

**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 2011 Long Session of the General Assembly and the 2012 Short Session of the General Assembly. 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 (Walter Dalton 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. THE LATEST AND GREATEST – THE 2012 SHORT SESSION

A. Directed Trustees – S.L. 2012-18/H707

This bill made changes and clarifications to the law governing directed trustees, trust protectors, and other fiduciaries

Background:

Law prior to 2012 session — Trustees and Other Fiduciaries: Two different statutes, G.S. 36C-8-808 and G.S. 32-72(d), governed the responsibility of fiduciaries who, by the terms of a governing instrument, must take directions from

others. H707 harmonized these statutes and modernized them in a manner similar to legislation in Delaware and other states.

Chapter 36 of the North Carolina Uniform Trust Code, codified in 2005, attempts to “house” all provisions governing trusts and trustees in one chapter. However, Chapter 32 continues to govern fiduciaries generally, as it is necessary to have provisions that apply to fiduciaries who are not trustees.

The “directed trustee” provision contained in G.S. 36C-8-808(b) of the North Carolina Uniform Trust Code, prior to H707, provided that a directed trustee must follow directions, and was absolved from liability for doing so, “unless the attempted exercise is manifestly contrary to the terms of the trust, or the [directed] trustee knows the attempted exercise would constitute a serious breach of trust.” Commentators pointed out a problem with this provision: the trustee, who was expected to “take a back seat” to the person giving the direction, was required to exercise a considerable amount of due diligence, including a duty to determine the fiduciary duty owed to the beneficiaries by the person giving the direction.

In contrast, the pre-H707 “directed fiduciary” provision in G.S. 32-72(d) provided simply that a directed fiduciary “is not liable” for following the directions of a person authorized to direct that fiduciary.

Changes made by H707

Following study of the commentary on directed trustees and legislation on this subject in other states, including Delaware, the Estate Planning and Fiduciary Law Section’s legislative committee made recommendations covered in H 707.

- G.S. 36C-8-808 was amended to retain the provision in G.S. 36C-8-808(a) absolving trustees from liability for following the directions of a settlor of a revocable trust. It was also amended to provide that trustees were not liable for losses resulting from a settlor’s failure to provide consents required in the revocable trust for the trustee to act.
- G.S. 36C-7-703 was amended to add a subsection to G.S. 36C-7-703, which governs co-trustees, to clarify that the provisions of G.S. 36C-8-808 do not apply when a cotrustee is given, to the exclusion of another cotrustee, the power to direct or prevent actions of the trustees. The addition of subsection (e1) is similar to the duty and liability clarifications for directed trustees in the new Article 8A which was added to Chapter 36C (see below).
- H 707 revised G.S. 32-72(d) in a manner consistent with the new Article 8A of Chapter 36C. As noted above under “Background,” it was necessary to have such provisions apply to fiduciaries generally that are governed by Chapter 32 and not by Chapter 36 which governs trustees.
- A new article 8A of Chapter 36C was adopted:

36C-8A-801: Defines a “power holder” as a person other than a trustee with power to take certain actions concerning a trust.

36C-8A-802: Provides explicitly that trust instruments may confer various powers as to investments, distributions, and other administrative matters on persons other than trustees, consistent with current trust practice. The provisions of G.S. 36C-8-808, prior to H 707, authorized the terms of a trust to confer upon a person the power to amend or terminate a trust. These provisions were carried forward and expanded in G.S. 36C-8A-802 to include other powers typically given to “trust protectors” by statutes of other states and as recommended by commentators. The duty and liability of the power holder is similar to the duty and liability of a power holder with the power to direct or consent.

36C-8A-803 and 36C-8A-804: *36C-8A-804* provides that directed trustees are absolved from liability except in the case of “intentional misconduct.” Keeping the directed trustee’s responsibility to a minimum is based on the rationale that the power to direct is most effective when the trustee is not deterred from exercising the power by fear of possible liability. Like similar statutes in other states, *36C-8A-804* also:

- Absolves the directed trustee from liability for failure to take any action requiring consent when a request is made for a power holder’s consent but the consent is not provided within a reasonable time; and
- Provides that the directed trustee is not responsible for monitoring the actions of or consulting with a power holder.

