North Carolina Legislative Updates
(Estate Planning and Fiduciary Law)
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Scope Note

This manuscript covers changes in North Carolina's General Statutes from the 2013 Long Session of the General Assembly. Because the session had not adjourned when I prepared this manuscript, there is some discussion of bills that have not been ratified. While the manuscript focuses on changes that affect the estate planning practice area, I have included discussions of other statutes not directly related to estate planning that may be relevant or of interest to estate planning attorneys.

I. RECAP OF FOURTH-GRADE CIVICS

The North Carolina General Assembly is a bicameral state legislature – it consists of a Senate and a House of Representatives. The Senate has 50 members, and the House has 120 members. Both Senators and Representatives have two-year terms. Representatives elect a Speaker who presides over the House. The current Speaker is Thom Tillis (R-Mecklenburg). The Lieutenant Governor presides over the Senate (Dan Forrest is the current Lieutenant Governor). The Senate also elects officers, including the President Pro Tempore. The current President Pro Tem is Phil Berger (R-Guilford/Rockingham). The President Pro Tem fills in when the Lieutenant Governor is not available, and is the second-highest official in the state Senate.

The General Assembly meets for a long session starting in January of each odd-numbered year. It adjourns the long session and then reconvenes for a short session in each even-numbered year. The long session typically lasts about six months. The short session typically goes for about six weeks.

Most new legislation is considered in the long session. In the short session, the General Assembly typically considers matters that were introduced and approved by one of the houses, but which were not reached by the other.

II. NEW LAWS RELATED TO ESTATE PLANNING AND FIDUCIARY LAW

A. SL 2013-91 – An Act to Update and Clarify Provisions of the Laws Governing Estates, Trusts, Guardianships, Powers of Attorney, and other Fiduciaries.

1. Out-of-state will probate and military wills

N.C.G.S. § 31-11.6 was revised to provide that a will can be self proved in North Carolina if:

- The will includes the attestation language contained in N.C.G.S. § 31-11.6 and is properly executed and notarized;
- The propounder of the will shows, to the clerk's satisfaction, that the will was made self proving under the laws of another state; OR
- It complies with the rules for self-proved military wills.

Questions: What proof is required to satisfy the clerk that a will was made self proving under the laws of another state?

Affidavit from an attorney in that state?

Will there be any presumption that a will that appears to be valid on its face complies with the laws of another state?

Will treatment of out-of-state wills vary from county to county?

N.C.G.S. § 31-46 (Validity of will; which laws govern) was revised to be consistent with the changes to § 31-11.6. It now provides that a will is valid if it is consistent with North Carolina law OR (this is the new part:) it complies with the law of the place where it was executed, its execution complies with the law of the place where the testator was domiciled at time of death, or it is a testamentary instrument.

Observation: This would apply when you have a will that was probated in another state (because the decedent lived in another state), and you want the out-of-state will (or an exemplified copy) to be probated in North Carolina and to be effective to convey title to real property.

N.C.G.S. § 28A-2A-17 deals with the recordation of a certified copy of the will of a nonresident, and was revised to expressly provide that wills valid under § 31-46 are effective to pass title or otherwise dispose of real estate in North Carolina.

These changes were intended to allow a valid testamentary instrument to be effective, even if it does not comply exactly with the language of North Carolina's self-proving statute. The changes arose out of anecdotal evidence that valid wills were not admitted to probate or were not effective to pass title to real property, solely because they did not comply with every part of North Carolina's self-proving statute. An example of the problem which this fixes is the tale that a will was denied probate because the witness attestation clause failed to state that the testator was over 18 years of age, even if other evidence was available to prove that the testator was over 18 years of age at the time of execution of the will.

2. Elective Share Change

The elective share statute was changed in a substantial way: the percentage, or applicable share, of the surviving spouse has been changed. In the past, the applicable share was tied (to some degree) to North Carolina's intestacy statute, with an additional reduction that reduced the share of surviving spouse when (1) the surviving spouse was a second or successive spouse; (2) the decedent had children that were not also children of the surviving spouse; and (3) the decedent and the surviving spouse had no children together.

The changes modernize the statute and bring it more in line with the elective share/dissent statutes of other states. The change is also more consistent with the approach of the Uniform Probate Code.

N.C.G.S. § 30-3.1 still provides that the elective share is an amount equal to (i) the applicable share of the Total Net Assets, less (ii) the value of Net Property Passing to Surviving Spouse. The applicable share was changed and is now a percentage based on the length of the marriage. It was discussed that a length-of-marriage approach was more equitable than an approach based on whether a marriage produced children, and whether a marriage was a first marriage. Of course, the elective share is a fairly blunt tool, and is generally not an ideal way to have an estate divided. When an elective share claim is made, it is almost certain that all parties interested in the estate will be less than thrilled with the outcome.

Under the new length-of-marriage approach, the applicable share is as follows:

Length of Marriage	**Applicable Share Percentage**
Less than 5 years	15%
At least 5 but less than 10 years	25%
At least 10 but less than 15 years	33%
15 years or more	50%

There is no longer any reduction for a second marriage, and the applicable share percentage is not dependent on whether the decedent had children or how many children the decedent had.

