students/ Criminal Background Checks.	Senator Hunt
HB 449	Gift Tax Changes	Representative Stam Representative Gibson

Senator Fletcher L. Hartsell, Jr., Chair

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	July 18, 2006	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 2002	UNC Students/ Criminal Background Checks.	Senator Hunt

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee

Minutes

July 18, 2006

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on July 18, 2006, with fifteen members present. Senator Hartsell introduced pages Ruth Small, Will Marshall, Jason Williams, Matt Mcchargue, Sarah Senter, and Brittani Ezuma, and thanked them for serving.

SB 2002 (UNC Students/Criminal Background Checks.) Senator Goodall moved to accept the Proposed Committee Substitute for purposes of discussion. All voted and the motion carried. Senator Hartsell noted that the bill would be discussed but no vote would be taken. Senator Hunt was recognized to explain the bill. Questions from Senators Forrester, Goodall, Berger, Apodaca, Bingham, Dannelly, Kerr and Bland were answered by Senator Hunt and Senator Hartsell. Ms. Leslie Winner, representing the University of North Carolina System spoke in opposition to the bill. Questions from Senators Dorsett and Dalton were answered by Ms. Winner. No Action was taken on the bill.

HB 2894 (Prohibit Various Lending Subterfuges.) Senator Atwater moved to adopt the Proposed Committee Substitute for purposes of discussion. In the absence of Representative Howard, Senator Bingham explained the bill. Mr. Josh Stein, of the Consumer Protection Division of the Office of the Attorney General spoke on the merits of the bill. Senator Dannelly moved for a favorable report, unfavorable to the original bill but favorable to the committee substitute. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, July 18, 2006

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B. **2894** Prohibit Various Lending Subterfuges.

Draft Number:	PCS 60866
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S 1

SENATE BILL 2002

Short Title:	UNC Students/ Criminal Background Checks.	(Public)
Sponsors:	Senator Hunt.	
Referred to:	Finance.	

May 26, 2006

A BILL TO BE ENTITLED

AN ACT TO REQUIRE CRIMINAL BACKGROUND CHECKS FOR STUDENTS TO BE ADMITTED TO THE UNIVERSITY OF NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 116 of the General Statutes is amended by adding a new Article to read:

"Article 33.

"Criminal Background Checks Required for Students to be Admitted to The University of North Carolina."

"**§ 116-265. Criminal background check required for students.**

(a) Each constituent institution shall require a national and State criminal background check of every person who is to be admitted to the institution.

(b) The Department of Justice may provide a criminal record check to the institution for a person who is accepted for admission to the institution. The institution shall provide to the Department of Justice, along with the request, the fingerprints of the student, any additional information required by the Department of Justice, and a form signed by the student consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The student's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The institution shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes. The Department of Justice may charge each student a fee for conducting the checks of criminal history records authorized by this subsection.

(c) A prospective student at a constituent institution may have fingerprints taken at any sheriff's office or local law enforcement agency that has the necessary equipment."

SECTION 2. This act becomes effective for students first admitted for the Fall 2007 semester and thereafter.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

S D

SENATE BILL 2002
PROPOSED COMMITTEE SUBSTITUTE S2002-CSLB-167 [v.1]

Short Title: UNC Students/ Criminal Background Checks. (Public)

Sponsors:

Referred to:

May 26, 2006

A BILL TO BE ENTITLED

AN ACT TO REQUIRE CRIMINAL BACKGROUND CHECKS FOR STUDENTS TO BE ADMITTED TO THE UNIVERSITY OF NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 116 of the General Statutes is amended by adding a new Article to read:

"Article 33.

"Criminal Background Checks Required for Students to be Admitted to The University of North Carolina."

"**§ 116-265. Criminal background check required for students, fingerprint check may be required.**

(a) Each constituent institution shall require a criminal background check of every person who is to be admitted to the institution. This check shall be of the state where the applicant resided at the time the applicant attained the age of 16.

