THE GENERAL STATUTES OF NORTH CAROLINA

1985 SUPPLEMENT

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

Under the Direction of
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Volume 2A, Part I

Chapters 28 to 41

1984 Replacement

Annotated through 329 S.E.2d 896. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume.

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Preface

This Supplement to Replacement Volume 2A, Part I contains the general laws of a permanent nature enacted by the General Assembly at the 1985 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purpose of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

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

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

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1985 Regular Session affecting Chapters 28 through 41 of the General Statutes.

Annotations:

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

North Carolina Reports through Volume 313, p. 337.
North Carolina Court of Appeals Reports through Volume 73, p. 335.
South Eastern Reporter 2nd Series through Volume 329, p. 896.
Federal Reporter 2nd Series through Volume 761, p. 712.
Federal Supplement through Volume 607, p. 1490.
Federal Rules Decisions through Volume 105, p. 250.
Bankruptcy Reports through Volume 48, p. 873.
Supreme Court Reporter through Volume 105, p. 2370.
North Carolina Law Review through Volume 63, p. 809.
Wake Forest Law Review through Volume 20, p. 540.
Campbell Law Review through Volume 7, p. 298.
Duke Law Journal through 1983, p. 1142.
North Carolina Central Law Journal through Volume 14, p. 680.
Opinions of the Attorney General.

The General Statutes of North Carolina

1985 Supplement

VOLUME 2A, PART I

Chapter 28A.

Administration of Decedents' Estates.

ARTICLE 2.

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

§ 28A-2-1. Clerk of superior court.

CASE NOTES

I. GENERAL CONSIDERATION.

Jurisdiction Exclusive. —

Although G.S. 7A-241 provides that exclusive original jurisdiction in probate matters is vested in the "superior court division," this section specifies that the clerk is given exclusive original jurisdiction in the administration of decedents' estates except in cases where the clerk is disqualified to act. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

Derivative Jurisdiction of Judge. — In most instances the superior court judge's probate jurisdiction is, in effect, that of an appellate court, because his jurisdiction is derivative and not concurrent. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

Procedure on Appeal from Order of Clerk. — In an appeal from an order of the clerk in a probate matter, the superior court is not required to conduct a de novo hearing. Rather, when a finding of fact by the clerk of court is properly challenged by specific exception, the superior court judge will review those findings, and either affirm, reverse, or modify them. If he deems it advisable, he may submit the issue to a jury, which course he could not follow without hearing evidence. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

Action for Breach of Duties, Negligence, and Fraud in Administration of Estate. —

In accord with original. See Ingle v. Allen, 69 N.C. App. 192, 317 S.E.2d 1, cert. denied, 311 N.C. 757, 321 S.E.2d 135 (1984).

ARTICLE 9.

Revocation of Letters.

§ 28A-9-1. Revocation after hearing.

CASE NOTES

I. GENERAL CONSIDERATION.

Proceeding to remove an executor and a civil suit for damages are not the same cause of action. The proceeding to remove an executor is purely statutory, with probate jurisdiction vested in the clerk of superior court, and reviewable by a superior court judge on appeal. A civil suit for damages involves a full trial with the right to have factual issues resolved by a jury. Shelton v. Fairley, — N.C. App. —, 323 S.E.2d 410 (1984).

Statutory action to remove administrators or executors is not res judicata in any other proceeding which the parties are entitled to pursue. Shelton v. Fairley, — N.C. App. —, 323 S.E.2d 410 (1984).

A proceeding under this section is not res judicata in a civil action for damages. Shelton v. Fairley, — N.C. App. —, 323 S.E.2d 410 (1984).

Orders entered in a proceeding under this section, in which an executor must show cause why he should not be removed, do not constitute res judicata as to a later civil action for damages between the parties or collaterally estop the bringing of such an action. Shelton v. Fairley, — N.C. App. —, 323 S.E.2d 410 (1984).

Beneficiaries Seeking Removal Not Held to Election of Remedies. — Prejudice would result if, when beneficiaries sought to remove an executor, they were held to an election of remedies and could not later bring a civil action for damages. Such a policy would either chill exercise of the right to seek statutory removal of an executor or force beneficiaries prematurely to bring civil actions for damages. Shelton v. Fairley, — N.C. App. —, 323 S.E.2d 410 (1984).

Verification Sufficient. — Signing of petition for revocation before a notary public under oath, petitioner having sworn that the matters stated in the petition upon her information and belief were true, constituted sufficient verification required by this section. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

III. DEFAULT OR MISCONDUCT.

Allegations of Misconduct Held Sufficient. — Allegations that coexecutor failed to timely file estate accountings with the clerk's office, disregarding notices issued by the clerk that such accountings were due, that he paid himself approximately $32,900 from the estate for his commission and attorney's fees without approval of the clerk and that this amount was in excess of any amount which he could legally be allowed for commissions and legal fees, and that through his default and misconduct he had violated his fiduciary duty as a coexecutor of the estate constituted sufficient grounds upon which executrix could petition for the revocation of coexecutor's letters under subdivision

(a)(3) of this section. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

ARTICLE 13.

Representative's Powers, Duties and Liabilities.

§ 28A-13-1. Time of accrual of duties and powers.

CASE NOTES

Testamentary directions for disposition of the testator's body must be treated as valid upon the death of the testator, and funeral directors who act upon the provision in good faith cannot later be held liable in tort because they acted before the will was probated. Dumouchelle v. Duke Univ., 69 N.C. App. 471, 317 S.E.2d 100 (1984).

A testamentary provision directing disposition of the testator's body must prevail over conflicting wishes of the testator's next-of-kin and the next-of-kin in such a case have no right to possession of the body for the purpose of selecting funeral arrangements and therefore they have no standing to sue for negligence for failure to carry out their instructions for disposal of testator's body. Dumouchelle v. Duke Univ., 69 N.C. App. 471, 317 S.E.2d 100 (1984).

§ 28A-13-3. Powers of a personal representative or fiduciary.

(a) Except as qualified by express limitations imposed in a will of the decedent or a court order, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative has the power to perform in a reasonable and prudent manner every act which a reasonable and prudent man would perform incident to the collection, preservation, liquidation or distribution of a decedent's estate so as to accomplish the desired result of settling and distributing the decedent's estate in a safe, orderly, accurate and expeditious manner as provided by law, including but not limited to the powers specified in the following subdivisions:

(1) To take possession, custody or control of the personal property of the decedent. If in the opinion of the personal representative his possession, custody or control of such property is not necessary for purposes of administration, such property may be left with or surrendered to the heir or devisee presumptively entitled thereto. He has the power to take possession, custody or control of the real property of the decedent if he determines such possession, custody or control is in the best interest of the administration of the estate. Prior to exercising such power over real property the procedure as set out in subsection G.S. 28A-13-3(c) shall be followed. If the personal representative determines that such possession, custody or control is not in the best interest of the administration of the estate such property may be left with or surrendered to the heir or devisee presumptively entitled thereto.

(2) To retain assets owned by the decedent pending distribution or liquidation even though such assets may include

items which are otherwise improper for investment of trust funds.

(3) To receive assets from other fiduciaries or other sources.

(4) To complete performance of contracts entered into by the decedent that continue as obligations of his estate, or to refuse to complete such contracts, as the personal representative may determine to be in the best interests of the estate, but such refusal shall not limit any cause of action which might have been maintained against decedent if he had refused to complete such contract. In respect to enforceable contracts by the decedent to convey an interest in land, the provisions of G.S. 28A-17-9 are controlling.

(5) To deposit, as a fiduciary, funds of the estate in a bank, including a bank operated by the personal representative upon compliance with the provisions of G.S. 36A-63.

(6) To make, as a fiduciary, any form of investment allowed by law to the State Treasurer under G.S. 147-69.1, with funds of the estate, when such are not needed to meet debts and expenses immediately payable and are not immediately distributable, including money received from the sale of other assets; or to enter into other short-term loan arrangements that may be appropriate for use by trustees or beneficiaries generally. Provided, that in addition to the types of investments hereby authorized, deposits in interest-bearing accounts of any credit union authorized to do business in this State, when such deposits are insured in the same manner as required by G.S. 147-69.1 for deposits in a savings and loan association, are hereby authorized.

(7) To abandon or relinquish all rights in any property when, in the opinion of the personal representative acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit to the estate.

(8) To vote shares of stock or other securities in person or by general or limited proxy.

(9) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.

(10) To hold shares of stock or other securities in the name of a nominee, without mention of the estate in the instrument representing stock or other securities or in registration records of the issuer thereof; provided, that

a. The estate records and all reports or accounts rendered by the personal representative clearly show the ownership of the stock or other securities by the personal representative and the facts regarding its holdings, and

b. The nominee shall not have possession of the stock or other securities or access thereto except under the immediate supervision of the personal representative or when such securities are deposited by the personal representative in a clearing corporation as defined in G.S. 25-8-102(3).

Such personal representative shall be personally liable for any acts or omissions of such nominee in connection with such stock or other securities so held, as if such personal representative had done such acts or been guilty of such omissions.

(11) To insure, at the expense of the estate, the assets of the estate in his possession, custody or control against damage or loss.

(12) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the personal representative shall deem advisable, including the power of a corporate personal representative to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the estate, and to mortgage, pledge or otherwise encumber such portion of the estate as may be required to secure such loan or loans. In respect to the borrowing of money on the security of the real property of the decedent, G.S. 28A-17-11 is controlling.

(13) To renew obligations of the decedent for the payment of money.

(14) To advance his own money for the protection of the estate, and for all expenses, losses and liabilities sustained in the administration of the estate or because of the holding or ownership of any estate assets. For such advances, with any interest, the personal representative shall have a lien on the assets of the estate as against a devisee or heir.

(15) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate.

(16) To pay taxes, assessments, his own compensation, and other expenses incident to the collection, care, administration and protection of the assets of the estate in his possession, custody or control.

(17) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(18) To allocate items of income or expense to either estate income or principal, as permitted or provided by law.

(19) To employ persons, including attorneys, auditors, investment advisors, appraisers or agents to advise or assist him in the performance of his administrative duties.

(20) To continue any business or venture in which the decedent was engaged at the date of his death, where such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the decedent's interest in such business. With respect to the use of the decedent's interest in a continuing partnership, the provisions of G.S. 59-71 and 59-72 qualify this power; and with respect to farming operations engaged in by the decedent at the time of his death, the provisions of G.S. 28A-13-4 qualify this power.

(21) To incorporate or participate in the incorporation of any business or venture in which the decedent was engaged at the time of his death.

(22) To provide for the exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(23) To maintain actions for the wrongful death of the decedent according to the provisions of Article 18 of this Chapter and to compromise or settle any such claims, whether in

litigation or not, provided that any such settlement shall be subject to the approval of a judge of superior court unless all persons who would be entitled to receive any damages recovered under G.S. 28A-18-2(b)(4) are competent adults and have consented in writing. It shall be the duty of the personal representative in distributing the proceeds of such settlement in any instance to take into consideration and to make a fair allocation to those claimants for funeral, burial, hospital and medical expenses which would have been payable from damages which might have been recovered had a wrongful death action gone to judgment in favor of the plaintiff.

(24) To maintain any appropriate action or proceeding to recover possession of any property of the decedent, or to determine the title thereto; to recover damages for any injury done prior to the death of the decedent to any of his property; and to recover damages for any injury done subsequent to the death of the decedent to such property.

(25) To purchase at any public or private sale of any real or personal property belonging to the decedent's estate or securing an obligation of the estate as a fiduciary for the benefit of the estate when, in his opinion, it is necessary to prevent a loss to the estate.

(26) To sell or lease personal property of the estate in the manner prescribed by the provisions of Article 16 of this Chapter.

(27) To sell or lease real property of the estate in the manner prescribed by the provisions of Article 17 of this Chapter.

(28) To enter into agreements with taxing authorities to secure the benefit of the federal marital deduction pursuant to G.S. 28A-22-6.

(29) To pay or satisfy the debts and claims against the decedent's estate in the order and manner prescribed by Article 19 of this Chapter.

(30) To distribute any sum recovered for the wrongful death of the decedent according to the provisions of G.S. 28A-18-2; and to distribute all other assets available for distribution according to the provisions of this Chapter or as otherwise lawfully authorized.

(31) To exercise such additional lawful powers as are conferred upon him by the will.

(32) To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the personal representative.

(33) To renounce in accordance with the provisions of Chapter 31B of the General Statutes.

(1868-9, c. 113, ss. 73, 77; Code, ss. 1501, 1505; Rev., ss. 85, 159; C.S., ss. 170, 171; 1925, c. 86; 1933, cc. 161, 196, 498; 1973, c. 1329, s. 3; 1975, c. 19, s. 9; c. 371, s. 4; 1977, c. 556; 1979, c. 467, s. 21; c. 717, s. 3; 1985, c. 689, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "G.S. 36A-63" for "G.S. 36-27" at the end of subdivision (a)(5).

ARTICLE 14.

Notice to Creditors.

§ 28A-14-1. Advertisement for claims.