Notes: (1) Most deceased spouses leave more, by will or intestate succession, to their surviving spouse. (2) This statute defines only the minimum that a spouse must leave his or her surviving spouse. It does NOT define the share a spouse takes in the absence of a will. (3) This

change will not affect prenuptial agreements or other agreements and documents in which a spouse waives his or her rights to an elective share.

The elective share change is effective October 1, 2013 and applies to estates of decedents dying on or after that date.

3. Limited Personal Representatives

A limited personal representative can be appointed in certain circumstances where a full estate administration is not required. The limited personal representative can run a notice to creditors. Previously, some clerks had interpreted the limited personal representative statute in a very restrictive way, so that it could only be used if the decedent had no property in the decedent's individual name. Thus, some clerks would not allow a limited personal representative to be appointed where the decedent had no assets subject to probate but did have real property (the argument was that real property could potentially be subject to probate if it was needed to pay a decedent's debts).

N.C.G.S. § 28A-29-1 was amended to provide that a limited personal representative can be appointed and can run a notice to creditors where:

- The decedent left no personal property subject to probate and no real property devised to the personal representative;
- The decedent's property is being collected by collection by affidavit pursuant to Article 25 of Chapter 28A;
- The decedent's estate is being administered under the summary administration provisions of Article 28 of Chapter 28A;
- The decedent's estate consists solely of a motor vehicle that can be transferred by the procedure authorized by G.S. § 20-77(b); or
- The decedent left assets that may be treated as assets of an estate for limited purposes as described in G.S. § 28A-15-10 (tentative trusts, gifts *causa mortis*, joint accounts with right of survivorship, certain securities passing to a beneficiary)

This revision should allow for more use of the limited personal representative statute.

4. Decanting Statute Improvements

G.S. § 36C-8-816.1 is a modern "decanting" provision, which allows a trustee who has the discretion to distribute both principal and income to distribute those assets by "pouring" the assets of one trust into another trust designed to protect the interests of the beneficiaries to whom the distribution is made. This power is subject to certain limitations, including notice to the qualified beneficiaries and their right to object.

One limitation on the trustee's ability to decant is that the interest of a beneficiary may not be reduced in certain circumstances. The change to G.S. § 36C-8-816.1(1)(c)(3) clarified that these limitations apply only if a current interest in the trust has come into effect, which of course is the whole point of the decanting statute. Previously, the statute did not expressly state that a beneficiary's fixed income, annuity, or unitrust interest could be reduced before it became effective, although many practitioners interpreted the statute that way (reasonably).

An additional change to G.S. § 36C-8-816.1(e)(2) deleted an outmoded reference to the rule against perpetuities as a limitation on the power to decant.

5. Insurable Interest

A new section was added to the Uniform Trust Code to clarify North Carolina law with regard to whether the trustee of an irrevocable life insurance trust had an insurable interest in the life of the decedent. This clarification was made in response to some federal district court cases from 2005 that raised the specter that a trustee might not have an insurable interest in the life of the settlor of an irrevocable life insurance trust.

The new N.C.G.S. § 36C-1-114 provides that a trustee does have an insurable interest if the insured is either (1) the settlor of the trust, or (2) an individual in whom the settlor of the trust has an insurable interest or would have had an insurable interest, if living at the time the policy was issued. The life insurance proceeds must also be primarily for the benefit of one or more trust beneficiaries that have an insurable interest in the life of the insured.

This new section follows the lead of the Uniform Law Commission's model "Insurable Interest Amendments to the Uniform Trust Code."

6. Inherited IRAs are Exempt from Creditor Claims

Debtors are entitled to retain certain assets under North Carolina law, free of the enforcement of the claims of creditors. These provisions are contained in N.C.G.S. § 1C-1601(a). This statute was amended to state that assets held in an IRA remain exempt after an individual's death if they are held by one or more subsequent beneficiaries by reason of a direct transfer or eligible rollover that is excluded from gross income.

With this change, it is clear that inherited IRA assets are exempt from the claims of creditors. For example, if two children of the decedent who established the IRA are named the beneficiaries of the IRA, and "roll over" their shares so that they are held in inherited IRAs, the inherited

IRA assets are exempt from the claims of both the decedent's creditors and the children's creditors so long as they save them for their retirement.

7. Attorneys' Fees on Year's Allowance

When a spouse seeks a year's allowance in excess of the presumptive statutory amount of $20,000, the clerk of court hears the matter as a special proceeding. The clerk hears evidence about why the surviving spouse is seeking the additional allowance (which is limited to one-half of the average annual income of the decedent for the three years preceding his or her death), and determines the allowance. N.C.G.S. § 30-31 was amended to clarify that the clerk has the power to order that the estate pay the surviving spouse's attorneys fees and costs, and that if they are so paid, they are properly categorized as administrative expenses.

8. Guardianship Gifting

The general guardian or guardian of the estate of an incompetent person can make gifts of the ward's property, with the court's approval.

The court may approve gifting if the court determines that the donee is the spouse, parent, descendant of the incompetent, or descendant of the incompetent's parent, and the gift qualifies for the federal annual gift tax exclusion under section 2503(b) of the Internal Revenue Code, or is a qualified transfer for tuition or medical expenses under section 2503(e) of the Internal Revenue Code. Previously, only annual exclusion gifts were allowed. (This change was effected by revisions to N.C.G.S. § 35A-1336.1 and 35A-1341.1.)

