THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1989 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

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Annotated through 379 S.E.2d 161. 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.

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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 1989 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

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

Chapter analyses show all affected sections, except sections for which catchlines are carried for the 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 1989 Regular Session affecting Chapters 28 through 41 of the General Statutes.

Annotations:

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

North Carolina Reports through Volume 324, p. 436.
North Carolina Court of Appeals Reports through Volume 92, p. 757.
South Eastern Reporter 2nd Series through Volume 379, p. 161.
Federal Reporter 2nd Series through Volume 873, p. 1452.
Federal Supplement through Volume 710, p. 802.
Federal Rules Decisions through Volume 124, p. 691.
Bankruptcy Reports through Volume 98, p. 605.
Supreme Court Reporter through Volume 109, p. 2114.
North Carolina Law Review through Volume 67, p. 740.
Wake Forest Law Review through Volume 24, p. 538.
Campbell Law Review through Volume 11, p. 310.
Duke Law Journal through 1988, p. 1271.
North Carolina Central Law Journal through Volume 17, p. 228.
Opinions of the Attorney General.

The General Statutes of North Carolina

1989 Cumulative Supplement

VOLUME 2A, PART I

Chapter 28A.

Administration of Decedents' Estates.

ARTICLE 2.

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

§ 28A-2-1. Clerk of superior court.

CASE NOTES

I. GENERAL CONSIDERATION.

Jurisdiction Exclusive. —

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

Exclusive Jurisdiction to Appoint Administrators Lies with Clerk of Superior Court. — A superior court judge lacks jurisdiction to appoint an administrator, because the original and exclusive jurisdiction to appoint administrators lies with the clerk of superior court. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, — N.C. —, 373 S.E.2d 104 (1988).

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).

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

CASE NOTES

Applied in Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

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 nonresi-

dent 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), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

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), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

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), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

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), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Beneficiaries Seeking Removal Not Held to Election of Remedies. — Prejudice would result if, when beneficiaries sought to remove an executor, they were held to an election of remedies and could not later bring a civil action for damages. Such a policy would either chill exercise of the right to seek statutory removal of an executor or force beneficiaries prematurely to bring civil actions for damages. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

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).

"Special Proceeding." — The procedure for the revocation of the letters testamentary of an administratrix as set forth in this section is a "special proceeding," and the clerk had statutory authority to appoint the guardian ad litem. In re Estate of Sturman, — N.C. App. —, 378 S.E.2d 204 (1989).

The minor heirs had a vested interest in who administered the estate of their deceased father and were entitled under this section to appeal the decision of the clerk on the revocation issue. This was sufficient to bring the matter within the

purview of Rule 17 providing it was an "action or special proceeding." In re Estate of Sturman, — N.C. App. —, 378 S.E.2d 204 (1989).

III. DEFAULT OR MISCONDUCT.

Executor's acceptance of commissions based on an erroneous interpretation of a statute would not be misconduct requiring revocation of letters testamentary. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

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 11.

Collectors.

§ 28A-11-3. Duties and powers of collectors.

CASE NOTES

Stated in Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447 (1988).

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 inter-

est-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).

CASE NOTES

Plantiffs Could Not Dispute Attorney's Fees. — Where plaintiff petitioned the trial court for an order approving settlement in the wrongful death suit, and the settlement included provisions which indicated that plaintiff agreed to pay a certain amount of attorney's fees to defendants, plaintiff could not dispute the attorney's fees received by defendants since the settlement order was binding and final as to defendants' entitlement to attorney's fees and defendants were entitled to the benefit of the doctrine of collateral estoppel to defeat plaintiff's claims against them. Beckwith v. Llewellyn, — N.C. App. —, 379 S.E.2d 74 (1989).

Stated in Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447 (1988).

§ 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 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), rev'd on

other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

ARTICLE 14.

Notice to Creditors.

§ 28A-14-1. Notice for claims.

(a) Every personal representative and collector after the granting of letters shall notify all persons, firms and corporations having claims against the decedent to present the same to such personal representative or collector, on or before a day to be named in such notice, which day must be at least six months from the day of the first publication or posting of such notice. The notice shall set out a mailing address for the personal representative or collector. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. If there is no newspaper published in the county, but there is a newspaper having general circulation in the county, then at the option of the personal representative, or collector, the notice shall be published once a week for four consecutive weeks in the newspaper having general circulation in the county and posted at the courthouse or the notice shall be posted at the courthouse and four other public places in the county. Personal representatives are not required to publish 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) Prior to filing the proof of notice required by G.S. 28A-14-2, every personal representative and collector shall personally deliver or 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 75 days after the granting of letters. Provided, however, no notice shall be required to be delivered or mailed with respect to any claim that is recognized as a valid claim by the personal representative or collector.

(c) The personal representative or collector may personally deliver or mail by first class mail a copy of the notice required by subsection (a) of this section to all creditors of the estate whose names and addresses can be ascertained with reasonable diligence. If the personal representative or collector in good faith believes that the notice required by subsection (b) of this section to a particular creditor is or may be required and gives notice based on that belief, the personal representative or collector is not liable to any person for giving the notice, whether or not the notice is actually required by subsection (b) of this section. If the personal representative or collector in good faith fails to give notice required by subsection (b) of this section, the personal representative or collector is not liable to any person for such failure. (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; 1989, c. 378, s. 1; c. 770, s. 8.)

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) amendment, 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).

Session Laws 1989, c. 378, s. 1, effective October 1, 1989, and applicable to the administration of the estates of all decedents dying on or after that date, deleted "within 20 days" preceding "after the granting of letters" in the first sentence of subsection (a); in subsection (b), in the first sentence, substituted "Prior to filing the proof of notice required by G.S. 28A-14-2, every personal representative and collector shall personally deliver or send by first class mail" for "Every personal representative and collector within 90 days after the granting of letters shall send by first class mail", and substituted "75 days after the granting of letters" for "the 90 days", and added the last sentence; and added subsection (c).

Session Laws 1989, c. 770, s. 8, effective August 12, 1989, substituted "at least" for "a least" in the first sentence of subsection (a).

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, 1989, except that it does not affect any pending litigation or any litigation instituted within 90 days of March 16, 1989. (1981, c. 96, ss. 1, 2; 1987, c. 277, s. 8; 1989, c. 390, s. 8.)

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 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).

The 1989 amendment, effective June 21, 1989, substituted "March 16, 1989" for "March 16, 1987" 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 personally delivered or 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 at the time the inventory required by G.S. 28A-20-1 is filed. 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; 1989, c. 378, 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.

The 1989 amendment, effective October 1, 1989, and applicable to the administration of the estates of all decedents dying on or after that date, inserted "personally delivered", and "at the time the inventory required by G.S. 28A-20-1 is filed" in the first 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).

CASE NOTES

Quoted in Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

Cited in Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064 (E.D.N.C. 1988).

§ 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).

Stated in Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

§ 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).

Cited in Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064 (E.D.N.C. 1988).

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-18-1. Survival of actions to and against personal representative.

CASE NOTES

I. GENERAL CONSIDERATION.

This section clearly manifests, etc. —

In accord with main volume. See Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, — N.C. —, 373 S.E.2d 104 (1988).

Action Properly Dismissed Against Defendants Who Were Merely Collectors by Affidavit. — Where plaintiff was required by this statute to bring his action against the collector or personal representative, his action was properly dismissed when he filed his action against defendants who were merely collectors by affidavit under § 28A-25-1, since plaintiff failed to bring his action against the proper party or parties. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, — N.C. —, 373 S.E.2d 104 (1988).

Cited in Clark v. Inn W., — N.C. —, 379 S.E.2d 23 (1989).

§ 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).

For note on the wrongful death of a viable fetus in North Carolina, see 66 N.C.L. Rev. 1291 (1988).

For note on the wrongful death of a viable fetus, see 23 Wake Forest L. Rev. 849 (1988).

For a note on the expansion of the viable fetus wrongful death action, see 11 Campbell L. Rev. 91 (1988).

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, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (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), cert. denied, 321 N.C. 473, 365 S.E.2d 1 (1988).

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., 88 N.C. App. 577, 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., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

Action Not Maintained Since Children Could Not Have Recovered For Injuries If They Had Lived. — The cause of action for the children's wrongful death, where the children were killed by their mother and her boyfriend as they were fleeing from police shortly before the truck they were in was blown up during the course of a gun battle and high speed chase with police, could not be maintained because the children could not have recovered for their injuries if they had lived, and the first requisite of a wrongful death action in this State is that the decedent could have recovered for his injuries if he had lived. Lynch v. North Carolina Dep't of Justice, — N.C. App. —, 376 S.E.2d 247 (1989).

Action Against Pharmacist. — While a pharmacist has no duty to advise absent knowledge of the circumstances, once a pharmacist is alerted to specific facts and he or she undertakes to advise a customer, the pharmacist then has a duty to advise correctly; therefore, where plaintiff alleged, among other things, that her decedent "sought out and was relying upon the skill, judgment and expertise of defendant with respect to the safety of taking the drug Indocin given the fact that plaintiff's intestate suffered the aforementioned medical condition," she stated a claim upon which relief could be granted. Ferguson v. Williams, 92 N.C. App. 336, 374 S.E.2d 438 (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 W., 89 N.C. App. 275, 365 S.E.2d 682, cert. granted, 323 N.C. 172, 373 S.E.2d 105 (1988).

Applied in Williams v. Odell, 90 N.C. App. 699, 370 S.E.2d 62 (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); Woodson v. Rowland, 92 N.C. App. 38, 373 S.E.2d 674 (1988); State v. Beale, 324 N.C. 87, 376 S.E.2d 1 (1989); Clark v. Inn W., — N.C. —, 379 S.E.2d 23 (1989).

III. PARTIES TO THE ACTION.

Editor's Note. *— Annotations in the main volume 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, rehearing denied, 320 N.C. 799, 361 S.E.2d. 73 (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., 89 N.C. App. 154, 365 S.E.2d 909, cert. granted, 322 N.C. 606, 370 S.E.2d 246 (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., 89 N.C. App. 154, 365 S.E.2d 909, cert. granted, 322 N.C. 606, 370 S.E.2d 246 (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. *— The annotation 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.*

Basis for Damages Generally. — This section allows the personal representative, on behalf of the statutory beneficiaries of the estate, to recover, inter alia, the present monetary value of the

decedent to the beneficiaries. The measure is the worth of the decedent; how well off the beneficiaries are absent the decedent is immaterial. Harris v. United States, 121 F.R.D. 652 (W.D.N.C. 1988).