Every personal representative and collector within 20 days after the granting of letters shall notify all persons, firms and corporations having claims against the decedent to present the same to such personal representative or collector, on or before a day to be named in such notice, which day must be at least six months from the day of the first publication or posting of such notice. The notice shall set out a mailing address for the personal representative or collector. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. If there is no newspaper published in the county, but there is a newspaper having general circulation in the county, then at the option of the personal representative, or collector, the notice shall be published once a week for four consecutive weeks in the newspaper having general circulation in the county and posted at the courthouse or the notice shall be posted at the courthouse and four other public places in the county. Personal representatives are not required to publish notice to creditors if the only asset of the estate consists of a claim for damages arising from death by wrongful act. When any collector or personal representative of an estate has published the notice provided for by this section, no further publication shall be required by any other collector or personal representative. (1868-9, c. 113, s. 29; 1881, c. 278, s. 2; Code, ss. 1421, 1422; Rev., s. 39; C.S., s. 45; 1945, c. 635; 1949, c. 47; c. 63, s. 1; 1955, c. 625; 1961, c. 26, s. 1; c. 741, s. 1; 1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1985, c. 319.)

Effect of Amendments. — The 1985 amendment, effective June 4, 1985, and applicable to the administration of the estates of persons dying on or after that date, added the last sentence.

Legal Periodicals. — For article, "Notice to Creditors in Estate Proceedings: What Process Is Due?", see 63 N.C.L. Rev. 659 (1985).

ARTICLE 15.

Assets; Discovery of Assets.

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

(c) If it shall be determined by the personal representative that it is in the best interest of the administration of the estate to sell, lease, or mortgage any real estate or interest therein to obtain money for the payment of debts and other claims against the decedent's estate, the personal representative shall institute a special

proceeding before the clerk of superior court for such purpose pursuant to Article 17 of this Chapter, except that no such proceeding shall be required for a sale made pursuant to authority given by will. A general provision granting authority to the personal representative to sell the testator's real property, or incorporation by reference of the provisions of G.S. 32-27(2) shall be sufficient to eliminate the necessity for a proceeding under Article 17.

(1868-9, c. 113, ss. 14, 15; Code, ss. 1406, 1407; Rev., ss. 45, 47; C.S., ss. 52, 54; 1973, c. 1329, s. 3; 1975, c. 300, s. 5; 1985, c. 426.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective June 19, 1985, added the last sentence of subsection (c).

ARTICLE 18.

Actions and Proceedings.

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

(a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The personal representative or collector of the decedent who pursues an action under this section may pay from the assets of the estate the reasonable and necessary expenses, not including attorneys' fees, incurred in pursuing the action. At the termination of the action, any amount recovered shall be applied first to the reimbursement of the estate for the expenses incurred in pursuing the action, then to the payment of attorneys' fees, and shall then be distributed as provided in this section. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding one thousand five hundred dollars ($1,500) incident to the injury resulting in death; provided that all claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time, but shall be disposed of as provided in the Intestate Succession Act.

(R.C., c. 1, s. 10; c. 46, ss. 8, 9; 1868-9, c. 113, ss. 70-72, 115; Code, ss. 1498-1500; Rev., ss. 59, 60; 1919, c. 29; C.S., ss. 160, 161; 1933, c. 113; 1951, c. 246, s. 1; 1959, c. 879, s. 9; c. 1136; 1969, c. 215; 1973, c. 464, s. 2; c. 1329, s. 3; 1981, c. 468; 1985, c. 625.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective July 5, 1985, inserted the present second and third sentences of subsection (a).

Legal Periodicals. —

For article, "Legal Implications of Human in Vitro Fertilization for the Practicing Physician in North Carolina," see 6 Campbell L. Rev. 5 (1984).

For article, "Economic Valuation for Wrongful Death," see 6 Campbell L. Rev. 47 (1984).

CASE NOTES

I. GENERAL CONSIDERATION.

Municipalities Not Exempt from Section. — The plain, positive provisions of this section contain no basis for supposing that the Legislature intended to exempt municipalities therefrom. Jackson v. Housing Auth., — N.C. App. —, 326 S.E.2d 295 (1985).

Cited in McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984).

V. DAMAGES RECOVERABLE.

A. In General.

Negative Factors Held Relevant to Present Monetary Value. — Evidence regarding 19 year old decedent's low level of educational attainment, absence of regular employment, status of dependency on her parents, and history of alcohol and drug abuse was clearly relevant to a determination of her "present monetary value ... to the persons entitled to receive the damages recovered," and the jury could conclude that these negative factors offset, to the extent found, what decedent's present monetary value would have been in their absence. Pearce v. Fletcher, — N.C. App. —, 328 S.E.2d 889 (1985), upholding award of damages in the amount of $5,000.

E. Punitive Damages.

Punitive damages are recoverable from municipalities in wrongful death cases on the same basis as from other tort-feasors. Jackson v. Housing Auth., — N.C. App. —, 326 S.E.2d 295 (1985).

ARTICLE 19.

Claims against the Estate.

§ 28A-19-1. Manner of presentation of claims.

(a) A claim against a decedent's estate must be in writing and state the amount or item claimed, or other relief sought, the basis for the claim, and the name and address of the claimant; and must be presented by one of the following methods:

(1) By delivery in person or by mail to the personal representative, collector or clerk of superior court. Such claim will be deemed to have been presented from the time of such delivery.

(2) By mailing, registered or certified mail, return receipt requested, to the personal representative or collector at the address set out in the general notice to creditors. Such claim will be deemed to have been presented from the time when the return receipt is signed by the personal representative, collector, or his agent, or is refused by the personal representative, collector, or his agent.

(3) By delivery to the clerk of court of the county in which the estate is pending, which notice shall be filed in the appropriate estate file and copy mailed first class by the clerk of superior court at the expense of the claimant to the personal representative, collector, or his agent. The claim will

be deemed to have been presented from the time of delivery to the clerk of court.

(1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1985, c. 645, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective July 8, 1985, and applicable to estate of decedents dying on or after that date, substituted "in person or by mail to the personal representative, collector or clerk of superior court" for "to the personal representative or collector" at the end of the first sentence of subdivision (a)(1), substituted "registered or certified mail, return receipt requested" for "first-class mail" in the first sentence of subdivision (a)(2); substituted "from the time when the return receipt is signed by the personal representative, collector, or his agent, or is refused by the personal representative, collector, or his agent" for "from the time of deposit of the claim enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care of the United States Postal Service" at the end of the second sentence of subdivision (a)(2), and added subdivision (a)(3).

CASE NOTES

Applied in In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984).

§ 28A-19-3. Limitations on presentation of claims.

CASE NOTES

Applied in Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692 (1984).

§ 28A-19-5. Contingent claims.

CASE NOTES

Applied in In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984).

§ 28A-19-12. Claims due representative not preferred.

CASE NOTES

Attorney's Fees and Commissions. — This section does not apply to the payment of attorney's fees and commissions. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

Claims by Personal Representative. — This section applies to "claims" against the estate, such as liens against property, funeral expenses, taxes, and judgments, where the claimant also happens to be the personal representative of the estate. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

ARTICLE 21.

Accounting.

§ 28A-21-2. Final accounts.

(a) Unless the time for filing the final account has been extended by the clerk of superior court, the personal representative or collector must file his final account for settlement within one year of his qualification or within six months after his receipt of the State inheritance tax release, whichever is later. If the total fair market value of the decedent's property subject to inheritance or estate tax, both real and personal, including the value of transfers over which the decedent retained any interest as described in G.S. 105-2(3), as well as the taxable value of any gifts made within three years prior to the date of death of the decedent, as also required by G.S. 105-2(3), is less than seventy-five thousand dollars ($75,000) and all of the beneficiaries belong to the class (A) as defined in G.S. 105-4(a), then the personal representative or collector shall certify in the final account filed with the clerk of superior court that no inheritance tax return was required to be filed with the Department of Revenue pursuant to G.S. 105-23. Such certification shall list the amount and value of all of the decedent's property, and with respect to real estate, its particular location within or outside the State, including any property transferred by the decedent over which he had retained any interest as described in G.S. 105-2(3), or any property transferred within three years prior to the date of the decedent's death, and after being filed and accepted by the clerk of the superior court shall be prima facie evidence that such property is free of any State inheritance or State estate tax liability. The personal representative or collector shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. With the approval of the clerk of superior court, such account may be filed voluntarily at any time. In all cases, the accounting shall be reviewed, audited and recorded by the clerk of superior court in the manner prescribed in G.S. 28A-21-1.

(C.C.P., s. 481; Code, s. 1402; Rev., s. 103; C.S., s. 109; 1973, c. 1329, s. 3; 1975, c. 637, s. 5; 1977, c. 446, s. 1; 1979, c. 801, s. 13; 1981, c. 955, s. 2; 1981 (Reg. Sess., 1982), c. 1221, s. 3; 1985, c. 82, s. 3; c. 656, s. 3.1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985, c. 656, s. 55 provides: "This act shall be known as the 'Tax Reduction Act of 1985'."

Section 56 of Session Laws 1985, c. 565 provides that the act does not affect the rights or liabilities of the State or a taxpayer arising under a section amended or repealed by the act before its amendment or repeal, nor affect the right to any refund or credit of a tax, such as the franchise tax credit under § 105-120.2(d) or § 105-122(d) that would otherwise have been available under a section amended or repealed by the act before its amendment or repeal.

Effect of Amendments. — The 1985 amendment by c. 82, s. 3, effective July 1, 1985, and applicable to the estates of decedents dying on or after that date, substituted "one hundred thousand dollars ($100,000)" for "seventy-five thousand dollars ($75,000)" in the second sentence of subsection (a).

The 1985 amendment by c. 656, s. 3.1, effective Aug. 1, 1985, and applicable to

the estates of decedents dying on or after that date, substituted "seventy-five thousand dollars ($75,000)" for "one hundred thousand dollars ($100,000)" in the second sentence of subsection (a).

§ 28A-21-4. Clerk may compel account.

CASE NOTES

Cited in In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

ARTICLE 23.

Settlement.

§ 28A-23-1. Settlement after final account filed.

CASE NOTES

Applied in In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984).

§ 28A-23-3. Commissions allowed personal representatives; representatives guilty of misconduct or default.

CASE NOTES

Discretion of Clerk. — The allowance of a commission to an executor is a matter within the original jurisdiction of the clerk of the superior court and it is within his discretion to fix the amount, subject to the maximum provided by statute. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

An executor has no right to fix and determine compensation to be received by him. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

It is necessary for the executor to file a petition for commissions and fees along with the annual accountings to enable the clerk to determine the amount of the commission and attorney's fees. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

Advance Held Improper. — Because the clerk alone has the discretion to fix an executor's compensation and an attorney's fee, coexecutor's advance to himself of the sum of $32,950.00 from the estate was improper. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

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

CASE NOTES

Advance Held Improper. — Because the clerk alone has the discretion to fix an executor's compensation and an attorney's fee, coexecutor's advance to himself of the sum of $32,950.00 from the estate was improper. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

ARTICLE 25.

Small Estates.

§ 28A-25-1. Collection of property by affidavit when decedent dies intestate.

(a) When a decedent dies intestate leaving personal property, less liens and encumbrances thereon, not exceeding ten thousand dollars ($10,000) in value, at any time after 30 days from the date of death, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be an heir or creditor of the decedent, not disqualified under G.S. 28A-4-2, upon being presented a certified copy of an affidavit filed in accordance with subsection (b) and made by or on behalf of the heir or creditor stating:

(1) The name and address of the affiant and the fact that he or she is an heir or creditor of the decedent;
(2) The name of the decedent and his residence at time of death;
(3) The date and place of death of the decedent;
(4) That 30 days have elapsed since the death of the decedent;
(5) That the value of all the personal property owned by the estate of the decedent, less liens and encumbrances thereon, does not exceed ten thousand dollars ($10,000);
(6) That no application or petition for appointment of a personal representative is pending or has been granted in any jurisdiction;
(7) The names and addresses of those persons who are entitled, under the provisions of the Intestate Succession Act, to the personal property of the decedent and their relationship, if any, to the decedent; and
(8) A description sufficient to identify each tract of real property owned by the decedent at the time of his death.

(1973, c. 1329, s. 3; 1975, c. 300, s. 9; 1983, c. 65, s. 1; c. 713, s. 21; 1985, c. 651, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 amendment, effective Oct. 1, 1985, rewrote the catchline to this section, which formerly read "Property collectible by affidavit; contents of affidavit," and inserted "or creditor" following "heir" in two places in the introductory language of subsection (a) and in subdivision (a)(1).

§ 28A-25-1.1. Collection of property by affidavit when decedent dies testate.

(a) When a decedent dies testate leaving property, real or personal or both, less liens and encumbrances, not exceeding ten thousand dollars ($10,000) in value, at any time after 30 days from the date of death, any person indebted to the decedent or having posses-

sion of property belonging to the decedent shall make payment of the indebtedness or deliver the property to a person claiming to be an heir, creditor, or devisee of the decedent, not disqualified under G.S. 28A-4-2, upon being presented a certified copy of an affidavit filed in accordance with subsection (b) and made by or on behalf of the heir, creditor, or devisee stating:

(1) The name and address of the affiant and the fact that he is an heir, creditor, or devisee of the decedent;
(2) The name of the decedent and his residence at time of death;
(3) The date and place of death of the decedent;
(4) That 30 days have elapsed since the death of the decedent;
(5) That the decedent died testate leaving property, real or personal or both, less liens and encumbrances, not exceeding ten thousand dollars ($10,000) in value;
(6) That the decedent's will has been admitted to probate in the court of the proper county and a duly certified copy of the will has been recorded in each county in which is located any real property owned by the decedent at the time of his death;
(7) That a certified copy of the decedent's will is attached to the affidavit;
(8) That no application or petition for appointment of a personal representative is pending or has been granted in any jurisdiction;
(9) The names and addresses of those persons who are entitled, under the provisions of the will or of the Intestate Succession Act, to the property of the decedent; and their relationship, if any, to the decedent; and
(10) A description sufficient to identify each tract of real property owned by the decedent at the time of his death.