In addition, the statute regarding the powers of a guardian was modified to state expressly that a guardian may take actions, including seeking approval for gifts, for the purposes of tax planning and public benefits planning. (N.C.G.S. § 35A-1251) This change is helpful for people who deal with guardianships, as it makes it clear that these are proper planning purposes for a guardian to consider.

9. Wrongful Death Statute

There was a small revision of N.C.G.S. § 28A-18-2 to clarify that claims filed for burial expenses and reasonable hospital and medical expenses of a decedent for whom a wrongful death claim has been prosecuted must be approved by the clerk of court before they are paid.

10. Clarifications

a. Trustee Powers Clarification (Help with Fiduciary Income Tax)

N.C.G.S. § 36C-8-816 was amended to allow a trustee to make certain elections with respect to federal, state, and local taxes, including, but not limited to, considering discretionary distributions to a beneficiary as being made from capital gains realized during the year.

This change gives specific statutory authority to trustees to utilize the exception under the Treasury regulations that allows capital gains to be carried out in distributable net income when the trustee of a discretionary trust deems a distribution to be made from capital gains.

b. UTC definition of "settlor's spouse"

Clarified that for the purposes of N.C.G.S. § 36C-5-505(c) (which deals with an irrevocable trust that is exempt from creditors claims, even though technically "self settled"), the term "settlor's spouse" refers to the settlor's spouse at the time the trust was created.

c. Clarification as to Directed Fiduciaries

The topic of directed fiduciaries is covered in a whole separate presentation, so I will just note that the statute that deals with fiduciaries other than trustees was modified to make its provisions with regard to directed fiduciaries mirror the provisions for directed trustees in the UTC. N.C.G.S. § 32-72(d) was modified.

11. Update to North Carolina Investment Advisers Act

The North Carolina Investment Advisers Act was revised to address changes made in federal law governing investment advisers. These changes were recommended by the Estate Planning and Fiduciary Law Section, the NCBA's Business Law section and the Securities Division of the Secretary of State's office.

N.C.G.S. § 78C-2 and 78C-8 were amended address changes to the federal law made by the Dodd-Frank Act. "Family offices" maintained by high net worth families to manage their wealth were exempted under the old federal law by the "private adviser" exemption for less than 15 clients. Dodd-Frank did away with this exemption, which was referenced in North Carolina law, but provided that the SEC would define "family offices" that meet certain criteria. These sections continue the policy of not requiring family offices to be registered and also preserve the private adviser exemption at the state level. The revisions also continue the policy of allowing private advisers to charge performance-based fees.

Note on effective date: The changes in S.L. 2013-91 are all effective as of June 12, 2013, except for the elective share change.

B. S.L. 2013-81 – Increase of Year's Allowance

Increases the spouse's year's allowance to $30,000.

Effective on January 1, 2014, and applies to estates of persons dying on or after that date.

C. H101 – Repeal Estate Tax

Proposal to repeal all of Article 1A of Chapter 105. (The title of Article 1A is "Estate Taxes.") If passed, it would be retroactive to January 1, 2013 and apply to estates of decedents dying on or after that date.

It passed the House of Representatives, and is now under consideration by the Finance Committee in the Senate.

A legislative fiscal note was issued in February that stated that the State would lose the following amounts of general fund revenue if the estate tax is repealed: $52 million in 2013-14; $57 million in 2014-15; $60 million on 2015-16; $63 million in 2016-17; and $66 million in 2017-18. This analysis was based on a $5 million exclusion amount.

D. H399 – Changes Related to Medicaid Estate Recovery

When a person receiving Medicaid dies, the Department of Health and Human Services (DHHS) can file a claim with the decedent's estate to be repaid for certain amounts spent by the Department on the decedent's care. This bill changes and clarifies the rights of that department.

The proposed changes clarify that:

- DHHS has all the rights available to estate creditors, including the right to qualify as a collector or personal representative. Changes to N.C.G.S. § 108A-70.5(b)(2).
- DHHS originally proposed changing the language regarding estate recovery to include recovery against a life estate, when the decedent was the life tenant. Many sections of the Bar Association pointed out that there were problems with this idea.
- DHHS had proposed that notice be sent to DHHS in all estates in North Carolina, to assist DHHS in determining when to file a claim. That language, through negotiation, was changed to provide that if the decedent was receiving medical assistance from DHHS, the PR must give a notice to DHHS. In essence, this makes DHHS a known creditor when a

decedent was receiving medical assistance. Changes to N.C.G.S. § 28A-14-1(b).

- The proposal also modifies N.C.G.S. § 28A-19-6 to state that DHHS is a 6th class creditor, but is in line behind other 6th class creditors whose judgments were docketed and in force before DHHS sought recovery.
- DHHS also proposed that trustees would have to notify DHHS of the trust's existence whenever *any beneficiary* of the trust was receiving assistance or medical care from DHHS. The proposal may have betrayed a lack of understanding of the numerous ways that trusts are used, but through negotiation, the proposal was changed to provide that if the settlor of a revocable trust was receiving medical assistance and if the trustee knows of that medical assistance, then the trustee must give notice of the decedent's death to DHHW within 90 days of the person's death.

