

THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1988 CUMULATIVE SUPPLEMENT

Volume 2A, Part I

Chapters 28 through 41

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

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Annotated through 368 S.E.2d 309. For complete scope of
annotations, see scope of volume page.

**Place Behind Supplement Tab in Binder Volume.
This Supersedes Previous Supplement, Which
May Be Retained for Reference Purposes.**

THE MICHIE COMPANY

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Preface

This Cumulative Supplement to Replacement Volume 2A, Part I contains the general laws of a permanent nature enacted by the General Assembly through the 1987 (Regular Session, 1988) 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 purposes 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 Cumulative 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.

User's Guide

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included herein. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1A, Part I for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1987 (Regular Session, 1988) 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 322, p. 116.
North Carolina Court of Appeals Reports through Volume 89, p. 583.
South Eastern Reporter 2nd Series through Volume 368, p. 309.
Federal Reporter 2nd Series through Volume 846, p. 78.
Federal Supplement through Volume 683, p. 1410.
Federal Rules Decisions through Volume 119, p. 460.
Bankruptcy Reports through Volume 85, p. 182.
Supreme Court Reporter through Volume 108, p. 1762.
North Carolina Law Review through Volume 66, p. 837.
Wake Forest Law Review through Volume 23, p. 398.
Campbell Law Review through Volume 10, p. 352.
Duke Law Journal through 1987, p. 976.
North Carolina Central Law Journal through Volume 17, p. 118.
Opinions of the Attorney General.

The General Statutes of North Carolina 1988 Cumulative Supplement

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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, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (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, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (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, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (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 3.

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

§ 28A-3-1. Proper county.

The venue for the probate of a will and for all proceedings relating to the administration of the estate of a decedent shall be:

(1) In the county in this State where the decedent had his domicile at the time of his death; or

(R.C., c. 46, s. 1; C.C.P., s. 433; 1868-9, c. 113, s. 115; Code, s. 1374; Rev., s. 16; C.S., s. 1; 1931, c. 165; 1943, c. 543; 1951, c. 765; 1973, c. 1329, s. 3.)

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

Editor's Note. — Subdivision (1) of this section is set out above to correct a typographical error in the main volume.

CASE NOTES

I. GENERAL CONSIDERATION.

Venue of a proceeding in the nature of a creditor's supplemental proceeding under § 1-307, in which in order to issue an execution on defendant's interest under his father's will,

the trial judge was required to find only that defendant possessed some interest under his father's will, was governed by § 1-307, and not by this section. *North Carolina Nat'l Bank v. C.P. Robinson Co.*, 319 N.C. 63, 352 S.E.2d 684 (1987).

ARTICLE 4.

Qualification and Disqualification for Letters Testamentary and Letters of Administration.

§ 28A-4-1. Order of persons qualified to serve.

(b) Letters of Administration. — Letters of administration shall be granted to persons who are qualified to serve, in the following order, unless the clerk of superior court in his discretion determines that the best interests of the estate otherwise require:

- (1) The surviving spouse of the decedent;
- (2) Any devisee of the testator;
- (3) Any heir of the decedent;
- (3a) Any next of kin, with a person who is of a closer kinship as computed pursuant to G.S. 104A-1 having priority;
- (4) Any creditor to whom the decedent became obligated prior to his death;
- (5) Any person of good character residing in the county who applies therefor; and
- (6) Any other person of good character not disqualified under G.S. 28A-4-2.

When applicants are equally entitled, letters shall be granted to the applicant who, in the judgment of the clerk of superior court, is most likely to administer the estate advantageously, or they may be granted to any two or more of such applicants. (R.C., c. 46, ss. 2, 3; C.C.P., s. 456; 1968-9, c. 113, s. 115; Code, s. 1376; Rev., s. 3; C.S., s. 6; 1949, c. 22; 1973, c. 1329, s. 3; 1987, c. 357.)

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 1987

amendment, effective with respect to the estates of decedents dying on or after October 1, 1987, inserted subdivision (b)(3a).

CASE NOTES

III. LETTERS OF ADMINISTRATION.

Correction of Error in Appointment. — Petitioner, an heir at law and

beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator

C.T.A. without notice to the petitioner, it was not error for the clerk to correct this error by removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under

§ 28A-4-2(4) because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, 80 N.C. App. 720, 343 S.E.2d 263 (1986).

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

CASE NOTES

I. GENERAL CONSIDERATION.

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner,

it was not error for the clerk to correct this error by removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under subdivision (4) of this section because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, 80 N.C. App. 720, 343 S.E.2d 263 (1986).

ARTICLE 6.

Appointment of Personal Representative.

§ 28A-6-2. Letters issued without notice; exceptions.

CASE NOTES

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner, it was not error for the clerk to correct this error by removing the respondent as

administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under § 28A-4-2(4) because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, 80 N.C. App. 720, 343 S.E.2d 263 (1986).

ARTICLE 9.

Revocation of Letters.

§ 28A-9-1. Revocation after hearing.

CASE NOTES

I. GENERAL CONSIDERATION.

Section 1A-1, Rule 58 Inapplicable to Denial of Motion to Revoke. — Section 1A-1, Rule 58 has no application in case involving the denial of a motion made before the clerk of superior court pursuant to this section to revoke the letters testamentary of executor. In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

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, 72 N.C. App. 1, 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, 72 N.C. App. 1, 323 S.E.2d 410 (1984).

A proceeding under this section is not res judicata in a civil action for damages. Shelton v. Fairley, 72 N.C. App. 1, 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, 72 N.C. App. 1, 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 ben-

eficiaries prematurely to bring civil actions for damages. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984).

Denial of Motion to Revoke "Entered" When Clerk Announced After Hearing He Would Deny It. — Clerk's order denying motion to revoke letters testamentary was "entered" when the clerk announced after hearing that he would deny the petition. The party aggrieved by the ruling, the petitioner, was present and even excepted to the order, had ten days thereafter to give notice of appeal pursuant to § 1-272. In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

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, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (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, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied, 314 N.C. 330, 333 S.E.2d 488 (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).

§ 28A-13-10. Liability of personal representative.

CASE NOTES

Liability for Depreciation of Assets. — An executor, in performing those duties related to managing the estate's assets, acts as a trustee to beneficiaries of the estate. As such, the execu-

tor is liable for the depreciation of assets which an ordinarily prudent fiduciary would not have allowed to occur. *Fortune v. First Union Nat'l Bank*, 87 N.C. App. 1, 359 S.E.2d 801 (1987).

ARTICLE 14.

Notice to Creditors.

§ 28A-14-1. Notice for claims.

(a) 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 a 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 or mail 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 or mailed the notice provided for by this section, no further publication or mailing shall be required by any other collector or personal representative.

(b) Every personal representative and collector within 90 days after the granting of letters shall send by first class mail to the last known address a copy of the notice required by subsection (a) of this section to all persons, firms, and corporations having unsatisfied claims against the decedent who are actually known or can be reasonably ascertained by the personal representative or collector within the 90 days. (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; 1987 (Reg. Sess., 1988), c. 1077, s. 1.)

Editor's Note. — The phrase "a least six months" in the first sentence of subsection (a), as set out in Session Laws 1987 (Reg. Sess., 1988), c. 1077, s. 1, was apparently meant to read "at least six months."

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.

The 1987 (Reg. Sess., 1988) amend-

ment, effective July 8, 1988, and applicable to decedents dying on or after April 19, 1988, rewrote the catchline, designated the first paragraph as subsection (a), in subsection (a) inserted "or mail" in the next-to-last sentence and inserted "or mailed" or "or mailing" in

the last sentence, and added subsection (b).

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

§ 28A-14-1.1. Validation of certain notices.

(b) This section applies to all notices published and posted between October 1, 1975, and March 16, 1987, except that it does not affect any pending litigation or any litigation instituted within 90 days of March 16, 1987. (1981, c. 96, ss. 1, 2; 1987, c. 277, 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.

Editor's Note. — Session Laws 1987, c. 277, s. 11 provides: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are

effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. — The 1987 amendment, effective June 4, 1987, substituted "March 16, 1987" for "March 16, 1981" in two places in subsection (b).

§ 28A-14-2. Proof of notice.

A copy of the notice directed by G.S. 28A-14-1(a) to be posted or published, together with an affidavit or affidavits of one of the persons authorized by G.S. 1-600(a) to make affidavits to the effect that such notice was posted or published in accordance with G.S. 28A-14-1(a), and an affidavit of the personal representative or collector, or the attorney for the personal representative or collector, to the effect that a copy of the notice was mailed to each creditor entitled to notice in accordance with G.S. 28A-14-1(b) shall be filed in the office of the clerk of superior court by the personal representative or collector. The copy of the notice, together with the affidavit or affidavits, shall be deemed a record of the court and a copy thereof, duly certified by the clerk of superior court, shall be received as prima facie evidence of the fact of publication or mailing in all the courts of this State. (1868-9, c. 113, s. 31; Code, s. 1423; Rev., s. 40; C.S., s. 46; 1951, c. 1005, s. 3; 1961, c. 26, s. 2; 1973, c. 1329, s. 3; 1987 (Reg. Sess., 1988), c. 1077, s. 2.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective July 8, 1988, and applicable to decedents dying on or after April 19, 1988, rewrote

the catchline and the first sentence, and inserted "or mailing" in the second sentence.

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).

§ 28A-15-2. Title and possession of property.

CASE NOTES

Vesting of Real Property in Heirs.

— When a property owner dies intestate, the title to his real property vests immediately in his heirs. The decedent's personal representative has the power, upon petition to the clerk of superior court, to sell decedent's real property for payments of debts and other claims against the decedent's estate, but the proceeding is an adversary one, requiring that the heirs be made parties. If an

heir is not joined, the order of sale is void as to him. *Swindell v. Lewis*, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Heirs of wife's deceased husband were necessary parties to equitable distribution action in which husband's administrator had been substituted as defendant, and they were properly added as parties defendant. *Swindell v. Lewis*, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

§ 28A-15-5. Order in which assets appropriated; abatement.

CASE NOTES

Bequest Not Adeemed by Sale during Testator's Incompetency.

— Where the trial court found that testator specifically bequeathed his interest in livestock to his daughter, and subsequently became incompetent and did not regain his competency at any time before his death, and where his interest in livestock was sold by his trustees for \$22,543.48, and those funds were included in the assets coming into the hands of the executor, and moreover, where there were sufficient assets in the

estate to satisfy all of its obligations as well as all general, specific and demonstrative devises without any abatement of those devises, these findings were sufficient to support the court's conclusion that testator's specific testamentary gift of his interest in livestock to his daughter was not adeemed by the trustee's sale thereof during testator's incompetency before his death. In re *Estate of Warren*, 81 N.C. App. 634, 344 S.E.2d 795 (1986).

§ 28A-15-12. Examination of persons or corporations believed to have possession of property of decedent.

CASE NOTES

Attorney's fees were recoverable by administrators of decedent's estate, as successful parties, in suit by administrators to compel decedent's son to provide

an accounting of certain estate property. In re Estate of Katsos, 84 N.C. App. 682, 353 S.E.2d 677, cert. denied, 320 N.C. 169, 358 S.E.2d 52 (1987).

ARTICLE 17.

Sales, Leases or Mortgages of Real Property.

§ 28A-17-1. Sales of real property.

CASE NOTES

I. GENERAL CONSIDERATION.

Vesting of Real Property in Heirs.

— When a property owner dies intestate, the title to his real property vests immediately in his heirs. The decedent's personal representative has the power, upon petition to the clerk of superior court, to sell decedent's real property for payments of debts and other claims against the decedent's estate, but the proceeding is an adversary one, requiring that the heirs be made parties. If an

heir is not joined, the order of sale is void as to him. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

II. PRACTICE AND PROCEDURE.

Heirs of wife's deceased husband were necessary parties to equitable distribution action in which husband's administrator had been substituted as defendant, and they were properly added as parties defendant. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

§ 28A-17-4. Heirs and devisees necessary parties.

CASE NOTES

Vesting of Real Property in Heirs.

— When a property owner dies intestate, the title to his real property vests immediately in his heirs. The decedent's personal representative has the power, upon petition to the clerk of superior court, to sell decedent's real property for payments of debts and other claims against the decedent's estate, but the proceeding is an adversary one, requiring that the heirs be made parties. If an

heir is not joined, the order of sale is void as to him. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Heirs of wife's deceased husband were necessary parties to equitable distribution action in which husband's administrator had been substituted as defendant, and they were properly added as parties defendant. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

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).

For note on use of the family purpose doctrine when no outsiders are involved,

in light of *Carver v. Carver*, 310 N.C. 669, 314 S.E.2d 739 (1984), see 21 Wake Forest L. Rev. 243 (1985).

For note discussing the appointment of an administrator for a decedent's estate to create diversity of citizenship, see 21 Wake Forest L. Rev. 489 (1986).

For comment, "Wrong Without a Remedy—North Carolina and the Wrongful Death of a Stillborn," see 9 Campbell L. Rev. 93 (1986).

For note discussing wrongful death recovery for a viable unborn fetus, in light of *DiDonato v. Wortman*, 80 N.C. App. 117, 341 S.E.2d 58 (1986), see 16 N.C. Cent. L.J. 207 (1987).

CASE NOTES

I. GENERAL CONSIDERATION.

Editor's Note. — Annotations in the main volume under analysis line I, "General Consideration," and catchlined "Persons in former § 28-173, etc." or "For case calling for legislative action, etc." should be read in light of *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987), which held that this section allows recovery for the wrongful death of a viable but unborn child.

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.*, 73 N.C. App. 363, 326 S.E.2d 295 (1985), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986).

Child Not a "Trespasser". — Child who was electrocuted when he entered power company's cabinet containing high voltage wires located on property on which the company had an easement, who had permission of the landowners to play on the property, was not a trespasser as that term has been defined by our case law, and thus the power company was not entitled to have its legal duty reduced. *Cole v. Duke Power Co.*, 81 N.C. App. 213, 344 S.E.2d 130, cert. denied, 318 N.C. 281, 347 S.E.2d 462 (1986).

Joinder of Action for Wrongful Death of Viable Fetus. — The action for wrongful death of a viable fetus must be joined with any action based on the same facts brought by the decedent's parents. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987), reversing *DiDonato v. Wortman*, 80 N.C. App. 117, 341 S.E.2d 58 (1986).

Lack of Administrator for Fetus's Estate Not Grounds for Dismissal Where Clerk Unwilling to Issue Letters of Administration. — Cause of action for the wrongful death of the fetus was not subject to dismissal on grounds that it was not brought by the personal representative of the deceased as required by subsection (a), where the failure to bring this action in the name of the administrator of the estate was apparently due to the unwillingness of the clerk of court to issue letters of administration for a fetus's "estate." The existence of a cause of action for wrongful death is sufficient for the appointment of an administrator, and since a wrongful

death action exists for a viable fetus, the clerk should have appointed an administrator to bring the action. *Ledford v. Martin*, 87 N.C. App. 279, 359 S.E.2d 505 (1987).

If an employee's action would be barred by the Workers' Compensation Act, then a wrongful death action brought by the employee's representative is also barred. *McAllister v. Cone Mills Corp.*, — N.C. App. —, 364 S.E.2d 186 (1988).