36C-8A-803 provides that the person who holds a power to direct or consent is generally a fiduciary who is required to act in good faith and is liable for losses arising from a breach of that fiduciary duty. (Prior law in G.S. 36C-8-808(d) only provided that the power holder was “presumptively” a fiduciary.) The changes in H 707 excepted from this fiduciary duty a power holder who (a) only has the power to remove and appoint trustees or other power holders, (b) is a beneficiary where the power to direct constitutes a power of appointment, or (c) is a beneficiary where the power affects only the interests of the beneficiary who is the power holder. This section also provides that Uniform Trust Code provisions on discretionary powers and tax savings, liability of trustees, and prudent investor rules are applicable to a power holder as a fiduciary.

36C-8A-805 through 36C-8A-811: To make the law governing power holders and directed trustees more comprehensive as recommended by commentators, H707 added administrative provisions governing compensation and expense reimbursement of a power holder, jurisdiction over a power holder, accepting or declining appointment as a power holder, powers of the trustee in the absence of a power holder, decisions by multiple power holders, and resignations and removals of a power holder.

B. Corrections to UTC and Probate Statutes S.L. 2012-18/H707

H 707 also made corrections to changes made to the Uniform Trust Code and laws that address probate in North Carolina in the last session.

Transfer of Title to a Successor Trustee – H 707 made a technical amendment to G.S. 36C-7-707(b). The old language required former trustees to execute documents “transferring title” to trust property. The amendment clarifies that, as provided in G.S. 36C-7-704(f), a successor trustee is immediately vested with title to property of the former trustee so that no documents of title are necessary to transfer title. The statute does require the former trustee to comply with reasonable requests to execute documents acknowledging that transfer to facilitate the administration of the trust.

There was a correction to a cross-reference in the Medicaid estate recovery law, with regard to priority of creditors of a decedent’s estate. G.S. 28A-19-6 was amended by Session Law 2009-288, but the reference in G.S. 108A-70.5(c) was not updated, and H 707 fixed the cross-reference.

A Petition for a Personal Representative to Take Possession, Custody, and Control of Real Property is a Special Proceeding. The revisions to Chapter 28A included changes that addressed how a personal representative could deal with real property – especially with regard to persons occupying real property which was in the possession of the personal representative. The revisions created a possible ambiguity in which one could argue a personal representative could take possession of real property in an estate proceeding rather than a special proceeding. H 707 clarified the ambiguity – a petition for a personal representative to take possession, custody, and control of real property is a special proceeding.

Notice of Final Accounts/Annual Accounts. Under G.S. 28A-21-6, if a personal representative chooses, he or she can give notice of a final account to a beneficiary. If the notice is given, the beneficiary has 30 days to object to the notice and is thereafter barred. The statute was clarified to provide that, when the final account is sent to a beneficiary, the personal representative may also include a copy of any annual accounts. The beneficiary can be barred from objecting to matters disclosed in any annual accounts sent with the final account in the same manner that the beneficiary can be barred from objecting to the final account.

Affidavit of Collection in Testate Estate. H 707 made a technical correction to G.S. 28A-25-1.1, to make it consistent with the provisions of G.S. 28A-15-1, which deals with intestate estates, on calculating amounts of a “small estate.” Specifically, in both a testate and intestate situation, an estate may be administered by affidavit *after* the spouse takes his or her year’s allowance.

H 707 also authorized additional comments on the Uniform Trust Code, consistent with other Uniform Trust Code enactments.

C. The Effective Date Conundrum

When North Carolina's probate statutes were substantially revised in 2011, the Senate bill which was enacted provided: "This act becomes effective January 1, 2012, and applies to estates of decedents dying on or after that date."

This effective date language is problematic. It provides a bright line for when the act applies, but it means that attorneys will have to remember the old version of the statute and apply those rules to estates where the decedent died before January 1, 2012. This raises particular problems with the changes to the caveat statutes and other procedural changes.