This bill has passed the House and is under consideration in the Finance Committee of the Senate.

E. S.L. 2013-198 – Children Born out of Wedlock

Revised our statutes to allow a child born out of wedlock to inherit from a person who died prior to or within one year after the birth of the child if paternity can be established by DNA testing.

Under current law, for an child born out of wedlock to inherit from the child's father, the child must show that the father was adjudged to be the child's father or the farther must have acknowledged in a written instrument that the child is his, and then filed that instrument in the office of the clerk during the father's lifetime and the child's lifetime. N.C.G.S. § 29-19.

The change allows a child born out of wedlock to inherit from the child's father if the father died prior to or within one year of the child's birth and is established by DNA testing to be the child's father.

The rules for a child born out of wedlock to inherit from the child's father also apply when the question is whether the child's putative father inherits from the child.

The change allows paternity to be established, for inheritance purposes, by DNA testing in certain circumstances would also apply to a child's claim for a year's allowance. N.C.G.S. § 30-17.

The session law also makes revisions throughout the General Statutes to eliminate the term "illegitimate" when used in connection with an individual and to remove references to "bastardy."

The sections that were revised are: § 6-21 (relating to costs in proceedings regarding children born out of wedlock); §14-325.1 (relating to failure to pay

child support); §15-155.2 (DA action with regard to children born out of wedlock and Work First family assistance); §15-155.3; §29-12 (Escheats); §29-18 (Succession by, through, and from legitimated children); §29-19 (Succession by, through and from children born out of wedlock); §29-20 (Descent and distribution upon intestacy of children born out of wedlock); §29-21 (Share of surviving spouse); §29-22 (Shares of others than surviving spouse); §30-17 (When children entitled to allowance); §31-5.5 (After-born or after-adopted child; children born out of wedlock; effect on will); all of chapter 49 (formerly titled "Bastardy"); §50-11(b); §97-2 (Definitions – Workers Compensation statute); §130A-119 (Clerk to furnish State Registrar with facts as to paternity of children born out of wedlock when judicially determined); .and §143-166.2(a) and (c) to include a child born out of wedlock as a dependent child of determining whether a child should receive benefits as a result of the child's father's death when the father was an officer, fireman, rescue squad worker, or senior member of the Civil Air Patrol killed in the line of duty).

F. S403 – Funeral Investments

(Passed Senate, now in House Committee on Banking)

The revisions to N.C.G.S. § 65-60.1(e) and 90-210.61(a)(1) allow a trustee holding cemetery trust funds to invest those funds consistent with the Uniform Prudent Investor Act contained in Article 9 of the UTC. It also allows preneed funeral funds to be invested consistent with the Uniform Prudent Investor Act. The change allows preneed funeral funds to be held in commingled trust accounts, for ease of management of the funds.

III. LIMITED LIABILITY COMPANY ACT – RESTATED[1]

The North Carolina Limited Liability Company Act was completely restated. It is now contained in Chapter 57D of the General Statutes. See S.L. 2013-157.

Observation: Be sure to update your documents to refer to the right chapter!

LLCs are used more and more in both traditional business situations and in estate planning. We use LLCs in the place of partnerships, for asset management, for planning for families, and for creditor protection purposes.

A. Affirmation of Contractual Underpinnings of the North Carolina Limited Liability Company Act.

[1] This summary of the changes to the LLC Act is based upon (and largely copies) a summary of the overhaul of the North Carolina LLC act prepared by Warren P. Kean, K&L Gates LLP, Chair of the Revised LLC Act Drafting Committee, with Mr. Kean's permission.

The public policy underlying the North Carolina Limited Liability Company Act (the "Act") is stated in G.S. § 57D-10-01(c): "It is the policy of this Chapter to give the maximum effect to the principle of freedom of contract and the enforceability of operating agreements." The revisions to the Act were intended more clearly, concisely, and effectively to achieve and implement that stated public policy objective.

1. No writing requirement. The revisions to the Act eliminate all requirements that any part of a North Carolina limited liability company's operating agreement be in writing. The revisions, however, do not go as far as the Delaware Limited Liability Company Act, which makes the "statute of frauds" inapplicable to Delaware limited liability company agreements. Under the revised Act, the operating agreement may be established in the same ways as any contract: i.e., by written, oral, or implied assent among the parties to the contract. As under the current Act, however, the parties may require that all of the components of the operating agreement be in a signed, written document or in any other prescribed form.

2. Supplemental Nature of the Act. In furtherance of the foregoing, the revised Act would establish that its provisions concerning the internal affairs of North Carolina limited liability companies are intended to apply only if, and to the extent, other provision is not made in the operating agreement. Accordingly, parties are free to modify, waive, and nullify the rules of the Act that would otherwise govern their respective rights and duties. The limited extent to which that freedom of contract is restricted is set forth in Part 3 of Article 2 of the revised Act. (N.C.G.S. § 57D-2-30 through § 57D-2-40.)