(b) The Department of Justice may provide a criminal record check to the institution for a person who is accepted for admission to the institution. The institution shall provide to the Department of Justice, along with the request, any additional information required by the Department of Justice, and a form signed by the student consenting to the check of the criminal record. The institution shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

(c) The constituent institution may also require as a condition of admission or enrollment a fingerprint check of the applicant. In such case, the institution shall provide to the Department of Justice the fingerprints of the student, any additional information required by the Department of Justice, and a form signed by the student consenting to the check of fingerprints and other identifying information required by the State or national repositories. The student's fingerprints shall be forwarded to the State

Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The institution shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

(d) The Department of Justice may charge each student a fee for conducting the checks of criminal history records authorized by this section.

(e) A prospective student at a constituent institution may have fingerprints taken at any sheriff's office or local law enforcement agency that has the necessary equipment.

(f) A constituent institution may contract with a third party to handle any duties assigned to it under this section."

SECTION 2. This act becomes effective for students first admitted for the Fall 2007 semester and thereafter.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H 1

HOUSE BILL 2894

Short Title:	Prohibit Various Lending Subterfuges.	(Public)
Sponsors:	Representative Howard.	
Referred to:	Rules, Calendar, and Operations of the House.	

July 3, 2006

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE APPLICATION OF THE NORTH CAROLINA CONSUMER FINANCE ACT TO VARIOUS LENDING SUBTERFUGES.

The General Assembly of North Carolina enacts:

SECTION 1. The General Assembly makes the following findings:

(1) Consumer loans in North Carolina are regulated by the North Carolina Consumer Finance Act, Article 15 of Chapter 53 of the General Statutes. The North Carolina Consumer Finance Act requires consumer finance lenders to be licensed and, under G.S. 53-173, authorizes interest rates of up to thirty-six percent (36%) on loans of three thousand dollars ($3,000) or less.

(2) Some lenders have attempted to evade the restrictions of the North Carolina Consumer Finance Act by offering cash advances in the form of instant cash rebates or other guises. These cash advance transactions are typically offered in conjunction with the sale of Internet access, telephone time units, catalog certificates, or the use of office equipment, when in fact the sale of the goods or services is a pretext for the making of a loan.

(3) North Carolina courts have declared some of these transactions to be unlawful, but new schemes continue to be devised in order to circumvent the lending laws of North Carolina and to avoid regulation by the Commissioner of Banks.

(4) It is the intent of the General Assembly that G.S. 53-166(a) should be construed broadly to prohibit illicit lending schemes and to clarify the devices, subterfuges, and pretenses that are prohibited under G.S. 53-166(b), as amended by Section 2 of this act.

SECTION 2. G.S. 53-166 reads as rewritten:

"**§ 53-166. Scope of Article; evasions; penalties; loans in violation of Article void.**

(a) Scope. – No person shall engage in the business of lending in amounts of ten thousand dollars ($10,000) or less and contract for, exact, or receive, directly or indirectly, on or in connection with any such loan, any charges whether for interest, compensation, consideration, or expense, or any other purpose whatsoever, which in the aggregate are greater than permitted by Chapter ~~24,~~24 of the General Statutes, except as provided in and authorized by this Article, and without first having obtained a license from the Commissioner. The word "lending" as used in this section, shall include, but shall not be limited to, endorsing or otherwise securing loans or contracts for the repayment of loans.

(b) Evasions. – The provisions of subsection (a) of this section ~~shall apply~~apply to any person who seeks to avoid its application by any device, ~~subterfuge~~ subterfuge, or pretense whatsoever. Such devices, subterfuges, and pretenses include, but are not limited to, any transaction in which a cash rebate or other advance of funds is offered and all of the following apply:

(1) The cash advance is made contemporaneously with the transaction.

(2) The amount of the cash advance is required to be repaid at a later date.

(3) The selling or providing of any item, service, or commodity with the transaction is incidental to, or a pretext for, the advance of funds.

(4) The transaction requires the consumer to present a check or electronic debit authorization for the purpose of making future repayment.

(c) Penalties; Commissioner to Provide and Testify as to Facts in His Possession. – Any person not exempt from this Article, or any officer, agent, ~~employee~~ employee, or representative thereof, who fails to comply with or who otherwise violates any of the provisions of this Article, or any regulation of the Banking Commission adopted pursuant to this Article, shall be guilty of a Class 1 misdemeanor. Each ~~such~~ violation shall be considered a separate offense. It ~~shall be~~is the duty of the Commissioner of Banks to provide the district attorney of the court having jurisdiction of any ~~such~~ offense under this subsection with all facts and evidence in ~~his~~ the Commissioner's actual or constructive possession, and to testify as to ~~such~~ these facts upon the trial of any person for ~~any such~~the offense.