Complaint Barred by Workers' Compensation Act. — Wrongful death complaint alleging that defendant, decedent's employer, negligently required decedent to perform tasks which exposed decedent to known carcinogens, thereby causing decedent's cancer of the bladder and resulting death, came within the language of § 97-53(13) and was barred by the Workers' Compensation Act. *McAllister v. Cone Mills Corp.*, — N.C. App. —, 364 S.E.2d 186 (1988).

Payment of Expenses of Suit from Assets of Estates. — With the 1985 amendment of subsection (a) of this section, the Legislature has chosen to allow reasonable and necessary expenses, excluding attorneys' fees, incurred in pursuing a wrongful death action to be paid from the assets of the deceased's estate. If there is any recovery from the wrongful death action, the recovery must first be applied to reimburse the estate for the expenses paid from its assets in pursuing the action. *In re Estate of Proctor*, 79 N.C. App. 646, 340 S.E.2d 138 (1986).

Prior to the 1985 amendment to subsection (a) of this section, there was no statutory authority for paying out of a decedent's estate the reasonable and necessary expenses incurred in pursuing a wrongful death action. Thus, on February 1, 1985, clerk properly denied petition seeking authorization of payment of litigation expenses out of decedent's estate, and superior court was correct in affirming the clerk's order. However, following the July 5, 1985 amendment there was nothing to prevent decedent's personal representatives from filing a new petition seeking to have those same expenses paid from the deceased's estate. *In re Estate of Proctor*, 79 N.C. App. 646, 340 S.E.2d 138 (1986).

Contributory negligence of decedent, who was operating his vehicle in an impaired condition in violation of § 20-138.1, was a defense to a wrongful

death claim under this section based on defendants' alleged negligence in selling alcohol to an intoxicated person. *Clark v. Inn West*, — N.C. App. —, 365 S.E.2d 682 (1988).

Cited in *McDowell v. Estate of Anderson*, 69 N.C. App. 725, 318 S.E.2d 258 (1984); *In re Ragan*, 64 Bankr. 384 (Bankr. E.D.N.C. 1986).

III. PARTIES TO THE ACTION.

Editor's Note. — Annotations in the main volume and the 1987 Cumulative Supplement under analysis line III, "Parties to the Action," and catchlined "Prenatal Death of Viable Child" should be read in light of *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987), which held that this section allows recovery for the wrongful death of a viable but unborn child.

Prenatal Death of Viable Child. — This section allows recovery for the death of a viable but unborn child. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987), reversing *DiDonato v. Wortman*, 80 N.C. App. 117, 341 S.E.2d 58 (1986).

The Supreme Court's holding in *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987), permitting an action to recover for the destruction of a viable fetus en ventre sa mere, could be applied retroactively to an action commenced before *DiDonato* was decided. *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, — N.C. App. —, 365 S.E.2d 909 (1988).

The definition of "viability" intended by the Supreme Court in *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987), is simply the common law definition of fetal capability to live independently of the mother. Although there is apparently no clear medical consensus as to the specific gestational age at which this capability is currently achieved, a gestational range of 20 to 26 weeks has been suggested. However, the determination of a fetus's viability is a question of fact. *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, — N.C. App. —, 365 S.E.2d 909 (1988).

A wrongful death action may be maintained against a municipal corporation. *Jackson v. Housing Auth.*, 316 N.C. 259, 341 S.E.2d 523 (1986).

IV. DISTRIBUTION OF RECOVERY.

Editor's Note. — The annotations to

the case of *Crawford v. Hudson*, 3 N.C. App. 555, 165 S.E.2d 557 (1969), appearing under this analysis line on pages 87 to 89 of the main volume, should be disregarded.

Attorney's Fees. — The 1985 amendment to this section provides that an attorney who litigates a wrongful death claim may be paid for his services from the wrongful death proceeds. *In re Lessard*, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

Attorney who neither initiated nor handled wrongful death claim and was appointed successor administrator only after wrongful death award had been made, but who expended considerable time in determining the correct distribution of wrongful death proceeds, could be compensated for his services from the wrongful death proceeds. *In re Lessard*, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

"Costs" of an estate would not be payable from wrongful death proceeds. *In re Lessard*, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

V. DAMAGES RECOVERABLE.

A. In General.

Editor's Note. — Annotations in the main volume under analysis line V A, "Damages Recoverable, In General," and catchlined "Prenatal Death of Viable Child" should be read in light of *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987), which held that this section allows recovery for the wrongful death of a viable but unborn child.

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*, 74 N.C. App. 543, 328 S.E.2d 889 (1985), upholding award of damages in the amount of \$5,000.

Under Subsection (b)(4), only reasonably expected net income of decedent can be recovered. Victim's parents, his only survivors, could only re-

cover the amount of his income that they reasonably might have received had he lived. *State v. Smith*, — N.C. App. —, 368 S.E.2d 33 (1988).

Trial Court Erred in Application of This Section. — Although the trial court properly used the wrongful death statute to compute the amount of restitution which defendant found guilty of misdemeanor death by vehicle should pay, it erred in its application of this section. *State v. Smith*, — N.C. App. —, 368 S.E.2d 33 (1988).

Certain increased medical expenses as well as funeral bills incident to the death of a 40 week-old fetus could only be recovered by the administrator of the fetal estate pursuant to an action under this section. *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, — N.C. App. —, 365 S.E.2d 909 (1988).

E. Punitive Damages.

B. Pain and Suffering.

Damages for the pain and suffering of a decedent fetus are recoverable if they can be reasonably established. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987), reversing *DiDonato v. Wortman*, 80 N.C. App. 117, 341 S.E.2d 58 (1986).

C. Burial Expenses.

Prenatal Death of Viable Child. — Medical and funeral expenses, as well as punitive and nominal damages, should be allowed in the case of a decedent fetus where appropriate. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987), reversing *DiDonato v. Wortman*, 80 N.C. App. 117, 341 S.E.2d 58 (1986).

D. Loss of Decedent's Income, Services, Society, Etc.

Prenatal Death of Viable Child. — Lost income damages normally avail-

able under subsection (b)(4)a cannot be recovered in an action for the wrongful death of a stillborn child. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987), reversing *DiDonato v. Wortman*, 80 N.C. App. 117, 341 S.E.2d 58 (1986).

Damages normally recovered under subsection (b)(4)b and c, for loss of services, companionship, advice and the like, will not be available in an action for the wrongful death of a viable fetus. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987), reversing *DiDonato v. Wortman*, 80 N.C. App. 117, 341 S.E.2d 58 (1986).

Three Categories of Conduct Affording Recovery. — By providing for recovery of punitive damages upon a showing of "maliciousness, wilful or wanton injury, or gross negligence" it appears that the General Assembly intended to establish three separate categories of conduct which would afford a recovery. *Cole v. Duke Power Co.*, 81 N.C. App. 213, 344 S.E.2d 130, cert. denied, 318 N.C. 281, 347 S.E.2d 462 (1986).

Gross Negligence, etc. —

In accord with 2nd paragraph in the main volume. See *Cole v. Duke Power Co.*, 81 N.C. App. 213, 344 S.E.2d 130, cert. denied, 318 N.C. 281, 347 S.E.2d 462 (1986).

Punitive damages are recoverable from municipalities in wrongful death cases on the same basis as from other tort-feasors. *Jackson v. Housing Auth.*, 73 N.C. App. 363, 326 S.E.2d 295 (1985), aff'd, 316 N.C. 259, 341 S.E.2d 523 (1986).

Recovery from Municipal Corporations. — Reading portions of § 12-3(6) into this section, the North Carolina Wrongful Death Act contains a statutory provision providing for the recovery of punitive damages from bodies politic, which includes municipal corporations. *Jackson v. Housing Auth.*, 316 N.C. 259, 341 S.E.2d 523 (1986).

§ 28A-18-3. To sue or defend in representative capacity.

CASE NOTES

Cited in *In re Lessard*, 78 N.C. App. 196, 336 S.E.2d 712 (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.

Legal Periodicals. —

For note on statute of limitations accrual in attorney malpractice actions, in light of *Thorpe v. DeMent*, 69 N.C. App.

355, 317 S.E.2d 692, aff'd per curiam, 312 N.C. 488, 322 S.E.2d 777 (1984), see 20 Wake Forest L. Rev. 1017 (1984).

CASE NOTES

Claim for Compensation for Occupation of Property Not Barred Where Presented within Period under Section. — A landowner's claim for "reasonable compensation" for occupation of her property (§ 42-4), brought against one of the former co-tenants as administratrix of her husband's estate, was presented to the administratrix within the statutory period under this section and was therefor not barred by the three-year statute of limitations (§ 1-52(2)) as of the decedent's death. The landowner was allowed to sue the administratrix for rents not paid in the period of three years prior to the decedent's death, although the action itself was not brought until some six months after this date. *Simon v. Mock*, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Reopening of Estate after Six-Month Period. — The provision in § 28A-23-5 prohibiting any claim which is already barred from being asserted in the reopened estate primarily refers to the limitations in this section on the presentation of claims. Thus, an estate may not ordinarily be reopened for the litigation

of claims not brought within the six-month period, even in the absence of a bar by some other statute of limitations. In *re Estate of English*, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Refusal of Clerk to Reopen Upheld. — In light of the public policy in favor of the expedited administration of estates, as evidenced by the six-month statute of limitations and other provisions of this Chapter, petitioner who alleged that the deceased had promised to devise a life estate to her had a heavy burden of justifying her failure to bring her suit within the six-month period provided for that purpose, or at the very least, within the greater than two-year period that the estate actually remained open. There was no error in the clerk's determination that this burden was not met. In *re Estate of English*, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

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-19-6. Order of payment of claims.

After payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order:

First class. Claims which by law have a specific lien on property to an amount not exceeding the value of such property.

Second class. Funeral expenses to the extent of two thousand dollars (\$2,000). This limitation shall not include cemetery lot or gravestone. The preferential limitation herein granted shall be construed to be only a limit with respect to preference of payment and shall not be construed to be a limitation on reasonable funeral expenses which may be incurred; nor shall the preferential limita-

tion of payment in the amount of two thousand dollars (\$2,000) be diminished by any Veterans Administration, social security or other federal governmental benefits awarded to the estate of the decedent or to his or her beneficiaries.

Third class. All dues, taxes, and other claims with preference under the laws of the United States.

Fourth class. All dues, taxes, and other claims with preference under the laws of the State of North Carolina and its subdivisions.

Fifth class. Judgments of any court of competent jurisdiction within the State, docketed and in force, to the extent to which they are a lien on the property of the decedent at his death.

Sixth class. Wages due to any employee employed by the decedent, which claim for wages shall not extend to a period of more than 12 months next preceding the death; or if such employee was employed for the year current at the decease, then from the time of such employment; for medical services within the 12 months preceding the decease; for drugs and all other medical supplies necessary for the treatment of such decedent during the last illness of such decedent, said period of last illness not to exceed 12 months.

Seventh class. All other claims. (1868-9, c. 113, s. 24; Code, s. 1416; Rev., s. 87; C.S., s. 93; 1941, c. 271; 1955, c. 641, s. 1; 1967, c. 1066; 1973, c. 1329, s. 3; 1981, c. 383, ss. 1, 2; 1987, c. 286.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "two thousand dollars (\$2,000)" for "one thousand dollars (\$1,000)" in two places in the paragraph relating to the second class.

§ 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, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (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, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

ARTICLE 21.

Accounting.

§ 28A-21-1. Annual accounts.

Until the final account has been filed pursuant to G.S. 28A-21-2, the personal representative or collector shall, within 30 days after the expiration of one year from the date of his qualification and annually, so long as any of the property of the estate remains in his control, custody or possession, file in the office of the clerk of superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and

nature of such investment, and his receipts and disbursements for the past year. The clerk of superior court in his discretion may allow the personal representative or collector to adopt a substitute date for the filing of the first and subsequent annual accounts; provided that the first account using the substitute date must be filed within one year of the opening of the estate or filing of a previous annual account. The personal representative or collector shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. The clerk of superior court may examine, under oath, such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate. He must carefully review and audit such account and, if he approves the account, he must endorse his approval thereon, which shall be prima facie evidence of correctness, and cause the same to be recorded. (C.C.P., s. 478; 1871-2, c. 46; Code, s. 1399; Rev., s. 99; C.S., s. 105; 1957, c. 783, s. 5; 1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1981, c. 955, s. 1; 1987, c. 783, s. 1.)

Effect of Amendments. — The 1987 amendment, effective August 12, 1987, inserted the present second sentence.

§ 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 no inheritance tax return was required to be filed for the estate under G.S. 105-23 because the estate met the requirements of subsection (b) of that section, the personal representative or collector shall so certify in the final account filed with the clerk of superior court. 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; 1985 (Reg. Sess., 1986), c. 822, s. 3.)

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. 656, s. 55 pro-

vides: "This act shall be known as the 'Tax Reduction Act of 1985'."

Section 56 of Session Laws 1985, c. 656 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) (now repealed) or § 105-122(d) that would otherwise have been available under a section amended or repealed by the act before its amendment or repeal.

The reference in subsection (a) of this section to § 105-2(3) is probably intended to refer to § 105-2(a)(3).

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).

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, and applicable to the estates of decedents dying on or after that date, rewrote the second sentence of subsection (a).

§ 28A-21-4. Clerk may compel account.

CASE NOTES

Cited in *In re Estate of Longest*, 74 N.C. App. 386, 328 S.E.2d 804 (1985).

ARTICLE 22.

Distribution.

§ 28A-22-1. Scheme of distribution; testate and intestate estates.

CASE NOTES

Cited in *Lee v. Barksdale*, 83 N.C. App. 368, 350 S.E.2d 508 (1986).

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-23-2. Payment into court of fund due minor.

When any personal representative or collector holds property due a minor without a guardian and desires to file his petition for settlement, he may deliver the property to the clerk of superior court who shall invest upon interest or otherwise manage said property for the use of the minor or the clerk may proceed to appoint a guardian for the minor pursuant to the provisions of Chapter 35A of the General Statutes and then may deliver the property of the minor to the guardian. (1868-9, c. 113, s. 97; Code, s. 1526; 1893, c. 317; Rev., s. 151; C.S., s. 153; 1965, c. 815, s. 3; 1973, c. 1329, s. 3; 1987, c. 550, s. 17.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "Chapter 35A" for "Chapter 33."

§ 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, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

An executor has no right to fix and determine compensation to be received by him. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (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, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (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, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (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, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Cited in In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

§ 28A-23-5. Reopening administration.

CASE NOTES

"Proper Cause" to Reopen. — The existence of a valid claim against an estate which is not time-barred may, in an appropriate case, constitute "proper cause" to reopen a closed estate in order to assert the claim. However, claims which are already barred may not be asserted in a reopened administration. Thus, without more, a claim which is barred by the statute of limitations may not constitute "proper cause" to reopen administration of a closed estate. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Reopening of Estate after Six-Month Period. — The provision in this section prohibiting any claim which is already barred from being asserted in the reopened estate primarily refers to the limitations in § 28A-19-3 on the presentation of claims. Thus, an estate may not ordinarily be reopened for the litigation of claims not brought within the six-month period, even in the absence of

a bar by some other statute of limitations. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Refusal of Clerk to Reopen Estate Upheld. — In light of the public policy in favor of the expedited administration of estates, as evidenced by the six-month statute of limitations and other provisions of this Chapter, petitioner who alleged that the deceased had promised to devise a life estate to her had a heavy burden of justifying her failure to bring her suit within the six-month period provided for that purpose, or at the very least, within the greater than two-year period that the estate actually remained open. There was no error in the clerk's determination that this burden was not met. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

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 sec-

tion, 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 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 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 decedent died testate leaving personal property, less liens and encumbrances thereon, 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 personal property of the decedent and their relationship, if any, to the decedent; and

sion 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; 1987, c. 670, s. 1.)