3. Objective of the Revised Act. The objective of the revisions is to provide certainty and a more detailed framework and structure to allow members of a North Carolina limited liability company to be confident that their management and ownership arrangements will be accommodated by and enforced under the Act. This flexibility is partially achieved through the introduction of certain new defined terms:

    a. Those relating to the management of the limited liability company: "company officials" (which may but need not be "managers");

    b. Those relating to the two different types of owners of limited liability companies: "economic interest owners" (referred to under the prior version of the Act as "assignees") and "members," and in reference to either economic interest owners or members or both, "interest owners," and the interest held by either being referred to as an "ownership interest" instead of a "membership interest;"

c. Those relating to the economic interest of an owner: "contribution amount," "capital interest," and "economic interest."

d. These definitions (and others) are contained in N.C.G.S. § 57D-1-03.

4. Clarification of Matters that May be Agreed Upon by the Members. In addition to the members being able to require the operating agreement to be in writing or other prescribed form, the revised Act makes it clear that the members' freedom of contract extends to decisions concerning the following matters:

a. Management Duties – The duties of those responsible for the management of the company, including the scope or elimination of fiduciary and other duties except nonwaivable contractual duties, including the implied contractual covenant of good faith and fair dealing and the requirement that the terms of the contract not be unconscionable at the time they are made.

b. Exculpation and Indemnification – The liabilities and other consequences to those managing the company for any breach or failure in the performance of their duties.

c. Penalties – The imposition of penalties and other remedies for breach of the operating agreement or the occurrence of proscribed events.

d. ADR – The right of the parties to select the manner in which they are to resolve their disputes, including having such dispute resolution procedures supplant the right to bring derivative actions or actions to cause the company to be judicially resolved.

e. Information Rights – The right to establish certain rules and procedures concerning access that owners may have to certain information, while specifying the type of information that cannot be denied members who comply with prescribed rules and procedures.

B. Foreign Limited Liability Companies

The revised act harmonizes, where appropriate, the rules under the LLC Act with their counterparts under the Business Corporation Act. One such set of rules where this would be accomplished relates to foreign limited liability companies.

C. Clarifying, Modernizing, and Coordinating Provisions of the Act

The remaining revisions are more in the nature of clarifying (i.e., removing ambiguities), simplifying, and modernizing the Act and coordinating its provisions to accommodate the new concepts and features described above. These revisions include those described in the following non-exhaustive list:

1. Coordinating the terms relating to bankruptcy with the current United States Bankruptcy Code;

2. Clarifying that the flexibility of the Act accommodates entities and arrangements such as low profit limited liability companies without the need to adopt separate sets of provisions such as those found in G.S. § 57C-2-03;

3. Providing that organizers may act by majority consent;

4. Removing the requirement that the articles of organization state whether the LLC is "member-managed" or "manager-managed;"

5. Clarifying that an LLC need not have any managers – instead management may be vested in persons having different titles and different powers and duties as may be provided in the operating agreement;

6. Allowing managers to delegate responsibilities to other persons without the approval by the members unless the operating agreement provides otherwise;

7. Providing that the term of a limited liability company is presumed to be perpetual unless other provision is made in the operating agreement (instead of in the articles of organization);

8. Adopting rules of construction to eliminate repetition of phrases and qualifiers, to make the Act easier to read and more user friendly;

9. Clarifying and modernizing the default rules relating to capital contributions and excuses from performance and basing distributions on the proportional contributions (of services as well as capital) of the owners (including promises to make contributions in the future);

10. Conforming the default rules and procedures relative to derivative actions with those in the Business Corporation Act; and

11. The elimination of redundant and otherwise superfluous provisions, including (A) G.S. § 57C-10-03(b) and (c) (concerning the law of estoppel and agency when § 57C-10-05 broadly provides that rules of equity and law supplement those under the Act) and (B) § 57C-2-02(1)-(16)

(illustrating the types of powers a limited liability company may exercise when the breadth of the statement in that section that there are no limitations or restrictions to such power other than not engaging in illegal activity makes doing so unnecessary).

D. Other Changes of Note

1. Override of UCC §§ 9-406 and 9-408. Because the application of UCC §§ 9-406 and 9-408, as currently in effect, may allow a member to encumber his or her economic interest in breach of the operating agreement [which may result in the foreclosure of that interest under circumstances that may result in adverse tax consequences to the other members, the transfer of ownership of the economic interest to a corporation or other ineligible shareholder of an S corporation, for those LLCs that elect to be taxed as S corporations, or a technical termination under I.R.C. § 708(b)(1)(B)], the revised Act adopts the approach taken in states such as Delaware and Virginia (among other states, including those states that have recently restated their LLC Acts: Texas, Mississippi, and New Hampshire) not to have UCC §§ 9-406 and 9-408 apply to LLC ownership interests.

2. Certificate of Existence. An example of the type of clean-up undertaken by the revised LLC Act concerns the certificates of existence issued by the Secretary of State. While the current LLC Act provides that one may conclusively rely on a certificate of existence as to the existence of an LLC, one does so at his or her peril. This is because, as contracted from a corporation under the BCA, the filing of articles of dissolution is not the event that causes an LLC to dissolve. Thus, the Secretary of State is not in a position to certify as to whether the LLC has dissolved. All she can do is certify as to the status of the LLC's filings made in her office, which certification will be conclusive evidence as to the accuracy of its contents.