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 recover the amount of his income that they reasonably might have received had he lived. State v. Smith, 90 N.C. App. 161, 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, 90 N.C. App. 161, 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., 89 N.C. App. 154, 365 S.E.2d 909, cert. granted, 322 N.C. 606, 370 S.E.2d 246 (1988).

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, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (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, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (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 available 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, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (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, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987), reversing DiDonato v. Wortman, 80 N.C. App. 117, 341 S.E.2d 58 (1986).

E. Punitive Damages.

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.

(a) All claims against a decedent's estate which arose before the death of the decedent, except contingent claims based on any warranty made in connection with the conveyance of real estate and claims of the United States and tax claims of the State of North Carolina and subdivisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis, which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 by the date specified in the general notice to creditors as provided for in G.S. 28A-14-1(a) or in those cases requiring the delivery or mailing of notice as provided for in G.S. 28A-14-1(b), within 90 days after the date of the delivery or mailing of the notice if the expiration of said 90-day period is later than the date specified in the general notice to creditors, are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent. Provided further, if the expiration of said 90-day period is later than the date specified in the general notice to creditors, the notice delivered or mailed to each creditor, if any, shall be accompanied by a statement which specifies the deadline for filing the claim of the affected creditor.

(c) Except as otherwise provided by subsection (f) of this section, no claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent's death, if the claim is presented within the period provided by subsection (a) hereof.

(e) Except as otherwise provided by subsection (f) of this section, unless a claim has been presented pursuant to G.S. 28A-19-1 giving notice of an action or special preceeding pending against a decedent at the time of his death and surviving under G.S. 28A-18-1 within the time provided by subsection (a) of this section, no recovery may be had upon any judgment obtained in any such action or proceeding against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.

(i) Nothing in this section shall bar:

(1) Any claim alleging the liability of the decedent or personal representative; or

(2) Any proceeding or action to establish the liability of the decedent or personal representative; or

(3) The recovery on any judgment against the decedent or personal representative

to the extent that the decedent or personal representative is protected by insurance coverage with respect to such claim, proceeding or judgment or where there is underinsured or uninsured motorist coverage that might extend to such claim, proceeding, or judgment. (1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1979, c. 509, s. 1; 1989, c. 378, s. 3; c. 485, s. 65.)

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 1989, c. 485, s. 67, contains a severability clause.

Effect of Amendments. — Session Laws 1989, c. 378, s. 3, effective October 1, 1989, and applicable to the administration of the estates of all decedents dying on or after that date, in subsection (a), inserted "G.S. 28A-14-1(a) or in those cases requiring the delivery or mailing of notice as provided for in G.S. 28A-14-1(b), within 90 days after the date of the delivery or mailing of the notice if the expiration of said 90-day period is later than the date specified in the general notice to creditors", and added the last sentence; substituted "Except as otherwise provided by subsection (f) of this section, no claim" for "No claim" in subsection (c); and in subsection (e) substituted "Except as otherwise provided by subsection (f) of this section, unless a claim" for "Unless a claim", and substituted "within the time provided by subsection (a) of this section" for "by the date specified in the general notice to creditors as provided in G.S. 28A-14-1."

Session Laws 1989, c. 485, s. 65, effective June 28, 1989, inserted "or where there is underinsured or uninsured motorist coverage that might extend to such claim, proceeding, or judgment" at the end of subsection (i).

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

Language of subsection (i) provides an exception to limitations only for claims where there is insurance under which a decedent was insured. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, — N.C. —, 373 S.E.2d 104 (1988).

Recovery Limited after Six Months. — Automobile accident victim who filed suit more than six months after the accident was limited in his amount of recovery by the amount of the deceased defendant's automobile insurance. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, — N.C. —, 373 S.E.2d 104 (1988).

Under Subsection (i) Plaintiff Barred from Claim Greater than Underinsurance Coverage. — Where, pursuant to subsection (i) of this section, all that plaintiff could recover from the underinsured decedent was the $25,000.00 coverage the decedent had under his policy with insurer, plaintiff, who was only legally entitled, by statute, to recover this amount, and nothing more, from decedent could not bring a claim for a greater amount against insurer under his underinsured motorist endorsement. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, — N.C. —, 373 S.E.2d 104 (1988).

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 limitation 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).

§ 28A-19-16. Disputed claim not referred barred in three months.

CASE NOTES

This section applies to creditors' claims against an estate and not to the interests of heirs. The cases construing this Article involve actions by creditors to recover debts. Moreover, § 28A-19-3(h) expressly provides that the word "claim" as used in this Article "does not apply to claims of heirs or devisees to their respective shares or interests in the decedent's estate in their capacity as such heirs or devisees." Poteat v. Robinson, 90 N.C. App. 764, 370 S.E.2d 61 (1988).

Cited in Blalock v. Dandelake, 90 N.C. App. 461, 368 S.E.2d 891 (1988).

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(a)(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; 1989, c. 770, s. 9.)

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 provides: "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.

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) amend-

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

The 1989 amendment, effective August 12, 1989, substituted "G.S. 105-2(a)(3)" for "G.S. 105-2(3)" in the third 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); Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

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

Purpose of Subsection (b). — Subsection (b) of this section ensures that the personal representative's commission on a sale of real estate is limited to the amount that was actually needed for the payment of claims. This discourages personal representatives from selling land merely to increase their commissions. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

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).

Payment of Commissions Held Proper. — Commissions to the executor of an estate could be paid on proceeds from the sale of real estate where the executor was required to sell the property under the terms of the will and the property was not sold to pay debts or legacies. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

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

Fees awarded under this section should be for actual services rendered and should not be based solely upon the size of the estate; nevertheless, the size of the estate provides a useful guideline and may be considered as a factor in determining whether legal services were necessary and the time expended justified. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

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 the public administrator appointed pursuant to G.S. 28A-12-1, or 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 or the public administrator stating:

(1) The name and address of the affiant and the fact that he or she is the public administrator or 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; 1989, c. 407, s. 1.)

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

Effect of Amendments. —

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

The 1989 amendment, effective October 1, 1989 and applicable to persons dying on or after that date, in subsection (a), in the introductory language, inserted "the public administrator appointed pursuant to G.S. 28A-12-1, or" and inserted "or the public administrator," and inserted "the public administrator or" in subdivision (1).

Action Properly Dismissed Against Defendants Who Were Merely Collectors by Affidavit. — Where plaintiff was required by this statute to bring his action against the collector or personal representative, his action was properly dismissed when he filed his action against defendants who were merely collectors by affidavit under this section, since plaintiff failed to bring his action against the proper party or parties. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, — N.C. —, 373 S.E.2d 104 (1988).

§ 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 the public administrator appointed pursuant to G.S. 28A-12-1, a person named or designated as executor in the will, devisee, 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, the person named or designated as executor in the will of the decedent, the creditor, the public administrator, or the devisee, stating:

(1) The name and address of the affiant and the fact that he is the public administrator, a person named or designated as executor in the will, devisee, 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 if applicable, of the Intestate Succession Act, to the property of the decedent; and their relationship, if any, to the decedent; and
(10) A description sufficient to identify each tract of real property owned by the decedent at the time of his death.

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

(c) The presentation of an affidavit as provided in subsection (a) shall be sufficient to require the transfer to the affiant or his designee of the title and license to a motor vehicle registered in the name of the decedent owner; the ownership rights of a savings account or checking account in a bank in the name of the decedent owner; the ownership rights of a savings account or share certificate in a credit union, building and loan association, or savings and loan association in the name of the decedent owner; the ownership rights in any stock or security registered on the books of a corporation in the name of a decedent owner; or any other property or contract right owned by decedent at the time of his death. (1985, c. 651, s. 2; 1987, c. 670, s. 1; 1989, c. 407, s. 2.)

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).

The 1989 amendment, effective October 1, 1989 and applicable to persons dying on or after that date, in subsection (a), in the introductory language, deleted "an" preceding "heir or creditor," inserted "the public administrator appointed pursuant to G.S. 28A-12-1, a person named or designated as executor in the will, devisee," and substituted "heir, the person named or designated as executor in the will of the decedent, the creditor, the public administrator, or the devisee" for "heir or creditor," in subdivision (1), deleted "an" preceding "heir or creditor," and inserted "the public administrator, a person named or designated as executor in the will, devisee," and inserted "if applicable" in subdivision (9).

§ 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 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, 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 affiant 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 affiant 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 affiant 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; 1989, c. 407, 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).

The 1989 amendment, effective October 1, 1989 and applicable to persons dying on or after that date, in subsection (a) substituted "affiant" for "heir or creditor" in the introductory language, and in the next to the last and last sentence of subdivision (2).

CASE NOTES

Action Properly Dismissed Against Defendants Who Were Merely Collectors by Affidavit. — Where plaintiff was required by this statute to bring his action against the collector or personal representative, his action was properly dismissed when he filed his action against defendants who were merely collectors by affidavit under § 28A-25-1, since plaintiff failed to bring his action against the proper party or parties. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, — N.C. —, 373 S.E.2d 104 (1988).

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

If any affiant 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 affiant 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; 1989, c. 407, 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 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, 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.

The 1989 amendment, effective October 1, 1989 and applicable to persons dying on or after that date, substituted "affiant" for "heir or creditor" in the first and second sentences.

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

§ 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.

§ 29-1. Short title.

Legal Periodicals. —
For article, "Requiem for the Rule in Shelley's Case", see 67 N.C.L. Rev. 681 (1989).

§ 29-2. Definitions.

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

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

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

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).

§ 29-4. Curtesy and dower abolished.

Legal Periodicals. — For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

§ 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 intestacy 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, 321 N.C. 730, 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, 321 N.C. 730, 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).

For note on the wrongful death of a viable fetus, see 23 Wake Forest L. Rev. 849 (1988).

§ 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 descendant of a deceased child or children, or by a parent, the share of the surviving spouse shall be the entire net estate.