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

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, and applicable to all cases in which an affidavit under § 28A-25-1 or § 28A-25-1.1 is first filed after that date, in the introductory language of subsection (a) substituted "leaving personal property, less liens and encumbrances thereon" for "leaving property real or personal or both, less liens and encumbrances," substituted "possession of tangible personal property or an instrument evidencing a debt, obligation,

stock or chose in action belonging to the decedent" for "having possession of property belonging to the decedent," substituted "deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action" for "deliver the property," and substituted "an heir or creditor" for "heir, creditor, or devisee" in two places; substituted "heir or creditor" for "heir, creditor or devisee" in subdivision (a)(1); and substituted "leaving personal property, less liens and encumbrances thereon" for "leaving property, real or personal or both, less liens and encumbrances" in subdivision (a)(5).

§ 28A-25-2. Effect of affidavit.

The person paying, delivering, transferring or issuing personal property or the evidence thereof pursuant to an affidavit meeting the requirements of G.S. 28A-25-1(a) or G.S. 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 personal 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 personal 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 G.S. 28A-25-1.1(a) made the action necessary. The heir or creditor to whom payment, delivery, transfer or issuance is made is answerable and accountable therefore 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; 1987, c. 670, s. 2.)

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.

The 1987 amendment, effective Octo-

ber 1, 1987, and applicable to all cases in which an affidavit under § 28A-25-1 or § 28A-25-1.1 is first filed after that date, inserted "personal" preceding "property" in three places in this section and substituted "the heir or creditor" for "the heir, creditor or devisee" at 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 [or] creditor who has collected personal 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 same 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 G.S. 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 personal 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 personal property of the decedent and the manner in which he has disbursed and distributed the same. 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 or creditor 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 or creditor 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; 1987, c. 670, s. 3.)

Editor's Note. — Subsection (a) was amended by Session Laws 1987, c. 670, s. 3, in the coded bill drafting format provided by § 120-20.1. It has been set out in the form above at the direction of the Revisor of Statutes.

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.

The 1987 amendment, effective October 1, 1987, and applicable to all cases in which an affidavit under § 28A-25-1 or § 28A-25-1.1 is first filed after that date, substituted "the heir or creditor who has collected personal property" for "the heir or creditor or devisee who has collected property" in the introductory language of subsection (a), substituted "the same" for "the property" in the introductory language of subdivision (a)(1), inserted "personal" preceding "property" in paragraph (a)(1)c and in the first sentence of subdivision (a)(2), and substituted "heir or creditor" for "heir, creditor or devisee" in the third and fourth sentences of subdivision (a)(2).

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

If any heir or creditor who has collected personal property of the decedent by affidavit pursuant to G.S. 28A-25-1 or G.S. 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 or creditor 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; 1987, c. 670, s. 4.)

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."

The 1987 amendment, effective Octo-

ber 1, 1987, and applicable to all cases in which an affidavit under § 28A-25-1 or § 28A-25-1.1 is first filed after that date, inserted "personal" preceding "property" near the beginning of the first sentence and substituted "heir or creditor" for "heir, creditor or devisee" in the last sentence.

§ 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 collected personal 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; 1987, c. 670, s. 5.)

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

The 1987 amendment, effective Octo-

ber 1, 1987, and applicable to all cases in which an affidavit under § 28A-25-1 or § 28A-25-1.1 is first filed after that date, inserted "personal" preceding "property" in the second sentence.

§ 28A-25-6. Payment to clerk of money owed intestate.

(f) If no administrator has been appointed, the clerk of superior court shall disburse the money received under this section for the following purposes and in the following order:

- (1) To pay the surviving spouse's year's allowance and children's year's allowance assigned in accordance with law;
- (2), (3) Repealed by Session Laws 1981, c. 383, s. 3.
- (4) All other claims shall be disbursed according to the order set out in G.S. 28A-19-6.

Notwithstanding the foregoing provisions of this subsection, the clerk shall pay, out of funds provided the deceased pursuant to G.S. 111-18 and Part 3 of Article 2 of Chapter 108A of the General Statutes of North Carolina, any lawful claims for domiciliary care received by the deceased, incurred not more than 90 days prior to his death. After the death of a spouse who died intestate and after the disbursements have been made in accordance with this subsection, the balance in the clerk's hands belonging to the estate of the intestate shall be paid to the surviving spouse, and if there is no surviving spouse, the clerk shall pay it to the heirs or distributees in proportion to their respective interests.

(1921, c. 93; Ex. Sess. 1921, c. 65; C.S., s. 65(a); Ex. Sess. 1924, cc. 15, 58; 1927, c. 7; 1929, cc. 63, 71, 121; 1931, c. 21; 1933, cc. 16, 94; 1935, cc. 69, 96, 367; 1937, cc. 13, 31, 55, 121, 336, 377; 1939, cc. 383, 384; 1941, c. 176; 1943, cc. 24, 114, 138, 560; 1945, cc. 152, 178, 555; 1947, cc. 203, 237; 1949, cc. 17, 81, 691, 762; 1951, c. 380, s. 1; 1955, c. 1246, ss. 103; 1957, c. 491; 1959, c. 795, ss. 1-4; 1965, c. 576, s. 1; 1973, c. 23; c. 1329, s. 1; 1975, c. 344; 1979, c. 163; c. 762, s. 1; 1981, c. 383, s. 3; 1983, c. 65, s. 2; 1987, c. 282, 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.

Effect of Amendments. —

The 1987 amendment, effective June

4, 1987, substituted "Part 3 of Article 2 of Chapter 108A" for "Part 6 of Article 2 of Chapter 108" near the beginning of the second paragraph of subsection (f).

ARTICLE 27.

*Apportionment of Federal Estate Tax.***§ 28A-27-1. Definitions.**

For the purposes of this Article:

- (1) "Estate" means the gross estate of a decedent as determined for the purpose of the federal estate tax.
- (2) "Fiduciary" includes a personal representative and a trustee.
- (3) "Person" means any individual, partnership, association, joint stock company, corporation, governmental agency, including any multiples or combinations of the foregoing as, for example, individuals as joint tenants.
- (4) "Person interested in the estate" means any person, including a personal representative, guardian, or trustee, entitled to receive, or who has received, from a decedent while alive or by reason of the death of a decedent any property or interest therein included in the decedent's taxable estate.
- (5) "State" means any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.
- (6) "Tax" means the net Federal Estate Tax due, after application of any available unified transfer tax credit, and interest and penalties imposed in addition to the tax. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

Editor's Note. — Session Laws 1985 the applicability of the provisions of this (Reg. Sess. 1986), c. 878, s. 3 makes this Article, see § 28A-27-9. Article effective October 1, 1986. As to

§ 28A-27-2. Apportionment.

(a) Except as otherwise provided in subsection (b) of this section, or in G.S. 28A-27-5, G.S. 28A-27-6, or G.S. 28A-27-8, the tax shall be apportioned among all persons interested in the estate in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values as finally determined for federal estate tax purposes shall be used for the purposes of this computation.

(b) In the event the decedent's will provides a method of apportionment of the tax different from the method provided in subsection (a) above, the method described in the will shall control. However, in the case of any will executed on or after October 1, 1986, a general direction in the will that taxes shall not be apportioned, whether or not referring to this Article, but shall be paid from the residuary portion of the estate shall not, unless specifically stated otherwise, apply to taxes imposed on assets which are includible in the valuation of the decedent's gross estate for federal estate tax purposes only by reason of Sections 2041, 2042 or 2044 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent tax law. In the case of an estate administered under any will

executed on or after October 1, 1986, in the event that the estate tax computation involves assets described in the preceding sentence, unless specifically stated otherwise, apportionment shall be made against such assets and the tax so apportioned shall be recovered from the persons receiving such assets as provided in Sections 2206, 2207 or 2207A of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent tax. (1985 (Reg. Sess., 1986), c. 878, s. 1; 1987, c. 694, s. 1.)

Effect of Amendments. — The 1987 amendment, effective July 29, 1987, inserted "However, in the case of any will executed on or after October 1, 1986" at the beginning of the second sentence of

subsection (b) and inserted "In the case of an estate administered under any will executed on or after October 1, 1986" at the beginning of the third sentence of subsection (b).

§ 28A-27-3. Procedure for determining apportionment.

(a) The personal representative of a decedent shall determine the apportionment of the tax.

(b) If the personal representative finds that it is inequitable to apportion interest and penalties in the manner provided in this Article because such interest or penalties were imposed due to the fault of one or more persons interested in the estate he may direct apportionment thereon in the manner he finds equitable.

(c) The expenses reasonably incurred by the personal representative in connection with the apportionment of the tax shall be apportioned as provided for taxes under this Article. If the personal representative finds that it is inequitable to apportion the expenses because such expenses were incurred because of the fault of one or more persons interested in the estate he may direct other more equitable apportionment. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-4. Uncollected tax.

The personal representative shall not be under any duty to institute any suit or proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the six months next following final determination of the tax. A personal representative who institutes the suit or proceeding within a reasonable time after the six months' period shall not be subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectable at a time following the death of the decedent but thereafter became uncollectable. If the personal representative cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be apportioned among the other persons interested in the estate who are subject to apportionment. The apportionment shall be made in the proportion that the value of the interest of each remaining person interested in the estate bears to the total value of the interests of all remaining persons interested in the estate. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-5. Exemptions, deductions, and credits.

(a) Any interest for which a deduction or exemption is allowed under the federal revenue laws in determining the value of the decedent's net taxable estate, such as property passing to or in trust for a surviving spouse and gifts or bequests for charitable, public, or similar purposes, shall not be included in the computation provided for in G.S. 28A-27-2 to the extent of the allowable deduction or exemption. When such an interest is subject to a prior present interest which is not allowable as a deduction or exemption, such present interest shall not be included in the computation provided for in this Article and no tax shall be apportioned to or paid from principal.

(b) Any credit for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate shall inure to the proportionate benefit of all persons liable to apportionment; provided, however, that if the tax which gives rise to such a credit has in fact been paid by a person interested in the estate, the benefit of such credit shall inure to that person paying the tax.

(c) Any credit for inheritance, succession, or estate taxes or taxes in the nature thereof in respect to property or interests includible in the estate shall inure to the benefit of the persons or interests chargeable with the payment thereof to the extent that, or in the proportion that, the credit reduces the tax.

(d) To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or similar gift or bequest does not constitute an allowed deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property shall not be included in the computation provided for in this Article, and to that extent no apportionment shall be made against the property. This section does not apply in any instance where the result will be to deprive the estate of a deduction otherwise allowable under Section 2053(d) of the Internal Revenue Code of 1954 of the United States or corresponding provisions of any subsequent tax law, relating to deduction for State death taxes on transfers for public charitable or religious uses. (1985 (Reg. Sess., 1986), c. 878, s. 1; 1987, c. 694, ss. 2, 3.)

Effect of Amendments. — The 1987 amendment, effective July 29, 1987, substituted "allowed" for "allowable"

near the beginning of the first sentences of subsections (a) and (d).

§ 28A-27-6. No apportionment between temporary and remainder interests.

No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-7. Fiduciary's rights and duties.

(a) The personal representative may withhold from any property of the decedent in his possession, distributable to any person interested in the estate, the amount of the tax apportioned to his interest. If the property in possession of the personal representative and distributable to any person interested in the estate tax is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative he may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Article.

(b) If property held by the fiduciary or other person is distributed prior to final apportionment of the tax, the personal representative may require the distributee to provide a bond or other security for the apportionment liability in the form and amount prescribed by the fiduciary, with the approval of the clerk of superior court having jurisdiction of the administration of the estate. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-8. Difference with Federal Estate Tax Law.

If the liabilities of persons interested in the estate as prescribed by this Article differ from those which result under the Federal Estate Tax Law, the liabilities imposed by the federal law will control and the balance of this Article shall apply as if the resulting liabilities had been prescribed herein. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-9. Effective date.

The provisions of this Article shall not apply to taxes due on account of the death of decedents dying prior to October 1, 1986. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

Chapter 29.

Intestate Succession.

ARTICLE 1.

General Provisions.

§ 29-2. Definitions.

Cross References. — As to meaning of "next of kin," see § 41-6.1.

Legal Periodicals. —

For article, "Class Gifts in North Car-

olina — When Do We 'Call The Role?," see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

VI. Heirs.

VII. Lineal Descendants.

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*, 74 N.C. App. 368, 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*, 74 N.C. App. 368, 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*, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

VII. LINEAL DESCENDANTS.

Children Distinguished from

Others. — The phrase "lineal descendants" generally applies not to distinguish between children of various marriages or out of wedlock, but to distinguish children from other collateral descendants, e.g., nieces and nephews. In *re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985), *aff'd*, 316 N.C. 698, 343 S.E.2d 913 (1986).

Illegitimate and Adopted Children Included. — The term "lineal descendants" would include even illegitimate children of a deceased female, under § 29-19(a), and clearly includes adopted children, under § 29-17. In *re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985), *aff'd*, 316 N.C. 698, 343 S.E.2d 913 (1986).

Children Adopted by Wife's Second Husband. — Children born to wife and her first husband became lineal descendants of her second husband upon his adoption of them because they became in law his children. In *re Estate of Edwards*, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

§ 29-5. Computation of next of kin.

Cross References. — As to meaning of "next of kin," see § 41-6.1.

Editor's Note. — The case of *In re Will of Cobb*, 271 N.C. 307, 156 S.E.2d

285 (1967), cited under this section in the main volume, has been abrogated by statute. See § 41-6.1

§ 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*, 73 N.C. App. 316, 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*, 73 N.C. App. 316, 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*, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

Presumption against partial intes-

tacy is merely a rule of construction and cannot have the effect of transferring property in the face of contrary provisions in the will. The presumption must yield when outweighed by manifest and unequivocal intent. *McKinney v. Mosteller*, — N.C. —, 365 S.E.2d 612 (1988).

Illustrative Case. — Where, as gleaned from will itself, the intent of the testator was that the residue of his estate was to pass to named beneficiaries under the residuary clause of the will only if testator's wife survived him, and she did not, the residue would pass to his heirs at law in accordance with the laws of intestacy as enacted by the legislature. *McKinney v. Mosteller*, — N.C. —, 365 S.E.2d 612 (1988).

§ 29-9. Inheritance by unborn infant.

Legal Periodicals. — For article, "Class Gifts in North Carolina — When

Do We 'Call The Roll?', see 21 Wake Forest L. Rev. 1 (1985).

§ 29-10. Renunciation.

CASE NOTES

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to October 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

Action Seeking Constructive

Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

Collateral Attack. — The legality of plaintiff's renunciation under this section as it read prior to Oct. 1, 1975, was a matter before the clerk, who, having exclusive original jurisdiction of the administration of testatrix's estate, allowed plaintiff's "Petition to Renounce." As a party to the original action, plaintiff could not later collaterally attack it. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

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 descen-

dant 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.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?", see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

Stated in *In re Estate of Edwards*, 316 N.C. 698, 343 S.E.2d 913 (1986).

Cited in *Rawls v. Rideout*, 74 N.C.