During the legislative process, new sections 57D-2-30(c) and (d) were added to provide that third parties may reasonably rely on documents filed with the Secretary of State, which is further inducement to keep current the information provided in an LLC's annual report, and written operating agreements that have been provided to third parties.

3. Deletion of Low Profit Limited Liability Company (L3C) Provisions. As under current law, the flexibility of the restated Limited Liability Company Act accommodates the organization of limited liability companies that qualify for "program related investments" under I.R.C. § 4944(c) by private foundations, without the need for any additional or special provisions under Chapter 57C.

E. Priority of Charging Orders

During the legislative process, new § 57D-5-03(b) was added to provide for the priority of multiple charging orders on the same economic interest (the first in time has priority, except in the case where a prejudgment garnishment order had been issued).

IV. AMENDMENTS TO NC BUSINESS CORPORATIONS ACT – S.L. 2013-153

A. Modernizes the Business Corporations Act to allow shareholders' meetings to take place with remote participation. The Board of Directors of the corporation can adopt guidelines and procedures for remote participation, and the statute provides that the corporation must implement procedures to:

- Verify that each person participating remotely is a shareholder; and
- Provide each shareholder a reasonable opportunity to participate in the meeting and to vote on matters submitted to the meeting

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B. Makes changes to rules about delegation of director duties.

C. Makes changes allowing a board of directors to present certain matters to shareholders for a vote, even if the board does not or cannot recommend the action. For example, if the board is presenting a plan of merger or share exchange, but cannot recommend it because of a conflict of interest, the plan can still be submitted to shareholders for a vote.

V. NORTH CAROLINA INCOME TAX

This is so up in the air at the time I am writing this manuscript, I almost don't know what to say about it.

A. Several bills were introduced. Some common themes:

- Reducing the overall income tax rate
- Reducing/eliminating corporate income tax
- Increasing sales tax rates
- Imposing a sales tax on services
- Increasing the annual fees for various corporate and other entities

B. At the time of the preparation of this manuscript, HB 998 had been reported favorably out of the Senate Finance Committee (although Senator Bob Rucho (R-Mecklenburg) resigned as chairman of the Senate Finance Committee in protest over the legislation the committee approved). The bill:

- Steeply reduces personal income tax rates – a flat rate of 5.25% by 2015
- Eliminates corporate income tax and business franchise taxes by 2017 and 2018

- Repeals state-level sales tax on food effective November 2014
- Does not include extending sales taxes to services
- Eliminates some sales tax exemptions – movie tickets, back-to-school tax holidays
- Bill removes more than $4 billion from state revenues over 5 years

C. On the corporate tax side, the new tax scheme may be a disincentive to organize a North Carolina entity (other than a non-LLP general partnership). The bill includes a business privilege tax that would replace the annual fee for business entities and the franchise tax for corporations and income tax for corporations (phased in). The new annual tax will be $0 for non-LLP general partnerships, $5,000 for C corporations (which it appears would only apply to an entity that actually is a corporation, and not an alternate entity that files IRS Form 8832 to be classified as a corporation for federal tax purposes), and $750 for all other entities, including LLCs and S corporations. The tax would be imposed on all domestic entities, regardless of their activities in North Carolina, and all foreign entities that are "required to obtain a certificate of authority" under Chapter 57C/D to "transact business" in North Carolina.

If an LLC is going to hold investments or other assets, such as a holding company or family LLC/partnership that owns marketable securities or otherwise is not deemed to be transacting business in North Carolina, there may be an incentive to organize in another state – Delaware's annual tax is $250, and South Carolina's is $0. Perhaps the proposal will be amended to lower the tax in North Carolina to $250 or less for NC business entities that do not "transact business" in North Carolina.

VI. ELDER LAW

A. SL 2013-5 – Turn down federal expanded Medicaid funding, not operate a state-run or partnership health benefit exchange.

B. S.L. 2013-4 – Temporary Funding for Group Care Homes – Result of cuts in benefits of people who received personal care services (and risk of those people being turned out)

C. S.L. 2013-167 – Drug Testing for Long Term Care Facility Employees

Requires long-term care facilities to require applicants for employment and certain employees to submit to drug testing for controlled substances.

D. H 399 – Expand Medicaid Estate Recovery – discussed above

E. H 982 – Modify Medicaid subrogation rules in response to a U.S. Supreme Court that the State of North Carolina lost. (*Wos v. E.M.A.*, 568 U.S. ____ (2013).)

1. North Carolina had imposed an irrebuttable presumption that one-third of any tort recovery by a Medicaid beneficiary was attributable to medical expense and was therefore recoverable by the State.

2. The Supreme Court ruled in a 6-3 decision that the anti-lien provision of federal Medicaid law pre-empts North Carolina's statute.