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

erty, 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 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 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, 321 N.C. 730, 365 S.E.2d 612 (1988); State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988); Brimley v. Logging, — N.C. —, 378 S.E.2d 52 (1989).

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); Brimley v. Logging, — N.C. —, 378 S.E.2d 52 (1989).

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, 90 N.C. App. 233, 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, 90 N.C. App. 233, 368 S.E.2d 201 (1988).

Applied in Poteat v. Robinson, 90 N.C. App. 764, 370 S.E.2d 61 (1988).

Cited in Brimley v. Logging, — N.C. —, 378 S.E.2d 52 (1989).

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.

§ 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.

(c) If the surviving spouse dissents from his or her deceased spouse's will and takes a share as determined by reference to the Intestate Succession Act as provided herein, the residue of the testator's net estate, as defined in G.S. 29-2, shall be distributed to the other devisees and legatees as provided in the testator's last will, diminished pro rata unless the will otherwise provides.

If the will to which the dissent is filed makes a disposition to a revocable inter vivos trust established by the deceased spouse, then the surviving spouse, upon taking the share of the deceased spouse's real and personal property to which the surviving spouse is entitled by reason of the dissent, shall be deemed for purposes of the trust to have forfeited all remaining benefits under the trust for the benefit of the surviving spouse. The assets remaining in the trust thereafter shall be administered and disposed of as if the surviving spouse had predeceased the testator. The provisions of this paragraph shall be applicable to all property bequeathed or devised to the trust by the will and to all property held by the trustee at the time of the death of the testator or which passes to the trustee by reason of the death of the testator to the extent that the testator had the right to control the disposition of the property at the testator's death. The provisions of this paragraph shall not be applicable to the extent that the will or trust instrument provides otherwise.

(d) No personal representative, fiduciary or other person liable for distributing or disposing of property in accordance with the testator's will or an inter vivos trust described in this subsection shall be liable for distributing or disposing of property in accordance with such will or trust agreement if the distribution or disposition is otherwise proper and the personal representative, trustee

or other person has no actual knowledge of the facts that constitute a revocation of the surviving spouse's rights as a devisee or a beneficiary under the will or trust under this section. (R.C., c. 118, s. 12; 1868-9, c. 93, s. 38; Code, s. 2109; Rev., s. 3081; C.S., s. 4097; 1959, c. 880, s. 1; 1961, c. 959, s. 3; 1965, c. 849, s. 1; 1971, c. 19; 1989, c. 590.)

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 1989 amendment, effective October 1, 1989 and applicable to the estates of all decedents dying on or after that date, in subsection (c), in the first paragraph, substituted "a share" for "an intestate share," and inserted "determined by reference to the Intestate Succession Act as," and added the second paragraph; and added subsection (d).

Legal Periodicals. —

For comment, "The North Carolina Dissent Statutes: The Seeds of Inequities 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).

ARTICLE 4.

Year's Allowance.

Part 2. Assigned by Magistrate.

§ 30-19. Value of property ascertained.

The value of the personal property assigned to the surviving spouse and children shall be ascertained by a magistrate of the county in which administration was granted or the will probated. (1868-9, c. 93, s. 13; Code, s. 2121; Rev., s. 3097; C.S., s. 4114; 1961, c. 749, s. 5; 1971, c. 528, s. 22; 1989, c. 11, s. 1.)

Editor's Note. — Session Laws 1989, c. 11, s. 6 provides that the act shall apply to applications for the assignment of a year's allowance made on or after October 1, 1989.

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, deleted "and two persons qualified to act as jurors" following "by a magistrate". As to the applicability of this amendment, see the Editor's note.

§ 30-20. Procedure for assignment.

Upon the application of the surviving spouse, a child by his guardian or next friend, or the personal representative of the deceased, the clerk of superior court of the county in which the deceased resided shall assign the inquiry to a magistrate of the county. The magistrate shall ascertain the person or persons entitled to an allowance according to the provisions of this Article, and determine the money or other personal property of the estate, and pay over to or assign to the surviving spouse and to the children, if any, so much thereof as they shall be entitled to as provided in this Article. Any deficiencies shall be made up from any of the personal property of the deceased, and if the personal property of the estate shall be insufficient to satisfy such allowance, the clerk of the superior court shall enter judgment against the personal representative for the amount of such deficiency, to be paid when a sufficiency of such assets shall come into his hands. (1870-1, c. 263; Code, s. 2122; 1891, c. 13; 1899, c. 531; Rev., s. 3098; C.S., s. 4115; 1961, c. 749, s. 6; 1971, c. 528, s. 23; 1989, c. 11, s. 2.)

Editor's Note. — Session Laws 1989, c. 11, s. 6 provides that the act shall apply to applications for the assignment of a year's allowance made on or after October 1, 1989.

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, in the first sentence, substituted "a child by his guardian or next friend, or the personal representative of the deceased," for "or whenever it shall appear that a child is entitled to an allowance as provided by G.S. 30-17, the personal representative of the deceased shall apply to", and "shall assign" for "to assign" and near the beginning of the second sentence, deleted "shall summon two persons qualified to act as jurors, who, having been sworn by the magistrate to act impartially as commissioners" following "The magistrate", and "with him," preceding "ascertain the person".

As to the applicability of this amendment, see the Editor's note.

§ 30-21. Report of magistrate.

The magistrate shall make and sign three lists of the money or other personal property assigned to each person, stating their quantity and value, and the deficiency to be paid by the personal representative. Where the allowance is to the surviving spouse, one of these lists shall be delivered to him. Where the allowance is to a child, one of these lists shall be delivered to the surviving parent with whom the child is living; or to the child's guardian or next friend if the child is not living with said surviving parent; or to the child if said child is not living with the surviving parent and has no guardian or next friend. One list shall be delivered to the personal representative. One list shall be returned by the magistrate, within 20 days after the assignment, to the superior court of the county in which administration was granted or the will probated, and the clerk shall file and record the same, together with any judgment entered pursuant to G.S. 30-20." (1868-9, c. 93, s. 15; Code, s. 2123; Rev., s. 3099; C.S., s. 4116; 1961, c. 749, s. 7; 1971, c. 528, s. 24; 1989, c. 11, s. 3.)

Editor's Note. — Session Laws 1989, c. 11, s. 6 provides that the act shall apply to applications for the assignment of a year's allowance made on or after October 1, 1989.

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "magistrate" for "commissioners" in the catchline and in the first sentence. As to the applicability of this amendment, see the Editor's note.

§ 30-23. Right of appeal.

The personal representative, or the surviving spouse, or child by his guardian or next friend, or any creditor, legatee or heir of the deceased, may appeal from the finding of the magistrate to the superior court of the county, and, within 10 days after the assignment, cite the adverse party to appear before such court on a certain day, not less than five nor exceeding 10 days after the service of the citation. (1868-9, c. 93, s. 16; Code, s. 2124; 1897, c. 442; Rev., s. 3100; C.S., s. 4117; 1961, c. 749, s. 9; 1989, c. 11, s. 4.)

Editor's Note. — Session Laws 1989, c. 11, s. 6 provides that the act shall apply to applications for the assigment of a year's allowance made on or after October 1, 1989.

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "magistrate" for "commissioners". As to the applicability of this amendment, see the Editor's note.

§ 30-24. Hearing on appeal.

At or before the day named, the appellant shall file with the clerk a copy of the assignment and a statement of his exceptions thereto, and the issues thereby raised shall be decided as other issues are directed to be. When the issues shall have been decided, judgment shall be entered accordingly, if it may be without injustice, without remitting the proceedings to the magistrate. (1868-9, c. 93, s. 17; Code, s. 2125; Rev., s. 3101; C.S., s. 4118; 1989, c. 11, s. 5.)

Editor's Note. — Session Laws 1989, c. 11, s. 6 provides that the act shall apply to applications for the assignment of a year's allowance made on or after October 1, 1989.

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "magistrate" for "commissioners" at the end of the second sentence. As to the applicability of this amendment, see the Editor's note.

Chapter 31.

Wills.

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, rehearing 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, rehearing 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, 88 N.C. App. 572, 364 S.E.2d 173, cert. denied, 322 N.C. 112, 367 S.E.2d 910 (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, 88 N.C. App. 251, 362 S.E.2d 826 (1987).

Where Testamentary Intent Must Appear. —

In accord with the main volume. See Stephens v. McPherson, 88 N.C. App. 251, 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, 88 N.C. App. 251, 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, rehearing 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, rehearing 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, 88 N.C. App. 572, 364 S.E.2d 173, cert. denied, 322 N.C. 112, 367 S.E.2d 910 (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, cert. denied, 321 N.C. 300, 362 S.E.2d 780 (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, cert. denied, 321 N.C. 300, 362 S.E.2d 780 (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 Parker, 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.

Legal Periodicals. — For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

I. GENERAL CONSIDERATION.

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

II. RULES OF CONSTRUCTION.

Intention of Testator. —

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, rehearing 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, rehearing 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. Where a devise or legacy of any interest in property is given to a person as a member of a class and the person predeceases the testator and is not survived by qualified issue, then, unless a contrary intent is

indicated by the will, the entire interest of such person shall devolve upon the members of the class who survived the testator and the qualified issue of any members of the class who predeceased the testator, taking by substitution as herein provided.

(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; 1989, c. 244.)

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

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, deleted the subsection catchlines of subsections (a) through (c), rewrote subsections (a) and (b), and substituted "If subsection (a) is not applicable" for "If subsections (a) and (b) above are not applicable" at the beginning of subsection (c).

The 1989 amendment, effective June 6, 1989 and applicable to the will of any person dying on or after that date, added the last sentence of subsection (a).

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, rehearing 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); In re Estate of Baumann, — N.C. App. —, 379 S.E.2d 107 (1989).

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, rehearing 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, rehearing 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, rehearing 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, rehearing 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 3.

Willful and Unlawful Killing of Decedent.

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 withholds his presence, his love, his care, and the opportunity to display filial affection, and willfully neglects to lend sup-

port 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 additional 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, 77 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, rehearing 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 accord with § 31-42(a). Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing 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, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

§ 31A-11. Insurance benefits.