App. 368, 328 S.E.2d 783 (1985); *In re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (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*, 74 N.C. App. 368, 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 com-

monly referred to as "per capita at each generation." *Rawls v. Rideout*, 74 N.C. App. 368, 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).

Cited in *McKinney v. Mosteller*, — N.C. —, 365 S.E.2d 612 (1988); *State v. Smith*, — N.C. App. —, 368 S.E.2d 33 (1988).

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*, 74 N.C. App. 368, 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*, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Applied in *Ferguson v. Croom*, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

Cited in *Ladd v. Estate of Kellenberger*, 314 N.C. App. 477, 334 S.E.2d 751 (1985).

ARTICLE 4.

Adopted Children.

§ 29-17. Succession by, through and from adopted children.

CASE NOTES

The term "lineal descendants" is defined at § 29-2(4) as "all children of

such person"; this would include even illegitimate children of a deceased female,

under § 29-19(a), and clearly includes adopted children, under this section. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

The purpose of subsection (e) of this section is to make it clear that the relationship of parent and child is not severed when the child is adopted by the spouse of the biological parent. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Biological Parent Need Not Join in Spouse's Petition for Adoption of Children. — Subsection (e) of this section and § 48-7(d) were enacted, not to retain adopted children's status as "lineal descendants" by the former marriage, but instead to provide that the parent-child relationship between adopted children and their biological parent is not severed by the parent's spouse's adoption of her children from a former marriage. Since the relationship

remains intact in this limited situation, it is not necessary for such a biological parent to become a co-petitioner in her husband's adoption of her legitimate children of a former marriage. This biological parent, however, must consent to the adoption, as must any biological parent who does not come within the ambit of § 48-6. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Wife's failure to "join" in her husband's petition for the adoption of her two minor children by a previous marriage in no way affected her relationship with the children and was immaterial to a determination of her husband's distributive share under § 30-3(b). In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Cited in Ladd v. Estate of Kellenberger, 314 N.C. App. 477, 334 S.E.2d 751 (1985).

ARTICLE 5.

Legitimated Children.

§ 29-18. Succession by, through and from legitimated children.

CASE NOTES

Cited in Hayes v. Dixon, 83 N.C. App. 52, 348 S.E.2d 609 (1986).

ARTICLE 6.

Illegitimate Children.

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

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Illegitimate Children in North

Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Birth certification amendment application form did not meet requirements of subsection (b) where it contained no statement by the putative father or anyone else that he was the father of the child, and even if his signature in the blank space involved could be construed to be an unambiguous acknowledgment of paternity, he did not swear to it before any official authorized to administer oaths. *In re Will of Bunch*, 86 N.C. App. 463, 358 S.E.2d 118 (1987).

The term "lineal descendants" is defined at § 29-2(4) as "all children of such person"; this would include even illegitimate children of a deceased female, under subsection (a) of this section, and clearly includes adopted children, pursuant to § 29-17. *In re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985), *aff'd*, 316 N.C. 698, 343 S.E.2d 913 (1986).

Compliance with Section Essential. — Where there has been no compliance with this section, illegitimate child has no right to inherit from deceased putative father. *Hayes v. Dixon*, 83 N.C. App. 52, 348 S.E.2d 609 (1986), *cert. denied* and *appeal dismissed*, 319 N.C. 224, 353 S.E.2d 402, *cert. denied*, — U.S. —, 108 S. Ct. 88, 98 L. Ed. 2d 50 (1987).

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*, 71 N.C. App. 797, 323 S.E.2d 426 (1984).

This section confers upon illegitimate children same rights enjoyed by legitimate children under laws of intestate succession once there is proper adjudication or acknowledgement of paternity. Notification of the personal representative within six months of published notice to creditors does not establish or define the illegitimate child's right, but merely sets a time limitation for an illegitimate child to seek its enforcement. *Jefferys v. Tolin*, — N.C. App. —, 368 S.E.2d 201 (1988).

Subsection (b) is Statute of Limitation. —

The six month limitation period in subsection (b), relating to notice of the claim of an illegitimate child to take from father's estate, is a statute of limitation which is subject to being tolled under the provisions of § 1-17. *Jefferys v. Tolin*, — N.C. App. —, 368 S.E.2d 201 (1988).

ARTICLE 8.

*Election to Take Life Interest in Lieu of Intestate Share.***§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.**

Legal Periodicals. —

For comment, "Offer to Purchase and

Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

Chapter 30.

Surviving Spouses.

Article 1.

Dissent from Will.

Sec.

30-1. Right of dissent.

ARTICLE 1.

Dissent from Will.

§ 30-1. Right of dissent.

(c) For the purpose of establishing the right of dissent, the estate of the deceased spouse and the property passing outside of the will to the surviving spouse as a result of the death of the testator shall be determined and valued as of the date of his death, which determination and value the executor or administrator with the will annexed and the surviving spouse are hereby authorized to establish by agreement subject to approval by the clerk of the superior court. If such personal representative and the surviving spouse do not so agree upon the determination and value, or if the surviving spouse is the personal representative, or if the clerk shall be of the opinion that the personal representative may not be able to represent the estate adversely to the surviving spouse, the clerk shall appoint one or more disinterested persons to make such determination and establish such value. Such determination and establishment of value made as herein authorized shall be final for determining the right of dissent and shall be used exclusively for this purpose. (1959, c. 880, s. 1; 1961, c. 959, s. 1; 1965, c. 849, s. 1; 1975, c. 106, s. 1.)

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

Editor's Note. — Subsection (c) of this section has been set out above to correct a typographical error in the main volume.

Legal Periodicals. —

For comment, "The North Carolina Dissent Statutes: The Seeds of Inequities Germinate ...," see 8 Campbell L. Rev. 449 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

Family settlement agreements are favored by the law; however, such an agreement is invalid unless all who receive under the will join in the agreement. In re Estate of Outen, 77 N.C. App. 818, 336 S.E.2d 436 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

Alleged agreement between dissenting widow and estate was not a "family

settlement agreement," where it was never executed by all of the beneficiaries under the will. In re Estate of Outen, 77 N.C. App. 818, 336 S.E.2d 436 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

The right time, manner and effect of filing and recording a dissent to a will are all matters within the probate jurisdiction of the clerk of superior court. In re Estate of Outen, 77 N.C. App. 818, 336 S.E.2d 436 (1985), cert.

denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

To establish the right to dissent, a spouse must make a timely filing pursuant to § 30-2, and must show an entitlement to that right under this section. In re Estate of Outen, 77 N.C. App. 818,

336 S.E.2d 436 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

Cited in Ladd v. Estate of Kellenberger, 314 N.C. 477, 334 S.E.2d 751 (1985); In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985); In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913 (1986).

§ 30-2. Time and manner of dissent.

CASE NOTES

The right time, manner and effect of filing and recording a dissent to a will are all matters within the probate jurisdiction of the clerk of superior court. In re Estate of Outen, 77 N.C. App. 818, 336 S.E.2d 436 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

To establish the right to dissent, a spouse must make a timely filing pursuant to this section, and must show an entitlement to that right under § 30-1. In re Estate of Outen, 77 N.C. App. 818, 336 S.E.2d 436 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

§ 30-3. Effect of dissent.

Legal Periodicals. —

For comment, "The North Carolina Dissent Statutes: The Seeds of Inequi-

ties Germinate ...," see 8 Campbell L. Rev. 449 (1986).

CASE NOTES

II. SECOND OR SUCCESSIVE SPOUSE.

Purpose of Subsection (b). — While the legislative purpose of subsection (b) of this section is not entirely clear, it was apparently passed to protect a testator's children by a former marriage against a "fortune-hunting" second or successive spouse. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Subsection (b) of this section was enacted for the protection of a testator's children by a former spouse, on the assumption that a second or successive spouse would not feel as compelled to provide for the stepchildren upon testator's death as would the testator in his will. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

The term "lineal descendants" is not defined in Chapter 30, but is defined at § 29-2(4) as "all children of such person"; this would include even illegitimate children of a deceased female, under § 29-19(a), and clearly includes

adopted children, pursuant to § 29-17. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

The phrase "lineal descendants" is generally applied not to distinguish between children of various marriages or out of wedlock, but to distinguish children from other collateral descendants, e.g., nieces and nephews. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Adopted Children as Lineal Descendants. — Natural children of one spouse born during a previous marriage, if adopted by second spouse with the consent of their surviving natural parent, are considered lineal descendants by the second marriage for the purposes of subsection (b) of this section, which determines a dissenting spouse's share. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Applying § 48-23(1), children adopted must be treated legally as having been born at the time of the order of adoption; accordingly, children in question were

as a matter of law born of decedent's second marriage, and were "lineal descendants by the second marriage" within the intended meaning of subsection (b) of this section. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

The natural children of a testatrix, born of a previous marriage and duly adopted by her second husband, are considered to be her lineal descendants by the second marriage for purposes of determining the second spouse's distributive share upon his dissent from the testatrix's will pursuant to subsection (b) of

this section. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Wife's failure to "join" in her husband's petition for adoption of her two minor children by a previous marriage in no way affected her relationship with the children and was immaterial to a determination of her husband's distributive share under subsection (b) of this section. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Chapter 31.

Wills.

Article 2.

Revocation of Will.

Sec.

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

Article 5.

Probate of Will.

31-23. [Repealed.]

Sec.

31-24. Examination of witnesses by affidavit.

31-25, 31-25.1. [Repealed.]

31-27. Certified copy of will of nonresident recorded.

Article 7.

Construction of Will.

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

ARTICLE 1.

Execution of Will.

§ 31-1. Who may make will.

Legal Periodicals. —

For note as to the transfer of land by wills in light of *Stephenson v. Rowe*, 315

N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

CASE NOTES

Primary object in interpreting a will is to give effect to the intention of the testator. *Misenheimer v. Misenheimer*, 312 N.C. 692, 325 S.E.2d 195, reh'g denied, 313 N.C. 515, 334 S.E.2d 778 (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*, 312 N.C. 692, 325 S.E.2d 195, reh'g denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

§ 31-3.3. Attested written will.

CASE NOTES

I. GENERAL CONSIDERATION.

For a will to be admitted to probate, § 31-18.1(a)(1) requires that the will meet the requirements of this section and that two of the attesting witnesses testify before the court. In re *Will of Everhart*, — N.C. App. —, 364 S.E.2d 173 (1988).

A codicil must be executed, etc. —

In accord with main volume. See In re *Will of King*, 80 N.C. App. 471, 342

S.E.2d 394, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

II. SIGNING BY OR FOR TESTATOR.

Evidence that testator made his mark on codicil in the presence of the witnesses indicates that the instrument was his, and is sufficient to imply a request that they attest his signature. In re *Will of King*, 80 N.C. App. 471, 342 S.E.2d 394, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

§ 31-3.4. Holographic will.

CASE NOTES

II. TESTAMENTARY INTENT.

Evidence of Testamentary Intent, etc. —

An instrument may not be probated as a testamentary disposition unless there is evidence that it was written with testamentary intent, that is, that the maker intended that the paper itself should operate as a will or codicil to take effect upon his death. *Stephens v. McPherson*, — N.C. App. —, 362 S.E.2d 826 (1987).

Where Testamentary Intent Must Appear. —

In accord with the main volume. See *Stephens v. McPherson*, — N.C. App. —, 362 S.E.2d 826 (1987).

IV. FOUND AMONG VALUABLE PAPERS, ETC.

Evidence of Finding among Valuables. —

Evidence as to whether the document in question was found among the valuable papers and effects of the deceased or in a safe place where it was deposited by her, in satisfaction of subdivision (a)(3) of this section, was sufficient to support the jury's determination that it was a valid holographic will. *Stephens v. McPherson*, — N.C. App. —, 362 S.E.2d 826 (1987).

§ 31-4. Execution of power of appointment by will.

Legal Periodicals. — For note, "Powers of Appointment—Does a General Residuary Clause Fulfill a Specific

Reference Requirement?," see 65 N.C.L. Rev. 1475 (1987).

CASE NOTES

A provision calling for reference to a power of appointment does not concern the "execution and attestation" of a will within the meaning of this section. *First Citizens Bank & Trust Co. v. Fleming*, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

In order to exercise a power of appointment calling for specific reference to the power before the power may be exercised, some reference to the power must be made. *First Citizens Bank & Trust Co. v. Fleming*, 77 N.C. App. 568, 335 S.E.2d 515 (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).

CASE NOTES

A testator is not required to mention by name or make some provision for a child in order to disinherit that child under North Carolina law,

even if the child is born or adopted after the will is made. *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 334 S.E.2d 751 (1985).

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*, 312 N.C. 692, 325 S.E.2d 195, reh'g denied, 313 N.C. 515, 334 S.E.2d 778 (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*, 312 N.C. 692, 325 S.E.2d 195, reh'g denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Jurisdiction of Clerk. —

The clerk of the superior court has exclusive and original jurisdiction over the probate of wills. In *re Will of Hester*, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

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

CASE NOTES

For a will to be admitted to probate, subdivision (a)(1) of this section requires that the will meet the requirements of § 31-3.3 and that two of the

attesting witnesses testify before the court. In *re Will of Everhart*, — N.C. App. —, 364 S.E.2d 173 (1988).

§ 31-23: Repealed by Session Laws 1987, c. 78, s. 1, effective October 1, 1987.

§ 31-24. Examination of witnesses by affidavit.

(a) The examination of witnesses to a will may be taken and subscribed in the form of an affidavit before a notary public or other person who is authorized to administer oaths in the jurisdiction where the examination is held.

(b) A photographic copy of the original will certified to be a true and exact copy thereof by the clerk of superior court of the county in which the will is to be probated may be used in the examination of the witnesses in the procedures set out in subsection (a); provided, the said clerk has in his possession the original will at the time of examination of the witnesses.

(c) Affidavits taken in accordance with subsection (a) shall be transmitted by the person taking the affidavit to the clerk of superior court of the county in which the will is to be probated.

(d) Testimony submitted in accordance with subsection (a) is competent in regard to all requirements of G.S. 31-3.3 and to establish that a will was executed in compliance with the requirements of G.S. 31-3.3.

(e) Nothing in this section is to limit or otherwise affect the authority of a clerk of superior court in the exercise of his authority as judge of probate under G.S. 28A-2-1 to:

(1) Issue subpoenas under G.S. 7A-103; or

(2) Order the taking of depositions of witnesses. (1917, c. 183; C.S., s. 4149; 1933, c. 114; 1957, c. 587, ss. 1, 1A; 1979, c. 226, s. 1; 1987, c. 78, s. 2.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

§§ 31-25, 31-25.1: Repealed by Session Laws 1987, c. 78, s. 1, effective October 1, 1987.

§ 31-27. Certified copy of will of nonresident recorded.

(a) Subject to the provisions of subsection (b), if the will of a citizen or subject of another state or country is probated in accordance with the laws of that jurisdiction and a duly certified copy of the will and the probate proceedings are produced before a clerk of superior court of any county wherein the testator had property, the copy of the will shall be probated as if it were the original. If the jurisdiction is within the United States, the copy of the will and the probate proceedings shall be certified by the clerk of the court wherein the will was probated. If the jurisdiction is outside the United States, the copy of the will and probate proceedings shall be certified by any ambassador, minister, consul or commercial agent of the United States under his official seal.