3. The statute was revised to include a rebuttable presumption.

VII. CIVIL PROCEDURE/LITIGATION/THE COURTS

A. Change to Jurisdictional Amounts. S.L. 2013-159

1. Small claims cannot exceed $10,000.
2. District court – amount in controversy is $25,000 or less.
   a. Also court-ordered nonbinding arbitration
   b. Adds nonbinding arbitration for small claims verdicts that are appealed.
3. Superior Court – amount in controversy exceeds $25,000

B. S. L. 2013 -204/H 332 – Notary Act

1. Strikes requirement that to be commissioned, a Notary must get the recommendation of a publicly elected official
2. Clarifies the rules regarding notarization by a "party" to a transaction
3. For an attorney who is also a notary, requires notice to the State Bar if the notary commits an untoward act
4. Loosens restrictions – makes it easier to validate a jurat if the notary made a mistake (for example, wrote the wrong date of the expiration of their commission)
5. Changes the rules regarding recording a power of attorney that affects real property
6. Deals with corrective affidavits for deeds
7. Alternative procedure for satisfaction of security instruments.

C. H 926 – Creates a private right of action against a notary, allowing a party or attorney to seek damages or injunctive relief against a notary who violates the notary act.

D. S.L. 2013-225 – Court Fees

1. Arbitration in all district court civil cases, regardless of amount at issue, unless all parties waive arbitration.

2. If a case is designated as a complex business case, there is an additional $1,000 court fee, for support of the General Court of Justice.
3. Excepts motions filed pursuant to G.S. 1C-1602 or 1603 (for debtor to claim exemptions) and motions filed by a child support enforcement agency from the $20 motion filing fee.
4. Clarifies that counties and municipalities are required to pay all court costs at the time of filing (but the clerk can grant a 45 day extension for payment).

VIII. REAL PROPERTY

A. S.L. 2013-34 – Clarifies laws regarding the powers and duties of a planned community and amends the procedures regarding amendment of a recorded declaration of planned community. Also provides that a unit owner in a condominium and a land owner in a planned community have to give access, when necessary, to other owners for the purpose of maintenance or repairs.

It seemed like there were several bills about home owners associations and planned communities.

B. H 802 (passed house) – Shortens the time period required to evict a tenant.

C. S.L. 2013-117 – Technical correction to law related to lien agents

The laws regarding the filing of mechanics and materialmen's liens were substantially rewritten in the last legislative session. These 2012 changes make it imperative that parties to a construction contract act when they begin work to protect their real property lien and bond right claims, or risk losing them.

The law now requires the use of a lien agent, a company that is to track information concerning parties who may have potential real property lien rights. The idea is to create an easy and early way to identify potential lien claimants and avoid the risk of unknown claims arising after the property is sold or refinanced. Parties with lien rights (the contractor and, particularly, subcontractors) must give notice to the lien agent, and failure to give timely and full notice may result in the loss of lien rights.

The revision made it clear, also, that execution of a lien waiver by the general contractor can cut off the subcontractor's subrogation lien rights against the real property (but the subcontractor can still have a lien on property that may arise by

operation of law if the recipient of a notice of lien upon funds pays over funds without holding back adequate money to pay the lien on funds).[2]

The technical corrections make some clarifications applicable to personal residences and the use of a lien agent, and define a "custom contractor," among other changes.

IX. FAMILY LAW

A. S.L. 2013-140 – Amending the laws pertaining to contracts between a husband and wife to allow a spouse to waive or establish alimony and post separation support during the marriage.

Amends G.S. § 52-10 and 50-16.6(b).

1. Previously, alimony could only be waived in a *pre* marital agreement.
2. There was a long line of NC cases that held that attempts to contractually affect alimony after a marriage were not effective
3. This law overturns those cases.
4. Effective as of June 13, 2013.

B. S.L. 2013-27 – Uniform Deployed Parents Custody and Visitation Act

- Changes and loosens many of the rules that apply to child custody matters where a parent who is a member of the armed services is being deployed
- Allows for temporary custody agreements
- Allows for a power of attorney made by a deploying parent to delegate all or part of custodial responsibility to a nonparent for the period of deployment.
- Allows testimony in a hearing for a temporary custody order to be provided by electronic means
- Allows for temporary child support orders

C. S.L. 2013-42 – Clarify Name Change Requirements for Minors in Certain Circumstances.

Allows a parent to change a child's name without the consent of the other parent if the other parent is convicted of felonious or misdemeanor child abuse, taking indecent liberties with a minor, rape, incest, assault, communicating a threat or any other crime of violence, if the crime was committed against the minor child or a sibling of the minor child.

Also allows a minor who has reached the age of 16 to file an application on his or her own behalf to change the minor's name, if one parent consents, and the non-consenting parent is shown, to the satisfaction of the clerk of court, to have

[2] This explanation of the lien law's status is borrowed from an article written by Matt Martin, Anna B. Osterhout, and Wayne K. Maiorano in the *Change Order*, which is the newsletter of the Construction Law Section of the North Carolina Bar Association, with permission.

abandoned the minor (this is different from the prior statute, which required that there have been a determination that the non-consenting parent abandoned the child).

Adds a requirement that a person who desires to change his or her name must provide the results of a station and national criminal history check conducted within 90 days of the date of application by the SBI, the FBI or a "Channeler" approved by the FBI. (This criminal record check does not apply to a name change of a minor under age 16.)

D. 50B Protective Orders

S.L. 2013-237 provides that a consent protective order may be entered without findings of fact and conclusions of law if the parties agree in writing that no findings of fact and conclusions of law will be included in the consent protective order.