(a) Insurance and annuity proceeds payable to the slayer:

(1) As the beneficiary or assignee of any policy or certificate of insurance on the life of the decedent, or

(2) In any other manner payable to the slayer by virtue of his surviving the decedent, shall be paid to the person or persons who would have been entitled thereto as if the slayer had predeceased the decedent. If no alternate beneficiary is

named, insurance and annuity proceeds shall be paid into the estate of the decedent.

(1961, c. 210, s. 1; 1989, c. 485, s. 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 1989, c. 485, s. 67, contains a severability clause.

Effect of Amendments. — The 1989 amendment, effective June 28, 1989, added the last sentence of subdivision (a)(2).

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.

Editor's Note. — The legislation and annotations affecting Chapter 31B have been included in a recently published replacement chapter.

Chapter 32.

Fiduciaries.

Article 3.

Powers of 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 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), rev'd on other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

Article 3.

Powers of Fiduciaries.

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

The following powers may be incorporated by reference as provided in G.S. 32-26:

(8.1) Comply with environmental law. —

a. To inspect property held by the fiduciary, including interests in sole proprietorships, partnerships, or corporations and any assets owned by any such business enterprise, for the purpose of determining compliance with environmental law affecting such property and to respond to any actual or threatened violation of any environmental law affecting property held by the fiduciary;

b. To take, on behalf of the estate or trust, any action necessary to prevent, abate, or otherwise remedy any actual or threatened violation of any environmental law affecting property held by the fiduciary, either before or after the initiation of an enforcement action by any governmental body;

c. To refuse to accept property in trust if the fiduciary determines that any property to be donated to the trust either is contaminated by any hazardous substance or is being used or has been used for any activity directly or indirectly involving hazardous sub-

stance which could result in liability to the trust or otherwise impair the value of the assets held therein;

d. To settle or compromise at any time any and all claims against the trust or estate which may be asserted by any governmental body or private party involving the alleged violation of any environmental law affecting property held in trust or in an estate;

e. To disclaim any power granted by any document, statute, or rule of law which, in the sole discretion of the fiduciary, may cause the fiduciary to incur personal liability under any environmental law;

f. To decline to serve as a fiduciary if the fiduciary reasonably believes that there is or may be a conflict of interest between it in its fiduciary capacity and in its individual capacity because of potential claims or liabilities which may be asserted against it on behalf of the trust or estate because of the type or condition of assets held therein.

g. For purposes of this subsection "environmental law" means any federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment or human health. For purposes of this subsection, "hazardous substances" means any substance defined as hazardous or toxic or otherwise regulated by any environmental law. The fiduciary shall be entitled to charge the cost of any inspection, review, abatement, response, cleanup, or remedial action authorized herein against the income or principal of the trust or estate. A fiduciary shall not be personally liable to any beneficiary or other party for any decrease in value of assets in trust or in an estate by reason of the fiduciary's compliance with any environmental law, specifically including any reporting requirement under such law. Neither the acceptance by the fiduciary of property or a failure by the fiduciary to inspect property shall be deemed to create any inference as to whether or not there is or may be any liability under any environmental law with respect to such property.

(1965, c. 628, s. 1; 1967, c. 24, s. 15; c. 956; 1971, c. 1136, s. 3; 1977, c. 30; 1989, c. 652, s. 20.)

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 Amendment. — The 1989 amendment, effective July 15, 1989, added subdivision (8.1).

Chapter 32A.

Powers of Attorney.

ARTICLE 1.

Statutory Short Form Power of Attorney.

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

Editor's Note. — Session Laws 1985, c. 162, effective May 7, 1985, which added "(Seal)" following the signature line in the form, as amended by Session Laws 1989, c. 390, s. 11, provides, in s. 2: "No power of attorney executed pursuant to Chapter 32A of the General Statutes prior to April 1, 1989, shall be invalid for the reason that the power of attorney was not signed by the principal under seal."

Chapter 33A.

North Carolina Uniform Transfers to Minors Act.

§ 33A-1. Definitions.

Legal Periodicals. — For note discussing the Uniform Transfers to Minors Act, see 66 N.C.L. Rev. 1349 (1988).

Chapter 34.

Veterans' Guardianship Act.

§ 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 provisions 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.

§ 34-14.1. Payment of veterans' benefits to relatives.

CASE NOTES

Cited in Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 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 Appointment 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 Advancements.

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 Irrevocable 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 I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

Article 1.

Determination of Incompetence.

Sec.

SUBCHAPTER II. GUARDIAN AND WARD.

Article 5.

Appointment of Guardian for Incompetent Person.

Article 6.

Appointment of Guardian for a Minor.

Article 7.

Guardian's Bond.

Article 9.

Powers and Duties of Guardian of the Estate.

Article 10.

Returns and Accounting.

Sec.

Article 13.

Removal or Resignation of Guardian; Successor Guardian; Estates Without Guardians; Termination of Guardianship.

SUBCHAPTER III. MANAGEMENT OF WARD'S ESTATE.

Article 14.

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

Article 15.

Mortgage or Sale of Estates Held by the Entireties.

Article 16.

Surplus Income and Advancements.

SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

ARTICLE 1.

Determination of Incompetence.

§ 35A-1101. Definitions.

When used in this Subchapter:

(11) "Interim guardian" means a guardian, appointed prior to adjudication of incompetence and for a temporary period, for a respondent who requires immediate intervention to address conditions that constitute imminent or foreseeable risk of harm to his physical well-being or to his estate.

(1987, c. 550, s. 1; 1989, c. 473, s. 11.)

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 1989 amendment, effective October 1, 1989, in subdivision (11), deleted "of the person" following "guardian", substituted "risk of harm" for "danger", and added "or to his estate."

§ 35A-1105. Petition before clerk.

A verified petition for the adjudication of incompetence of an adult, or of a minor who is within six months of reaching majority, may be filed with the clerk by any person, including any State or local human resources agency through its authorized representative. (1987, c. 550, s. 1; 1989, c. 473, s. 22.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, inserted "of an adult, or of a minor who is within six months of reaching majority."

§ 35A-1109. Service of notice and petition.

Copies of the petition and initial notice of hearing shall be personally served on the respondent. Respondent's counsel or guardian ad litem shall be served pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure. A sheriff who serves the notice and petition shall do so without demanding his fees in advance. The petitioner, within five days after filing the petition, shall mail or cause to be mailed, by first-class mail, copies of the notice and petition to the respondent's next of kin alleged in the petition and any other persons the clerk may designate, unless such person has accepted notice. Proof of such mailing or acceptance shall be by affidavit or certificate of acceptance of notice filed with the clerk. The clerk shall mail, by first-class mail, copies of subsequent notices to the next of kin alleged in the petition and to such other persons as the clerk deems appropriate. (1987, c. 550, s. 1; 1989, c. 473, s. 18.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, inserted "unless such person has accepted notice" in the third sentence; in the next to the last sentence inserted "or acceptance", and inserted "or certificate of acceptance of notice."

§ 35A-1114. Appointment of interim guardian.

(b) The motion shall set forth facts tending to show:

(1) That there is reasonable cause to believe that the respondent is incompetent, and

(2) One or both of the following:

a. That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his physical well-being and that requires immediate intervention;

b. That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate that requires immediate intervention in order to protect the respondent's interest, and

(3) That the respondent needs an interim guardian to be appointed immediately to intervene on his behalf prior to the adjudication hearing.

(c) Upon filing of the motion for appointment of an interim guardian, the clerk shall immediately set a date, time, and place for a hearing on the motion. The motion and a notice setting the date, time, and place for the hearing shall be served promptly on the respondent and on his counsel or guardian ad litem and other persons the clerk may designate. The hearing shall be held as soon as possible but no later than 15 days after the motion has been served on the respondent.

(d) If at the hearing the clerk finds that there is reasonable cause to believe that the respondent is incompetent, and:

(1) That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his physical well-being, and that there is immediate need for a guardian to provide consent or take other steps to protect the respondent, or

(2) That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate, and that immediate intervention is required in order to protect the respondent's interest,

the clerk shall immediately enter an order appointing an interim guardian.

(e) The clerk's order appointing an interim guardian shall include specific findings of fact to support the clerk's conclusions, and shall set forth the interim guardian's powers and duties. Such powers and duties shall be limited and shall extend only so far and so long as necessary to meet the conditions necessitating the appointment of an interim guardian. In any event, the interim guardianship shall terminate on the earliest of the following: the date specified in the clerk's order; 45 days after entry of the clerk's order unless the clerk, for good cause shown, extends that period for up to 45 additional days; when any guardians are appointed following an adjudication of incompetence; or when the petition is dismissed by the court. An interim guardian whose authority relates only to the person of the respondent shall not be required to post a bond. If the

interim guardian has authority related to the respondent's estate, the interim guardian shall post a bond in an amount determined by the clerk, with any conditions the clerk may impose, and shall render an account as directed by the clerk.

(1987, c. 550, s. 1; 1989, c. 473, s. 12.)

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 1989 amendment, effective October 1, 1989, rewrote subsection (b); inserted "and other persons the clerk may designate" in the next to the last sentence of subsection (c); and rewrote subsections (d) and (e).

§ 35A-1116. Costs and fees.

(a) Except as otherwise provided herein, costs shall be assessed as in special proceedings. Costs, including any reasonable fees and expenses of counsel for the petitioner which the clerk, in his discretion, may allow, may be taxed against either party in the discretion of the court unless:

(1) The clerk finds that the petitioner did not have reasonable grounds to bring the proceeding, in which case costs shall be taxed to the petitioner; or

(2) The respondent is indigent, in which case the costs shall be waived by the clerk if not taxed against the petitioner as provided above or otherwise paid as provided in subsection (b) or (c).

(1987, c. 550, s. 1; 1989, c. 473, s. 15.)

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 1989 amendment, effective October 1, 1989, inserted "including any reasonable fees and expenses of counsel for the petitioner which the clerk, in his discretion, may allow" in the introductory language of subsection (a).

SUBCHAPTER II. GUARDIAN AND WARD.

ARTICLE 4.

Purpose and Scope; Jurisdiction; Venue.

§ 35A-1207. Motions in the cause.

