

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2001

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HOUSE BILL 716  
Committee Substitute Favorable 4/24/01

Short Title: Estate Law Changes.

(Public)

Sponsors:

Referred to:

March 21, 2001

1 A BILL TO BE ENTITLED  
2 AN ACT TO MAKE VARIOUS CHANGES IN THE LAW OF FIDUCIARIES AND  
3 DECEDENTS' ESTATES.

4 The General Assembly of North Carolina enacts:

5

6 **PART I. CLARIFY AUTHORITY OF PERSONAL REPRESENTATIVE TO**  
7 **TAKE POSSESSION OF AND SELL REAL PROPERTY OWNED BY**  
8 **DECEDENT**

9

10 **SECTION 1.** G.S. 28A-13-3(a)(1) reads as rewritten:

11 "(1) To take possession, custody or control of the personal property of the  
12 decedent. If in the opinion of the personal representative his  
13 possession, custody or control of such property is not necessary for  
14 purposes of administration, such property may be left with or  
15 surrendered to the heir or devisee presumptively entitled thereto. He  
16 has the power to take possession, custody or control of the real  
17 property of the decedent if he determines such possession, custody or  
18 control is in the best interest of the administration of the estate. Prior to  
19 exercising such power over real property the procedure as set out in  
20 ~~subsection~~ G.S. 28A-13-3(c) shall be ~~followed~~. followed unless the  
21 will of the decedent authorizes the personal representative to exercise  
22 the power without a court order. If the personal representative  
23 determines that such possession, custody or control is not in the best  
24 interest of the administration of the estate such property may be left  
25 with or surrendered to the heir or devisee presumptively entitled  
26 thereto."

27 **SECTION 1.1.** G.S. 28A-13-3(c), which is also amended by Section 2 of  
28 this act, reads as rewritten:

1       "(c) Prior Unless the will of the decedent authorizes the personal representative to  
2 take possession, custody, and control over real property of the decedent without a court  
3 order, prior to the personal representative exercising possession, custody or control over  
4 real property of the estate he shall petition the clerk of court to obtain an order  
5 authorizing such possession, custody or control. The petition shall include:

- 6           (1) A description of the real property ~~which~~that is the subject of the  
7           petition;  
8           (2) The names, ages, and addresses, if known, of the devisees and heirs of  
9           the decedent;  
10          (3) A statement by the personal representative that he has determined that  
11          such possession, custody or control is in the best interest of the  
12          administration of the estate.

13       The devisees and heirs will be made parties to the proceeding by service of  
14       summons in the manner prescribed by law. If the clerk of court determines that it is in  
15       the best interest of the administration of the estate to authorize the personal  
16       representative to take possession, custody or control he shall grant an order authorizing  
17       that power."

18           **SECTION 1.2.** G.S. 28A-15-2 reads as rewritten:

19       "**§ 28A-15-2. Title and possession of property.**

20       (a) Personal Property. – Subsequent to the death of the decedent and prior to the  
21       appointment and qualification of the personal representative or collector, the title and  
22       the right of possession of personal property of the decedent is vested in his heirs; but  
23       upon the appointment and qualification of the personal representative or collector, the  
24       heirs shall be divested of such title and right of possession which shall be vested in the  
25       personal representative or collector relating back to the time of the decedent's death for  
26       purposes of administering the estate of the decedent. But, if in the opinion of the  
27       personal representative, his possession, custody and control of any item of personal  
28       property is not necessary for purposes of administration, such possession, custody and  
29       control may be left with or surrendered to the heir or devisee presumptively entitled  
30       thereto.

31       (b) Real Property. – The title to and right of possession of real property of a  
32       decedent is vested in his heirs as of the time of his ~~death; death.~~ but ~~Except as provided~~  
33       in subsection (c) of this section, when title to real property is not devised to the personal  
34       representative, the title to and right of possession of real property of a decedent devised  
35       under a valid probated will becomes vested in the devisees and shall relate back to the  
36       decedent's death, subject to the provisions of G.S. 31-39.