(b) Prior to the recovery of any assets of the decedent, a copy of the affidavit described in subsection (a) shall be filed in the office of the clerk of superior court of the county where the decedent had his domicile at the time of his death. The affidavit shall be filed by the clerk upon payment of the fee provided in G.S. 7A-307, shall be indexed in the index to estates, and a copy shall be mailed by the clerk to the persons shown in the affidavit as entitled to the property.

(c) The presentation of an affidavit as provided in subsection (a) shall be sufficient to require the transfer to the affiant or his designee of the title and license to a motor vehicle registered in the name of the decedent owner; the ownership rights of a savings account or checking account in a bank in the name of the decedent owner; the ownership rights of a savings account or share certificate in a credit union, building and loan association, or savings and loan association in the name of the decedent owner; the ownership rights in any stock or security registered on the books of a corporation in the name of a decedent owner; or any other property or contract right owned by decedent at the time of his death. (1985, c. 651, s. 2.)

Editor's Note. — Session Laws 1985, c. 651, s. 7 makes this section effective Oct. 1, 1985.

§ 28A-25-2. Effect of affidavit.

The person paying, delivering, transferring, or issuing property or the evidence thereof pursuant to an affidavit meeting the requirements of G.S. 28A-25-1(a) or 28A-25-1.1(a) is discharged and released to the same extent as if he dealt with a duly qualified personal representative of the decedent. He is not required to see to the application of the property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of their right in an action brought for that purpose by or on behalf of the persons entitled thereto. The court costs and attorney's fee incident to the action shall be taxed against the person whose refusal to comply with the provisions of G.S. 28A-25-1(a) or 28A-25-1.1(a) made the action necessary. The heir, creditor, or devisee to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any duly qualified personal representative or collector of the decedent's estate or to any other person having an interest in the estate. (1973, c. 1329, s. 3; 1985, c. 651, s. 3.)

Effect of Amendments. — The 1985 amendment, effective Oct. 1, 1985, substituted "property" for "personal property" in the first, second and third sentences, inserted "or 28A-25-1.1(a)" in the first and fourth sentences, and substituted "heir, creditor, or devisee" for "heir or creditor" near the beginning of the last sentence.

§ 28A-25-3. Disbursement and distribution of property collected by affidavit.

(a) If there has been no personal representative or collector appointed by the clerk of superior court, the heir, creditor, or devisee who has collected property of the decedent by affidavit pursuant to G.S. 28A-25-1 or G.S. 28A-25-1.1 shall:

(1) Disburse and distribute the property in the following order:
   a. To the payment of the surviving spouse's year's allowance and the children's year's allowance assigned in accordance with G.S. 30-15 through 30-33;
   b. To the payment of the debts and claims against the estate of the decedent in the order of priority set forth in G.S. 28A-19-6, or to the reimbursement of any person who has already made payment thereof;
   c. To the distribution of the remainder of the property to the persons entitled thereto under the provisions of the will or of the Intestate Succession Act; and

(2) File an affidavit with the clerk of superior court that he has collected the property of the decedent and the manner in which he has disbursed and distributed it. This final affidavit shall be filed within 90 days of the date of filing of the qualifying affidavit provided for in G.S. 28A-25-1 or

G.S. 28A-25-1.1. If the heir, creditor, or devisee cannot file the final affidavit within 90 days, he shall file a report with the clerk within that time period stating his reasons. Upon determining that the heir, creditor, or devisee has good reason not to file the final affidavit within 90 days, the clerk may extend the time for filing up to one year from the date of filing the qualifying affidavit.

(b) Nothing in this section shall be construed as changing the rule of G.S. 28A-15-1 and G.S. 28A-15-5 rendering both real and personal property, without preference or priority, available for the discharge of debts and other claims against the estate of the decedent. If it appears that it may be in the best interest of the estate to sell, lease, or mortgage any real property to obtain money for the payment of debts or other claims against the decedent's estate, the affiant shall petition the clerk of superior court for the appointment of a personal representative to conclude the administration of the decedent's estate pursuant to G.S. 28A-25-5. (1973, c. 1329, s. 3; 1983, c. 711, s. 1; 1985, c. 651, s. 4.)

Effect of Amendments. —

The 1985 amendment, effective Oct. 1, 1985, substituted "the heir, creditor, or devisee" for "the heir or creditor", deleted "personal" preceding "property," and inserted "or G.S. 28A-25-1.1" in the introductory language of subsection (a), in the introductory language of subdivision (a)(1) substituted "the property" for "the same," in paragraph (a)(1)c deleted "personal" preceding "property" and inserted "of the will or," in subdivision (a)(2) inserted "or G.S. 28A-25-1.1" at the end of the second sentence and substituted "heir, creditor, or devisee" for "heir or creditor" in the third and final sentences, and in subsection (b) added the second sentence.

§ 28A-25-4. Clerk may compel compliance.

If any heir, creditor, or devisee who has collected property of the decedent by affidavit pursuant to G.S. 28A-25-1 or 28A-25-1.1 shall fail to make distribution or file affidavit as required by G.S. 28A-25-3, the clerk of superior court may, upon his own motion or at the request of any interested person, issue an attachment against him for a contempt and commit him until he makes proper distribution and files the affidavit. In addition to or in lieu of filing this attachment, the clerk may require the heir, creditor, or devisee to post a bond conditioned as provided in G.S. 28A-8-2. (1973, c. 1329, s. 3; 1983, c. 711, s. 2; 1985, c. 651, s. 5.)

Effect of Amendments. —

The 1985 amendment, effective Oct. 1, 1985, inserted "creditor, or devisee" in the first and second sentences and in the first sentence deleted "personal" preceding "property" and inserted "or 28A-25-1.1."

§ 28A-25-5. Subsequently appointed personal representative or collector.

Nothing in this Article shall preclude any interested person, including the affiant, from petitioning the clerk of superior court for the appointment of a personal representative or collector to conclude the administration of the decedent's estate. If such is done, the affiant who has been collecting property by affidavit shall cease

to do so, shall deliver all assets in his possession to the personal representative, and shall render a proper accounting to the personal representative or collector. A copy of the accounting shall also be filed with the clerk having jurisdiction over the personal representative or collector. (1973, c. 1329, s. 3; 1975, c. 300, s. 10; 1985, c. 651, s. 6.)

Effect of Amendments. — The 1985 amendment, effective Oct. 1, 1985, deleted "personal" preceding "property" in the second sentence.

Chapter 29.
Intestate Succession.

ARTICLE 1.

General Provisions.

§ 29-2. Definitions.

CASE NOTES

VI. Heirs.

VI. HEIRS.

Technical Construction of Term "Heirs". — Absent words expressing testatrix' contrary intent, the court would construe the word "heirs" in will in the technical sense. Rawls v. Rideout, — N.C. App. —, 328 S.E.2d 783 (1985).

Consideration of Laws in Effect at Time of Death. — In construing a will with a remainder interest to a class of the testatrix' "heirs," the courts look to the intestacy laws in effect at the testatrix' death to determine who the "heirs" are and the shares which they are entitled to take, unless the language of the will reveals a contrary intent. Rawls v. Rideout, — N.C. App. —, 328 S.E.2d 783 (1985).

For discussion of construction of the phrase "to my nearest (relatives) heirs" in the remainder clause of a devise by testatrix who died in May, 1962, see Rawls v. Rideout, — N.C. App. —, 328 S.E.2d 783 (1985).

§ 29-8. Partial intestacy.

CASE NOTES

Section Codifies Common Law. — This section, which was adopted in 1959, was a codification of the common law. Ferguson v. Croom, — N.C. App. —, 326 S.E.2d 373 (1985).

Section Adopts Majority Rule. — The rule adopted by this section is also in accordance with the rule followed by a majority of the sister states. Ferguson v. Croom, — N.C. App. —, 326 S.E.2d 373 (1985).

This section creates a mandatory plan for disposing of a decedent's property which does not pass by will. It directs that the property pass by intestate succession without regard to the intent expressed by a testator in a will. Ferguson v. Croom, — N.C. App. —, 326 S.E.2d 373 (1985).

ARTICLE 2.

Shares of Persons Who Take upon Intestacy.

§ 29-14. Share of surviving spouse.

Editor's Note. — Session Laws 1979, c. 186, s. 1, which became effective October 1, 1979 and was applicable to the estates of decedents dying on or after that date, rewrote this section to read as follows:

"§ 29-14. *Share of surviving spouse.*

(a) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, and the net estate does not exceed fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be the entire net estate; but if the net estate exceeds fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be fifteen thousand dollars ($15,000) in value plus one-half of the balance of the net estate; or

"(b) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, and the net estate does not exceed fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be the entire net estate; but if the net estate exceeds fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be fifteen thousand dollars ($15,000) in value plus one-third of the balance of the net estate; or

"(c) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, but is survived by one or more parents, and the net estate does not exceed twenty-five thousand dollars ($25,000) in value, the share of the surviving spouse shall be the entire net estate; but if the net estate exceeds twenty-five thousand dollars ($25,000) in value, the share of the surviving spouse shall be twenty-five thousand dollars ($25,000) in value plus one-half of the balance of the net estate; or

"(d) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent, the share of the surviving spouse shall be the entire net estate.

"(e) If under subsections (a), (b), or (c) of this section the surviving spouse is not entitled to the entire net estate, the surviving spouse may elect to take his or her share wholly in personal property, wholly in real property, or partly in personal property and partly in real property in such proportions as the surviving spouse may elect. The election of the surviving spouse may be made by written instrument filed with the personal representative within seven months after the issuance of letters testamentary or letters of administration. By agreement between the personal representative and the surviving spouse, or by order of the Clerk of Superior Court upon good cause shown, the seven month period for the surviving spouse's election may be extended. If the surviving spouse is the personal representative, any extension shall be granted by the Clerk of Superior Court. If no election is filed within seven months, and no extension has been agreed to or ordered, the personal representative shall distribute the share of the surviving spouse wholly in personal property, wholly in real property, or partly in personal property and partly in real property in such proportions as the personal representative may determine."

For the version of this section as in effect prior to the 1979 amendment, see Session Laws 1959, c. 879, s. 1.

Session Laws 1981, c. 69, which became effective March 5, 1981, and is applicable to estates of persons dying on or after that date, again rewrote this section, to read as set out in the main volume.

CASE NOTES

Cited in Rawls v. Rideout, — N.C. App. —, 328 S.E.2d 783 (1985).

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

CASE NOTES

When a gift is made to a class of "heirs," the intestacy laws govern not only the identification of the "heirs," but also the shares to which they are entitled. Rawls v. Rideout, — N.C. App. —, 328 S.E.2d 783 (1985).

Per Capita Distribution. — This chapter calls for a per capita distribution of the decedent's real and personal property to all surviving persons in the same degree of relationship to the decedent. The distribution scheme is commonly referred to as "per capita at each generation." Rawls v. Rideout, — N.C. App. —, 328 S.E.2d 783 (1985).

Applied in McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984); Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

ARTICLE 3.

Distribution among Classes.

§ 29-16. Distribution among classes.

CASE NOTES

When a gift is made to a class of "heirs," the intestacy laws govern not only the identification of the "heirs," but also the shares to which they are entitled. Rawls v. Rideout, — N.C. App. —, 328 S.E.2d 783 (1985).

Per Capita Distribution. — This chapter calls for a per capita distribution of the decedent's real and personal property to all surviving persons in the same degree of relationship to the decedent. The distribution scheme is commonly referred to as "per capita at each generation." Rawls v. Rideout, — N.C. App. —, 328 S.E.2d 783 (1985).

Applied in Ferguson v. Croom, — N.C. App. —, 326 S.E.2d 373 (1985).

ARTICLE 6.

Illegitimate Children.

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

CASE NOTES

Plea of Guilty in Bastardy Action as Basis for Inheritance by Child. — An illegitimate child may inherit, through intestate succession, from the estate of a father who acknowledged paternity to the child by pleading guilty in a criminal bastardy action. Sanders v. Brantley, — N.C. App. —, 323 S.E.2d 426 (1984).

Chapter 31.

Wills.

Article 1.

Execution of Will.

§ 31-1. Who may make will.

CASE NOTES

Primary object in interpreting a will is to give effect to the intention of the testator. Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

Presumption Against Intestacy. — It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any part of his property. Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

Article 2.

Revocation of Will.

§ 31-5.5. After-born or after-adopted child; illegitimate child; effect on will.

(b) The provisions of G.S. 28A-22-2 shall be construed as being applicable to after-adopted children and to after-born children, whether legitimate or entitled illegitimate.

(1868-9, c. 113, s. 62; Code, s. 2145; Rev., s. 3145; C.S., s. 4169; 1953, c. 1098, s. 7; 1955, c. 541; 1973, c. 1062, s. 2; 1985, c. 689, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "G.S. 28A-22-2" for "G.S. 28-153 through 28-158" near the beginning of subsection (b).

Article 5.

Probate of Will.

§ 31-12. Executor may apply for probate.

CASE NOTES

Primary object in interpreting a will is to give effect to the intention of the testator. Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

Presumption Against Intestacy. —

It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any part of his property. Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

§ 31-38. Devise presumed to be in fee.

CASE NOTES

II. RULES OF CONSTRUCTION.

Primary object in interpreting a will is to give effect to the intention of the testator. Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

Presumption Against Intestacy. —

It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any part of his property. Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

ARTICLE 7.

Construction of Will.