The effective date represents a trap for unwary practitioners. It is critical that in administering an estate, especially an estate where there may be contentious matters or where any petition may need to be filed, one considers carefully whether the new version of Chapters 28A, 29, 30, and 31 apply, or whether the old versions apply.

D. Landlord-Tenant/Deceased Tenant's Belongings – S.L. 2012-17/H493 -

Updates various provisions regarding rent that accrues after a judgment but before a tenant vacates premises and bond to be posted on appeal. G.S. 42-34.1.

Allows personal property of a tenant who abandons rental property to be delivered to a nonprofit organization, if the personal property is \$750 or less in value, and if the organization agrees to hold the property for 30 days and to release the property to the tenant at no charge during the 30-day period. If a tenant's personal property is less than \$500, after summary ejectment, the property is deemed abandoned 5 days after execution of the eviction order, and the landlord may throw away the property.

Introduced a new section 28A-25-1.2 regarding removal of tangible personal property by a landlord after the death of a residential tenant:

- Applies when the decedent was the sole occupant of a dwelling unit
- Landlord can take possession of the property upon filing an affidavit IF
 - At least 10 days has passed since the last day rent was paid through
 - No PR, collector, or receiver has been appointed
 - No affidavit has been filed (collection by affidavit)
- The affidavit must state:
 - Name and address of affiant and that affiant is landlord
 - Name of decedent and fact that decedent was lessee and sole occupant
 - A copy of the decedent's death certificate must be attached to the affidavit (not sure how the affiant gets this)
 - Address of the dwelling unit

- Decedent's date of death
 - Date paid rental period expired and the fact that 10 days have elapsed since that date
 - Affiant's good faith estimate of the value of the tangible personal property, with an inventory of the property that includes, at a minimum, the categories of furniture, clothing and accessories, and miscellaneous items
 - That no PR, collector, or receiver has been appointed and no affidavit for collection has been filed
 - The name of the person listed as an emergency contact for the tenant, and a statement that the affiant tried to contact the person and either was unsuccessful in contacting the person, or if the person was contacted, that the person has not taken action to administer the estate.
- The affidavit must be filed in the county where the dwelling is located. The filing fee is \$30.
 - The landlord must provide a copy of the affidavit to the emergency contact. If there is not an emergency contact, the affidavit must be posted at the door of the landlord's rental office and in the courthouse.
 - After the affidavit is filed, the landlord can take the personal property out of the premises and can store it. The landlord can then re-let the premises.
 - If 90 days after the affidavit is filed, no PR has been appointed, the landlord can sell the property (at public or private sale) and apply the proceeds to the landlord's costs and past-due rent. The landlord must file an accounting to the clerk showing how the proceeds were used and must turn over any excess proceeds to the clerk.
 - Alternatively, the landlord can deliver the personal property to a nonprofit organization.
 - If, before the 90 days passes, the landlord receives notice that a PR has been appointed, the landlord must turn the property over to the PR.
 - If the personal property has a value of less than \$500, the landlord can go ahead and deliver it to a nonprofit organization, just like a landlord could do in the case of personal property abandoned by a tenant (see above).
 - This procedure presents an alternative to summary ejectment filed against an estate.
 - If a landlord takes possession of property without following this procedure, then the landlord may be liable for damages.

E. Passing Title by Will – H1066

Section 28A-2A-1 was modified to remove the provisions in that section that addressed the effectiveness of a will to pass title to real property.

Section 31-39 was modified to clarify that:

- A duly probated will is effective to pass title to real property.

- If an estate is administered as an intestate estate, and the heirs convey title to real property to a purchaser for valuable consideration, then a will can only divest the intestate heirs of their interest in the property if it is filed before the final account in the estate is filed.
- Likewise, if a buyer purchases real estate from intestate heirs more than two years from the date of the decedent's death, that buyer's interest in the property will not be divested by the later filing of a will.