E. S.L. 2013-336 – Amend Adoption Laws

If spouses petition jointly to adopt, and one spouse dies before the entry of the adoption decree, the adoption may proceed in the name of both spouses, and upon completion of the adoption, the deceased parent will be included on the new birth certificate issued for the adopted child. The adopted child is treated as a child of the deceased spouse for inheritance purposes (testate or intestate).

If a stepparent who has petitioned to adopt a child dies before entry of a final decree, a person who had previously consented to the adoption must be given notice and has 15 days to request a hearing on the adoption. If the adoption is completed, the deceased stepparent will be added as one of the adopted child's parents, and the adopted child will be treated as a child of the deceased stepparent for purposes of inheritance.

(This bill made other changes to some of the requirements for notice and for relinquishments.)

X. OTHER STUFF

A. S.L. 2013-116 – North Carolina Captive Insurance Act[3]

a. Allows for captive insurance companies to be established in North Carolina.
b. What is a captive insurance company?

[3] Much of this discussion of captive insurance was borrowed from a summary prepared by W. Y. Alex Webb, JD, CPA, who is a member of the NCBA Tax Section Council, and is used with his permission.

i. It insures certain risks of its owner, who is also the insured. In other words, the insured (or the insured's parent or common owners) own the insurance company.

ii. There are several types of CICs:
   1. Pure Captive
   2. Association or Industrial Captive
   3. Sponsored Captive
   4. Risk Retention or Purchasing Group.

iii. CICs can insure:
   1. Limited types or amounts of worker's comp and group health and life insurance (generally requires special regulatory exemption or approval)
   2. A wide variety of property, casualty, and liability insurance
   3. NOT individual life insurance, automobile insurance, or homeowner's insurance.

iv. Business Advantages:
   1. Lower insurance cost
   2. Improved cash flow (because the owner invests the funds, controls payment terms)
   3. Fast resolution of claims
   4. Tax law encourages "formal" self-insurance program (IRC § 831)
   5. Allows coverage when over priced in the commercial market
   6. Allows for coverage where no coverage exists
   7. Focus risk management efforts of the business
   8. Allows a business to access the reinsurance market (and wholesale prices)
   9. Reserves are protected (asset protection) – "Reserves" are preserved in an entity reachable only by policyholders
   10. Business planning opportunities
      a. Reward managers responsible for risk reduction and control
      b. Create a buyer for succession purposes
      c. Reduce the value of an operating entity to enable purchase by the buyer
      d. Can be a companion to ESOP
      e. Allows transfer of wealth with no gift tax
      f. Wealth grows with no future estate tax

v. Makes North Carolina more competitive
   1. S.C. licenses approx. 200 CICs.
   2. Tennessee is aggressively pursuing this business
   3. 32 states and DC have CIC laws. About 10 are very active
   4. Would allow NC business owners to form a CIC instead of having to go out of state.

B. S.L. 2013-162 – Modifies the maximum interest rate allowed in NC and makes amendment to the North Carolina Consumer Finance Act.
   a. The maximum rate varies, depending on the amount of the loan and the terms, but in some cases the maximum is 18%; in others 24%; and in some 30%.

C. North Carolina Symbols – More things to love about NC! (note, all of these facts come from S.L. 2013-189.
   a. North Carolina school children suggested the adoption of various official State symbols after studying history, science, social studies, and geography.
   b. State fossil
      i. The fossilized teeth of the megalodon shark
      ii. The megalodon shark is extinct and lived over 1.5 million years ago.
      iii. It may have reached over 40 feet in length and weighed over 100 tons.
      iv. It had serrated, heart-shaped teeth that may have grown to over seven inches in length.
   c. State frog
      i. The pine barrens tree frog (Hyla andersonii)
      ii. It can be found in the Sandhills and Coastal Plain regions of NC
      iii. It is considered to be one of the most striking and beautiful frogs in the Southeast United States.
   d. State salamander
      i. The marbled salamander (Ambystoma opacum)
      ii. It is found throughout the state and is unique in that it is a "charismatic, striking, chunky-bodied, fossorial amphibian, of which no two are exactly alike in color pattern."
   e. State marsupial
      i. The Virginia opossum (Didelphis virginiana)
      ii. It is native to North Carolina and is the only marsupial found in North America (our choices of State marsupial were limited).
      iii. The female carries its underdeveloped young in a pouch until they are capable of living independently, similar to a kangaroo.
      iv. It is one of the oldest and most primitive species of mammal found in North America.
      v. It is about the size of a large housecat, with a triangular head, a long pointed nose, dark eyes, a long, scaly, prehensile tail, and short, black, leathery ears.
      vi. It is nocturnal and lives in deciduous forests, open woods, and farmland, but prefers wet areas such as marshes, swamps, and streams.
   f. State folk art
      i. The whirligigs created by Vollis Simpson, of Wilson, North Carolina.

g. State art medium

i. Clay.

ii. "The use of clay has grown from the State's early Native American making mostly utilitarian wares and European settlers continuing the traditions of their ancestors to today's potters designing pottery with utilitarian and aesthetic elements."

iii. The potting tradition continues, especially in the Seagrove area, and clay continues to be an important art medium, contributing to the State's cultural, social, and economic prosperity.