CASE NOTES

Chapter 35A contemplates a spousal support obligation. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Any interested person, including a spouse, may seek payment of an obligation from an incompetent's estate by filing a motion in the cause under this section. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

The duty to provide support to a dependent spouse is a continuing obligation, fairly chargeable to the estate of an incompetent; therefore, incompetent's wife's complaint for support stated a legally recognized claim. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Clerk of Superior Court Has Power to Determine Whether Incompetent's Spouse Is Granted Support. — The clerk of superior court—after first ensuring that the estate is ample to meet the expenses of caring for the incompetent—has residual equitable

power under Chapter 35A to examine the facts and circumstances of the case to determine whether the incompetent's spouse should be granted support from her husband's estate and the right to continue to live in his home; factors the clerk may consider include the size and condition of the estate, the present and future demands against it, and the spouse's needs. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

The district court was not the proper forum in which to seek spousal support from the estate of an incompetent; the superior court is the only proper division to hear matters regarding the administration of incompetents' estates; therefore, the incompetent's spouse should have made her demand for support before the clerk of superior court either as a motion in the cause pursuant to this section, or as a special proceeding for the sale of her husband's property under § 35A-1307. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

The estate of an incompetent may not be so depleted in favor of a spouse as to compromise the quality of care provided to the incompetent, or to force the incompetent to become a public charge; rather, in the limited instance in which an incompetent's estate is ample to provide for his own care and maintenance, an award of spousal support may properly be charged against the estate. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

If the guardian questions the propriety of a particular charge against the estate, he may seek prior court approval before making payment by filing a motion in the cause with the superior court clerk. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

ARTICLE 5.

Appointment of Guardian for Incompetent Person.

§ 35A-1211. Service of application, motions, and notices.

(a) Application for appointment of a guardian and related motions and notices shall be served on the respondent, respondent's counsel or guardian ad litem, other parties of record, and such other persons as the clerk shall direct.

(b) When the application for appointment of a guardian is joined with a petition for adjudication of incompetence, the application shall be served with and in the same manner as the petition for adjudication of incompetence. When the application is filed subsequent to the petition for adjudication of incompetence, the applicant shall serve the application as provided by G.S. 1A-1, Rule 5, Rules of Civil Procedure, unless the clerk directs otherwise. (1987, c. 550, s. 1; 1989, c. 473, s. 25.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "The respondent, respondent's counsel or guardian ad litem, other parties of record, and such other persons" for "the parties and on such other persons" in subsection (a); and rewrote subsection (b).

ARTICLE 6.

Appointment of Guardian for a Minor.

§ 35A-1221. Application before clerk.

(1987, c. 550, s. 1; 1989, c. 473, s. 24.)

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

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "Application" for "Petition" in the catchline.

§ 35A-1222. Service of application and notices.

The copy of the application and written notice of the time, date, and place set for a hearing shall be served on each parent, guardian, and legal custodian of the minor who is not an applicant, and on any other person the clerk may direct, including the minor. Service shall be provided by G.S. 1A-1, Rule 4, Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by the sheriff, the sheriff shall make such service without demanding his fees in advance. Parties may waive their right to notice of the hearing and the clerk may proceed to consider the application upon determining that all necessary parties are before the court and agree to have the application considered. (1987, c. 550, s. 1; 1989, c. 473, s. 19.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "each parent, guardian and legal custodian" for "any parent, guardian, or legal custodian"; and added the present second sentence.

§ 35A-1224. Criteria for appointment of guardians.

(b) The clerk may appoint as guardian of the person or general guardian only an adult individual whether or not that individual is a resident of the State of North Carolina.

(c) The clerk may appoint as guardian of the estate an adult individual whether or not that individual is a resident of the State of North Carolina or a corporation that is authorized by its charter to serve as a guardian or in similar fiduciary capacities.

(1987, c. 550, s. 1; 1989 c. 473, 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 1989 amendment, effective October 1, 1989, substituted "whether or not that individual" for "who" in subsections (b) and (c).

§ 35A-1227. Funds owed to minors.

(d) Inter vivos or testamentary transfers to minors may be made and administered according to the North Carolina Uniform Transfers to Minors Act, Chapter 33A of the General Statutes. (1987, c. 550, s. 1; 1989, c. 473, s. 23.)

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 1989 amendment in subsection (d) substituted "transfers" for "gifts" in two places, and substituted "Chapter 33A" for "Chapter 33."

ARTICLE 7.

Guardian's Bond.

§ 35A-1230. Bond required before receiving property.

Except as otherwise provided by G.S. 35A-1225(a), no general guardian or guardian of the estate shall be permitted to receive the ward's property until he has given sufficient surety, approved by the clerk, to account for and apply the same under the direction of the court, provided that if the guardian is a nonresident of this State and the value of the property received exceeds one thousand dollars ($1,000) the surety shall be a bond under G.S. 35A-1231(a) executed by a duly authorized surety company, or secured by cash in an amount equal to the amount of the bond or by a mortgage executed under Chapter 109 of the General Statutes on real estate located in the county, the value of which, excluding all prior liens and encumbrances, shall be at least one and one-fourth times the amount of the bond; and further provided that the nonresident shall appoint a resident agent to accept service of process in all actions and proceedings with respect to the guardianship. The clerk shall not require a guardian of the person who is a resident of North Carolina to post a bond; the clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties. (1987, c. 550, s. 1; 1989, c. 473, s. 2.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, rewrote this section.

§ 35A-1231. Terms and conditions of bond; increase on sale of realty or personal property.

(b) If the court orders a sale of the ward's real property, or if the guardian expects or offers to sell personal property that he knows or has reason to know has a value greater than the value used in determining the amount of the bond posted, the guardian shall, before receiving the proceeds of the sale, furnish bond or increase his existing bond to cover the proceeds if real estate is sold, or to

cover the increased value if personal property is sold. The bond, or the increase in the existing bond, shall be twice the amount of the proceeds of any real property sold, or of the increased value of any personal property sold, except where the bond is executed by a duly authorized surety company, in which case the penalty of the bond need not exceed one and one-fourth times the amount of the real property sold or the increased value of the personal property sold. (1987, c. 550, s. 1; 1989, 473, 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 1989 amendment, effective October 1, 1989, added "or personal property" in the catchline, and rewrote subsection (b).

§ 35A-1237. Relief of endangered sureties.

Any surety of a guardian, who is in danger of sustaining loss by his suretyship, may file a motion in the cause before the clerk where the guardianship is docketed, setting forth the circumstances of his case and demanding relief. The guardian shall have 10 days after service of the motion to answer the motion. If, upon the hearing, the clerk deems the surety entitled to relief, the clerk may order the guardian to give a new bond or to indemnify the surety against apprehended loss, or may remove the guardian from his trust. If the guardian fails to give a new bond or security to indemnify within a reasonable time when required to do so, the clerk must enter a peremptory order for his removal, and his authority as guardian shall cease. (1987, c. 550, s. 1; 1989, c. 473, s. 20.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "motion in the cause" for "complaint" in the first sentence; and substituted "have 10 days after service of the motion to answer the motion" for "be required to answer the complaint within 20 days after service of the summons" in the second sentence.

Article 9.

Powers and Duties of Guardian of the Estate.

§ 35A-1251. Guardian's powers in administering incompetent ward's estate.

In the case of an incompetent ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:

(17)a. Without a court order to lease any of the ward's real estate for a term of not more than three years, or to sell, lease or exchange any of the ward's personal property including securities, provided that the aggregate value of all items of the ward's tangible personal property sold without court order over the duration of the

estate shall not exceed one thousand five hundred dollars ($1,500). When any item of the ward's tangible personal property has a value which when increased by the value of all other tangible personal property previously sold in the estate without a court order would exceed one thousand five hundred dollars ($1,500), a guardian may sell the item only as provided in subdivision (17)b.

b. A guardian who is required by subdivision (17)a to do so shall, and any other guardian who so desires may, by motion in the cause, request the court to issue him an order to lease any of the ward's real estate or to sell any item or items of the ward's personal property. Notice of the motion and of the date, time and place of a hearing thereon shall be served, as provided in G.S. 1A-1, Rule 5, Rules of Civil Procedure, upon all parties of record and upon such other persons as the clerk may direct, and the court may issue the order after hearing and upon such conditions as the court may require; provided that:

1. A sale, lease, or exchange under this subdivision may not be subject to Article 29A of Chapter 1 of the General Statutes unless the order so requires; and
2. The power granted in this subdivision shall not affect the power of the guardian to petition the court for prior approval of expenditures from estate principal under subdivision (12) of this section.

(21) To expend estate income for the support, maintenance, and education of the ward's minor children, spouse, and dependents, and to petition the court for prior approval of expenditures from estate principal for these purposes; provided, the clerk, in the original order appointing the guardian or a subsequent order, may require that the expenditures from estate income also be approved in advance. In determining whether and in what amount to make or approve these expenditures, the guardian or clerk shall take into account the ward's legal obligations to his minor children, spouse, and dependents; the sufficiency of the ward's estate to meet the ward's needs; the needs and resources of the ward's minor children, spouse, and dependents; and the ward's conduct or expressed wishes, prior to becoming incompetent, in regard to the support of these persons. (1987, c. 550, s. 1; 1989, c. 473, ss. 3, 13.)

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 1989 amendment, effective October 1, 1989, rewrote subdivision (17), and added subdivision (21).

CASE NOTES

Guardian Is Under Fiduciary Obligation to Manage Estate Reasonably and Prudently. — The guardian is always under a fiduciary obligation to manage the estate reasonably, prudently, and in the ward's best interest, and in all cases, the guardian's management of the estate will eventually be

subject to judicial scrutiny. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Guardian Is Empowered to Make Expenditures Without Prior Court Approval Except When Property Mortgaged or Sold. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 35A-1252. Guardian's powers in administering minor ward's estate.