F. Co-owners/Unequal Shares/Simultaneous Death – H1067

G.S. 28A-24-3 was modified to provide that in the case of co-owned property, where the co-owners have simultaneous deaths (defined to mean that one does not survive the others by at least 120 hours), the estate of each co-owner will receive the co-owner's pro rata share of the property. (Previously if there were 2 co-owners, each co-owner received half, if there were 3 co-owners, each received 1/3, etc., but the change makes the division relate to the actual ownership interest of the deceased co-owner.)

G. Intestate Property/Child's Year's Allowance - H1069

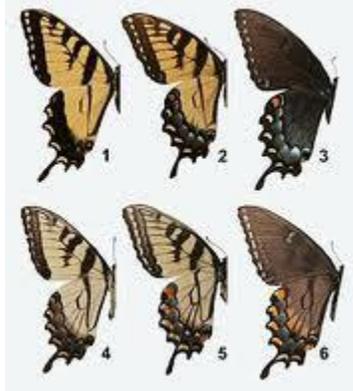
Changes the intestate share of personal property of a surviving spouse and increases the child's year's allowance amount:

- If decedent is survived by one child/descendants of one child, surviving spouse receives first **\$60,000** of personal property, plus **one-half** of the balance of the personal property. (Previously, the surviving spouse received the first \$30,000 of personal property.)
- If decedent is survived by two or more children (or descendants thereof), surviving spouse receives first **\$60,000** of personal property, plus **one-third** of the balance of the personal property.
- If the decedent had no children surviving, but is survived by one or more parents, the surviving spouse receives the first **\$100,000** of personal property, plus **one-half** of the balance of the personal property. (Previously, the surviving spouse received the first \$50,000 of personal property.)
- Increases the child's year's allowance to **\$5,000** from \$2,000 previously

Applies to estates of decedents dying on or after January 1, 2013.

H. Some very important matters – Session Law 2012-29

The Eastern tiger swallowtail is adopted as the official butterfly of the State of North Carolina.



en.wikipedia.org

The Shelby Livermush Festival is adopted as the official fall livermush festival of the State of North Carolina.

The Marion Livermush Festival is adopted as the official spring livermush festival of the State of North Carolina.

The Swansboro Mullet Festival is adopted as the official mullet festival of the State of North Carolina.



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III. STATUTES DEALING WITH ESTATE PLANNING AND FIDUCIARY LAW FROM THE 2011 LONG SESSION

A. Payable on Death Accounts – S.L. 2011-236

Allows a payable on death account to name a person other than a natural person as a beneficiary. For example, allows a trust to be named as the payable on death

beneficiary. Provides that if a beneficiary is other than a natural person, there may only be one beneficiary.

The payable on death arrangement must be set out in a “conspicuous manner” and may be on a signature card or on a separate document whose receipt is acknowledged by the person establishing the account.

These modifications apply to accounts at banks (§ 53-146.2A), savings and loan institutions (§ 54B-130A), savings banks (§54C-130A), and credit unions (§54-109.57A).

B. Devisee/Devise/Statutory Construction – S.L. 2011-284

Defines devisee and devise. Makes changes throughout various sections of the General Statutes to make the use of the words devise and devisee consistent.

A “devise” is defined as “a testamentary disposition of real or personal property and, wherever used in any of the statutes as a verb, shall be construed to mean to dispose of real or personal property by will.”

(Gets rid of the terms “legatee” and “bequest” and related language.)

C. Deeds of Trust/Modernize Procedures – S.L. 2011-312

Makes changes to Chapter 45. If preparing a deed of trust, especially a future-advance deed of trust, be sure to review the current version of the statutes to make sure that your deed of trust complies with the statutes. The session law also makes changes to the way the terms of a deed of trust may be modified.