37       (c) Notwithstanding subsection (b) of this section, the devisees shall be divested  
38       of title upon a sale of real property without a court order made pursuant to authority  
39       granted by the will as provided in G.S. 28A-17-8.1, and the personal representative  
40       may, without the joinder or consent of the devisees, execute a deed in favor of a  
41       purchaser for value who shall take title free of any rights of the devisees. The personal  
42       representative may take possession, custody, and control of real property without a court

1 order pursuant to authority granted by the will. Prior to taking possession, custody, and  
2 control of any real property and prior to conducting a sale under this subsection, the  
3 personal representative shall file with the clerk of superior court in the county where the  
4 estate administration is pending and with the clerk of any other county where any  
5 portion of the real property is located a notice of intent to take such action. The notice of  
6 intent shall describe the real property, state the basis and purpose for taking possession,  
7 custody, and control and conducting a sale, and shall list the names and addresses of the  
8 decedent, the devisees, and the personal representative. The notice of intent shall be  
9 served on all devisees of the real property in any manner prescribed in Rule 4 of the  
10 Rules of Civil Procedure. The personal representative shall be deemed to have taken  
11 possession, custody, and control of the real property on the date set forth in the notice of  
12 intent or the date of filing of the notice of intent, whichever occurs later. Proceeds of  
13 any sale conducted pursuant to this section shall be distributed in accordance with G.S.  
14 28A-22-1. Upon receiving the affidavit or certification of the personal representative  
15 that the notice requirements set out in this subsection have been met, any third party  
16 dealing with the personal representative shall be entitled to act in all respects as though  
17 title is vested in the personal representative."

18 **SECTION 1.3.** G.S. 28A-17-8 is repealed.

19 **SECTION 1.4.** Article 17 of Chapter 28A of the General Statutes is  
20 amended by adding a new section to read:

21 "**§ 28A-17-8.1. Sale or other disposition pursuant to authority in will.**

22 (a) Subject to the provisions of subsection (d) of this section, a personal  
23 representative has the power to sell, lease, mortgage, exchange, partition, grant options  
24 with respect to, or otherwise dispose of the real property of a decedent without a court  
25 order if authorized to do so by the will of the decedent, regardless of whether title to the  
26 real property was devised to the personal representative.

27 (b) A personal representative who sells, leases, or mortgages real property of a  
28 decedent without a court order pursuant to authority granted by the will is not required  
29 to institute a proceeding under this Article or to follow any of the procedures set forth in  
30 Article 29A of Chapter 1 of the General Statutes, entitled 'Judicial Sales', but shall  
31 include in the next account, whether annual or final, a record of any receipts and  
32 disbursements incident to any such transaction.

33 (c) A general provision in the will of a decedent granting authority to the  
34 personal representative to sell the decedent's real property without a court order, or the  
35 incorporation by reference of the provisions of G.S. 32-27(2) in the will, is sufficient to  
36 authorize the personal representative to sell that real property without a court order for  
37 any reason that the personal representative deems to be for the best interest of the estate,  
38 including the payment of debts and other claims against the decedent's estate, the  
39 payment of specific cash bequests to devisees, or the distribution of cash to residuary  
40 devisees.

41 (d) Notwithstanding the provisions of subsection (c) of this section, a general  
42 provision in the will of a decedent granting authority to the personal representative to

1 sell the decedent's property without a court order, or the incorporation by reference of  
2 the provisions of G.S. 32-27(2) in the will, shall not be deemed to authorize the personal  
3 representative to sell specifically devised property without the joinder or consent of the  
4 devisee of that real property.

5 (e) A personal representative authorized by the will of a decedent to sell or lease  
6 real property without a court order may request the clerk of superior court to issue an  
7 order to sell or lease real property of the decedent. Upon such a request, the procedure  
8 for the sale shall be as provided in Article 29A of Chapter 1 of the General Statutes,  
9 entitled 'Judicial Sales'.

10 **SECTION 1.5.** G.S. 28A-17-10 reads as rewritten:

11 **"§ 28A-17-10. Title in personal representative for estate; he or successor to convey.**

12 When real property is conveyed to a personal representative for the benefit of the  
13 estate he represents, he or any successor personal representative may sell and convey it  
14 upon such terms as he may deem just and for the advantage of the estate. ~~The~~Unless the  
15 will of the decedent authorizes the personal representative to sell the real property  
16 without a court order, the procedure shall be as is provided in Article 29A of Chapter 1  
17 of the General Statutes, entitled "Judicial Sales." If it is made to appear to the clerk of  
18 superior court by petition and by satisfactory proof that it will be for the best interest of  
19 the estate to sell by private sale, the clerk may authorize a private sale in accordance  
20 with the provisions of G.S. 1-339.33 through G.S.1-339.40."