(b) For a copy of a will probated under the provisions of subsection (a) to be valid to pass title to or otherwise dispose of real estate in this State, the execution of said will according to the laws of this State must appear affirmatively, to the satisfaction of the clerk of the superior court of the county in which such will is offered for probate, from the testimony of a witness or witnesses to such will, or from findings of fact or recitals in the order of probate, or otherwise in such certified copy of the will and probate proceedings.

(c) If the execution of the will in accordance with the laws of this State does not appear as required by subsection (b), the clerk before whom the copy is exhibited shall have power to take proof as prescribed in G.S. 31-24, and the will may be adjudged duly proved, and if so proved, the will shall be recorded as herein provided.

(d) Any copy of a will of a nonresident heretofore allowed, filed and recorded in this State in compliance with the foregoing shall be valid to pass title to or otherwise dispose of real estate in this State. (C.C.P., s. 444; 1883, c. 144; Code, s. 2156; 1885, c. 393; Rev., s. 3133; C.S., s. 4152; 1941, c. 381; 1965, c. 995; 1987, c. 78, s. 3.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.

CASE NOTES

I. GENERAL CONSIDERATION.

Propounder Functions as Plaintiff.

— It is the propounder, and not the caveator, who functions as a plaintiff in a caveat proceeding. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

The Contest Is a Special Proceeding in Rem. —

A caveat is an in rem proceeding, perhaps more strictly so regarded than any other proceeding with which the courts deal. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

The rules peculiar to a caveat stem from the in rem nature of the proceeding. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Nonsuit Cannot Be Taken. —

Because the caveat proceeding is in rem, the proceeding must go on until the issue devisavit vel non is appropriately answered; nonsuit cannot be taken by the propounders or the caveators. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

An attack upon the validity of a will must be direct and in the form of a caveat. In re Will of Hester, 320 N.C. 738, 360 S.E.2d 801 (1987).

The trial court may not exclude from the caveat proceeding consideration of any script offered by an interested party which is relevant to the issue devisavit vel non. However, it

does not mandate that the issues relating to all scripts be considered simultaneously. In re Will of Hester, 320 N.C. 738, 360 S.E.2d 801 (1987).

Burden of Proof. — Although a caveat proceeding is an in rem proceeding without a plaintiff and a defendant as such, it is the propounder who has the initial burden of proof, namely, to prove that the instrument in question was executed with the proper formalities required by law. Once this has been established, the burden shifts to the caveator to show that the execution of the will was procured by undue influence. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

II. INTERESTED PERSONS.

This section affords protection to any interested persons who do not receive notice. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Executor. — A named executor is not a person interested in the event of the caveat proceeding within the meaning of the dead man's statute. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Membership in Congregation. — Membership in a church congregation, albeit distinguished membership, is too tenuous an interest to come within the meaning of the dead man's statute. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

§ 31-33. Bond given and cause transferred to trial docket.

CASE NOTES

Proceedings Transferred, etc. —

When a caveat is filed, the clerk of superior court transfers the proceeding to the civil issue docket of the superior court, to the end that the issue devisavit vel non may be tried by a jury. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Who Are Necessary Parties. — Persons who qualify as persons interested in the estate are not necessarily equivalent to necessary parties. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Discretion of Court as to Necessary Parties. — The decision whether certain persons are necessary parties to the caveat proceeding is within the court's discretion. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Persons who will share in the estate under the law governing intestacy in case a script which purports to be the will of the deceased is adjudged invalid are proper persons to receive notice and participate in the proceedings within the meaning of this section. In re

Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Beneficiaries under Previous Will.

— Where caveators alleged that probated will was invalid on grounds of undue influence and lack of mental capacity and that they were beneficiaries under a will made at a time when the testator possessed mental capacity, if the facts were as caveators alleged, they were interested in the estate. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Heirs at law who have no knowledge of a caveat proceeding and who were not cited under this section are not estopped to file a second caveat, nor are they bound by the former judgment sustaining the validity of the script. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Caveat filed without compliance with bond requirement under this section is not a valid attack upon the will. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

§ 31-34. Prosecution bond required in actions to contest wills.

CASE NOTES

Section is not applicable to a caveator. Therefore, a prosecution bond cannot be required of a caveator in an action to contest a will. In re Will of Par-

ker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

§ 31-36. Caveat suspends proceedings under will.

CASE NOTES

Stated in In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643 (1987).

ARTICLE 7.

*Construction of Will.***§ 31-38. Devise presumed to be in fee.**

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in *Brinkley v. Day*, — N.C. App. —, 362 S.E.2d 587 (1987).

II. RULES OF CONSTRUCTION.

Primary object in interpreting a will is to give effect to the intention of the testator. *Misenheimer v. Misenheimer*, 312 N.C. 692, 325 S.E.2d 195, reh'g denied, 313 N.C. 515, 334 S.E.2d 778 (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*, 312 N.C. 692, 325 S.E.2d 195, reh'g denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

III. ILLUSTRATIVE CASES.

Language Insufficient to Show Intent to Pass Less Than Fee Simple Estate. —

The language "provided, that if she own the property or any part thereof at her death, the same shall descend to the children born of her body, or the heirs of such children" did not show the intestator's intention to convey a life estate. An unrestricted or general devise of real property, to which is affixed, either specifically or by implication, an unlimited power of disposition in the first taker, conveys the fee and a subsequent clause purporting to dispose of what remains at his death is not allowed to defeat the devise or limit it to a life estate. *Leonard v. Dillard*, 87 N.C. App. 79, 359 S.E.2d 497 (1987).

§ 31-40. What property passes by will.

Legal Periodicals. —

For note as to the transfer of land by wills in light of *Stephenson v. Rowe*, 315

N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

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

(a) Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a person as an individual or as a member of a class and the person dies survived by qualified issue before the testator dies, then the qualified issue of such deceased person that survive the testator shall represent the deceased person, and the entire interest that the deceased person would have taken had he survived the testator shall pass by substitution to his qualified issue. The qualified issue shall take pursuant to the preceding sentence regardless of whether or not the deceased person dies before or after the making of the will.

(b) The term "qualified issue" as used in subsection (a) means issue of the deceased person who would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will.

(c) If subsection (a) is not applicable and if a contrary intent is not indicated by the will:

- (1) Where a devise or legacy of any interest in property is void, is revoked, or lapses or which for any other reason fails to take effect, such a devise or legacy shall pass:
 - a. Under the residuary clause of the will applicable to real property in case of such devise, or applicable to personal property in case of such legacy, or
 - b. As if the testator had died intestate with respect thereto when there is no such applicable residuary clause; and
- (2) Where a residuary devise or legacy is void, revoked, lapsed or for any other reason fails to take effect with respect to any devisee or legatee named in the residuary clause itself or a member of a class described therein, then such devise or legacy shall continue as a part of the residue and shall pass to the other residuary devisees or legatees if any; or, if none, shall pass as if the testator had died intestate with respect thereto.

(1844, c. 88, s. 4; R.C., c. 119, s. 7; Code, s. 2142; Rev., s. 3142; 1919, c. 28; C.S., s. 4166; 1951, c. 762, s. 1; 1953, c. 1084; 1965, c. 938, s. 1; 1975, c. 371, s. 3; 1979, c. 525, s. 5; 1987, c. 86, ss. 1, 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 1987 amendment, effective October 1, 1987, deleted the subsection catchlines of subsections (a) through (c), rewrote subsections (a) and (b), and substituted "If sub-

section (a) is not applicable" for "If subsections (a) and (b) above are not applicable" at the beginning of subsection (c).

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?", see 21 Wake Forest L. Rev. 1 (1985).

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*, 312 N.C. 692, 325 S.E.2d 195, reh'g denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. *Hinson v.*

Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Cited in *McMillan v. Davis*, 81 N.C. App. 433, 344 S.E.2d 595 (1986).

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*, 312 N.C. 692, 325 S.E.2d 195, reh'g denied, 313 N.C. 515, 334 S.E.2d 778 (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*, 312 N.C. 692, 325 S.E.2d 195, reh'g denied, 313 N.C. 515, 334 S.E.2d 778 (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*, 312 N.C. 692, 325 S.E.2d 195, reh'g denied, 313 N.C. 515, 334 S.E.2d 778 (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*, 312 N.C. 692, 325 S.E.2d 195, reh'g denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

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

Legal Periodicals. —

For note, "Powers of Appointment—Does a General Residuary Clause Fulfill

a Specific Reference Requirement?," see 65 N.C.L. Rev. 1475 (1987).

CASE NOTES

Purpose of Section. —

In accord with the main volume. See *First Citizens Bank & Trust Co. v. Fleming*, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

In order to exercise a power of appointment calling for specific reference to the power before the power may be exercised, some reference to the power must be made. *First Citizens*

Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

Residuary Devise, etc. —

A power of appointment upon which no restrictions are imposed is exercised by a residuary clause. *First Citizens Bank & Trust Co. v. Fleming*, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

Chapter 31A.

Acts Barring Property Rights.

ARTICLE 1.

Rights of Spouse.

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

Legislative Intent. —

The apparent purpose of the full statute is to bar the benefits of certain types of property rights and interests otherwise accruing to a person but for his wrongful acts or a divorce or annulment. *Taylor v. Taylor*, 321 N.C. 244, 362 S.E.2d 542 (1987).

Subdivision (b)(6) is inapplicable to separation agreements entered into by parties contemplating a separation or divorce from a valid marriage. *Taylor v. Taylor*, 321 N.C. 244, 362 S.E.2d 542 (1987).

CASE NOTES

Section Held to Bar Claim. — This section is clear, and was an absolute bar to defendant's claim to have plaintiff pay her one-half of his retirement pay pursuant to deed of separation entered into between the parties. *Taylor v. Taylor*, 84 N.C. App. 391, 352 S.E.2d 918 (1987).

Proceeding to set aside invalid divorce decree is not barred by death of one of the spouses where property rights are involved. *Allred v. Tucci*, 85 N.C. App. 138, 354 S.E.2d 291, cert. denied, 320 N.C. 166, 358 S.E.2d 47 (1987).

ARTICLE 2.

Parents.

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

CASE NOTES

Meaning of Abandonment. — Abandonment is defined as any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. *Lessard v. Lessard*, 77 N.C. App. 97, 334 S.E.2d 475 (1985), cert. granted as to additional issues, 315 N.C. 390, 338 S.E.2d 879 (1986), *aff'd*, 316 N.C. 546, 342 S.E.2d 522 (1986).

Abandonment has been defined as willful neglect and refusal to perform the natural and legal obligations of parental care and support; if a parent with-

holds his presence, his love, his care, and the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. *Lessard v. Lessard*, 77 N.C. App. 97, 334 S.E.2d 475 (1985), cert. granted as to additional issues, 315 N.C. 390, 338 S.E.2d 879 (1986), *aff'd*, 316 N.C. 546, 342 S.E.2d 522 (1986).

Willful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence. *Lessard v. Lessard*, 77 N.C. App. 97, 334 S.E.2d 475 (1985), cert. granted as to ad-

ditional issues, 315 N.C. 390, 338 S.E.2d 879 (1986), *aff'd*, 316 N.C. 546, 342 S.E.2d 522 (1986).

Or Wrongful Death Proceeds. —
In accord with 1st paragraph in the

main volume. See *Lessard v. Lessard*, 7 N.C. App. 97, 334 S.E.2d 475 (1985), *cert. granted as to additional issues*, 315 N.C. 290, 338 S.E.2d 879 (1986), *aff'd*, 316 N.C. 546, 342 S.E.2d 522 (1986).

ARTICLE 3.

Willful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

CASE NOTES

Applied in *Jones v. All Am. Life Ins. Co.*, 312 N.C. 725, 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*, 312 N.C. 692, 325 S.E.2d 195, *reh'g denied*, 313 N.C. 515, 334 S.E.2d 778 (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 ac-

cord with § 31-42(a). *Misenheimer v. Misenheimer*, 312 N.C. 692, 325 S.E.2d 195, *reh'g denied*, 313 N.C. 515, 334 S.E.2d 778 (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*, 312 N.C. 692, 325 S.E.2d 195, *reh'g denied*, 313 N.C. 515, 334 S.E.2d 778 (1985).

ARTICLE 4.

General Provisions.

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

CASE NOTES

Applied in *Jones v. All Am. Life Ins. Co.*, 312 N.C. 725, 325 S.E.2d 237 (1985).

Chapter 31B.

Renunciation of Transfers by Will, Intestacy, Appointment or Insurance Contract Act.

§ 31B-1. Right to renounce succession.

CASE NOTES

Beneficiary of a spendthrift trust created by trustor's will, who had only a life estate in the trust fund, while his unborn children and brothers and sisters had a contingent interest in the remainder, could renounce his life

estate, but could not renounce the interest of his unborn children or accelerate the remainder for the benefit of his brothers and sisters. *Stewart v. Johnson*, — N.C. App. —, 362 S.E.2d 849 (1987).

§ 31B-3. Effect of renunciation.

CASE NOTES

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

§ 31B-5. Exclusiveness of remedy.

CASE NOTES

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A beneficiary's right to renounce

exists irrespective of statutory authority. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Time for Renunciation. — A devisee may disclaim or renounce a right under a will, but he or she must do so within a reasonable time. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an

action seeking the declaration of a constructive trust. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Chapter 32.**Fiduciaries.****ARTICLE 1.***Uniform Fiduciaries Act.***§ 32-2. Definition of terms.****CASE NOTES**

Liability of Executor. — An executor, in performing those duties related to managing the estate's assets, acts as a trustee to beneficiaries of the estate. As such, the executor is liable for the depre-

ciation of assets which an ordinarily prudent fiduciary would not have allowed to occur. *Fortune v. First Union Nat'l Bank*, 87 N.C. App. 1, 359 S.E.2d 801 (1987).

Chapter 34.

Veterans' Guardianship Act.

Sec.

34-2.1. Guardian's powers as to property; validation of prior acts.

34-4. Guardian may not be named for more than five wards; ex-

Sec.

ceptions; banks and trust companies, public guardians, or where wards are members of same family.

34-16. [Repealed.]

§ 34-2.1. Guardian's powers as to property; validation of prior acts.

Any guardian appointed under the provisions of this Chapter may be guardian of all property, real or personal, belonging to the ward to the same extent as a guardian appointed under the provisions of Chapter 35A of the General Statutes, and the provisions of such Chapter concerning the custody, management and disposal of property shall apply in any case not provided for by this Chapter. All acts heretofore performed by guardians appointed under the provisions of this Chapter with respect to the custody, management and disposal of property of wards are hereby validated where no provision for such acts was provided for by this Chapter, if such acts were performed under and in conformity with the provisions of Chapter 35A of the General Statutes. (1955, c. 1272, s. 1; 1987, c. 550, s. 18.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "Chapter 35A of the General Statutes, and the provisions of such Chapter" for "Chapter 33 or Chapter 35 of the General Statutes of North Carolina, as the case may be, and the provi-

sions of such chapters" in the first sentence, and substituted "Chapter 35A of the General Statutes" for "Chapter 33 or Chapter 35 of the General Statutes of North Carolina, as the case may be" at the end of the last sentence.

§ 34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, public guardians, or where wards are members of same family.