In the case of a minor ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:

(14)a. Without a court order to lease any of the ward's real estate for a term of not more than three years, or to sell, lease or exchange any of the ward's personal property including securities, provided that the aggregate value of all items of the ward's tangible personal property sold without court order over the duration of the estate shall not exceed one thousand five hundred dollars ($1,500). When any item of the ward's tangible personal property has a value which when increased by the value of all other tangible personal property previously sold in the estate without a court order would exceed one thousand five hundred dollars ($1,500), a guardian may sell the item only as provided in subdivision (14)b.

b. A guardian who is required by subdivision (14)a to do so shall, and any other guardian who so desires may, by motion in the cause, request the court to issue him an order to lease any of the ward's real estate or to sell any item or items of the ward's personal property. Notice of the motion and of the date, time and place of a hearing thereon shall be served, as provided in G.S. 1A-1, Rule 5, Rules of Civil Procedure, upon all parties of record and upon such other persons as the clerk may direct, and the court may issue the order after hearing and upon such conditions as the court may require; provided that:

1. A sale, lease, or exchange under this subdivision may not be subject to Article 29A of Chapter 1 of the General Statutes unless the order so requires; and
2. The power granted in this subdivision shall not affect the power of the guardian to petition the court for prior approval of expenditures from estate principal under subdivision (9) of this section.

(1987, c. 550, s. 1; 1989, c. 473, s. 4.)

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 1989 amendment, effective October 1, 1989, rewrote subdivision (14).

ARTICLE 10.

Returns and Accounting.

§ 35A-1261. Inventory or account within three months.

Every guardian, within three months after his appointment, shall file with the clerk an inventory or account, upon oath, of the estate of his ward; but the clerk may extend such time not exceeding six months, for good cause shown. (1987, c. 550, s. 1; 1989, c. 473, s. 26.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "Inventory or account" for "Return" in the catchline; substituted "file with" for "exhibit to"; and inserted "inventory or."

§ 35A-1262. Procedure to compel inventory or account.

(a) In cases of default to file the inventory or account required by G.S. 35A-1261, the clerk must issue an order requiring the guardian to file the inventory or account within the time specified in the order, or to show cause why he should not be removed from office or held in civil contempt, or both. If after due service of the order, the guardian does not, within the time specified in the order, file such inventory or account, or obtain further time to file the same, the clerk may remove him from office, hold him in civil contempt as provided in Article 2 of Chapter 5A, or both.

(b) The guardian shall be personally liable for the costs of any proceeding incident to his failure to file the inventory or account required by G.S. 35A-1261. Such costs shall be taxed against him by the clerk and may be collected by deduction from any commissions that may be found due the guardian upon final settlement of the estate. (1987, c. 550, s. 1; 1989, c. 473, s. 27.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, rewrote this section.

§ 35A-1263: Repealed by Session Laws 1989, c. 473, s. 28, effective October 1, 1989.

§ 35A-1263.1. Supplemental inventory.

Whenever any property not included in the original inventory report becomes known to the guardian or whenever the guardian learns that the valuation or description of any property or interest therein indicated in the original inventory is erroneous or misleading, he shall prepare and file with the clerk a supplementary inventory in the same manner as prescribed for the original inventory. The clerk shall record the supplemental inventory with the original inventory. A guardian who fails to file a supplementary inventory as required by this section shall be subject to the enforcement provisions of G.S. 35A-1262. (1989, c. 473, s. 29.)

Editor's Note. — Session Laws 1989, c. 473, s. 33 makes this section effective October 1, 1989.

§ 35A-1265. Procedure to compel accounting.

(a) If any guardian omits to account, as directed in G.S. 35A-1264, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such guardian to render a full and satisfactory account, as required by law, within 20 days after service of the order. Upon return of the order, duly served, if the guardian fails to appear or refuses to exhibit such account, the clerk may issue an attachment against him for contempt and commit him until he exhibits such account, and may likewise remove him from office. In all proceedings hereunder the defaulting guardian will be liable personally for the costs of the said proceedings, including the costs of service of all notices or writs incidental to, or thereby acquiring, and also including reasonable attorney fees and expenses incurred by a successor guardian or other person in bringing any such proceeding, or other proceedings deemed reasonable and necessary to discover or obtain possession of assets of the ward in the possession of the defaulting guardian or which the defaulting guardian should have discovered or which the defaulting guardian should have turned over to the successor guardian. The amount of the costs and attorney fees and expenses of such proceeding may be deducted from any commissions which may be found due said guardian on settlement of the estate. (1987, c. 550, s. 1; 1989, c. 473, s. 16.)

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 1989 amendment, effective October 1, 1989, rewrote subsection (a).

§ 35A-1266. Final account and discharge of guardian.

Within 60 days after a guardianship is terminated under G.S. 35A-1295, the guardian shall file a final account for the period from the end of the period of his most recent annual account to the date of that event. If the clerk, after review of the guardian's account, approves the account, the clerk shall enter an order discharging the guardian from further liability. (1987, c. 550, s. 1; 1989, c. 473, s. 32.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, rewrote this section.

§ 35A-1269. Commissions.

The clerk shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors under the provisions of G.S. 28A-23-3 and G.S. 28A-23-4. (1987, c. 550, s. 1; 1989, c. 473, s. 21.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, substituted "clerk" for "superior court"; and inserted "and G.S. 28A-23-4."

ARTICLE 13.

Removal or Resignation of Guardian; Successor Guardian; Estates Without Guardians; Termination of Guardianship.

§ 35A-1290. Removal by Clerk.

Editor's Note. — Session Laws 1989, c. 473, s. 30, effective October 1, 1989, substituted the present title of Article 13 for "Termination of Guardianship; Estates Without Guardians."

CASE NOTES

Editor's Note. *— The annotation in the main volume under this section, catchlined "Removal without Cause Is Error," relating to the case of Sanderson v. Sanderson, 79 N.C. 369 (1878), should be disregarded.*

§ 35A-1295. Termination of guardianship.

(a) Every guardianship shall be terminated and all powers and duties of the guardian provided in Article 9 of this Chapter shall cease when the ward:

(1) Ceases to be a minor as defined in G.S. 35A-1202(12),

(2) Is adjudicated to be restored to competency pursuant to the provisions of G.S. 35A-1130, or

(3) Dies.

(b) Notwithstanding subsection (a), a guardian of the estate or a general guardian is responsible for all accountings required by Article 10 of this Chapter until the guardian is discharged by the clerk. (1989, c. 473, s. 31.)

Editor's Note. — Session Laws 1989, c. 473, s. 33 makes this section effective October 1, 1989.

§§ 35A-1296 to 35A-1300: Reserved for future codification purposes.

SUBCHAPTER III. MANAGEMENT OF WARD'S ESTATE.

ARTICLE 14.

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

§ 35A-1301. Special proceedings to sell, exchange, mortgage, or lease.

(b) A guardian may apply to the clerk, by verified petition setting forth the facts, to sell, mortgage, exchange, or lease for a term of more than three years, any part of his ward's real estate, and such proceeding shall be conducted as in other cases of special proceedings. The clerk, in his discretion, may direct that the next of kin or presumptive heirs of the ward be made parties to such proceeding. The clerk may order a sale, mortgage, exchange, or lease to be made by the guardian in such way and on such terms as may be most advantageous to the interest of the ward, upon finding by satisfactory proof that:

(1) The ward's interest would be materially promoted by such sale, mortgage, exchange, or lease, or

(2) The ward's personal estate has been exhausted or is insufficient for his support and the ward is likely to become chargeable on the county, or

(3) A sale, mortgage, exchange, or lease of any part of the ward's real estate is necessary for his maintenance or for the discharge of debts unavoidably incurred for his maintenance, or

(4) Any part of the ward's real estate is required for public purposes, or

(5) There is a valid debt or demand against the estate of the ward; provided, when an order is entered under this subdivision, (i) it shall authorize the sale of only so much of the real estate as may be sufficient to discharge such debt or demand, and (ii) the proceeds of sale shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative, and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases.

The order shall specify particularly the property thus to be disposed of, with the terms of leasing or sale or exchange or mortgage, and shall be entered at length on the records of the court. The guardian may not mortgage the property of his ward for a term of years in excess of the term fixed by the court in its order.

(c) In the case of a ward who is a minor, no sale, mortgage, exchange, or lease under this Article shall be made until approved by the superior court judge, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale, mortgage, exchange, or lease

shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify.

(d) All petitions filed under this section wherein an order is sought for the sale, mortgage, exchange, or lease of the ward's real estate shall be filed in the county in which all or any part of the real estate is situated.

(1987, c. 550, s. 1; 1989, c. 473, 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 1989, c. 473, s. 5, effective October 1, 1989, substituted "Lease" for "Rental" in the title for Article 14.

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, in the catchline inserted "exchange", and substituted "lease" for "rent"; in subsection (b) in the introductory paragraph substituted "to sell" for "for the sale", substituted "lease for a term of more than three years" for "rental of", substituted "real estate" for "estate, real or personal", and substituted "lease" for "rental"; substituted "lease" for "rental" in subdivisions (b)(1) and (b)(3); deleted "or personal" preceding "estate" in subdivision (b)(3); deleted "personal or" preceding "real estate" in subdivision (b)(5); substituted "leasing" for "renting" in the first sentence of the last paragraph of subsection (b); substituted "lease under this Article" for "rental" in subsection (c); substituted "lease" for "rental" in subsections (c) and (d); and in subsection (d) deleted "or both real and personal property" following "real estate", and deleted the last sentence which read "If the order sought is for the sale, mortgage, exchange, or rental of the ward's personal estate, the petition shall be filed in the county in which any or all of such personal estate is situated."

CASE NOTES

Guardian Has Power to Make Expenditures Without Court Approval Except When Property Mortgaged or Sold. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 35A-1304: Repealed by Session Laws 1989, c. 473, s. 7, effective October 1, 1989.

§ 35A-1306. Abandoned incompetent spouse.

CASE NOTES

Guardian Has Power to Make Expenditures Without Court Approval Except When Property Mortgaged or Sold. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 35A-1307. Spouse of incompetent husband or wife entitled to special proceeding for sale of real 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 real 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; 1989, c. 473, s. 8.)

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.

The 1989 amendment, effective October 1, 1989, inserted "real" preceding "property" in the catchline and in the first sentence.