D. Trust and Estate Planning Changes – S.L. 2011-339

- **Trustee Compensation.** If a trustee wants compensation in excess of 0.4% in a given year, the trustee can give written notice to the qualified beneficiaries, and if a beneficiary does not file a proceeding for review of the compensation within 20 days, then the trustee can receive the compensation.
- **Deemed Contribution to Trusts.** Provides that the property in certain trusts will be deemed to have been contributed by the settlor’s spouse. The property will be included in the spouse’s estate for estate tax purposes, and the settlor is considered a beneficiary. The trusts to which this rule applies are: (i) a marital general power of appointment trust under IRC §2523(e); (ii) an inter-vivos QTIP trust; (iii) an irrevocable inter-vivos trust of which the settlor’s spouse is the sole beneficiary during the spouse’s lifetime, but which does not qualify for the federal gift tax marital deduction; or (iv) a subtrust or other trust attributable to the previous 3 trusts.

- Adds to §36C-7-704(f) a provision that a successor trustee is vested with the title to property held by the former trustee.
- Clarifies §36C-8-816 to provide that a trustee's powers, including investment powers and powers to sell assets, continue after termination of the trust to allow for wind-up of the trust administration.
- Provides that a personal representative that is a licensed trust institution does not have to be bonded. §28A-8-1(b).
- Adds several amendments to update references to banking statutes to clarify what institutions may serve as trust institutions and to remove outdated language. Clarifies that all trust institutions must be licensed by the Commission of Banks, and the fee for the license is \$500. Also allows the Commissioner to investigate, at a trust institution's expense, whether the trust institution is in a "hazardous condition." The "hazardous condition" language replaces the previous solvency standard for trust institutions. If the Commissioner revokes a trust institution's license because it is in a hazardous condition, notice of the revocation is to be sent to the clerk of court in each county.
- Modifies provisions with regard to the boards of directors of private trust companies, to allow equity owners of a private trust company to delegate functions to advisory groups or sub-groups of the board of directors. Notice of such delegation must be given to the Commissioner within 48 hours of the change to the power of the board of directors.

E. Revise Probate Code – S.L. 2011-344

Chapters 28A, 29, 30, and 31 all received substantial modifications dealing with both procedural and substantive matters. These are covered in a separate presentation.

IV. TAX STATUTES FROM THE 2011 LONG SESSION

A. Repeal Land Transfer Tax – S.L. 2011-18

Removed a provision that allowed a county Board of Commissioners to impose a local land transfer tax on instruments conveying interests in real property located in the county.

B. Eliminate Means Test from 529 Deduction – S.L. 2011-106

Certain taxpayers whose AGI was low enough could deduct from their taxable income up to \$2,500 for contribution to a N.C. 529 plan (\$5,000 for a married couple). The limits were: \$100,000 AGI for a married couple filing jointly; \$80,000 for a head of household; \$60,000 for a single person; and \$50,000 for

married, filing separately. These limits have been repealed, effective as of June 3, 2011.

V. STATUTES THAT AFFECT ELDER LAW FROM THE 2011 LONG SESSION

- A. Protect Adult Care Home Residents – S.L. 2011-99. Imposes a variety of requirements upon Adult Care Homes to help reduce the incidence of transmission of HIV, hepatitis B and C, and other blood-borne pathogens. Icky.

Also requires training of employees of Adult Care Homes on the safe administration of medications. By October 1, 2013, no staff members will be permitted to administer medications unsupervised, unless they have completed the Department of Health and Human Services training course.

- B. Additional Section 1915 Medicaid Waiver Sites – S.L. 2011-102. Allows the Department of Health and Human Services to implement two Local Management Entities (LMEs), which are Medicaid waiver programs. Allows LMEs to apply to become managed-care organizations.
- C. Statewide Expansion of 1915(b)/(c) Waiver – S.L. 2011-264. Affects CAP/MR/DD waiver program.
- D. Task Force on Fraud Against Older Adults – S.L. 2011-189. Directs the Department of Justice's Consumer Protection Division to coordinate a task force to evaluate the issue of fraud against seniors. The task force is charged with identifying areas where current laws can be enhanced to better protect older adults against fraud. Final report and recommendations due by October 1, 2012.
- E. Pilot Release of Inmates to Adult Care Homes. S.L. 2011-389. DHHS must establish a pilot programs to allow certain inmates to be placed in adult care homes to provide personal care services and medication management.