It shall be unlawful for any person, other than a public guardian qualified under Article 11, Chapter 35A, General Statutes of North Carolina, to accept appointment as guardian of any United States Veterans Administration ward, if such person shall at the time of such appointment be acting as guardian for five wards. For the purpose of this section, all minors of same family unit shall constitute one ward. In all appointments of a public guardian for United States Veterans Administration wards, the guardian shall furnish a separate bond for each appointment as required by G.S. 34-9. If, in any case, an attorney for the United States Veterans Administration presents a petition under this section alleging that an individual guardian other than a public guardian is acting in a fiduciary capacity for more than five wards and requesting discharge of the guardian for that reason, then the court, upon satisfactory evi-

dence that the individual guardian is acting in a fiduciary capacity for more than five wards, must require a final accounting forthwith from such guardian and shall discharge the guardian in such case. Upon the termination of a public guardian's term of office, he may be permitted to retain any appointments made during his term of office.

This section shall not apply to banks and trust companies licensed to do trust business in North Carolina. (1929, c. 33, s. 4; 1967, c. 564, s. 1; 1987, c. 550, s. 19.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "Article 11, Chapter 35A" for "Article 6, Chapter 33" in the first sentence.

§ 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.

Sterilization Procedures.

Article 1.

Definitions.

Sec.

35-1 to 35-1.5. [Repealed.]

Article 1A.

Guardianship of Incompetent Adults.

Part 1. Legislative Purpose.

35-1.6. [Repealed.]

Part 2. Definitions.

35-1.7. [Repealed.]

Part 3. Jurisdiction and Venue.

35-1.8, 35-1.9. [Repealed.]

Part 4. Proceedings before Clerk.

35-1.10 to 35-1.27. [Repealed.]

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

35-1.28 to 35-1.40. [Repealed.]

Part 6. Testamentary Appoint-
ment of Guardians.

35-1.41. [Repealed.]

Article 2.

Guardianship and Management of Estates of Incompetents.

35-2 to 35-9. [Repealed.]

Article 3.

Sales of Estates.

Sec.

35-10 to 35-13. [Repealed.]

Article 4.

Mortgage or Sale of Estates Held by the Entireties.

35-14 to 35-18. [Recodified.]

Article 5.

Surplus Income and Advance- ments.

35-19 to 35-29. [Recodified.]

Article 5A.

Gifts from Income for Certain Purposes.

35-29.1 to 35-29.4. [Recodified.]

Article 5B.

Gifts from Principal for Certain Purposes.

35-29.5 to 35-29.10. [Recodified.]

Article 5C.

Declaring Revocable Trust Irrevo- cable and Making Gift of Incompetent's Life Interest Therein.

35-29.11 to 35-29.16. [Recodified.]

Cross References. — As to incompetency and guardianship, see now Chapter 35A.

Editor's Note. — Session Laws 1987,

c. 550, s. 8, effective October 1, 1987, rewrote the heading of Chapter 35, which formerly read "Persons with Mental Diseases and Incompetents".

ARTICLE 1.

Definitions.

§§ 35-1 to 35-1.5: Repealed by Session Laws 1987, c. 550, s. 7, effective October 1, 1987.

ARTICLE 1A.

Guardianship of Incompetent Adults.

Part 1. Legislative Purpose.

§ 35-1.6: Repealed by Session Laws 1987, c. 550, s. 7, effective October 1, 1987.

Part 2. Definitions.

§ 35-1.7: Repealed by Session Laws 1987, c. 550, s. 7, effective October 1, 1987.

Editor's Note. — Session Laws 1987, c. 783, s. 2, effective August 12, 1987, inserted "without further proceedings" in subdivision (4) of this section as it read prior to repeal by Session Laws

1987, c. 550, s. 7. The amendment was incorporated in new Chapter 35A, which was added by Session Laws 1987, c. 550, s. 1.

Part 3. Jurisdiction and Venue.

§§ 35-1.8, 35-1.9: Repealed by Session Laws 1987, c. 550, s. 7, effective October 1, 1987.

Part 4. Proceedings before Clerk.

§§ 35-1.10 to 35-1.27: Repealed by Session Laws 1987, c. 550, s. 7, effective October 1, 1987.

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

§§ 35-1.28 to 35-1.40: Repealed by Session Laws 1987, c. 550, s. 7, effective October 1, 1987.

Part 6. Testamentary Appointment of Guardians.

§ 35-1.41: Repealed by Session Laws 1987, c. 550, s. 7, effective October 1, 1987.

ARTICLE 2.

Guardianship and Management of Estates of Incompetents.

§§ 35-2 to 35-9: Repealed by Session Laws 1987, c. 550, s. 7, effective October 1, 1987.

ARTICLE 3.

Sales of Estates.

§§ 35-10 to 35-13: Repealed by Session Laws 1987, c. 550, s. 7, effective October 1, 1987.

ARTICLE 4.

Mortgage or Sale of Estates Held by the Entireties.

§§ 35-14 to 35-18: Recodified as §§ 35A-1310 to 35A-1314 by Session Laws 1987, c. 550, s. 2, effective October 1, 1987.

ARTICLE 5.

Surplus Income and Advancements.

§§ 35-19 to 35-29: Recodified as §§ 35A-1320 to 35A-1330 by Session Laws 1987, c. 550, s. 3, effective October 1, 1987.

ARTICLE 5A.

Gifts from Income for Certain Purposes.

§§ 35-29.1 to 35-29.4: Recodified as §§ 35A-1335 to 35A-1338 by Session Laws 1987, c. 550, s. 4, effective October 1, 1987.

ARTICLE 5B.

Gifts from Principal for Certain Purposes.

§§ 35-29.5 to 35-29.10: Recodified as §§ 35A-1340 to 35A-1345 by Session Laws 1987, c. 550, s. 5, effective October 1, 1987.

ARTICLE 5C.

Declaring Revocable Trust Irrevocable and Making Gift of Incompetent's Life Interest Therein.

§§ 35-29.11 to 35-29.16: Recodified as §§ 35A-1350 to 35A-1355 by Session Laws 1987, c. 550, s. 6, effective October 1, 1987.

ARTICLE 7.

*Sterilization of Persons Mentally Ill and Mentally Retarded.***§ 35-36. Sterilization of mentally retarded in State institutions.****Legal Periodicals. —**

For note, *In re Truesdell*: North Carolina Adopts Two New and Conflicting Standards for Sterilization of Mentally Retarded Persons, see 64 N.C.L. Rev. 1196 (1986).

For article, "Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy," see 5 Duke L.J. 806 (1986).

CASE NOTES

Cited in *In re Truesdell*, 313 N.C. 421, 329 S.E.2d 630 (1985).

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

CASE NOTES

Quoted in *In re Truesdell*, 313 N.C. 421, 329 S.E.2d 630 (1985).

§ 35-39. Duty of petitioner.

Legal Periodicals. —

For note, *In re Truesdell*: North Carolina Adopts Two New and Conflicting

Standards for Sterilization of Mentally Retarded Persons, see 64 N.C.L. Rev. 1196 (1986).

CASE NOTES

Quoted in *In re Truesdell*, 313 N.C. 421, 329 S.E.2d 630 (1985).

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

Legal Periodicals. —

For note, *In re Truesdell*: North Carolina Adopts Two New and Conflicting

Standards for Sterilization of Mentally Retarded Persons, see 64 N.C.L. Rev. 1196 (1986).

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*, 313 N.C. 421, 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*, 313 N.C. 421, 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*, 313 N.C. 421, 329 S.E.2d 630 (1985).

§ 35-44. Appeals.

CASE NOTES

Cited in *In re Truesdell*, 313 N.C. 421, 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*, 313 N.C. 421, 329 S.E.2d 630 (1985).

Chapter 35A.

Incompetency and Guardianship.

SUBCHAPTER III. MANAGEMENT OF WARD'S ESTATE.

Sec.

cial proceeding for sale of
property.

Article 14.

Sale, Mortgage, Exchange or Rental of Ward's Estate.

Article 15.

Mortgage or Sale of Estates Held by the Entireties.

Sec.

35A-1307. Spouse of incompetent hus-
band or wife entitled to spe-35A-1311. General law applicable; ap-
proved by judge.

SUBCHAPTER III. MANAGEMENT OF WARD'S ESTATE.

ARTICLE 14.

Sale, Mortgage, Exchange or Rental of Ward's Estate.

§ 35A-1307. Spouse of incompetent husband or wife entitled to special proceeding for sale of property.

Every married person whose husband or wife is adjudged incompetent and is confined in a mental hospital or other institution in this State, and who was living with the incompetent spouse at the time of commitment shall, if he or she be in needy circumstances, have the right to bring a special proceeding before the clerk to sell the property of the incompetent spouse, or so much thereof as is deemed expedient, and have the proceeds applied for support: Provided, that said proceeding shall be approved by the judge of the superior court holding the courts of the superior court district or set of districts as defined in G.S. 7A-41.1 where the said property is situated. When the deed of the commissioner appointed by the court, conveying the lands belonging to the incompetent spouse is executed, probated, and registered, it conveys a good and indefeasible title to the purchaser. (1987, c. 550, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 83.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "superior

court district or set of districts as defined in G.S. 7A-41.1" for "judicial district" at the end of the first sentence.

ARTICLE 15.

*Mortgage or Sale of Estates Held by the Entireties.***§ 35A-1311. General law applicable; approved by judge.**

The proceedings herein provided for shall be conducted under and shall be governed by laws pertaining to special proceedings, and it shall be necessary for any sale or mortgage or other conveyance herein authorized to be approved by a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in the district or set of districts as defined in G.S. 7A-41.1 wherein the property or any part of same is located. (1935, c. 59, s. 2; 1945, c. 426, s. 6; 1987, c. 550, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 84.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in the

district or set of districts as defined in G.S. 7A-41.1" for "the resident judge or the judge holding the courts in the judicial district."

Chapter 36A.

Trusts and Trustees.

Article 1.

Investment and Deposit of Trust Funds.

Sec.

36A-3. Terms of creating instrument.

Article 2.

Removal of Fiduciary Funds.

36A-13. Removal of fiduciary funds from this State.

Article 4A.

Charitable Remainder Trusts Administration Act.

36A-59.3. Definitions.

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

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

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

Article 5.

Uniform Trusts Act.

Sec.

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

Article 8.

Testamentary Trustees.

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

36A-108. Registration and indexing.

36A-109 to 36A-114. [Reserved.]

Article 9.

Alienability of Beneficial Interest; Spendthrift Trust.

36A-116 to 36A-119. [Reserved.]

Article 10.

Trusts Accounts in Financial Institutions.

36A-120. (Effective July 1, 1989) Discretionary revocable trust accounts in financial institution.

ARTICLE 1.

Investment and Deposit of Trust Funds.

§ 36A-1. Definition.

Legal Periodicals. — For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrong-

ful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

§ 36A-2. Investment; prudent man rule.

Legal Periodicals. —

For article, "A Proposal for a Simple and Socially Effective Rule Against Perpetuities," see 66 N.C.L. Rev. 545 (1988).

CASE NOTES

Liability of Executor. — An executor, in performing those duties related to managing the estate's assets, acts as a trustee to beneficiaries of the estate. As

such, the executor is liable for the depreciation of assets which an ordinarily prudent fiduciary would not have allowed to occur. *Fortune v. First Union*

Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987).

§ 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 ap-

plies to such instruments whether created before or after October 1, 1985."

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

§ 36A-6. Employee trusts.

Legal Periodicals. —

For article, "A Proposal for a Simple and Socially Effective Rule Against Per-

petuities," see 66 N.C.L. Rev. 545 (1988).

ARTICLE 2.

Removal of Fiduciary Funds.

§ 36A-13. Removal of fiduciary funds from this State.

Unless the creating instrument contains an express prohibition or provides a method of removal, when any personal property in this State is vested in a resident trustee, guardian, or other fiduciary, the clerk of superior court of the county in which the fiduciary resides may, on petition filed for that purpose by the fiduciary, beneficiary, ward, or other interested person, order the said fiduciary or his personal representative to pay, transfer, and deliver the said property or any part of it, to a nonresident fiduciary appointed by a court of record in another state; provided the clerk of superior court finds that such removal is in accord with the express or implied intention of the settlor, would aid the efficient administration of the trust, or is otherwise in the best interests of the beneficiaries, and further provided that,

- (1) No such order of any clerk of superior court shall be valid and in force until approved by a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county; and
- (2) No such order shall be made, in the case of a petition, until after a hearing, as to which notice of the application shall

- have been given to all persons interested in such property as required in other special proceedings; and
- (3) Such order may be conditioned on the appointment of a fiduciary in the state to which the property is to be removed and shall be subject to such other terms and conditions as the clerk of superior court deems appropriate for protection of the property and interests of the beneficiaries, provided any North Carolina beneficiary may require that a bond be posted prior to such removal in an amount sufficient to protect his interest, the premium for which shall be charged against his interest. (1911, c. 161, ss. 1, 2; C.S., ss. 4020, 4021; 1977, c. 502, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 85.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "a superior court judge who has jurisdiction pursu-

ant to G.S. 7A-47.1 or G.S. 7A-48 in that county" for "the resident judge of said judicial district, or the judge holding court in such district" in subdivision (1).

ARTICLE 4.

Charitable Trusts.

§ 36A-48. Action for account; court to enforce trust.

Legal Periodicals. —

For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right

to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

CASE NOTES

Quoted in State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986).

§ 36A-53. Charitable Trusts Administration Act.

Legal Periodicals. —

For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right

to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

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).

Cited in *Oxford Orphanage, Inc. v. United States*, 775 F.2d 570 (4th Cir. 1985).

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 non-charitable 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*, 71 N.C. App. 660, 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

Trust which was created prior to October 1, 1979, was not subject to this section. Lineback ex rel. Hutchens v. Stout, 79 N.C. App. 292, 339 S.E.2d 103 (1986).

Testamentary trust created for "the lifetime" of beneficiary, the disabled daughter of settlor, containing provision for the distribution of the trust corpus remaining upon beneficiary's death, which was designed so that trust funds would be used to provide supplemental, rather than total, support for

the beneficiary, was a discretionary trust and the superior court erred in requiring trustee to expend funds from the trust for the general welfare, support, maintenance and benefit of the beneficiary. Lineback ex rel. Hutchens v. Stout, 79 N.C. App. 292, 339 S.E.2d 103 (1986), decided under law in effect prior to this section.

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

§§ 36A-116 to 36A-119: Reserved for future codification purposes.

ARTICLE 10.

Trust Accounts in Financial Institutions.

(This Article is effective July 1, 1989.)

§ 36A-120. (Effective July 1, 1989) Discretionary revocable trust accounts in financial institution.

Trusts created under the provisions of G.S. 53-146.2, G.S. 54-109.57 or G.S. 54B-129 are governed by the provisions of those statutes. (1987 (Reg. Sess., 1988), c. 1078, s. 8.)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1078, s. 10 makes this Article effective July 1, 1989.

Session Laws 1987 (Reg. Sess., 1988), c. 1078, s. 9 provides that all accounts opened pursuant to any statute amended

by the act before the effective date thereof (July 1, 1989) shall continue to be governed by the provisions of those statutes as they read prior to the effective date of the act.

Chapter 37.

Allocation of Principal and Income.

ARTICLE 2.

Principal and Income Act of 1973.

§ 37-16. Short title.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-17. Definitions.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-18. Duty of trustee or personal representative as to receipts and expenditures.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-19. Income; principal; charges.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-20. When right to income arises; apportionment of income.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-21. Income earned and expenses incurred during administration of a decedent's estate.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-22. Corporate distributions.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-23. Bond premium and discount.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-25. Disposition of natural resources.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-26. Timber.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-27. Other property subject to depletion.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-28. Underproductive property.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-30. Taxes.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-37. Depreciation.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-39. Recurring charges; apportionment.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income

Act of 1973," see 8 Campbell L. Rev. 173 (1986).