(d) Additional Penalties. – Any contract of loan, the making or collecting of which violates any provision of this Article, or regulation thereunder, except as a result of accidental or bona fide error of computation ~~shall be void~~ is void, and the licensee or any other party in violation shall ~~have no right to~~ not collect, ~~receive~~ receive, or retain any principal or charges whatsoever with respect to ~~such~~ the loan. If an affiliate operating in the same office or subsidiary operating in the same office of a licensee makes a loan in violation of ~~G.S. 53-180(i) such~~ G.S. 53-180(i), the affiliate or subsidiary may recover only its principal on ~~such~~ the loan."

SECTION 3. This act becomes effective October 1, 2006, and applies to transactions that are investigated on or after that date under the North Carolina Consumer Finance Act, Article 15 of Chapter 53 of the General Statutes, as amended by this act, and applies to transactions that are subject to enforcement actions under the North Carolina Consumer Finance Act that are filed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

H D

HOUSE BILL 2894
PROPOSED SENATE COMMITTEE SUBSTITUTE H2894-PCS60866-RC-121

Short Title: Prohibit Various Lending Subterfuges. (Public)

Sponsors:

Referred to:

July 3, 2006

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE APPLICATION OF THE NORTH CAROLINA CONSUMER FINANCE ACT TO VARIOUS LENDING SUBTERFUGES.

The General Assembly of North Carolina enacts:

SECTION 1. The General Assembly makes the following findings:

(1) Consumer loans in North Carolina are regulated by the North Carolina Consumer Finance Act, Article 15 of Chapter 53 of the General Statutes. The North Carolina Consumer Finance Act requires consumer finance lenders to be licensed and, under G.S. 53-173, authorizes interest rates of up to thirty-six percent (36%) on loans of three thousand dollars ($3,000) or less.

(2) Some lenders have attempted to evade the restrictions of the North Carolina Consumer Finance Act by offering cash advances in the form of instant cash rebates or other guises. These cash advance transactions are typically offered in conjunction with the sale of Internet access, telephone time units, catalog certificates, or the use of office equipment, when in fact the sale of the goods or services is a pretext for the making of a loan.

(3) North Carolina courts have declared some of these transactions to be unlawful, but new schemes continue to be devised in order to circumvent the lending laws of North Carolina and to avoid regulation by the Commissioner of Banks.

(4) It is the intent of the General Assembly that G.S. 53-166(a) should be construed broadly to prohibit illicit lending schemes and to clarify the devices, subterfuges, and pretenses that are prohibited under G.S. 53-166(b), as amended by Section 2 of this act.

SECTION 2. G.S. 53-166 reads as rewritten:

"**§ 53-166. Scope of Article; evasions; penalties; loans in violation of Article void.**

(a) Scope. -- No person shall engage in the business of lending in amounts of ten thousand dollars ($10,000) or less and contract for, exact, or receive, directly or indirectly, on or in connection with any such loan, any charges whether for interest, compensation, consideration, or expense, or any other purpose whatsoever, which in the aggregate are greater than permitted by Chapter ~~24,~~24 of the General Statutes, except as provided in and authorized by this Article, and without first having obtained a license from the Commissioner. The word "lending" as used in this section, shall include, but shall not be limited to, endorsing or otherwise securing loans or contracts for the repayment of loans.

(b) Evasions. – The provisions of subsection (a) of this section ~~shall apply~~apply to any person who seeks to avoid its application by any device, ~~subterfuge~~ subterfuge, or pretense whatsoever. Devices, subterfuges, and pretenses include any transaction in which a cash rebate or other advance of funds is offered and all of the following apply:

(1) The cash advance is made contemporaneously with the transaction or soon thereafter.

(2) The amount of the cash advance is required to be repaid at a later date.

(3) The selling or providing of any item, service, or commodity with the transaction is incidental to, or a pretext for, the advance of funds.