VI. STATUTES DEALING WITH BUSINESS LAW FROM THE 2011 LONG SESSION

- A. Allow Attorneys' Fees in Business Contracts – S.L. 2011-341. This addition of section 6.21.6 to Chapter 6 of the General Statutes states that in a business contract, the parties may provide for the payment of reasonable attorneys fees and expenses incurred in a lawsuit, arbitration, or other proceeding involving the contract, but only if the attorney-fee provisions are applicable to all parties. Interestingly, a reciprocal attorney fee provision is only valid if all parties sign the contract *by hand*. In addition, the attorney fees cannot exceed the monetary damages awarded.

The statute also includes a list of factors in determining whether an attorney's fee is reasonable:

1. The amount in controversy and the results obtained.

2. The reasonableness of the time and labor expended, and the billing rates of the attorneys.
3. The novelty and difficulty of the questions raised in the action.
4. The skill required to perform properly the legal services rendered.
5. The relative economic circumstances of the parties.
6. Settlement offers made prior to the institution of the action.
7. Offers of judgment pursuant to Rule 68 and whether the judgment was more favorable than an offer of judgment.
8. Whether a party unjustly exercised superior economic bargaining power in the conduct of the action.
9. The timing of settlement offers.
10. The amounts of settlement offers compared to the verdict.
11. The extent to which the party seeking attorneys' fees prevailed in the action.
12. The amount of attorney's fees awarded in similar cases.
13. The terms of the business contract.

VII. OTHER ITEMS OF INTEREST FROM THE 2011 LONG SESSION

- A. Name Change Requirements. G.S. 101-5 which deals with name changes was amended to require that information from the person's birth certificate, certified results of an official state and national criminal history record check, a sworn statement regarding the person's residence, and outstanding tax or child support obligations be provided for a name change. Also creates a process for denial of the name change by the clerk and appeal to superior court.
- B. Unborn Victims of Violence Act – S.L. 2011-60. Adds Article 6A to G.S. Chapter 14, which creates a criminal offense for acts that cause the death of or injury to an unborn child or that are committed against a pregnant woman.
- C. Amend Various Gun Laws/Castle Doctrine. S.L. 2011-268. Amends numerous gun laws related to the right to own, possess, or carry a firearm in North Carolina. Outlines when a person may use defensive force to protect home, workplace, or vehicle.
- D. Appropriations Act – Cut \$38 million from the judicial budget for 2011-2012, and \$42 million for 2012-2013. Forces elimination of over 300 staff positions, the

removal of drug treatment courts, and reduction in technology funding for the courts.

- E. Abortion – Woman’s Right to Know Act. Enacts Article 11 in G.S. Chapter 90 that requires, before an abortion may be performed, a 24-hour waiting period and informed consent of the woman. The law also requires an obstetric ultrasound at least four hours before an abortion is performed (unless it is a medical emergency).
- F. Employers and Local Government Must Use E-Verify. Requires expanded use of E-Verify to confirm the work authorization for newly hired employees.
- G. Protect and Put NC Back to Work. Substantial revisions to North Carolina’s Worker’s Compensation Act. Includes caps on benefits for temporary total disability. Increases death benefit and burial expense allowance. Makes willful misrepresentations by an employee grounds for disqualification for benefits.

VIII. CONSTITUTIONAL AMENDMENT

A new section was added to Article XIV of the North Carolina Constitution. (Article XIV is titled “Miscellaneous.”)

Sec. 6. Marriage

Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts.

IX. CONCLUSION

Thank you to Kim Crouch, Director of Governmental Affairs of the North Carolina Bar Association. Kim does a great job of representing us with the General Assembly and putting together an annual Legislative Bulletin that summarizes laws affecting North Carolina lawyers. Thank you also to Paula Kohut and E. Knox Proctor V, who both provided valuable bill summaries which I relied upon in preparing this manuscript.