CASE NOTES

The duty to provide support to a dependent spouse is a continuing obligation, fairly chargeable to the estate of an incompetent; therefore, incompetent's wife's complaint for support stated a legally recognized claim. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Clerk of Superior Court Has Power to Determine Whether Spouse Should Be Granted Support. — The clerk of superior court—after first ensuring that the estate is ample to meet the expenses of caring for the incompetent—has residual equitable power under Chapter 35A to examine the facts and circumstances of the case to determine whether the incompetent's spouse should be granted support from her husband's estate and the right to continue to live in his home; factors the clerk may consider include the size and condition of the estate, the present and future demands against it, and the spouse's needs. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

The district court was not the proper forum in which to seek spousal support from the estate of an incompetent; the superior court is the only proper division to hear matters regarding the administration of incompetents' estates; therefore, the incompetent's spouse should have made her demand for support before the clerk of superior court either as a motion in the cause pursuant to § 35A-1207, or as a special proceeding for the sale of her husband's property under this section. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

The estate of an incompetent may not be so depleted in favor of a spouse as to compromise the quality of care provided to the incompetent, or to force the incompetent to become a public charge; rather, in the limited instance in which an incompetent's estate is ample to provide for his own care and maintenance, an award of spousal support may properly be charged against the estate. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

ARTICLE 15.

Mortgage or Sale of Estates Held by the Entireties.

§ 35A-1310. Where one spouse or both incompetent; special proceeding before clerk.

CASE NOTES

Guardian Has Power to Make Expenditures Without Court Approval Except Where Property is Mortgaged or Sold. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 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."

CASE NOTES

Guardian is Empowered to Make Expenditures Without Court Approval Except Where Property is Mortgaged or Sold. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

ARTICLE 16.

Surplus Income and Advancements.

§ 35A-1320: Repealed by Session Laws 1989, c. 473, s. 14, effective October 1, 1989.

Chapter 36A.

Trusts and Trustees.

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 Wrongful 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); rev'd on other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

§ 36A-3. Terms of creating instrument.

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

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

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

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

§ 36A-6. Employee trusts.

Legal Periodicals. —

For article, "A Proposal for a Simple and Socially Effective Rule Against Perpetuities," 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 pursuant to G.S.7.1 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 3.

Resignation, Removal, and Renunciation of Trustees.

§ 36A-22. Applicability of this Article.

CASE NOTES

Transfer of an action, seeking removal of a trustee, to civil issue docket by clerk of superior court was proper where petitioner alleged breach of fiduciary duties by the trustee. Such an issue is a civil matter which is not a part of the administration of the estate, but rather arises from their administration. Freer v. Weinstein, 91 N.C. App. 138, 370 S.E.2d 860, cert. denied, 323 N.C. 476, 373 S.E.2d 863 (1988).

§ 36A-24. Petition; contents and verification.

CASE NOTES

Cited in Freer v. Weinstein, 91 N.C. App. 138, 370 S.E.2d 860 (1988).

§ 36A-32. Rights and duties devolve on successor.

CASE NOTES

Cited in Freer v. Weinstein, 91 N.C. App. 138, 370 S.E.2d 860 (1988).

§ 36A-35. Removal of trustee.

CASE NOTES

Transfer of an action, seeking removal of a trustee, to civil issue docket by clerk of superior court was proper where petitioner alleged breach of fiduciary duties by the trustee. Such an issue is a civil matter which is not a part of the administration of the estate, but rather arises from their administration. Freer v. Weinstein, 91 N.C. App. 138, 370 S.E.2d 860, cert. denied, 323 N.C. 476, 373 S.E.2d 863, (1988).

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 noncharitable beneficiary of a charitable remainder trust will terminate not later than such payments would otherwise terminate under the governing instrument. (1981 (Reg. Sess., 1982), c. 1252, s. 1; 1985, c. 406, ss. 1-3.)

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

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

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

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

(b1) Selection of Alternative Charitable Beneficiary if Remaindermen do not Qualify under Section 170(b)(1)(A) of the Code at Time of Distribution. — Notwithstanding the foregoing provisions of G.S. 36A-59.4(b), if the designated charity is, at the time of the creation of the trust, an organization described in both Section 170(b)(1)(A) and Section 170(c) of the Code, and if the designated charity is not an organization described in both Section 170(b)(1)(A) and Section 170(c) of the Code when any principal or income of the trust is to be distributed to it, the trustee shall distribute the principal or income to one or more organizations then described in both Section 170(b)(1)(A) and Section 170(c) of the Code selected in accordance with the terms of the governing instrument; provided, however, that in the event the governing instrument does not provide a method of selecting alternative charitable beneficiaries that are then described in both Section 170(b)(1)(A) and Section 170(c) of the Code, the trustee shall, in his sole discretion, select one or more alternative charitable beneficiaries that are described in both Section 170(b)(1)(A) and Section 170(c) of the Code and shall distribute the principal or income to the organization or organizations so selected in such shares as the trustee, in his sole discretion, shall determine.

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

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

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

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

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

(d) Deferral of Annuity Amount during Period of Administration or Settlement. — When property passes to the trust at the death of the grantor, the obligation to pay the annuity amount commences with the date of death of the grantor, but payment of the annuity amount may be deferred from the date of the grantor's death to the end of the taxable year in which complete funding of the trust occurs. Within a reasonable time after the end of the taxable year in which the complete funding of the trust occurs, the trustee must pay to the beneficiary, in the case of an underpayment, or must receive from the beneficiary, in the case of an overpayment, the difference between:

(1) Any annuity amount actually paid, plus interest on such amounts computed at ten percent (10%) a year, compounded annually; and

(2) The annuity amounts payable, determined under the method described in Section 1.664-1(a)(5) of the federal income tax regulations, plus interest on such amounts computed at ten percent (10%) a year, compounded annually.

Notwithstanding the foregoing sentence, in computing any underpayment or overpayment of the annuity amounts, if the governing instrument was executed or last amended prior to August 9, 1984, and if the governing instrument does not specify that a ten percent (10%) rate of interest shall be used, the underpayment or overpayment of the annuity amounts shall be computed using an interest rate at six percent (6%) a year, compounded annually.

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

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

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

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

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

(f) Deferral of Unitrust Amount During Period of Administration or Settlement. — When property passes to the trust at the death of the grantor, the obligation to pay the unitrust amount commences with the date of the grantor's death, but payment of the unitrust amount may be deferred from the date of the grantor's death to the end of the taxable year of the trust in which complete funding of the trust occurs. Within a reasonable time after the end of the taxable year in which the complete funding of the trust occurs, the trustee must pay to the beneficiary, in the case of an underpayment, or

must receive from the beneficiary, in the case of an overpayment, the difference between:

(1) Any unitrust amounts actually paid, plus interest on such amounts computed at ten percent (10%) a year, compounded annually; and

(2) The unitrust amounts payable, determined under the method described in Section 1.664-1(a)(5) of the federal income tax regulations, plus interest on such amounts computed at ten percent (10%) a year, compounded annually.

Notwithstanding the foregoing sentence, in computing any underpayment or overpayment of the unitrust amounts, if the governing instrument was executed or last amended prior to August 9, 1984, and if the governing instrument does not specify that a ten percent (10%) rate of interest shall be used, the underpayment or overpayment of the unitrust amounts shall be computed using an interest rate of six percent (6%) a year, compounded annually.

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

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

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

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

ARTICLE 5.

Uniform Trusts Act.

§ 36A-63. Funds held by a corporation exercising fiduciary powers awaiting investment or distribution.

(a) Funds held in a fiduciary capacity by a bank, trust company, savings and loan association, or other corporation authorized to exercise the powers of a fiduciary, awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account. A corporation acting in a fiduciary capacity has complied with this requirement if such funds awaiting investment or distribution in excess of one thousand dollars ($1,000) are invested or distributed within 30 days of receipt or accumulation thereof.

(b) Funds held in a fiduciary capacity by a bank, awaiting investment or distribution may, unless prohibited by the instrument creating the fiduciary relationship, be deposited in the commericial or savings or other department of the bank, provided that it shall first set aside under control of the trust department as collateral security, such securities as may be found listed in G.S. 142-34 as being eligible for the investment of the sinking funds of the State of North Carolina equal in market value of such deposited funds, or

readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five percent (125%) of the funds so deposited.

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

If such funds are deposited in a bank insured under the provisions of the Federal Deposit Insurance Corporation, the above collateral security will be required only for that portion of uninvested balances of each trust which are not fully insured under the provisions of that corporation.

(c) Funds held in a fiduciary capacity by a corporate fiduciary awaiting investment or distribution may, unless prohibited by the instrument creating the fiduciary relationship, be invested in short-term, trust-quality investment vehicles, through the medium of a collective investment fund or otherwise.

(d) In addition to any other compensation to which it may be entitled under G.S. 28A-23-3, 32-50, 34-12, 35A-1269, or under any other authority, a corporation acting in a fiduciary capacity shall be allowed to charge a fee for the temporary investment of funds held awaiting investment or distribution, which fee may be calculated upon the amount of such funds actually invested and upon the income produced thereby. The fee authorized by this subsection shall not exceed twelve percent (12%) of the income produced by such investment. A corporation acting in a fiduciary capacity has complied with its duty to disclose fees and practices in connection with the investment of fiduciary funds awaiting investment or distribution if the corporation's periodic statements set forth the method of computing such fees. (1939, c. 197, s. 4; 1963, c. 243, ss. 1, 2; 1977, c. 502, s. 2; 1989, c. 443.)

Effect of Amendments. — The 1989 amendment, effective June 26, 1989, substituted "corporation exercising fiduciary powers" for "bank" in the catchline of the section; in subsection (a), inserted "trust company, savings and loan association, or other corporation authorized to exercise the powers of a fiduciary" in the first sentence, and added the second sentence; in the first paragraph of subsection (b), substituted "a fiduciary capacity" for "trust," and substituted "fiduciary relationship" for "trust"; and added subsections (c) and (d).

§ 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.

§ 36A-81. Liabilities for violations of Article.

CASE NOTES

Quoted in Freer v. Weinstein, 91 N.C. App. 138, 370 S.E.2d 860 (1988).

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.

Legal Periodicals. — For an article on ERISA spendthrift rules, see 11 Campbell L. Rev. 29 (1988).

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.

§ 36A-120. 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).

Chapter 38.

Boundaries.

§ 38-1. Special proceeding to establish.

CASE NOTES

Putting Title in Issue Converts Proceeding into Quiet Title Action. — Where the only issue to be tried is the location of a dividing line, it is a processioning proceeding under this Chapter. However, where title to the land is put in issue the clerk has no authority to pass on any question involved. He must transfer the proceeding to the regular session of superior court where it becomes in effect an action to quiet title pursuant to § 41-10. Cobb v. Spurlin, 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 8.