21 **SECTION 1.6.** G.S. 28A-22-1 reads as rewritten:

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

23 After the payment of costs of administration, taxes and other valid claims against the  
24 decedent's estate, the personal representative shall distribute the remaining assets of the  
25 estate in accordance with the terms of decedent's valid probated will or the provisions of  
26 Chapter 29 of the General Statutes or as otherwise lawfully authorized. Assets  
27 remaining from the sale of real property without a court order as authorized by G.S.  
28 28A-17-8.1 shall be distributed to the devisees of the real property."

29 **SECTION 1.7.** G.S. 32-27(8) reads as rewritten:

30 "(8) Manage Real Property. –

- 31 a. To take possession, custody, and control, improve, manage,  
32 protect, and subdivide any real property;
- 33 b. To dedicate or withdraw from dedication parks, streets,  
34 highways, or alleys;
- 35 c. To terminate any subdivision or part thereof;
- 36 d. To borrow money for the purposes authorized by this  
37 subdivision for such periods of time and upon such terms and  
38 conditions as to rates, maturities and renewals as the fiduciary  
39 shall deem advisable and to mortgage or otherwise encumber  
40 any such property or part thereof, whether in possession or  
41 reversion;

- 1 e. To lease any such property or part thereof to commence at the  
2 present or in the future, upon such terms and conditions,  
3 including options to renew or purchase, and for such period or  
4 periods of time as the fiduciary deems advisable although such  
5 period or periods may extend beyond the duration of the trust or  
6 the administration of the estate involved;
- 7 f. To make gravel, sand, oil, gas and other mineral leases,  
8 contracts, licenses, conveyances or grants of every nature and  
9 kind which are lawful in the jurisdiction in which such property  
10 lies;
- 11 g. To manage and improve timber and forests on such property, to  
12 sell the timber and forest products, and to make grants, leases,  
13 and contracts with respect thereto;
- 14 h. To modify, renew or extend leases;
- 15 i. To employ agents to rent and collect rents;
- 16 j. To create easements and release, convey, or assign any right,  
17 title, or interest with respect to any easement on such property  
18 or part thereof;
- 19 k. To erect, repair or renovate any building or other improvement  
20 on such property, and to remove or demolish any building or  
21 other improvement in whole or in part; and
- 22 l. To deal with any such property and every part thereof in all  
23 other ways and for such other purposes or considerations as it  
24 would be lawful for any person owning the same to deal with  
25 such property either in the same or in different ways from those  
26 specified elsewhere in this subdivision (8)."  
27

28 **PART II. AUTHORIZE COMBINATION OF HEARINGS FOR CONTROL OF**  
29 **REAL PROPERTY BY PERSONAL REPRESENTATIVE**

30  
31 **SECTION 2.** G.S. 28A-13-3(c) reads as rewritten:

32 "(c) Prior to the personal representative exercising possession, custody or control  
33 over real property of the estate he shall petition the clerk of court to obtain an order  
34 authorizing such possession, custody or control. The petition shall include:

- 35 (1) A description of the real property ~~which~~that is the subject of the  
36 petition;
- 37 (2) The names, ages, and addresses, if known, of the devisees and heirs of  
38 the decedent;
- 39 (3) A statement by the personal representative that he has determined that  
40 such possession, custody or control is in the best interest of the  
41 administration of the estate.

1 The devisees and heirs will be made parties to the proceeding by service of  
2 summons in the manner prescribed by law. If the clerk of court determines that it is in  
3 the best interest of the administration of the estate to authorize the personal  
4 representative to take possession, custody or control he shall grant an order authorizing  
5 that power. If a special proceeding has been instituted by the personal representative  
6 pursuant to G.S. 28A-15-1(c), the personal representative may petition for possession,  
7 custody, or control of any real property as a part of that proceeding and is not required  
8 to institute a separate special proceeding."