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

CASE NOTES

III. Devise or Legacy to Testator's Slayer.

I. GENERAL CONSIDERATION.

This section applies to all wills and provides means by which property is to be distributed in the event of failure of devises and legacies by lapse or otherwise. Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

II. PROPERTY PASSING UNDER RESIDUARY CLAUSE.

Construction of Residuary Clause, etc. —

No particular mode of expression is needed to constitute a residuary clause. All that is required is an adequate indication that a particular clause was intended to dispose of property which was not otherwise disposed of by the will. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Construction to Prevent Intestacy. It is a general rule always to construe a residuary clause so as to prevent an intestacy as regards any part of the testator's estate, unless there is an apparent intention to the contrary. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

When the language of the will is definite and clear, the presumption that the will must be construed to prevent partial intestacy is generally not employed. If the language is unambiguous, then there is no need to resort to a construction of the will, and the expression of the testator must be given effect. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Applicability of Subdivision (c)(1)a. — Where it is clear from the residuary clause itself or other parts of the will, that the testator had in fact a contrary intention, namely, that the residue should not be general, and that things given away should not fall into the residue, subdivision (c)(1)a does not apply. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

III. DEVISE OR LEGACY TO TESTATOR'S SLAYER.

Subsection (a) Rather than Subdivision (c)(2) Applies. — If the court were to hold that subdivision (c)(2) applies merely because the slayer does not, in fact, predecease the slain, the court would be ignoring the legislative

scheme intended by the statutory presumption of the slayer's death. Moreover, subsection (c) expressly states that that subsection applies only if subsection (a) is not applicable, thus making subsection (a) the dominant or controlling statute. Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

Presumption in § 31A-4(3) Equivalent to Actual Death. — It was the intent of the General Assembly that the presumption in § 31A-4(3) be equivalent to actual death for all purposes of determining the disposition of property of the testator. Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

Distributed in Accord with Subsection (a). — Because of the failure of a slayer's legacy, the property that would have gone to him under the will had he not been convicted of killing the testator must be distributed in accord with subsection (a). Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

Where slayer's two children are alive and would have been heirs of testator had he died intestate, slayer's failed legacy must pass by substitution to them in accordance with subsection (a). Because of the conclusive presumption in § 31A-4(3) that the slayer predeceased the testator, subsection (a), not subdivision (c)(2), applies. Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

Chapter 31A.
Acts Barring Property Rights.

ARTICLE 3.

Willful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

CASE NOTES

Applied in Jones v. All Am. Life Ins. Co., — N.C. —, 325 S.E.2d 237 (1985).

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

CASE NOTES

Presumption in Subdivision (3) Equivalent to Actual Death. — It was the intent of the General Assembly that the presumption in subdivision (3) of this section be equivalent to actual death for all purposes of determining the disposition of property of the testator. Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

Slayer's Legacy Distributed in Accord with § 31-42(a). — Because of the failure of a slayer's legacy, the property that would have gone to him under the will had he not been convicted of killing the testator must be distributed in accord with § 31-42(a). Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

Where slayer's two children are alive and would have been heirs of testator had he died intestate, slayer's failed legacy must pass by substitution to them in accordance with § 31-42(a). Because of the conclusive presumption in subdivision (3) of this section that the slayer predeceased the testator, § 31-42(a), not § 31-42(c)(2), applies. Misenheimer v. Misenheimer, — N.C. —, 325 S.E.2d 195 (1985).

ARTICLE 4.

General Provisions.

§ 31A-15. Chapter to be broadly construed.

CASE NOTES

Applied in Jones v. All Am. Life Ins. Co., — N.C. —, 325 S.E.2d 237 (1985).

Chapter 32A.

Powers of Attorney.

Article 1.

Statutory Short Form Power of Attorney.

§ 32A-1. Statutory Short Form of General Power of Attorney.

The use of the following form in the creation of a power of attorney is lawful, and, when used, it shall be construed in accordance with the provisions of this Chapter.

"NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE DEFINED IN CHAPTER 32A OF THE NORTH CAROLINA GENERAL STATUTES WHICH EXPRESSLY PERMITS THE USE OF ANY OTHER OR DIFFERENT FORM OF POWER OF ATTORNEY DESIRED BY THE PARTIES CONCERNED.

State of .....

County of .....

I....., the undersigned, hereby appoint..... my attorney-in-fact for me and give such person full power to act in my name, place and stead in any way which I myself could do if I were personally present with respect to the following matters as each of them is defined in Chapter 32A of the North Carolina General Statutes to the extent that I am permitted by law to act through an agent. (DIRECTIONS: Initial the line opposite any one or more of the subdivisions as to which the principal desires to give the attorney-in-fact authority.)

(1) Real property transactions; ....._____
(2) Personal property transactions; ....._____
(3) Bond, share and commodity transactions;_____
(4) Banking transactions; ....._____
(5) Safe deposits; ....._____
(6) Business operating transactions; ....._____
(7) Insurance transactions; ....._____
(8) Estate transactions; ....._____
(9) Personal relationships and affairs; ....._____
(10) Social security and unemployment; ....._____
(11) Benefits from military service; ....._____

(12) Tax .....

(13) Employment of agents .....

(If power of substitution and revocation is to be given, add: 'I also give to such person full power to appoint another to act as my attorney-in-fact and full power to revoke such appointment.')

(If period of power of attorney is to be limited, add: 'This power terminates ....., 19.....')

(If power of attorney is to be a durable power of attorney under the provision of Article 2 of Chapter 32A and is to continue in effect after the incapacity or mental incompetence of the principal, add: 'This power of attorney shall not be affected by my subsequent incapacity or mental incompetence.')

(If power of attorney is to take effect only after the incapacity or mental incompetence of the principal, add: 'This power of attorney shall become effective after I become incapacitated or mentally incompetent.')

Dated ....., 19....

..... (Seal)

Signature

STATE OF ..... COUNTY OF .....

On this ..... day of ....., ..., personally appeared before me, the said named ..... to me known and known to me to be the person described in and who executed the foregoing instrument and he (or she) acknowledged that he (or she) executed the same and being duly sworn by me, made oath that the statements in the foregoing instrument are true.

My Commission Expires .....

.....

(Signature of Notary Public)

Notary Public (Official Seal)"

(1983, c. 626, s. 1; 1985, c. 162, s. 1; c. 618, s. 1.)

Editor's Note. —

Session Laws 1985, c. 162, s. 2, provides: "No power of attorney executed pursuant to Chapter 32A of the General Statutes prior to October 1, 1985, shall be invalid for the reason that the power of attorney was not signed by the principal under seal."

Effect of Amendments. — The 1985 amendment by c. 162, s. 1, effective May 7, 1985, added "(Seal)" following the signature line in the form.

The 1985 amendment by c. 618, s. 1, effective July 5, 1985, made the same change made by c. 162 and further revised the form set out in this section.

§ 32A-2. Powers conferred by the Statutory Short Form Power of Attorney set out in G.S. 32A-1.

The Statutory Short Form Power of Attorney set out in G.S. 32A-1 confers the following powers on the attorney-in-fact named therein:

(2) Personal Property Transactions. — To lease, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, purchase, exchange, and acquisition of, and

to accept, take, receive, and possess any personal property whatsoever, tangible or intangible, or interest thereto, on such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper; and to maintain, repair, improve, manage, insure, rent, lease, sell, convey, subject to liens and mortgages, and hypothecate, and in any way or manner deal with all or any part of any personal property whatsoever, tangible or intangible, or any interest therein, that the principal owns at the time of execution or may thereafter acquire, under such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper.

(10) Social Security and Unemployment. — To prepare, execute and file all social security, unemployment insurance and information returns required by the laws of the United States, or of any state or subdivision thereof, or of any foreign government.

(12) Tax. — To prepare, execute, verify and file in the name of the principal and on behalf of the principal any and all types of tax returns, amended returns, declaration of estimated tax, report, protest, application for correction of assessed valuation of real or other property, appeal, brief, claim for refund, or petition, including petition to the Tax Court of the United States, in connection with any tax imposed or proposed to be imposed by any government, or claimed, levied or assessed by any government, and to pay any such tax and to obtain any extension of time for any of the foregoing; to execute waivers or consents agreeing to a later determination and assessment of taxes than is provided by any statute of limitations; to execute waivers of restriction on the assessment and collection of deficiency in any tax; to execute closing agreements and all other documents, instruments and papers relating to any tax liability of any sort; to institute and carry on through counsel any proceeding in connection with determining or contesting any such tax or to recover any tax paid or to resist any claim for additional tax on any proposed assessment or levy thereof; and to enter into any agreements or stipulations for compromise or other adjustments or disposition of any tax.

(13) Employment of Agents. — To employ agents such as legal counsel, accountants or other professional representation as may be appropriate and to grant such agents such powers of attorney or other appropriate authorization as may be required in connection with such representation or by the Internal Revenue Service or other governmental authority. (1983, c. 626, s. 1; 1985, c. 618, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective July 5, 1985, substituted "and mortgages" for "mortgages, subject to deeds of trust" preceding "and hypothecate, and in any way or manner deal with all or any part of any" and deleted "real or" thereafter in subdivision (2), rewrote subdivision (10), which formerly related to tax, social se-

curity, and unemployment returns, and added subdivisions (12) and (13).

§ 32A-3. Provisions not exclusive; reference to Chapter 32B.

(a) The provisions of this Article are not exclusive and shall not bar the use of any other or different form of power of attorney desired by the parties concerned.

(b) A power of attorney under the provisions of this Article may refer to Chapter 32B as the same is set out in Chapter 626 of the 1983 Session Laws. (1983, c. 626, s. 1; 1985, c. 609, s. 4.)

Effect of Amendments. — The 1985 amendment, effective July 4, 1985, and applicable to powers of attorneys executed on or after October 1, 1983, inserted "reference to Chapter 32B" at the end of the catchline, designated the first paragraph as subsection (a), and added subsection (b).

Article 2.

Durable Power of Attorney.

§ 32A-14. Powers of attorney executed under the provisions of G.S. 47-115.1; reference to Chapter 32B.

(a) A power of attorney executed pursuant to G.S. 47-115.1 prior to October 1, 1983, shall be deemed to be a durable power of attorney as defined in G.S. 32A-8.

(b) A power of attorney under the provisions of this Article may refer to Chapter 32B as the same is set out in Chapter 626 of the 1983 Session Laws. (1983, c. 626, s. 1; 1985, c. 609, s. 5.)

Editor's Note. — Section 47-115.1, referred to in this section, was repealed by Session Laws 1983, c. 626, s. 2.

Effect of Amendments. — The 1985 amendment, effective July 4, 1985, and applicable to powers of attorneys executed on or after October 1, 1983, added "reference to Chapter 32B" at the end of the catchline, designated the first paragraph as subsection (a), and added subsection (b).

Chapter 33.

Guardian and Ward.

Article 1.

Creation and Termination of Guardianship.

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

The clerks of the superior court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, incompetents or inebriates: Provided, that guardians shall be appointed by the clerks of the superior courts in the counties in which the infants, incompetents or inebriates reside, unless the guardians be the next of kin of such incompetents or a person designated by such next of kin in writing filed with the clerk, in which case, guardians may be appointed by the clerk of the superior court in any county in which is located a substantial part of the estates belonging to such incompetents, or unless an infant resides with an individual who is domiciled in the State of North Carolina and who is guardian of such infant's estate, in which case a guardian of the person of such infant may be appointed by the clerk of the superior court in the county in which the guardian of such infant's estate is domiciled. Provided, further, where any adult person is found to be incompetent from want of understanding to manage his affairs by reason of physical and mental weakness on account of old age, disease, or other like infirmities, the clerk may appoint a trustee in lieu of a guardian for said persons. The trustee so appointed shall be subject to the laws now or which hereafter may be enacted for the control and handling of estates by guardians. (1762, c. 69, ss. 5, 7; R.C., c. 54, s. 2; 1868-9, c. 201, s. 4; Code, s. 1566; Rev., s. 1766; 1917, c. 41, s. 1; C.S., s. 2150; 1935, c. 467; 1945, c. 902; 1953, c. 615; 1959, c. 1028, s. 5; 1977, c. 725, s. 4; 1985, c. 589, s. 13.)

Editor's Note. —

Session Laws 1985, c. 589, s. 65 is a severability clause.

Effect of Amendments. — The 1985 amendment, effective Jan. 1, 1986, deleted "is declared incompetent in connection with his commitment to a mental hospital or" following "Provided, further, where any adult person" at the beginning of the second sentence.

OPINIONS OF ATTORNEY GENERAL

A clerk of superior court may appoint a guardian of the person when there is no natural guardian for a minor. See opinion of Attorney General to Ms. Diana Morgan, Assistant Clerk of Superior Court, Brunswick County, 54 N.C.A.G. 31 (1984).

ARTICLE 4A.

Guardian Sales Validated.

§ 33-35.1. Deeds by guardians omitting seal, prior to January 1, 1944, validated.

Editor's Note. — Session Laws 1985, c. 654, s. 1(1) rewrote the heading to Article 4A, which formerly read "Guardians' Deeds Validated When Seal Omitted."

§ 33-35.2. Certain private sales validated.

All private sales of real and personal property made by a guardian under Article 4 of this Chapter before June 1, 1985, that, under G.S. 1-339.36, should have been conducted as public sales because an upset bid was submitted, are validated to the same extent as if the guardian had complied with the procedures for a public sale. (1985, c. 654, s. 1(2)).

Editor's Note. — Session Laws 1985, c. 654, s. 2, makes this section effective upon ratification and provides that it shall not affect pending litigation. The act was ratified July 8, 1985.