(c) Penalties; Commissioner to Provide and Testify as to Facts in His Possession. – Any person not exempt from this Article, or any officer, agent, ~~employee~~ employee, or representative thereof, who fails to comply with or who otherwise violates any of the provisions of this Article, or any regulation of the Banking Commission adopted pursuant to this Article, shall be guilty of a Class 1 misdemeanor. Each ~~such~~ violation shall be considered a separate offense. It ~~shall be~~is the duty of the Commissioner of Banks to provide the district attorney of the court having jurisdiction of any ~~such~~ offense under this subsection with all facts and evidence in ~~his~~ the Commissioner's actual or constructive possession, and to testify as to ~~such~~ these facts upon the trial of any person for ~~any such~~the offense.

(d) Additional Penalties. – Any contract of loan, the making or collecting of which violates any provision of this Article, or regulation thereunder, except as a result of accidental or bona fide error of computation ~~shall be void~~ is void, and the licensee or any other party in violation shall ~~have no right to~~ not collect, ~~receive~~ receive, or retain any principal or charges whatsoever with respect to ~~such~~ the loan. If an affiliate operating in the same office or subsidiary operating in the same office of a licensee makes a loan in violation of ~~G.S. 53-180(i) such~~ G.S. 53-180(i), the affiliate or subsidiary may recover only its principal on ~~such~~ the loan."

SECTION 3. This act becomes effective October 1, 2006, and applies to transactions that are investigated on or after that date under the North Carolina Consumer Finance Act, Article 15 of Chapter 53 of the General Statutes, as amended by this act, and applies to transactions that are subject to enforcement actions under the North Carolina Consumer Finance Act that are filed on or after that date.

HOUSE BILL 2894:
Prohibit Various Lending Subterfuges

BILL ANALYSIS

Committee:	Senate Judiciary II	**Date:**	July 17, 2006
Introduced by:	Rep. Howard	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	PCS to First Edition H2894-PCS60866-RC-121		

SUMMARY: ***The North Carolina Consumer Finance Act limits the interest rate on small consumer loans to 36%, and prohibits "any device, subterfuge or pretense" used by lenders to evade the maximum interest rate. HB 2894 clarifies that certain cash rebate transactions are subterfuges for unlawful loans and are prohibited. The bill language is consistent with a recent Court of Appeals decision which held that the Consumer Finance Act does apply to cash advances offered in the form of rebates.***

The act clarifies that a subterfuges includes any transaction in which a cash rebate or other advance of funds is offered and all of the following apply:

- ***The cash advance is made contemporaneously with the transaction or soon thereafter.***
- ***The amount of the cash advance is required to be repaid at a later date.***
- ***The selling or providing of any item, service, or commodity with the transaction is incidental to, or a pretext for, the advance of funds.***

EFFECTIVE DATE: The act becomes effective October 1, 2006, and applies to transactions that are investigated on or after that date under the North Carolina Consumer Finance Act, Article 15 of Chapter 53 of the General Statutes, as amended by this act, and applies to transactions that are subject to enforcement actions under the North Carolina Consumer Finance Act that are filed on or after that date.

H2894e1-SMRC-PCS60866-RC-121

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 7-18-06

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
LeAnn C Pennyman	CFSA
Timothy C. Smith	NC AG
Lynne Weaver	NC AG
Cady Wiggins	Gov.'s office
	UNC
Kevin FitzGerald	UNC
	NCATL
Jill Shotzberger	ACLU-NC
Jeff Wolfe	Daily Bulletin
	BPM+C

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 7-18-06

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Amy Simes	NCDENR
Eric Sauls	Edmisten + Webb
Brandon Reid	NCGA Intern
Suzanne Wu	NCIIS
Kathy Davis	Staff
Clem Butler	Student
Greg Butler	Conf of D.A's
N.T. Duvall	VA. & N.C. Public School teacher*
Paul Stocic	NCBA

* ECU & ASU graduate

Box 14 Contents
2005-06 Standing Committee Minutes

2005 Senate Mental Health & Youth Services
2005-06 Senate Opportunities & Needs for Economic Growth
2005-06 Senate Pensions & Retirement & Aging
2005-06 Senate Rules
2005 Senate State & Local Government
2006 Senate Transportation