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 partitioning 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*, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

Questions of Law and Fact as to Lines. — Ordinarily, in a special proceeding brought under this Chapter,

"the only question presented is the location of the true dividing line," title or ownership to land not being directly at issue. Particularly, what are petitioners' lines is determinable as a matter of law from the calls in the description of their lands. Where these lines are located on the earth's surface is determinable as a matter of fact. *Taylor v. Brittain*, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

Applied in *Metcalf v. McGuinn*, 73 N.C. App. 604, 327 S.E.2d 51 (1985).

Cited in *Fauchette v. Zimmerman*, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

§ 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*, 73 N.C. App. 604, 327 S.E.2d 51, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Cited in *Green Hi-Win Farm, Inc. v. Neal*, 83 N.C. App. 201, 349 S.E.2d 614 (1986).

§ 38-4. Surveys in disputed boundaries.

CASE NOTES

Survey Not Required. — While the better practice is to order a survey in a proceeding to establish a boundary line, this section, the pertinent statute, does not require the court to do so. *Young v. Young*, 76 N.C. App. 93, 331 S.E.2d 769 (1985).

Applied in *Metcalf v. McGuinn*, 73 N.C. App. 604, 327 S.E.2d 51, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Cited in *Higdon v. Davis*, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

Chapter 39.

Conveyances.

ARTICLE 1.

Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.

Legal Periodicals. —

For article, "Class Gifts in North Car-

olina — When Do We 'Call The Roll?',

see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in *Atlas Fire Apparatus, Inc. v. Beaver*, 56 Bankr. 927 (Bankr. E.D.N.C.

1986); *International Paper Co. v. Hufhum*, 81 N.C. App. 606, 345 S.E.2d 231 (1986).

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

Legal Periodicals. —

For note as to the transfer of land by wills in light of *Stephenson v. Rowe*, 315

N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

§ 39-2. Vagueness of description not to invalidate.

Legal Periodicals. — For note as to the transfer of land by wills in light of *Stephenson v. Rowe*, 315 N.C. 330, 338

S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

CASE NOTES

Construction so as to Effectuate Intent. — In construing a conveyance of an easement, whether or not executed prior to January 1, 1968, the effective date of this section, the deed is to be construed in such a way as to effectuate the

intention of the parties, as gathered from the entire instrument. *Higdon v. Davis*, 315 N.C. 208, 337 S.E.2d 543 (1985).

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

§ 39-6.3. Inter vivos and testamentary conveyances of future interests permitted.

Legal Periodicals. —

For article, "Class Gifts in North Car-

olina — When Do We 'Call The Roll?', see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

Contingent future interests are subject to execution by a judgment creditor of a remainderman. North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987),

overruling *Watson v. Dodd*, 68 N.C. 528 (1873), and *Bourne v. Farrar*, 180 N.C. 135, 104 S.E. 170 (1920), to the extent that they are inconsistent with this holding.

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-7. Instruments affecting married person's title; joinder of spouse; exceptions.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in *Schiller v. Scott*, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

§ 39-13.1. Validation of certain deeds, etc., executed by married women without private examination.

CASE NOTES

What Deeds Are Cured under Subsection (a). — The plain language of subsection (a) of this section purports to cure deeds which are void because of failure to conduct a private examination of the wife. Subsection (a) does not purport to cure, and does not in fact cure, deeds which are void because the certify-

ing officer taking the acknowledgment of the wife failed to state in his certificate his findings of fact and conclusions that the conveyance is not "unreasonable or injurious to her," as required under former §§ 47-39 and 52-12. *West v. Hays*, 82 N.C. App. 574, 346 S.E.2d 690 (1986).

§ 39-13.3. Conveyances between husband and wife.

CASE NOTES

Property Not Removed from Equitable Distribution Act by Dissolution of Tenancy by Entirety. — Though conveyances from wife to husband dissolved the tenancy by the entirety in the parcels of land and vested title thereto solely in husband, as § 39-13.3(c) provides, he nevertheless acquired title to the property thereunder, not by gift, but during the course of the marriage and before the parties separated, and prop-

erty so acquired, so the General Assembly has declared, is ipso facto marital property. Thus, contrary to husband's contention, dissolving the tenancy by the entirety did not remove the property involved from the ambit of the Equitable Distribution Act, and the trial judge did not err in finding and concluding otherwise. *Beroth v. Beroth*, 87 N.C. App. 93, 359 S.E.2d 512 (1987).

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

Legal Periodicals. —

For note, "Branch Banking & Trust Co. v. Wright — Creditors' Rights to Entireties Property Awarded to Nondebtor Spouse Upon Divorce," see 64 N.C.L. Rev. 1471 (1986).

For a note on the retroactive application of section 39-13.6 under a vested rights analysis, see 65 N.C.L. Rev. 1195 (1987).

CASE NOTES

This section is reflective of changed circumstances in economic relationship and responsibilities among married persons and expresses a public policy of this State that their rights in property should be equalized. *Perry v. Perry*, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Applicability to tenancies by the entireties which existed prior to January 1, 1983. — Provisions of subsection (a) of this section should generally be construed to apply to tenancies by the entirety which preexisted the effective date of the statute (January 1, 1983) and such application is not, in and of itself, unconstitutional. *Perry v. Perry*, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

The General Assembly has clearly manifested its intention that this section, including the "equal right to control" provision of subsection (a), apply to estates by the entirety created before January 1, 1983. *Perry v. Perry*, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

The claim of a vested property right may not rest upon state en-

forcement of common law which is unconstitutionally discriminatory. Thus, to the extent that defendant husband's claims to the exclusive right of control and income of pre-1983 estates by the entirety were based solely upon the common-law incidents of the tenancy, they would fail, as the right recognized by the common law could not be said to be a "vested property right." *Perry v. Perry*, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Burden of Proving Vested Rights. — There may be circumstances under which a husband's rights to income and control of pre-1983 tenancy by the entirety property, to the exclusion of his wife, may be classified as "vested rights" for reasons other than the common-law incidents of that estate. In such cases, the burden will be upon the husband to demonstrate facts showing why his rights are "vested rights" such that application of the "equal control" provisions of subsection (a) of this section to the estate would violate due process. *Perry v. Perry*, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

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).

It Applies Only to Conveyances, etc. —

In accord with the main volume. See *Havee v. Belk*, 775 F.2d 1209 (4th Cir. 1985).

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).

Question for Jury. — Whether a conveyance, whatever its form, was in substance and fact a conveyance by the debtor-bankrupt, or by another such as a

pledgee, is a jury question. *Havee v. Belk*, 775 F.2d 1209 (4th Cir. 1985).

Applied in *Doby v. Lowder*, 72 N.C. App. 22, 324 S.E.2d 26 (1984).

Cited in *Moffett v. Daniels*, 80 N.C. App. 516, 342 S.E.2d 925 (1986).

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.**

When Conveyance May Be Set Aside as Fraudulent. — Before a conveyance may be set aside as fraudulent, the finder of fact must find that the conveyance was voluntary, that the conveyance was made without fair and reasonable consideration and that the conveyance was either made with the intent to defraud creditors or made so that at the time of the conveyance the transferor

did not retain sufficient property to satisfy his then existing debts. *Valdese Gen. Hosp. v. Burns*, 79 N.C. App. 163, 339 S.E.2d 23 (1986).

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.**Legal Periodicals. —**

For note, "Branch Banking & Trust Co. v. Wright — Creditors' Rights to En-

tireties Property Awarded to Nondebtor Spouse Upon Divorce," see 64 N.C.L. Rev. 1471 (1986).

CASE NOTES

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

ARTICLE 7.

Uniform Vendor and Purchaser Risk Act.

§ 39-36. Necessity for actual notice of release or limitation to bind fiduciary.

CASE NOTES

Cited in Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§ 39-37. Short title.

Legal Periodicals. —
For comment, "Offer to Purchase and

Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

§ 39-38. Uniformity of interpretation.

Legal Periodicals. —
For comment, "Offer to Purchase and

Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Cited in Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§ 39-39. Risk of loss.

Legal Periodicals. —
For comment, "Offer to Purchase and

Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Risk of Loss Not Shifted to High Bidder prior to Closing. — Under this Act the making of the high bid in a foreclosure sale does not operate to extinguish the seller's interests and shift all risks to the purchaser. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Nothing in this section shifts the risk

of loss prior to closing to the high bidder. In fact, the high bidder cannot compel relinquishment of the premises until the price has been paid in full, and the mortgagor remains subject to personal liability on the note until then. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Chapter 40A.

Eminent Domain.

Article 1.

General.

Sec.

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

ARTICLE 1.

General.

§ 40A-1. Exclusive provisions.

Local Modification. — City of 1985, c. 47; Town of Maiden: 1985, c. 422; City of Hickory: 422; City of Winston-Salem: 1987, c. 95; 1985, c. 422; City of Winston-Salem: Town of Apex: 1987, c. 70.

CASE NOTES

Chapter Is Applicable to Private Land-owners. — Even though private landowners are not specifically mentioned in § 40A-3, they are bound by the provisions of this chapter. *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — Section 40A-12, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this chapter. *VEPCO v. Tillett*, 316 N.C. 73, 340 S.E.2d 62 (1986).

Conversion of Private Condemnation Proceedings into Quiet Title Action. — Trial court did not err by applying § 1A-1, Rule 15(b) in such a way as to convert condemnation proceedings brought by private condemnors, with the consent of the parties, into an action to quiet title. *VEPCO v. Tillett*, 316 N.C. 73, 340 S.E.2d 62 (1986).

Municipal Annexation Proceedings Enjoined by Condemnor-County. — When a county initiates condemnation of property for a sanitary landfill, and the property is being considered for voluntary annexation into a municipality, the county may proceed with the condemnation action. The county is entitled to an injunction enjoining the annexation proceeding, and the property owners and the municipality may raise the proposed annexation in the answer to the condemnation complaint, for appropriate consideration by the court. *Yandle v. Mecklenburg County*, 85 N.C. App. 382, 355 S.E.2d 216, cert. denied, 320 N.C. 798, 361 S.E.2d 91 (1987).

Applied in *Bandy v. City of Charlotte*, 72 N.C. App. 604, 325 S.E.2d 17 (1985).

Cited in *Davidson County v. City of High Point*, 85 N.C. App. 26, 354 S.E.2d 280 (1987); *Town of Emerald Isle ex rel. Smith v. State*, 320 N.C. 640, 360 S.E.2d 756 (1987).

§ 40A-2. Definitions.

CASE NOTES

Definition of "property" is broad enough to include profits a'prendre, requiring just compensation to the owner of that interest when the right to enter upon lands is lost through condem-

nation. In re Lee, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

Cited in VEPCO v. Tillett, 316 N.C. App. 73, 343 S.E.2d 188 (1986).

§ 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.

(b) Local Public Condemnors. — For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.

- (1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.
- (2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.
- (3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.
- (4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.
- (5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.
- (6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.
- (7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.
- (8) Acquiring designated historic properties, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B.
- (9) Opening, widening, extending, or improving public wharves.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by other statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 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 established under the provisions of Article 2 of Chapter 115D for the purposes of that Article.
- (12) A district established under the provisions of Article 6 of Chapter 162A 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; 1987, c. 2, s. 1; c. 564, s. 13; c. 783, s. 6.)

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; County of Guilford and Cities of Greensboro and High Point: 1987, c. 669, s. 3; Cities of Statesville and Morganton: 1987, c. 265, s. 1; Town of Carrboro: 1987, c. 476, s. 1; Grandfather Village: 1987, c. 419, s. 1.

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), substi-

tuted "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).

Session Laws 1987, c. 2, s. 1, effective February 19, 1987, added subdivision (c)(12).

Session Laws 1987, c. 564, s. 13, effective July 6, 1987, substituted "community college" for "community college or technical college or technical institute" in subdivision (c)(11).

Session Laws 1987, c. 783, s. 6, effective August 12, 1987, inserted "or sewer and septic tank lines and systems" at the end of subdivision (b)(4).

CASE NOTES

I. GENERAL CONSIDERATION.

Chapter Is Applicable to Private Landowners. — Even though private landowners are not specifically mentioned in this section, they are bound by the provisions of this chapter. *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

II. PUBLIC USE.

Meaning of "Public Use". —

The statutory phrase "the public use or benefit" is incapable of a precise definition applicable to all situations. Rather, because of the progressive demands of an ever-changing society and the perpetually fluid concept of governmental duty and function, the phrase is elastic and keeps pace with the changing times. *Carolina Tel. & Tel. Co. v. McLeod*, — N.C. —, 364 S.E.2d 399 (1988).

Test of Public Use or Benefit. — On judicial determination of whether a condemnor's intended use is an action for "the public use or benefit" under this section, courts in this and other states have employed essentially two approaches to this problem. The first approach — the public use test — asks whether the public has a right to a definite use of the condemned property. The

second approach — the public benefit test — asks whether some benefit accrues to the public as a result of the desired condemnation. *Carolina Tel. & Tel. Co. v. McLeod*, — N.C. —, 364 S.E.2d 399 (1988).

Question of Law. — While the delegation of the power of eminent domain is for the legislature, the determination of whether a condemnor's intended use of the land is for "the public use or benefit" is a question of law for the courts. *Carolina Tel. & Tel. Co. v. McLeod*, — N.C. —, 364 S.E.2d 399 (1988).

A taking can be for public use or benefit even when there is also a substantial private use, so long as the private use in question is incidental to the paramount public use. *Carolina Tel. & Tel. Co. v. McLeod*, — N.C. —, 364 S.E.2d 399 (1988).

The provision of telephone service, irrespective of the number of customers affected, is an action for "the public use or benefit." *Carolina Tel. & Tel. Co. v. McLeod*, — N.C. —, 364 S.E.2d 399 (1988).

III. PRIVATE CONDEMNORS.

A. In General.

Installation of water and sewer lines solely for the benefit of one in-

dividual's manufacturing plant involved a private use, despite petitioner's argument that the plant would benefit the public by employing 30 people and thus contribute to the public welfare; and dismissal of petitioner's condemnation proceeding would be affirmed. *City of Statesville v. Roth*, 77 N.C. App. 803, 336 S.E.2d 142 (1985).

IV. PUBLIC CONDEMNORS.

Municipal Airports. — The provisions of this chapter now control cities' eminent domain actions with respect to airports. *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Public Recreational Facility Need Not Be Designed Before Land Is Acquired. — Neither subdivision (b)(3) of this section, which vests municipalities with the power of eminent domain to establish, enlarge or improve parks, playgrounds and other recreational facilities, nor § 160A-353, of similar import, nor any other statute contains any requirement that the city design a public

facility authorized by resolution before the land for the facility is acquired. *City of Charlotte v. Rousso*, 82 N.C. App. 588, 346 S.E.2d 693 (1986).

Local Zoning Laws. — While municipalities or counties may exercise the power of eminent domain for the construction, enlarging or improving of those buildings listed in subdivision (b)(6), the power of eminent domain does not include locating a particular building in violation of another jurisdiction's zoning laws, by virtue of the fact that through §§ 153A-347 and 160A-392 the Legislature has made zoning regulations with regard to buildings specifically applicable to political subdivisions. The same zoning restrictions do not apply, however, to the construction, establishment, enlargement, improvement, maintenance, ownership or operation of a public enterprise unless the Legislature has clearly manifested a contrary intent. *Davidson County v. City of High Point*, 85 N.C. App. 26, 354 S.E.2d 280, cert. granted, 320 N.C. 167, 358 S.E.2d 49 (1987).