Chapter 34.

Veterans' Guardianship Act.

Sec.
34-16. [Repealed.]

§ 34-16: Repealed by Session Laws 1985, c. 589, s. 14, effective January 1, 1986.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

Chapter 35.

Persons with Mental Diseases and Incompetents.

Article 1.

Definitions.

§ 35-1. Inebriates defined.

Any person who habitually, whether continuously or periodically, indulges in the use of alcoholic beverages, narcotics or drugs to such an extent as to stupefy his mind and to render him incompetent to transact ordinary business with safety to his estate, or who renders himself, by reason of the use of alcoholic beverages, narcotics or drugs, dangerous to person or property, or who, by the frequent use of alcoholic beverages, narcotics or drugs, renders himself cruel and intolerable to his family, or fails from such cause to provide his family with reasonable necessities of life, shall be deemed an inebriate: Provided, the habit of so indulging in such use is at the time of incompetency hearing of at least one year's standing. (1879, c. 329; Code, s. 1671; 1891, c. 15, s. 7; 1903, c. 543; Rev., s. 1892; C.S., s. 2284; 1981, c. 412, s. 4; c. 747, s. 66; 1985, c. 589, s. 15.)

Editor's Note. —
Session Laws 1985, c. 589, s. 65 is a severability clause.

Effect of Amendments. — The 1985 amendment, effective Jan. 1, 1986, substituted "incompetency hearing" for "inquisition" near the end of the section.

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

The words "mental disease," "mental disorder" and "mental illness" shall mean an illness which so lessens the capacity of the person to use his customary self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. The terms shall be construed to include "lunacy," "unsoundness of mind," and "insanity."

A "mentally retarded" person refers to a person who has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22. (1945, c. 952, s. 2; 1979, c. 751, s. 29; 1985, c. 589, s. 16.)

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

Effect of Amendments. — The 1985 amendment, effective Jan. 1, 1986, substituted "before age 22" for "during his developmental period" at the end of the second paragraph.

ARTICLE 1A.

Guardianship of Incompetent Adults.

Part 1. Legislative Purpose.

§ 35-1.6. Legislative purpose.

CASE NOTES

Cited in Thomas S. v. Morrow, 601 F. Supp. 1055 (W.D.N.C. 1984).

Part 2. Definitions.

§ 35-1.7. Definitions.

When used in this Article:

(4) The term "disinterested public agent" means an adult officer, agent, or employee of a State human resources agency who has no immediate responsibilities for providing services to a ward or the director or assistant directors of a local human resources agency. The fact that a disinterested public agent is employed by a State or local human resources agency that provides financial assistance to a ward does not disqualify that person from being appointed a guardian. A disinterested public agent who is appointed a guardian shall serve in this capacity by virtue of his office or employment, which shall be identified in the clerk's order issued pursuant to G.S. 35-1.16(g) or G.S. 35-1.17. When the disinterested public agent's office or employment terminates, his successor in office or employment or his immediate supervisor, if there is no successor, shall succeed him as guardian unless the clerk shall otherwise order. Any individual permitted to be a guardian under G.S. 122C-122 is a disinterested public agent if he has no immediate responsibilities for providing services to a ward.

(17) "Mental health professional" means any individual with appropriate training or experience in the field of mental health care of the mentally ill, including physicians, practicing psychologists, psychological associates, social workers, and registered nurses as specified by the Commission for Mental Health, Mental Retardation, and Substance Abuse Services.

(18) "Mental retardation professional" means any individual with appropriate training or experience in the field of care for the mentally retarded, including practicing psychologists, psychological associates, physicians, educators, social workers, and registered nurses as specified by the Commission for Mental Health, Mental Retardation, and Substance Abuse Services.

(23) The term "treatment facility" means the same as the term "treatment facility" means under the provisions of G.S. 122C-3, and it includes group homes, halfway houses and other community-based residential facilities for impaired adults.

(31) The term "mental retardation" refers to a person who has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22. (1977, c. 725, s. 1; 1979, c. 751, s. 1; 1985, c. 361, s. 1; c. 589, ss. 17-21.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

Effect of Amendments. — The 1985 amendment by c. 361, s. 1, effective July 1, 1985, added the third and fourth sentences of subdivision (4).

The 1985 amendment by c. 589, ss. 17 to 21, effective Jan. 1, 1986, added the last sentence of subdivision (4), rewrote subdivision (17), which formerly read "The term 'mental health professional' has the same meaning as set out in G.S. 122-36(h)," rewrote subdivision (18), which formerly read "The term 'mental retardation professional' has the same meaning as set out in G.S. 122-36(i)," in subdivision (23) substituted "G.S. 122C-3" for "G.S. 122-36(g) and G.S. 122-56.2(b)," and in subdivision (31) substituted "before age 22" for "during the developmental period".

CASE NOTES

Applied in State v. Kornegay, — N.C. —, 326 S.E.2d 881 (1985).

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

§ 35-1.28. Qualifications of guardians.

CASE NOTES

Cited in Thomas S. v. Morrow, 601 F. Supp. 1055 (W.D.N.C. 1984).

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

(a) A guardian of the person or general guardian has the following powers and duties:

(1) To the extent that it is not inconsistent with the terms of any order by a court of competent jurisdiction relating to the admission, detention, or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of domicile within or without this State. In arranging for a place of domicile, the guardian shall give preference to places within this State over places not within this State if both in- and out-of-state places are substantially equivalent. He also shall give preference to places that are not treatment facilities; if the only available and appropriate places of domicile are treatment facil-

ities, he shall give preference to community-based treatment facilities, such as group homes or nursing homes, over treatment facilities that are not community-based, such as State facilities for the mentally ill or mentally retarded as established by G.S. 122C-181.

(2) He shall make provision for the care, comfort, and maintenance of his ward and shall arrange for his training, education, employment, and rehabilitation or habilitation. He shall take reasonable care of his ward's personal property.

(3) He may commence and defend against any judicial action in the ward's name.

(4) He may give any consent or approval that may be necessary to enable the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service. He also may give any other consent or approval that may be required or desirable. He may petition the clerk for the clerk's concurrence in the consent or approval. He may not, however, consent to the sterilization of a mentally ill or mentally retarded ward, which sterilization may be performed legally only after compliance with Chapter 35, Article 7.

(1977, c. 725, s. 1; 1979, c. 751, s. 23; 1985, c. 589, s. 22.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

Effect of Amendments. — The 1985 amendment, effective Jan. 1, 1986, substituted "State facilities for the mentally ill or mentally retarded as established by G.S. 122C-181" for "residential hospitals for the mentally ill as established and provided for by Article 1 of Chapter 122 or residential centers for the mentally retarded as established and provided for by Article 9 of Chapter 122" in the last sentence of subdivision (a)(1).

ARTICLE 2.

Guardianship and Management of Estates of Incompetents.

§ 35-2. Appointment of guardian.

Any person, in behalf of one who is deemed an incompetent from want of understanding to manage his own affairs or inebriate by reason of the excessive use of intoxicating drinks, may file a petition before the clerk of the superior court of the county where such person resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the person, to the sheriff of the county, commanding him to summon a jury of 12 men to inquire into the state of such person. Upon the return of the sheriff summoning said jury, the clerk of the superior court shall swear and organize said jury and shall preside over said hearing, and the jury shall make return of their proceedings under their hand to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be inebriate or incompetent by inquisition of a jury, as in cases of orphans. The clerk may appoint as guardian any person or entity specified in G.S. 35-1.28 and in so doing shall follow the

priorities established in G.S. 35-1.29. The clerk shall appoint a guardian ad litem to represent the supposed inebriate or incompetent person.

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

The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be inebriate or incompetent by inquisition of a jury as in cases of orphans. Provided, where the person is found to be incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age and/or disease and/or other like infirmities, the clerk may appoint a trustee instead of guardian for said person. The trustee or guardian administering an estate for any person shall be subject to all the laws governing the administration of estates of minors and incompetents. The clerks of superior courts who have heretofore appointed guardians for persons described in this proviso are hereby authorized and empowered to change said appointment from guardian to trustee. The sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. And the juries of the several counties upon whom a process is served under the provisions of this section shall serve and make their returns without demanding their fees in advance.

If a petition for adjudication of incompetency has been filed against the respondent, alleging him to be mentally ill, under the provisions of Chapter 35, Article 1A, and the petition has been dismissed after a hearing on the merits, the clerk on his own motion may dismiss a petition filed under this Article or this section against the same person, alleging him to be mentally ill, unless the petition alleges substantially new facts, not previously alleged in the Article 1A proceeding, tending to prove that he is incompetent, as defined in this Article, because of mental illness. (C.C.P., s. 473; Code, s. 1670; Rev., s. 1890; 1919, c. 54; C.S., s. 2285; 1921, c. 156, s. 1; 1929, c. 203, s. 1; 1933, c. 192; 1945, c. 952, s. 3; 1951, c. 777; 1971, c. 528, s. 31; 1977, c. 725, s. 5; 1979, c. 751, ss. 32, 33; 1985, c. 361, s. 2.)

Effect of Amendments. — The 1985 amendment, effective July 1, 1985, inserted the next-to-last sentence of the first paragraph.

§ 35-4.1: Repealed by Session Laws 1985, c. 589, s. 23, effective January 1, 1986.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

§ 35-4.2: Repealed by Session Laws 1985, c. 589, s. 24, effective January 1, 1986.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

§ 35-5: Repealed by Session Laws 1985, c. 589, s. 25, effective January 1, 1986.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

ARTICLE 7.

Sterilization of Persons Mentally Ill and Mentally Retarded.

§ 35-36. Sterilization of mentally retarded in State institutions.

CASE NOTES

Cited in In re Truesdell, — N.C. —, 329 S.E.2d 630 (1985).

§ 35-37. Sterilization of mentally retarded not in State institutions.

CASE NOTES

Quoted in In re Truesdell, — N.C. —, 329 S.E.2d 630 (1985).

§ 35-39. Duty of petitioner.

CASE NOTES

Quoted in In re Truesdell, — N.C. —, 329 S.E.2d 630 (1985).

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

CASE NOTES

II. PRACTICE AND PROCEDURE.

Findings Required. —

The petitioner must prove by clear, strong and convincing evidence that there is a substantial likelihood that respondent will voluntarily or otherwise engage in sexual activity likely to cause impregnation before the district court judge may enter an order and judgment authorizing a sterilization procedure. In

re Truesdell, — N.C. —, 329 S.E.2d 630 (1985).

Emergency Situations. — Under § 35-49, in life-threatening or emergency situations where sterilization is medically necessary, a petition could be granted absent a showing of the factors required by this section. In re Truesdell, — N.C. —, 329 S.E.2d 630 (1985).

Burden and Standard of Proof. — The petitioner who seeks sterilization pursuant to this section must satisfy the standards listed by the Court of Appeals in its opinion in North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976). In addition, the trial judge, in his discretion, may consider certain other factors that he considers to be reflective of the best interests of the respondent in any particular circumstance. In re Truesdell, — N.C. —, 329 S.E.2d 630 (1985).

§ 35-44. Appeals.

CASE NOTES

Cited in In re Truesdell, — N.C. —, 329 S.E.2d 630 (1985).

§ 35-49. Necessary medical treatment unaffected by Article.

CASE NOTES

Emergency Situations. — Under this section, in life-threatening or emergency situations where sterilization is medically necessary, a petition could be granted absent a showing of the factors required by § 35-43. In re Truesdell, — N.C. —, 329 S.E.2d 630 (1985).

Chapter 36A.

Trusts and Trustees.

Article 1.

Investment and Deposit of Trust Funds.

§ 36A-3. Terms of creating instrument.

(c) Whenever a fiduciary holding funds for investment is directed, required, authorized, or permitted by an instrument creating the fiduciary relationship to invest in United States government obligations, the fiduciary may, in the absence of an express prohibition in the instrument, invest in and hold such obligations either directly or in the form of interests in a money market mutual fund registered under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1, et seq., as from time to time amended, the portfolio of which is limited to United States government obligations and repurchase agreements fully collateralized thereby. (1973, c. 1277; 1977, c. 502, s. 2; 1985, c. 538, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985, c. 538, s. 2 provides: "This act shall become effective October 1, 1985, and applies to such instruments whether created before or after October 1, 1985."

Effect of Amendments. — The 1985 amendment, effective Oct. 1, 1985, added subsection (c).

ARTICLE 4.

Charitable Trusts.

§ 36A-53. Charitable Trusts Administration Act.

CASE NOTES

To invoke the application of this section, plaintiff must show that the three following conditions exist: (1) That the testatrix manifested a general charitable intent; (2) that the trust has become either illegal, impossible or impracticable of fulfillment; and (3) that the testatrix made no provision for alternative disposition of the trust corpus in the event that the charitable trust fails. Board of Trustees v. Unknown & Unascertained Heirs, 311 N.C. 644, 319 S.E.2d 239 (1984).

General Charitable Intent. — The making of a gift for a charitable purpose which may not occur for an indefinite period of time is a strong indication of a general charitable intent. It presupposes the settlor's awareness that a material change in the surrounding circumstances may occur which could render impractical a literal compliance with the terms of the gift. Board of Trustees v. Unknown & Unascertained Heirs, 311 N.C. 644, 319 S.E.2d 239 (1984).

The failure or conscious omission to provide for the possibility of trust failure is evidence of the testatrix's general charitable intentions. Board of Trustees v. Unknown & Unascertained Heirs, 311 N.C. 644, 319 S.E.2d 239 (1984).