Business Trusts.

Sec.
39-48, 39-49. [Reserved.]

Article 9.

Disclosure.

Sec.
39-50. Death or illness of previous occupant.

Article 1.

Construction and Sufficiency.

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

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

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

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 Carolina — 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 certifying 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 property 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, cert. denied, 321 N.C. 296, 362 S.E.2d 778 (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).

A tenant in common has a right to demand an accounting from a cotenant; furthermore, plaintiff's action for an accounting was still ripe because the statute of limitations did not begin running until her demand for an accounting was refused. Beam v. Beam, 92 N.C. App. 509, 374 S.E.2d 636 (1988).

Once the parties were divorced, they no longer held the property as tenants by the entirety but as tenants in common. Smith v. Smith, 249 N.C. 669, 107 S.E.2d 530 (1959); Beam v. Beam, 92 N.C. App. 509, 374 S.E.2d 636 (1988).

The claim of a vested property right may not rest upon state enforcement 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).

Corporation Sold Subject to Its Corporate Debt. — A corporation holds its property subject to the payment of the corporate debts, and when a corporation sells or transfers its entire property to a purchaser, knowing the fact, the latter is chargeable with knowledge that the property is subject to the corporate debts and that equity will, in proper cases, allow the corporate creditors to follow the property into the hands of the purchaser, for satisfaction of their claims. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

When a corporation purchases all or substantially all of the assets of another corporation for grossly inadequate consideration, the transfer will be deemed fraudulent as to the selling corporation's creditors, regardless of whether the parties had the actual intent to defraud. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

Good will is an asset capable of be-

ing fraudulently conveyed, and where the good will is put beyond reach of creditors, equity will allow a money damage award equal to the value of the good will. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

Where one corporation purchases all or substantially all of the assets of another corporation, including the good will, in a manner deemed fraudulent, the selling corporation's creditors may follow the good will into the hands of the purchasing corporation and obtain a money damage award equal to its value. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

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 Entireties 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).

ARTICLE 8.

Business Trusts.

§§ 39-48, 39-49: Reserved for future codification purposes.

ARTICLE 9.

Disclosure.

§ 39-50. Death or illness of previous occupant.

In offering real property for sale it shall not be deemed a material fact that the real property was occupied previously by a person who died or had a serious illness while occupying the property; provided, however, that no seller may knowingly make a false statement regarding such past occupancy. (1989, c. 592, s. 1.)

Editor's Note. — Session Laws 1989, c. 592, s. 3 makes this article effective July 1, 1989, and applicable to acts or omissions occurring on or after July 1, 1989.

Chapter 40A.
Eminent Domain.

Article 1.

General.

ARTICLE 1.
General.

§ 40A-1. Exclusive provisions.

Local Modification. — City of Conover: 1985, c. 422; City of Hickory: 1985, c. 422; City of Rocky Mount: 1989, c. 328, s. 1; City of Wilson: 1989, c. 348, s. 1; City of Winston-Salem: 1985, c. 47; 1987, c. 95; Town of Apex: 1987, c. 70; Town of Maiden: 1985, c. 422.

CASE NOTES

Chapter Is Applicable to Private Landowners. — 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 condemnation. 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, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, 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, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.

(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. 162A-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.

(13) A regional transportation authority established under Article 26 of Chapter 160A of the General Statutes 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; 1989, c. 706, s. 3; c. 740, s. 1.1.)

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), substituted "Part B of Article 2 of Chapter 131E for the purposes stated in that Part" for "Article 12 of Chapter 131 for the purposes stated in that Article" and substituted "G.S. 131E-24(c)" for "G.S. 131-112" in subdivision (c)(3), and substituted "Chapter 162A" for "Chapter 162" in subdivision (c)(10).

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

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).

Session Laws 1989, c. 706, s. 3, effective October 1, 1989, in subdivision (b)(8) inserted "designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989", and inserted "effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate."

Session Laws 1989, c. 740, s. 1.1, effective August 8, 1989, added subdivision (c)(13).

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).

Cited in Batch v. Town of Chapel Hill, — N.C. App. —, 376 S.E.2d 22 (1989).

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, 321 N.C. 426, 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, 321 N.C. 426, 364 S.E.2d 399 (1988).

Question of Law. — While the dele-

gation 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, 321 N.C. 426, 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, 321 N.C. 426, 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, 321 N.C. 426, 364 S.E.2d 399 (1988).

III. PRIVATE CONDEMNORS.

A. In General.

Installation of water and sewer lines solely for the benefit of one individual'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, modified, 321 N.C. 252, 362 S.E.2d 553 (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 municipality 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

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).

Cited in VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 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

II. EXCEPTIONS AND APPEALS.

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, 89 N.C. App. 578, 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. — Franklin: 1989, c. 432, s. 1; Wake: 1985, c. 640, s. 2; County of Guilford and Cities of Greensboro and High Point: 1987, c. 669, s. 4; Town of Holly Springs: 1985 (Reg. Sess., 1986), c. 941.

CASE NOTES

Subsection (a) does not grant landowner a statutory right to bring an action for injunctive relief to bar condemnation proceeding and to prevent the title and the right to immediate possession of the property from vesting in defendant when under § 40A-45 landowner has an adequate remedy of law. Tradewinds Campground, Inc. v. Town of Atlantic Beach, 90 N.C. App. 601, 369 S.E.2d 365, cert. denied, — N.C. —, 373 S.E.2d 126 (1988).

§ 40A-45. Answer, reply and plat.

CASE NOTES

Section 40A-42(a) does not grant landowner a statutory right to bring an action for injunctive relief to bar condemnation proceeding and to prevent the title and the right to immediate possession of the property from vesting in defendant when under this section landowner has an adequate remedy of law. Tradewinds Campground, Inc. v. Town of Atlantic Beach, 90 N.C. App. 601, 369 S.E.2d 365, cert. denied, — N.C. —, 373 S.E.2d 126 (1988).

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 entitled. 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, 88 N.C. App. 207, 363 S.E.2d 184 (1987), cert. denied, 322 N.C. 113, 367 S.E.2d 916 (1988).

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

What Constitutes a "Project" under this Section. — Although defendant designated the entire widening of the road as a "project," where there was evidence that individual sections were also referred to as "projects," because the road was widened in sections by different contractors, and there were beginning and ending points to the widening of each section, these individual sections met the definition of "projects" for purposes of subsection (a). McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Where plaintiffs sued for inverse condemnation by city whose road widening project was composed of many separate projects performed by more than one contractor, the plaintiffs had 24 months from the completion of the individual section of road encroaching upon their property which for purposes of subsection (a) was the "project" involving the taking. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

The statutory time begins to run, etc. —

The individual section of widened roadway, which constituted the taking by inverse condemnation of plaintiff's property, was not completed until the maintenance period was completed; the statutory period runs from the completion of the "project," which does not necessarily mean it runs from the completion of construction. McAdoo v. City of

Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Applicability of Subsection (c). — Although subsection (c) provides that "nothing in this action shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property," it was not relevant in an inverse condemnation case, since an owner has no common-law right to bring a trespass action against a city. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Cited in Batch v. Town of Chapel Hill, — N.C. App. —, 376 S.E.2d 22 (1989).

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 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 entitled. 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, 88 N.C. App. 207, 363 S.E.2d 184 (1987), cert. denied, 322 N.C. 113, 367 S.E.2d 916 (1988).

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), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

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 reasonable 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), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

§ 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), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

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, 315 N.C. 702, 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.

§ 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).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

For article, "Requiem for the Rule in Shelley's Case", see 67 N.C.L. Rev. 681 (1989).

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

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

I. GENERAL CONSIDERATION.

Cited in McLain v. Wilson, 91 N.C. App. 275, 371 S.E.2d 151 (1988).

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

CASE NOTES

Where the signature cards for the savings and loan association accounts designated both parties "as joint tenants with right of survivorship" and instructed the savings and loan association "to act pursuant to any one or more of the joint tenants' signatures, shown below, in any manner in connection with this account and, ... to pay, without any liability for such payment, to any one or the survivor or survivors at any time," the withdrawal clause indicating that withdrawals were to be made only by the deceased party was disregarded and the contractual terms allowing both parties the right to act in any manner regarding the account controlled. McLain v. Wilson, 91 N.C. App. 275, 371 S.E.2d 151, cert. granted, 323 N.C. 625, 374 S.E.2d 588 (1988).

§ 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).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

§ 41-5. Unborn infant may take by deed or writing.

Legal Periodicals. —

For note on the wrongful death of a viable fetus, see 23 Wake Forest L. Rev. 849 (1988).

§ 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 Carolina — 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 Carolina — 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 technical 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 transfers of property that take effect on or after that date.

§ 41-7. Possession transferred to use in certain conveyances.

Legal Periodicals. — For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

§ 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

Betterments claim is not a claim of title to land. It is, instead, a claim demanding payment for permanent improvements to the land over and above the value of the use and occupation of the land. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

State Did Not Consent to Be Sued for Betterments. — Construing this section strictly, a claim for betterments is not a claim of title to land. The State therefore has not consented to be sued for betterments and is entitled to the full protection of its sovereign immunity. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

"Claim of Title to Land" Cannot Be Broadened to Include Claim for Betterments. — Sovereign immunity is a common-law doctrine to which the existing exceptions or waivers have been mandated by the legislature, and statutes which waive the benefits of the doctrine of sovereign immunity are to be strictly construed. Thus, the phrase "claim of title to land" contained in this section cannot be broadened to include a claim for betterments under § 1-340. The betterments statute does not, by its terms, create a right against the State. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

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

Legal Periodicals. — For article, "Requiem for the Rule in Shelley's Case", see 67 N.C.L. Rev. 681 (1989).

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

Legal Periodicals. — For article, "Requiem for the Rule in Shelley's Case", see 67 N.C.L. Rev. 681 (1989).

§ 41-12. Sales or mortgages of contingent remainders validated.

Legal Periodicals. — For article, "Requiem for the Rule in Shelley's Case", see 67 N.C.L. Rev. 681 (1989).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1989

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1989 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.

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Attorney General of North Carolina