§ 40A-8. Costs.

CASE NOTES

Assessment of Costs Upheld. — Where although city filed a Declaration of Taking, it did not include property held to have been inversely condemned, the court's assessment of costs under

this section was proper. *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Cited in *Yates v. Jamison*, 782 F.2d 1182 (4th Cir. 1986).

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

Local Modification. — Cabarrus County and any incorporated municipal-

ity partly or wholly in Cabarrus County: 1985, c. 269.

§ 40A-12. Additional rules.

CASE NOTES

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — This section, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this

chapter. *VEPCO v. Tillett*, 316 N.C. 73, 340 S.E.2d 62 (1986).

Conversion of Private Condemnation Proceeding into Quiet Title Action. — Trial court did not err by applying § 1A-1, Rule 15(b) in such a way as to convert condemnation proceeding brought by private condemnors, with the consent of the parties, into an action to

quiet title. *VEPCO v. Tillett*, 316 N.C. 73, 340 S.E.2d 62 (1986).

ARTICLE 2.

Condemnation Proceedings by Private Condemnors.

§ 40A-19. Proceedings by private condemnors.

CASE NOTES

Cited in *VEPCO v. Tillett*, 80 N.C. App. 383, 343 S.E.2d 188 (1986); *Carolina Tel. & Tel. Co. v. McLeod*, — N.C. —, 364 S.E.2d 399 (1988).

§ 40A-22. Service.

CASE NOTES

Applied in *VEPCO v. Tillett*, 73 N.C. App. 512, 327 S.E.2d 2 (1985).

§ 40A-28. Exceptions to report; hearing; when title vests; appeal; restitution.

CASE NOTES

Filing Exceptions to Commissioner's Report as Prerequisite to Filing of Appeal. — The respondents failed to make any exceptions to the Commissioner's report. They also failed

to file exceptions to the clerk's final judgment. Therefore, respondents' appeal was properly dismissed. *Carolina Power & Light Co. v. Crowder*, — N.C. App. —, 366 S.E.2d 499 (1988).

ARTICLE 3.

Condemnation by Public Condemnors.

§ 40A-40. Notice of action.

CASE NOTES

Cited in *Yandle v. Mecklenburg County*, 85 N.C. App. 382, 355 S.E.2d 216 (1987).

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

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

CASE NOTES

Stated in *Yandle v. Mecklenburg County*, 85 N.C. App. 382, 355 S.E.2d 216 (1987).

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

Local Modification. — Wake: 1985, c. 640, s. 2; Town of Holly Springs: 1985 (Reg. Sess., 1986), c. 941; County of

Guilford and Cities of Greensboro and High Point: 1987, c. 669, s. 4.

§ 40A-45. Answer, reply and plat.

CASE NOTES

Property Owners Not Entitled to Injunctive Relief. — As subdivision (a)(3) gave owners an opportunity to raise in court the issue of pending voluntary annexation proceeding, they had an adequate remedy at law and were not

entitled to injunctive relief granted by the trial court, enjoining county from proceeding with condemnation proceeding. *Yandle v. Mecklenburg County*, 85 N.C. App. 382, 355 S.E.2d 216, cert. denied, 320 N.C. 798, 361 S.E.2d 91 (1987).

§ 40A-47. Determination of issues other than damages.

CASE NOTES

A municipality is solely liable for the damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor, and contract provisions which require that work be accomplished upon public property or upon private property for which the city holds an easement do not alter the city's liability for such damages. *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Damages to land outside city's easements which inevitably or necessarily flow from the construction of the outfall result in an appropriation of land for public use. Such damages are embraced within the just compensation to which defendant landowners are enti-

tled. *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Denial of Jury Trial on Issue of Ownership Upheld. — In special proceedings for condemnation of land for an airport, trial judge did not err in denying motion for a jury trial on the issue of ownership of the property, as the issue of ownership was not triable by a jury of right, and moreover, appellant did not demand a trial by jury in writing within the prescribed time. *Raleigh-Durham Airport Auth. v. Howard*, — N.C. App. —, 363 S.E.2d 184 (1987).

Cited in *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E.2d 794 (1986); *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-48. Appointment of commissioners.

CASE NOTES

Cited in *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-51. Remedy where no declaration of taking filed; recording memorandum of action.

CASE NOTES

An inverse condemnation remedy is now provided in this jurisdiction by this section. *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Inverse condemnation is simply a device to force a governmental body to exercise its power of condemnation, even though it may have no desire to do so. It allows a property owner to obtain compensation for a taking in fact, even though no formal exercise of the taking power has occurred. *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Defendants' assertion of a counterclaim in condemnation action by city, alleging that property not included therein had been taken, properly placed the inverse condemnation issue before the court. *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Remedy for Municipal Airport Overflight. — Private landowners no longer have any private common law actions for damages in trespass or nuisance in municipal airport overflight cases; their sole remedy is inverse condemnation. *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

This section provided the sole procedure by which plaintiffs could bring an inverse condemnation action involving a taking occurring as a result of the construction and operation of an airport runway. *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

No simple test exists for determining when a taking occurs by aircraft overflights; rather, a particularized judgment of the facts of the individual case is necessary. Thus the date requirement of this section does not impose any stringent standard of specificity. *Smith*

v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Plaintiffs' allegation of a very general taking by aircraft overflights "within the past two years" failed to allege with reasonable specificity when the alleged appropriation or taking occurred; however, rather than dismissing the complaint altogether, the court should have required plaintiffs to come forward in accordance with defendant's motion for a more definite statement and plead the facts which they possessed, so that the court could then rule on their timeliness and sufficiency. *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

The statutory time begins to run on completion of the project or the taking, whichever is later. *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Limitation Period for Taking Occurring Prior to Enactment of Chapter. — Where plaintiffs' action involving a taking incident to construction of an airport runway accrued in June 1979, and over two years later, in July 1981, new Chapter 40A was enacted, the period between such enactment and the cutoff date under the new limitation, five months and three weeks (10 July 1981 to 1 January 1982) was not itself so unreasonably short as to deny plaintiffs due process of law, particularly in light of the fact that plaintiffs lived in an area where large numbers of inverse condemnation actions were filed within the statutory period. *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

A municipality is solely liable for the damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor, and contract provisions which require that work be ac-

complished upon public property or upon private property for which the city holds an easement do not alter the city's liability for such damages. *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Damages to land outside city's easements which inevitably or necessarily flow from the construction of the outfall result in an appropriation of land for public use. Such damages are embraced within the just compensation to which defendant landowners are enti-

tled. *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Assessment of Costs. — Where although city filed a Declaration of Taking, it did not include property held to have been inversely condemned, the court's assessment of costs under § 40A-8 was proper. *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Stated in *Yates v. Jamison*, 782 F.2d 1182 (4th Cir. 1986).

Cited in *VEPCO v. Tillett*, 80 N.C. App. 383, 343 S.E.2d 188 (1986).

§ 40A-55. Payment of compensation.

CASE NOTES

Denial of Jury Trial on Issue of Ownership Upheld. — In special proceedings for condemnation of land for an airport, trial judge did not err in denying motion for a jury trial on the issue of ownership of the property, as the issue of ownership was not triable by a jury of

right, and moreover, appellant did not demand a trial by jury in writing within the prescribed time. *Raleigh-Durham Airport Auth. v. Howard*, — N.C. App. —, 363 S.E.2d 184 (1987).

Cited in *In re Lee*, 85 N.C. App. 302, 354 S.E.2d 759 (1987).

ARTICLE 4.

Just Compensation.

§ 40A-62. Application.

CASE NOTES

Real Property Valuations for Ad Valorem Purposes Admissible. — Evidence of real property valuations made by the county for ad valorem tax purposes are admissible against the county, in an eminent domain proceeding, as an

admission of a party opponent. *Craven County v. Hall*, 87 N.C. App. 256, 360 S.E.2d 479 (1987).

Cited in *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-63. In general.

CASE NOTES

Valuation of Land as of Date of Taking. —

In determining the fair market value of property taken in condemnation, it is generally regarded as competent to show the value of the property within a rea-

sonable time before and/or after the taking as bearing upon its value at the time of the appropriation. *Craven County v. Hall*, 87 N.C. App. 256, 360 S.E.2d 479 (1987).

§ 40A-64. Compensation for taking.

CASE NOTES

Landowner's Son Competent to Give Opinion of Land Value. — The son of a landowner who had exhibited a great deal of familiarity with the property, as well as neighboring properties, and was familiar with the value of these properties was competent to give an opinion as to the land value. *Craven County v. Hall*, 87 N.C. App. 256, 360 S.E.2d 479 (1987).

The sales prices of voluntary sales of property similar in nature, location, and condition to the land being condemned is admissible as evidence of the value of that land if the other sales are not too remote in time. Whether the properties are sufficiently similar to admit such evidence is a question to be determined by the trial judge in his sound discretion, usually after a hearing on the issue conducted out of the presence of the jury. *City of Winston-Salem v. Cooper*, 79 N.C. 103, 340 S.E.2d 366 (1986).

Measure of compensation to one who loses right to remove sand and gravel from the property of another, when that right has never been exercised and the sand and gravel remain in the ground untouched, is the fair market value of the sand and gravel in place. *In re Lee*, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

Where petitioner which had the contractual right to remove sand and gravel from property which was condemned, failed to show by credible and convincing evidence the value of its interest in the condemned land, petitioner was entitled to nominal damages only. *In re Lee*, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

Stated in *Yates v. Jamison*, 782 F.2d 1182 (4th Cir. 1986).

§ 40A-65. Effect of condemnation procedure on value.

CASE NOTES

Evidence of Highest and Best Use as if Not under "Cloud of Condemnation" Was Proper. — In a condemnation action by an airport authority, the testimony of the condemnee's expert witness as to the property's highest and best use as if it had not been under a "cloud of condemnation" was proper. Since a property owner cannot capitalize

on any increase in the property's value due to the reasonable likelihood that it will be acquired, the condemnor likewise cannot take advantage of any resulting decrease in the property due to the threat of condemnation. *Raleigh-Durham Airport Auth. v. King*, 75 N.C. App. 57, 330 S.E.2d 622 (1985).

Chapter 41.

Estates.

Sec.

41-6.3. Rule in Shelley's case abolished.

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

Editor's Note. — The cases under this section in the main volume were decided prior to the enactment of § 41-6.3, which abolished the rule in Shelley's case.

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).

§ 41-2. Survivorship in joint tenancy abolished; proviso as to partnership.

Legal Periodicals. —

For article, "Class Gifts in North Car-

olina — When Do We 'Call The Roll?', see 21 *Wake Forest L. Rev.* 1 (1985).

§ 41-2.5. Tenancy by the entirety in mobile homes.

CASE NOTES

Security interest in a mobile home which was moveable, tangible property, was governed by Article 9 of the U.C.C. subsection (a) of this section, which provides that when a husband and wife become co-owners of a mobile home, in the absence of anything to the contrary appearing in the instrument of title, they

become tenants by the entirety with all the incidents of an estate by the entirety in real property, does not dictate a contrary result. *Joyce v. Cloverbrook Homes, Inc.*, 81 N.C. App. 270, 344 S.E.2d 58, cert. denied, 317 N.C. 704, 347 S.E.2d 42 (1986).

§ 41-4. Limitations on failure of issue.

Editor's Note. — The cases under this section in the main volume were decided prior to the enactment of § 41-6.3, which abolished the rule in Shelley's case.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll?', see 21 *Wake Forest L. Rev.* 1 (1985).

§ 41-6. "Heirs" construed to be "children" in certain limitations.

Editor's Note. — The cases under this section in the main volume were decided prior to the enactment of § 41-6.3, which abolished the rule in Shelley's case.

Legal Periodicals. —

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits

to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For article, "Class Gifts in North Car-

olina — When Do We 'Call The Roll?', see 21 Wake Forest L. Rev. 1 (1985).

§ 41-6.1. Meaning of "next of kin."

Legal Periodicals. —

For article, "Class Gifts in North Car-

olina — When Do We 'Call The Roll?', see 21 Wake Forest L. Rev. 1 (1985).

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 techni-

cal common-law meaning. *Rawls v. Rideout*, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

§ 41-6.3. Rule in Shelley's case abolished.

The rule of property known as the rule in Shelley's case is abolished. (1987, c. 706, s. 1.)

Editor's Note. — Session Laws 1987, c. 706, s. 2 makes this section effective October 1, 1987, and applicable to trans-

fers of property that take effect on or after that date.

§ 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*, 73 N.C. App. 566, 327 S.E.2d 46 (1985), rev'd in part, 316 N.C. 622, 342 S.E.2d 840 (1986).

No statute of limitations runs against plaintiff bringing action for removal of a cloud upon title. Such an action is a continuing right, which exists as long as there is occasion for its exercise. *Poore v. Swan Quarter Farms, Inc.*, 79 N.C. App. 286, 338 S.E.2d 817 (1986).

But Theory of Relief May Determine Applicability of Limitations. — There is no express statute of limitations governing actions to quiet title under this section. It thus is necessary to refer to plaintiffs' underlying theory of relief to determine which statute, if any, applies. *Poore v. Swan Quarter Farms, Inc.*, 79 N.C. App. 286, 338 S.E.2d 817 (1986).

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*, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

When Quiet Title Actions Are Treated as Ejectment Actions. — Actions to remove a cloud upon title are in essence ejectment actions and are properly reviewed as such where defendants are in actual possession and plaintiffs seek to recover possession. *Poore v. Swan Quarter Farms, Inc.*, 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Action Held Not One for Ejectment. — Where plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of their action, and did not seek specifically to recover possession in their

demand for relief, but merely prayed for rents and profits and removal of certain deeds as a cloud upon their title, plaintiffs' action was not in essence one for ejectment controlled by §§ 1-38 and 1-40; rather, plaintiffs' action was one to remove a cloud upon title which was not barred by any statute of limitations. *Poore v. Swan Quarter Farms, Inc.*, 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Applied in *VEPCO v. Tillett*, 73 N.C. App. 512, 327 S.E.2d 2 (1985).

Cited in *Williams v. Sapp*, 83 N.C. App. 116, 349 S.E.2d 304 (1986).

III. PLEADING AND PRACTICE.

A. In General.

Complaint Upheld. — Plaintiffs' complaint, which alleged that noncompliance with legal formalities voided two deeds, but did not allege fraud, despite failure to state specific facts underlying these allegations, nevertheless, under the liberal theory of notice pleading, was minimally sufficient to state a claim for relief under this section. *Poore v. Swan Quarter Farms, Inc.*, 79 N.C. App. 286, 338 S.E.2d 817 (1986).

§ 41-10.1. Trying title to land where State claims interest.

CASE NOTES

Claim for Betterments Deemed "Claim of Title". — Since a claim for betterments can arise only by virtue of a "claim of title," a claim for betterments is a "claim of title" as that term is used in this section. Therefore, such a claim

for betterments is not barred by sovereign immunity. *State v. Taylor*, 85 N.C. App. 549, 355 S.E.2d 169, appeal of right allowed pursuant to Rule 16(b) and petition allowed as to additional issues, 320 N.C. 516, 358 S.E.2d 531 (1987).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 1, 1988

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1988 Cumulative 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.

LACY H. THORNBURG
Attorney General of North Carolina