The fact that a testator bequeathed practically all of his estate for charitable purposes is sound evidence denoting that he had a general charitable intention. Board of Trustees v. Unknown & Unascertained Heirs, 311 N.C. 644, 319 S.E.2d 239 (1984).

The presence within a will of other bequests to charities, especially those of a similar character, is indicative of a general charitable intention. Board of Trustees v. Unknown & Unascertained Heirs, 311 N.C. 644, 319 S.E.2d 239 (1984).

How Settlor's Intent Determined. — As in most situations where the settlor's intent is in question, the courts must look for evidence of that intent from the "four corners" of the instrument being construed and from the situation of the parties to the trust. Board of Trustees v. Unknown & Unascertained Heirs, 311 N.C. 644, 319 S.E.2d 239 (1984).

Fulfillment of Settlor's Primary Objective. — Where the construction of a new dramatic arts facility at a university, made possible by the legislative grant of sufficient funds, expressly made "impracticable" the achievement of a trust, in that the settlor's primary objective had been fulfilled, the trial court did not err in ruling that this charitable trust had become "impossible or impracticable of fulfillment" within the meaning of this section. Board of Trustees v. Unknown & Unascertained Heirs, 311 N.C. 644, 319 S.E.2d 239 (1984).

The procedure whereby one amends or conforms a will is a creature of State law. Generally, the only requirements for obtaining the amendment are consent of the charitable beneficiaries or a finding that the interests of such beneficiaries are substantially preserved. Oxford Orphanage, Inc. v. United States, 587 F. Supp. 1231 (M.D.N.C. 1984).

ARTICLE 4A.

Charitable Remainder Trusts Administration Act.

§ 36A-59.3. Definitions.

The following definitions apply to this Article unless the context clearly requires otherwise:

(2) "Charitable remainder annuity trust" means a charitable remainder trust:

(a) From which a sum certain (which 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 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 such individual or individuals; provided, however, that in the case of an individual, such amount to be paid to such 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 a above 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 Code; and

c. Following the termination of the payments described in a above, 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 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 (which 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 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 such individual or individuals; provided, however, that in the case of an individual, such amount to be paid to such 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 a above 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 Code; and

c. Following the termination of the payments described in a above, 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 Code, or is to be retained by the trust for such a use.

Notwithstanding the provisions of a and b above, 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 a above, and (ii) any amount of the trust income that exceeds the amount required to be distributed under a above to the extent that (by reason of a) the aggregate of the amounts paid in prior years is less than the aggregate of the required amounts.

(5) "Qualified contingency" means any provision of the governing instrument which 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 such payments would otherwise terminate under the governing instrument. (1981 (Reg. Sess., 1982), c. 1252, s. 1; 1985, c. 406, ss. 1-3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985, c. 406, s. 8 provides: "This act is effective upon ratification and applies to all charitable remainder annuity trusts and all charitable remainder unitrusts that would not qualify for the deduction pursuant to Section 2055 or Section 2522 of the Code in the absence of Article 4A that are in existence on that date or are established after that date. For trusts in existence on that date, this act relates back to the date of creation of the trust." The act was ratified June 17, 1985.

Effect of Amendments. — The 1985 amendment, effective June 17, 1985, added the provisos at the end of paragraphs (2)a and (3)a and inserted subdivision (5), defining "Qualified contingency."

§ 36A-59.4. Administrative provisions applicable to both charitable remainder annuity trusts and charitable remainder unitrusts.

(b1) Selection of Alternative Charitable Beneficiary if Remaindermen do not Qualify under Section 170(b)(1)(A) of the Code at Time of Distribution. — Notwithstanding the foregoing provisions of G.S. 36A-59.4(b), 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 Code, and if the designated charity is not an organization described in both Section 170(b)(1)(A) and Section 170(c) of the 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 Code selected in accordance with the terms of the governing instrument; provided, however, that in the event 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 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 Code and shall distribute the principal or income to the organization or organizations so selected in such shares as the trustee, in his sole discretion, shall determine.

(g) Payment of Taxes by Noncharitable Beneficiary. — In the case of any inter vivos charitable remainder trust which is liable to pay, from trust property, any federal estate, State inheritance or other similar death taxes by reason of the death of the grantor of such trust, the interest of any noncharitable beneficiary of such trust shall terminate upon the death of the grantor unless such noncharitable beneficiary shall furnish to the trust sufficient funds for payment of all such taxes attributable to the interest of such noncharitable beneficiary in the trust property, and such termination shall be deemed as the occurrence of a qualified contingency. (1981 (Reg. Sess., 1982), c. 1252, s. 1; 1985, c. 406, ss. 4, 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985, c. 406, s. 8 provides: "This act is effective upon ratification and applies to all charitable remainder annuity trusts and all charitable remainder unitrusts that would not qualify for the deduction pursuant to Section 2055 or Section 2522 of the Code in the absence of Article 4A that are in existence on that date or are established after that date. For trusts in existence on that date, this act relates back to the date of creation of the trust." The act was ratified June 17, 1985.

Effect of Amendments. — The 1985 amendment, effective June 17, 1985, added subsections (b1) and (g).

§ 36A-59.5. Administrative provisions applicable to charitable remainder annuity trusts only.

(d) Deferral of Annuity Amount during Period of Administration or Settlement. — When property passes to the trust at the death of the grantor, the obligation to pay the annuity amount commences with the date of death of the grantor, but payment of the annuity amount may be deferred from the date of the grantor'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 amount actually paid, plus interest on such 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 such 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.

(1981 (Reg. Sess., 1982), c. 1252, s. 1; 1985, c. 406, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985, c. 406, s. 8 provides: "This act is effective upon ratification and applies to all charitable remainder annuity trusts and all charitable remainder unitrusts that would not qualify for the deduction pursuant to Section 2055 or Section 2522 of the Code in the absence of Article 4A that are in existence on that date or are established after that date. For trusts in existence on that date, this act relates back to the date of creation of the trust." The act was ratified June 17, 1985.

Effect of Amendments. — The 1985 amendment, effective June 17, 1985, rewrote subsection (d).

§ 36A-59.6. Administrative provisions applicable to charitable remainder unitrusts only.

(f) Deferral of Unitrust Amount During Period of Administration or Settlement. — When property passes to the trust at the death of the grantor, the obligation to pay the unitrust amount commences with the date of the grantor's death, but payment of the unitrust amount may be deferred from the date of the grantor'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 such 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 such 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.

(1981 (Reg. Sess., 1982), c. 1252, s. 1; 1985, c. 406, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985, c. 406, s. 8 provides: "This act is effective upon ratification and applies to all charitable remainder annuity trusts and all charitable remainder unitrusts that would not qualify for the deduction pursuant to Section 2055 or Section 2522 of the Code in the absence of Article 4A that are in existence on that date or are established after that date. For trusts in existence on that date, this act relates back to the date of creation of the trust." The act was ratified June 17, 1985.

Effect of Amendments. — The 1985 amendment, effective June 17, 1985, rewrote subsection (f).

ARTICLE 5.

Uniform Trusts Act.

§ 36A-66. Trustee buying from or selling to self.

CASE NOTES

Applied in Johnson v. Brown, — N.C. App. —, 323 S.E.2d 389 (1984).

§ 36A-66.1. Investments in securities by banks or trust companies.

Unless the governing instrument, court order, or a statute specifically directs otherwise, a bank or trust company serving as trustee, guardian, agent, or in any other fiduciary capacity may invest in any security authorized by this Chapter even if such fiduciary or an affiliate thereof, as defined in G.S. 36A-60(1), participates or has participated as a member of a syndicate underwriting such security, if:

(1) The fiduciary does not purchase the security from itself or its affiliate; and

(2) The fiduciary does not purchase the security from another syndicate member or an affiliate, pursuant to an implied or express agreement between the fiduciary or its affiliate and a selling member or its affiliate, to purchase all or part of each other's underwriting commitments. (1985, c. 549, s. 1.)

Editor's Note. — Session Laws 1985, c. 549, s. 2 makes this section effective upon ratification. The act was ratified July 1, 1985.

Article 8.

Testamentary Trustees.

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

Trustees appointed in any will admitted to probate in this State, into whose hands assets come under the provisions of the will, shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of the county where the will is probated inventories of the assets which come into his hands and annual and final accounts thereof, such as are required of executors and administrators. The power of the clerk to enforce the filing and his duties in respect to auditing and approving shall be the same as in such cases. This section shall not apply to the extent that any will makes a different provision. (1907, c. 804; C.S., s. 51; 1961, c. 519; 1965, c. 1176, s. 1; 1973, c. 1329, s. 4; 1977, c. 502, s. 2; 1985, c. 377, s. 1.)

Effect of Amendments. — The 1985 amendment, effective Oct. 1, 1985, and applicable to the wills of decedents dying on or after Oct. 1, 1985, deleted "in regard to the requirements for filing inventories and accounts" at the end of the last sentence.

§ 36A-108. Registration and indexing.

The Administrative Office of the Courts is authorized to adopt rules regulating the registration or indexing of testamentary trusts. (1985, c. 377, s. 2.)

Editor's Note. — Session Laws 1985, c. 377, s. 3 makes this section effective Oct. 1, 1985, and applicable to the wills of decedents dying on or after Oct. 1, 1985.

§§ 36A-109 to 36A-114: Reserved for future codification purposes.

ARTICLE 9.

Alienability of Beneficial Interest; Spendthrift Trust.

§ 36A-115. Alienability of beneficiary's interest; spendthrift trusts.

CASE NOTES

Applied in Gray v. Ingles Mkts., Inc. Employees' Stock Bonus Plan & Trust (In re DeWeese), 47 Bankr. 251 (Bankr. W.D.N.C. 1985).

Chapter 36B.

Uniform Management of Institutional Funds Act.

COMMENTARY

This commentary contains the official comments of the National Conference of Commissioners on Uniform State Laws, the comments of the General Statutes Commission, and reflects amendments made during legislative consideration of the Uniform Management of Institutional Funds Act. Neither the General Statutes Commission nor any legislative official has reviewed and approved this commentary on a line-by-line basis.

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§ 36B-1. Definitions.

As used in this Chapter, the following terms have the meanings specified:

(1) "Institution" means an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes, or a governmental organization to the extent that it holds funds exclusively for any of these purposes;

(2) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes, but does not include (i) a fund held for an institution by a trustee that is not an institution or (ii) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund or (iii) funds other than endowment funds held by a governmental organization;

(3) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument;

(4) "Governing board" means the body responsible for the management of an institution or of an institutional fund;

(5) "Historic dollar value" means the aggregate fair value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the institution is conclusive.

(6) "Gift instrument" means a will, deed, trust, grant, conveyance, agreement, memorandum, writing, or other governing document (including the terms of any institutional solicitations from which an institutional fund resulted) under which property is transferred to or held by an institution as an institutional fund. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 1 of the Uniform Management of Institutional Funds Act except that G.S. 36B-1(2)(iii) was added by the General Statutes Commission to limit the application of the Act to governmental funds that are endowment funds and, thus, eliminate from the scope of the Act any regulation of the management or investment of funds that are not derived from a charitable gift that is not completely expendable.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"[Subdivision (1)] The Uniform Act applies generally to colleges, universities, hospitals, religious organizations and other institutions of an eleemosynary nature. It applies to a governmental organization to the extent that the organization holds funds for the listed purposes, e.g., a public school which has an endowment fund.

A non-governmental institution which is not 'charitable' in the classic sense is not within the Act, even though it may hold funds for such purpose. If the fund is separate and distinct from the noncharitable organization, the fund itself may be an institution to which the Act applies.

[Subdivision (2)] An institutional fund is any fund held by an institution which it may invest for a long or short term. Excluded from the Act is any fund held by a trustee which is not an institution as defined in this Act, e.g., a bank or trust company, for the benefit of an institution even though the institution is the sole beneficiary.

A fund held by an institution for the benefit of any noninstitutional beneficiary is also excluded. The exclusion would apply to any fund with an individual beneficiary such as an annuity trust or a unitrust. When the interest of a noninstitutional beneficiary is terminated, the fund may then become an institutional fund.

The 'use, benefit, or purposes' of an institution broadly encompasses all of the activities permitted by its charter or other source of authority. A fund to provide scholarships for students or medical care for indigent patients is held by the school or hospital for the institution's purposes. Such a fund is not deemed to be held for the benefit of a particular student or patient as distinct from the use, benefit, or purposes of the institution, nor does the student or patient have an interest in the fund as a 'beneficiary which is not an institution.'

The particular recipient of the aid of a charitable organization is not a 'beneficiary' in the sense of a beneficiary of a private trust; only the Attorney General or similar public authority may enforce a charitable trust. 4 Scott, Law of Trusts § 348 pp. 2768-9 (3d ed. 1967); Bogert, The Law of Trusts and Trustees § 411-15 pp. 317-348 (2d ed. 1962).

[Subdivision (3)] An endowment fund is an institutional fund, or any part thereof, which is held in perpetuity or for a term and which is not wholly expendable by the institution. Implicit in the definition is the continued maintenance of all or a specified portion of the original gift. 'Endowment fund' is specially defined because it is subject to the appropriation rules of Section 2.

A restriction on use that makes a fund an endowment fund arises only from the applicable gift instrument. If a governing board has the power to spend all of a fund but, in its discretion, decides to invest the fund and spend only the yield or appreciation therefrom, the fund does not become an endowment fund under this definition, but it may be described as a 'quasi-endowment fund' or 'fund functioning as endowment.'

A fund which is not an institutional fund originally and therefore not an endowment fund may become an endowment fund at a later time. For example, a fund given to an institution to pay the grantor's widow a life income, with the remainder to the institution, would become an institutional fund on the widow's death, and, if the fund were not then wholly expendable, it would become an endowment fund at that time.

If a gift instrument provided that the institution could use the income from the fund for ten years and thereafter spend the entire principal, the fund would be an endowment fund for the ten-year period and would cease to be an endowment fund at the time it became wholly expendable.

[Subdivision (4)] The definition is meant to designate the policy making or management group which has the responsibility for the affairs of the institution or the fund.

[Subdivision (5)] 'Historic dollar value' is simply the value of the fund expressed in dollars at the time of the original contribution to the fund plus the dollar value of any subsequent gifts to the fund. Accounting entries recording realization of gains or losses to the fund have no effect upon historic dollar value. No increase or decrease in historic dollar value of the fund results from the sale of an asset held by the fund and the reinvestment of the proceeds in another asset.

If the gift instrument directs accumulation, the historic dollar value will increase with each accumulation. For example, if a donor gives an institution $300,000 and directs that the fund is to be accumulated until its value reaches $500,000, the historic dollar value will be the aggregate value of $500,000 at the time the fund becomes available for use by the institution.

If under the terms of the gift instrument a portion of an endowment fund, after passage of time or upon the happening of some event, becomes currently wholly expendable, such portion should be treated as a separate fund and the historic dollar value of the remaining endowment fund should be reduced proportionately.

[Subdivision (6)] A gift instrument establishes the terms of the gift. It may be a writing of any form, or it may result from the institution's solicitation activities, or the bylaws, or other rules of an existing fund."

Editor's Note. — Session Laws 1985, c. 98, s. 3, provides that this Chapter shall become effective July 1, 1985.

Session Laws 1985, c. 98, s. 2, provides: "The Revisor of Statutes shall cause the commentary to each section of Chapter 36B to be printed in the General Statutes. The commentary shall contain the comments of the National Conference of Commissioners on Uniform State Laws, the comments of the General Statutes Commission, and shall reflect amendments made during legislative consideration of this act."

§ 36B-2. Appropriation of appreciation.

The governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the net appreciation, realized and unrealized, in the fair value of the assets of an endowment fund over the historic dollar value of the fund as is prudent under the standard established by G.S. 36B-6. This section does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 2 of the Uniform Management of Institutional Funds Act.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"This section authorizes a governing board to expend for the purposes of the fund the increase in value of an endowment fund over the fund's historic dollar value, within the limitations of Section 6 [G.S. 36B-6] which establishes a standard of business care and prudence.

The section does not apply to funds which are wholly expendable by the institution such as so-called 'quasi-endow-

ment funds' or 'funds functioning as endowment,' nor does the section limit or reduce any spending power granted by a gift instrument or otherwise held by the institution.

Unrealized gains and losses must be combined with realized gains and losses to insure that the historic dollar value is not impaired."

§ 36B-3. Rule of construction.

G.S. 36B-2 does not apply if the applicable gift instrument indicates the donor's intention that net appreciation shall not be expended. A restriction upon the expenditure of net appreciation may not be implied from a designation of a gift as an endowment, or from a direction or authorization in the applicable gift instrument to use only "income," "interest," "dividends," or "rents, issues or profits," or "to preserve the principal intact," or a direction which contains other words of similar import. This rule of construction applies to gift instruments executed or in effect before or after July 1, 1985. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 3 of the Uniform Management of Institutional Funds Act.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"If a gift instrument expresses or otherwise indicates the donor's intention that the governing board may not appropriate the appreciation in the value of the fund, his wishes will govern.

The rule of construction of this section is based upon the assumption that a grantor who makes an outright gift to an educational, religious, charitable or other eleemosynary institution seldom makes a full statement of his intentions and that his unstated intention is usually quite different from the intention of a grantor who makes a gift to a trust for private beneficiaries. The assumption is that the grantor of a gift to an institution: (1) means to devote to the institution any return or benefit that the institution can obtain from the gift, (2) acknowledges the responsibility of the institutional management to determine the prudent use of the return or benefit over time and (3) usually regards the 'amount' of the gift as the dollars given or the dollar value of the property transferred to the institution at the time of the gift. Thus, in the case of a gift instrument which states no clear intention or merely echoes the rubrics of a private trust, the statutory rule of interpretation should apply.

Some advisers to institutions, aware of the body of private trust law, have interpreted references to 'income' or 'principal' in a gift instrument to evidence a grantor's intent that the private trust rules developed to insure equity between an income beneficiary and a remainderman should be applied to an outright gift to an institutional donee. Neither the facts of donor's intentions nor the law of trusts support such an interpretation of the meaning of gift instruments where an institution is the sole beneficiary.

This section does not purport to change existing law or rights; it simply codifies a rule of construction or interpretation or administration by articulating the presumed intent of a donor in the absence of a statement of the donor's actual intent."

§ 36B-4. Investment authority.

In addition to an investment otherwise authorized by law or by the applicable gift instrument, and without restriction to investments a fiduciary may make, the governing board, subject to any specific limitations set forth in the applicable gift instrument or in the applicable law other than law relating to investments by a fiduciary, may, subject to G.S. 36B-6:

(1) Invest and reinvest an institutional fund in any real or personal property deemed advisable by the governing board, whether or not it produces a current return, including mortgages, stocks, bonds, debentures, and other securities of profit or nonprofit corporations, shares in or obligations of associations, partnerships, or secured obligation of individuals, and obligations of any government or subdivision or instrumentality thereof;

(2) Retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable;

(3) Include all or any part of an institutional fund in any pooled or common fund maintained by the institution; and

(4) Invest all or any part of an institutional fund in any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, investment partnerships, real estate investment trusts, or similar organizations in which funds are commingled and investment determinations are made by persons other than the governing board. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 4 of the Uniform Management of Institutional Funds Act except that the General Statutes Commission added the words "subject to G.S. 36B-6" at the end of the introductory paragraph to eliminate any question that the section might be construed to abrogate liability.

The General Assembly amended this section by adding the words "secured obligation of" before the word "individuals" in subdivision (1). The amendment limits the obligations of individuals in which the governing board may invest to secured obligations.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"Institutional investment managers suggest that a general grant of investment powers will clarify the authority of a governing board to select investments. Subsection (1) provides broad powers of investment and states that a governing board is not restricted to investments authorized to trustees.

Two other matters of investment policy have been troublesome to boards because of the absence of specific authority. Subsections (2) and (3) provide authority to hold property given by a donor even though it may not be the best investment (ordinarily in the hope of obtaining additional contributions) and to invest in common or pooled investment funds such as the Common Fund for Non-Profit Organizations. See 4 Scott, Law of Trusts § 389 pp. 2997-3000 (3d ed. 1967).

The absence of specific reference to investment for return by an institution in its own facilities does not limit the power of a governing board to make such investments under the general clause of Section 4(1), or other law or the gift instrument.

Section 6 [G.S. 36B-6] establishes the standard of care and prudence under which the investment authority is exercised."

§ 36B-5. Delegation of investment management.

Except as otherwise provided by the applicable gift instrument or by applicable law relating to governmental institutions or funds, the governing board may:

(1) Delegate to its committees, officers or employees of the institution or the fund, or agents, including investment counsel, the authority to act in place of the board in investment and reinvestment of institutional funds;

(2) Contract with independent investment advisors, investment counsel or managers, banks, or trust companies, so to act; and

(3) Authorize the payment of reasonable compensation for investment advisory or management services. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 5 of the Uniform Management of Institutional Funds Act except that the General Assembly added the word "reasonable" before the word "compensation" in subdivision (3). The amendment limits the payment of compensation by the governing board for investment advisory or management services to reasonable compensation.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"Questions have arisen about the power of a governing board to delegate investment decisions. In the absence of authority, some boards have tried to follow the nondelegation principles applicable to trustees. Governing boards do, in fact, delegate investment authority, sometimes with rather cumbersome procedures to produce a record of apparent decisions by the boards.

This section clarifies the authority to delegate investment management and to purchase investment advisory and management services. Responsibility for investment policy and selection of competent agents remains with the board under the Section 6 standard of business care and prudence."

§ 36B-6. Standard of conduct.

In the administration of the powers to appropriate net appreciation, to make and retain investments, and to delegate investment management of institutional funds, members of a governing board shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision. In so doing they shall consider long- and short-term needs of the institution in carrying out its educational, religious, charitable, or other eleemosynary purposes, its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 6 of the Uniform Management of Institutional Funds Act except that the General Assembly added the word "net" before the word "appreciation" in the first sentence of the section. The amendment changes the reference to appropriation of appreciation to appropriation of net appreciation in the statement of the required standard of conduct.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"The section establishes a standard of care and prudence for a member of a governing board. The standard is generally comparable to that of a director of a business corporation rather than that of a private trustee, but it is cast in terms of the duties and responsibilities of a manager of a nonprofit institution.

Officers of a corporation owe a duty of care and loyalty to the corporation, and the more intimate the knowledge of the affairs of the corporation the higher the standard of care. Directors are obligated to act in the utmost good faith and to exercise ordinary business care and prudence in all matters affecting the management of the corporation. This is a proper standard for the managers of a nonprofit institution, whether or not it is incorporated.

The standard of Section 6 was derived in part from Proposed Treasury Regulations § 53.4944-1(a)(2) dealing with the

investment responsibility of managers of private foundations.

The standard requires a member of a governing board to weigh the needs of today against those of the future."

§ 36B-7. Release of restrictions on use or investment.

(a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(b) If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the Superior Court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The Attorney General shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund.

(c) A release under this section may not allow a fund to be used for purposes other than the educational, religious, charitable, or other eleemosynary purposes of the institution affected.

(d) This section does not limit the application of G.S. 36A-53 or of the doctrine of cy pres. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 7 of the Uniform Management of Institutional Funds Act except that the General Statutes Commission added the words "of G.S. 36A-53 or" in subsection (d) to make it clear that the Act does not purport to limit the application of the Charitable Trusts Administration Act.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"One of the difficulty problems of fund management involves gifts restricted to uses which cannot be feasibly administered or to investments which are no longer available or productive. There should be an expeditious way to make necessary adjustments when the restrictions no longer serve the original purpose. Cy pres has not been a satisfactory answer and is reluctantly applied in some states. See Restatement of Trusts (2d), §§ 381, 399; 4 Scott, Law of Trusts § 399 p. 3084, § 399.4 pp. 3119 et seq. (3d ed. 1967).

This section permits a release of limitations that imperil efficient administration of a fund or prevent sound investment management if the governing board can secure the approval of the donor or the appropriate court.

Although the donor has no property interest in a fund after the gift, nonetheless if it is the donor's limitation that controls the governing board and he or she agrees that the restriction need not apply, the board should be free of the burden. See Restatement of Trusts (2d) § 367. Scott suggests that in minor matters, the consent of the settlor may be effective to remove restrictions upon the trustees in the administration of a charitable trust. 4 Scott, § 367.3 p. 2846 (3d ed. 1967).

If the donor is unable to consent or cannot be identified, the appropriate court may upon application of a governing board release a limitation which is shown to be obsolete, inappropriate or impracticable.

This section authorizes only a release of a limitation. Thus, if a fund were established to provide scholarships for students named Brown from Brown County, Iowa, a donor might acquiesce in a reduction of the limitation to enable

the institution to offer scholarships to students from Brown County who are not named Brown, or to students from other counties in Iowa or to students from other states, or he could acquiesce in the release of the restriction to scholarships so that the fund could be used for the general educational purposes of the school.

Subsection (d) makes it clear that the Act does not purport to limit the established doctrine of cy pres. A liberalization of, addition to, or substitute for cy pres is not without respectable support. Professor Kenneth Karst in 'The Efficiency of the Charitable Dollar: An Unfilled State Responsibility,' 73 Harv. L. Rev. 433 (1960) suggested that the doctrine of cy pres be expanded to permit the courts to redirect charitable grants if the purpose had become 'obsolete, or useless, or prejudicial to the public welfare, or are insignificant in comparison with the magnitude of the endowment ...' quoting from the Nathan Report (of the British Committee on the Law and Practice Relating to Charitable Trusts, Cmd. 8710, 1952) quoting the Scotland Education Act 1946, 9-10 Geo. 6, ch. 72 § 119(b). The Uniform Act provision is far less broad; it applies only to the release of restrictions on the gift under limited circumstances.

New England courts apply a rather strict doctrine of separation of powers to deny legislative encroachment on judicial cy pres. The Act is compatible with the New England cases because the final decision is in the courts. See City of Hartford v. Larrabee Fund Association, 161 Conn. 312, 288 A. 2d 71 (1971); Opinion of Justices, 101 N. H. 531, 133 A. 2d 792 (1957).

No federal tax problems for the donor are anticipated by permitting release of a restriction. The donor has no right to enforce the restriction, no interest in the fund and no power to change the eleemosynary beneficiary of the fund. He may only acquiesce in a lessening of a restriction already in effect."

§ 36B-8. Conflict with other law.

To the extent that the provisions of this Chapter are inconsistent with the provisions of either Chapter 36A or Chapter 55A, the provisions of this Chapter shall control. The provisions of this Chapter shall not apply to the University of North Carolina. (1985, c. 98, s. 1.)

COMMENTARY

This section was added by the General Statutes Commission to establish that the Uniform Management of Institutional Funds Act controls in situations where either Chapter 36A, Trusts and Trustees, or Chapter 55A, Nonprofit Corporation Act, overlaps with its provisions. This section also provides that the Act does not apply to the University of North Carolina because the endowment fund of the University is governed by the provisions of G.S. 116-36.

§ 36B-9. Uniformity of application and construction.

This Chapter shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among those states which enact it. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 9 of the Uniform Management of Institutional Funds Act.

§ 36B-10. Short title.

This Chapter may be cited as the "Uniform Management of Institutional Funds Act." (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 10 of the Uniform Management of Institutional Funds Act.

Chapter 38.
Boundaries.

§ 38-1. Special proceeding to establish.

CASE NOTES

Putting Title in Issue Converts Proceeding into Quiet Title Action. — Where the only issue to be tried is the location of a dividing line, it is a processioning proceeding under this Chapter. However, where title to the land is put in issue the clerk has no authority to pass on any question involved. He must transfer the proceeding to the regular session of superior court where it becomes in effect an action to quiet title pursuant to § 41-10. Cobb v. Spurlin, — N.C. App. —, 327 S.E.2d 244 (1985).

Applied in Metcalf v. McGuinn, — N.C. App. —, 327 S.E.2d 51 (1985).

§ 38-3. Procedure.

CASE NOTES

Parties to Proceeding. — All landowners whose land adjoins the disputed boundary and whose interest may be affected are necessary and proper parties. Landowners whose land adjoins boundary lines which are not in dispute, but which may connect with or intersect the disputed line, are not necessary parties, although they may be joined in the discretion of the trial judge. Metcalf v. McGuinn, — N.C. App. —, 327 S.E.2d 51 (1985).

§ 38-4. Surveys in disputed boundaries.

CASE NOTES

Applied in Metcalf v. McGuinn, — N.C. App. —, 327 S.E.2d 51 (1985).

Cited in Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

Chapter 39.

Conveyances.

ARTICLE 1.

Construction and Sufficiency.

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

CASE NOTES

Applied in Biggers v. Evangelist, 71 N.C. App. 35, 321 S.E.2d 524 (1984).

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-13.6. Control of real property held in tenancy by the entirety.

CASE NOTES

Cited in Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984).

ARTICLE 3.

Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void.

CASE NOTES

I. GENERAL CONSIDERATION.

The case of Aman v. Walker, 165 N.C. 224, 81 S.E. 162 (1914), is the cornerstone of the North Carolina fraudulent conveyance law. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

For discussion of what constitutes valuable consideration under this section, see North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979). Smith-Douglass, Div. of Borden Chem., Borden, Inc. v. Kornegay, 70 N.C. App. 264, 318 S.E.2d 895 (1984).

Applied in Doby v. Lowder, — N.C. App. —, 324 S.E.2d 26 (1984).

III. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

Grantee Must Be Purchaser for Value to Be Protected. — North Carolina law protects bona fide purchasers from creditors of the grantor. In order to be protected a grantee must first be a purchaser for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Deed of trust to secure a present loan constitutes the beneficiary a purchaser for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.

I. GENERAL CONSIDERATION.

Applied in Smith-Douglass, Div. of Borden Chem., Borden, Inc. v. Kornegay, 70 N.C. App. 264, 318 S.E.2d 895 (1984); Havee v. Belk, 589 F. Supp. 600 (W.D.N.C. 1984).

Cited in Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

§ 39-18. Marriage settlements void as to existing creditors.

CASE NOTES

Cited in Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Chapter 40A.

Eminent Domain.

Article 1.

General.

ARTICLE 1.

General.

§ 40A-1. Exclusive provisions.

Local Modification. — City of Conover: 1985, c. 422; City of Hickory: 1985, c. 422; City of Winston-Salem: 1985, c. 47; Town of Maiden: 1985, c. 422.

CASE NOTES

Condemnation proceedings are commenced differently from ordinary civil actions, different documents are required to be filed and served, and the filing deadlines are different. VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

Procedure Where Condemnor Claims Ownership Interest. — A condemnation proceeding may not be converted to an action to quiet title even when the parties to the condemnation action stipulate that it may. Rather, where it appears that a condemnor claims an ownership interest in the property sought to be condemned, the appropriate action for the court would be to dismiss the condemnation proceeding without prejudice, permitting it to be reinstituted, if necessary, when the collateral issues regarding title to the land have been resolved, either by settlement or litigation. VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

Applied in Bandy v. City of Charlotte, — N.C. App. —, 325 S.E.2d 17 (1985).

§ 40A-3. By whom right may be exercised.

(a) Private Condemnors. — For the public use or benefit, the persons or organizations listed below shall have the power of eminent domain and may acquire by purchase or condemnation property for the stated purposes and other works which are authorized by law.

(1) Corporations, bodies politic or persons have the power of eminent domain for the construction of railroads, power generating facilities, substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, tramroads, canals, telegraphs, telephones, electric power lines, electric lights, public water supplies, public sewerage systems, flumes, bridges, and pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals. Land condemned for any liquid pipelines shall:

a. Not be less than 50 feet nor more than 100 feet in width; and

b. Comply with the provisions of G.S. 62-190(b).

The width of land condemned for any natural gas pipelines shall not be more than 100 feet.

(2) School committees or boards of trustees or of directors of any corporation holding title to real estate upon which any private educational institution is situated, have the power of eminent domain in order to obtain a pure and adequate water supply for such institution.

(3) Franchised motor vehicle carriers or union bus station companies organized by authority of the Utilities Commission, have the power of eminent domain for the purpose of constructing and operating union bus stations: Provided, that this subdivision shall not apply to any city or town having a population of less than 60,000.

(4) Any railroad company has the power of eminent domain for the purposes of: constructing union depots; maintaining, operating, improving or straightening lines or of altering its location; constructing double tracks; constructing and maintaining new yards and terminal facilities or enlarging its yard or terminal facilities; connecting two of its lines already in operation not more than six miles apart; or constructing an industrial siding ordered by the Utilities Commission as provided in G.S. 62-232.

The width of land condemned for any single or double track railroad purpose shall be not less than 80 feet nor more than 100 feet, except where the road may run through a town, where it may be of less width, or where there may be deep cuts or high embankments, where it may be of greater width.

No rights granted or acquired under this subsection shall in any way destroy or abridge the rights of the State to regulate or control any railroad company or to regulate foreign corporations doing business in this State. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State. Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city.

No such condemnor shall be allowed to have condemned to its use, without the consent of the owner, his burial ground, usual dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute.

The power of eminent domain shall be exercised by private condemnors under the procedures of Article 2 of this Chapter.

(c) Other Public Condemnors. — For the public use or benefit, the following political entities shall possess the power of eminent domain and may acquire property by purchase, gift, or condemnation for the stated purposes.

(1) A sanitary district board established under the provisions of Part 2 of Article 2 of Chapter 130A for the purposes stated in that Part.

(2) The board of commissioners of a mosquito control district established under the provisions of Part 2 of Article 12 of Chapter 130A for the purposes stated in that Part.

(3) A hospital authority established under the provisions of Part B of Article 2 of Chapter 131E for the purposes stated

in that Part, provided, however, that the provisions of G.S. 131E-24(c) shall continue to apply.

(4) A watershed improvement district established under the provisions of Article 2 of Chapter 139 for the purposes stated in that Article, provided, however, that the provisions of G.S. 139-38 shall continue to apply.

(5) A housing authority established under the provisions of Article 1 of Chapter 157 for the purposes of that Article, provided, however, that the provisions of G.S. 157-11 shall continue to apply.

(6) A corporation as defined in G.S. 157-50 for the purposes of Article 3 of Chapter 157, provided, however, the provisions of G.S. 157-50 shall continue to apply.

(7) A commission established under the provisions of Article 22 of Chapter 160A for the purposes of that Article.

(8) An authority created under the provisions of Article 1 of Chapter 162A for the purposes of that Article, provided, however, the provisions of G.S. 162-7 shall continue to apply.

(9) A district established under the provisions of Article 4 of Chapter 162A for the purposes of that Article.

(10) A district established under the provisions of Article 5 of Chapter 162A for purposes of that Article.

(11) The board of trustees of a community college or technical college or technical institute established under the provisions of Article 2 of Chapter 115D for the purposes of that Article.

The power of eminent domain shall be exercised by a public condemnor listed in this subsection under the procedures of Article 3 of this Chapter. (1852, c. 92, s. 1; R.C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C.S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806; 1951, c. 1002, ss. 1, 2; 1953, c. 1211; 1957, c. 65, s. 11; c. 1045, s. 1; 1961, c. 247; 1973, c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1981, c. 919, s. 1; 1983, c. 378, s. 2; 1983 (Reg. Sess., 1984), c. 1084; 1985, c. 689, s. 10; c. 696, s. 2.)

Local Modification. — Iredell: 1985, c. 570, s. 25; Stanly: 1985, c. 433, s. 2; Wake: 1985, c. 640, s. 1; City of Asheville: 1985, c. 556, s. 2; City of Monroe: 1985, c. 177; City of Raleigh: 1985, c. 556, s. 2; City of Statesville: 1985, c. 570, s. 25; Village of Pinehurst: 1985, c. 379, s. 2.

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The 1985 amendment by c. 689, s. 10, effective July 11, 1985, substituted "Part 2 of Article 2 of Chapter 130A for the purposes stated in that Part" for "Article 12 of Chapter 130 for the purpose stated in that Article" at the end of subdivision (c)(1), substituted "Part 2 of Article 12 of Chapter 130A for the purposes stated in that Part" for "Article 24 of Chapter 130 for the purposes stated in that Article" at the end of subdivision (c)(2), substituted "Part B of Article 2 of Chapter 131E for the purposes stated in that Part" for "Article 12 of Chapter 131 for the purposes stated in that Article" and substituted "G.S. 131E-24(c)" for "G.S. 131-112" in subdivision (c)(3), and substituted "Chapter 162A" for "Chapter 162" in subdivision (c)(10).

The 1985 amendment by c. 696, s. 2, effective July 11, 1985, added the language beginning "Land condemned for any liquid pipelines" at the end of subdivision (a)(1).

§ 40A-10. Sale or other disposition of land condemned.

Local Modification. — Cabarrus County and any incorporated municipality partly or wholly in Cabarrus County: 1985, c. 269.

ARTICLE 2.

Condemnation Proceedings by Private Condemnors.

§ 40A-19. Proceedings by private condemnors.

CASE NOTES

Issues Outside Pleadings May Not Be Tried by Consent of Parties. — Because condemnation is a special proceeding, the Rules of Civil Procedure do not apply to allow issues outside the pleadings to be tried by consent of the parties. Though it is sometimes possible to convert special proceedings to civil actions, the situations where that is true are limited and are governed by statute. VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

Parties Cannot Consent to Settlement of Incidental Questions of Title. — Because of the fundamental procedural and substantive differences between civil actions to quiet title and special proceedings to condemn land, parties to a nonadversary condemnation proceeding cannot consent to settle incidental questions of title to land. The nature of the issues raised simply will not admit of simultaneous resolution. VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

Procedure Where Condemnor Claims Ownership Interest. — A condemnation proceeding may not be converted to an action to quiet title even when the parties to the condemnation action stipulate that it may. Rather, where it appears that a condemnor claims an ownership interest in the property sought to be condemned, the appropriate action for the court would be to dismiss the condemnation proceeding without prejudice, permitting it to be reinstituted, if necessary, when the collateral issues regarding title to the land have been resolved, either by settlement or litigation. VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

No Procedure for Conversion to Action to Quiet Title. — There is no statutory or procedural mechanism by which a condemnation proceeding under this Chapter may be converted to a civil action to quiet title. Nor is there any precedent in case law. VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

§ 40A-22. Service.

CASE NOTES

Applied in VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

§ 40A-31. Rights of claimants of fund determined.

CASE NOTES

This section does not encompass the situation where one of the conflicting claimants is the condemnor. VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

ARTICLE 3.

Condemnation by Public Condemnors.

§ 40A-41. Institution of action and deposit.

Local Modification. —
Cabarrus: 1985, c. 194, s. 2.

§ 40A-42. Vesting of title and right of possession; injunction not precluded.

Local Modification. —
Wake: 1985, c. 640, s. 2.

Chapter 41.

Estates.

§ 41-1. Fee tail converted into fee simple.

Legal Periodicals. — For note discussing the enforceability of assessments against property owners in residential developments in light of Figure Eight Beach Homeowners' Ass'n v. Parker, 62 N.C. App. 367, 303 S.E.2d 336, cert. denied, 309 N.C. 320, 307 S.E.2d 170 (1983), see 7 Campbell L. Rev. 33 (1984).

§ 41-6.1. Meaning of "next of kin."

CASE NOTES

At the time of death of testatrix who died May 22, 1962, "next of kin" and, by implication, "nearest relatives" still retained their very narrow technical common-law meaning. Rawls v. Rideout, — N.C. App. —, 328 S.E.2d 783 (1985).

§ 41-10. Titles quieted.

CASE NOTES

I. GENERAL CONSIDERATION.

This section is highly remedial. — This statute is remedial in nature, designed to provide a means for determining all adverse claims to land, including those formerly encompassed within the equitable proceedings to remove clouds on title. Boyd v. Watts, — N.C. App. —, 327 S.E.2d 46 (1985).

If title becomes involved in a processioning proceeding, etc. — Where the only issue to be tried is the location of a dividing line, it is a processioning proceeding under Chapter 38. However, where title to the land is put in issue the clerk has no authority to pass on any question involved. He must transfer the proceeding to the regular session of superior court where it becomes in effect an action to quiet title pursuant to this section. Cobb v. Spurlin, — N.C. App. —, 327 S.E.2d 244 (1985).

Applied in VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 1, 1985

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1985 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

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