9 **SECTION 2.1.** G.S. 28A-15-1(c), which is also amended by Section 1.1 of  
10 this act, reads as rewritten:

11 "(c) If it shall be determined by the personal representative that it is in the best  
12 interest of the administration of the estate to sell, lease, or mortgage any real estate or  
13 interest therein to obtain money for the payment of debts and other claims against the  
14 decedent's estate, the personal representative shall institute a special proceeding before  
15 the clerk of superior court for such purpose pursuant to Article 17 of this Chapter,  
16 except that no such proceeding shall be required for a sale made pursuant to authority  
17 given by will. A general provision granting authority to the personal representative to  
18 sell the testator's real property, or incorporation by reference of the provisions of G.S.  
19 32-27(2) shall be sufficient to eliminate the necessity for a proceeding under Article 17.  
20 If a special proceeding has been instituted by the personal representative pursuant to  
21 G.S. 28A-13-3(c), the personal representative may petition for sale of any real property  
22 as a part of that proceeding and is not required to institute a separate special  
23 proceeding."

### 24 25 **PART III. PROVIDE FOR DISTRIBUTION OF ASSETS OF INOPERATIVE** 26 **TRUSTS**

27  
28 **SECTION 3.** Article 22 of Chapter 28A of the General Statutes is amended  
29 by adding a new section to read:

#### 30 **"§ 28A-22-10. Distribution of assets of inoperative trust.**

31 When the facts at the time of distribution of property to a trust are such that the trust  
32 would be inoperative under the terms of the instrument creating the trust for any reason,  
33 including the death of a beneficiary, renunciation by a beneficiary, the exercise of a  
34 right to withdraw the property by a beneficiary, or the attainment of a stipulated age by  
35 a beneficiary, the personal representative or the trustee authorized or required to make  
36 the distribution of that property to the trust may distribute the property directly to the  
37 person or persons entitled to it under the terms of the instrument creating the trust  
38 without the interposition of the establishment of the trust. If only a portion of the trust  
39 would be inoperative, the property distributable to that portion of the trust may be  
40 distributed directly to the person or persons entitled to the property under the terms of  
41 the instrument creating the trust."

1           **SECTION 3.1.** Article 13 of Chapter 36A of the General Statutes is  
2 amended by adding a new section to read:

3 **§ 36A-141. Distribution of assets of inoperative trust.**

4       A trustee may distribute the assets of an inoperative trust consistent with the  
5 authority granted under the provisions of G.S. 28A-22-10."  
6

7 **PART IV. PROVIDE THAT A FIDUCIARY EXPRESSLY EXCLUDED FROM**  
8 **INVESTMENT DECISIONS IS NOT LIABLE FOR DECISIONS MADE BY**  
9 **THOSE AUTHORIZED TO MAKE INVESTMENT DECISIONS**

10  
11           **SECTION 4.** G.S. 36A-3 is amended by adding a new subsection to read:

12       "(d) Whenever an instrument reserves to the settlor or vests in any person,  
13 including an advisory or investment committee or one or more co-fiduciaries, the  
14 authority to direct the making or retention of any investment to the exclusion of the  
15 fiduciary or to the exclusion of one or more of several co-fiduciaries, the excluded  
16 fiduciary or co-fiduciary who has no discretion in selecting the person authorized to  
17 make or retain investments is not liable to the beneficiaries or to the trust for the  
18 decisions or actions of the settlor or other person authorized to direct the making or  
19 retention of investments. As used in this subsection, the term 'person' includes an  
20 individual, a corporation, or any legal or commercial entity authorized to hold property  
21 or do business in the State of North Carolina."  
22

23 **PART V. TECHNICAL CORRECTIONS TO REFERENCES TO THE**  
24 **INTERNAL REVENUE CODE**

25  
26           **SECTION 5.** G.S. 32-34(a) reads as rewritten:

27       "(a) For purposes of this section:

- 28       (1) "General power of appointment" means any power that would cause  
29       income to be taxed to the fiduciary in his individual capacity under  
30       section 678 of the Internal Revenue Code and any power that would be  
31       a general power of appointment, in whole or in part, under section  
32       2041(b)(1) or 2514(c) of the Internal Revenue Code.  
33       (2) "Internal Revenue Code" means the "Code" as defined in ~~G.S. 105-~~  
34       ~~2-1.~~G.S. 105-228.90.  
35       (3) The term "fiduciary" has the meaning set forth in G.S. 32-25."

36           **SECTION 5.1.** G.S. 32A-2(14) reads as rewritten:

37       "(14) Gifts to Charities, and to Individuals Other Than the Attorney-In-Fact.

- 38       a. Except as provided in G.S. 32A-2(14)b., to make gifts of any of  
39       the principal's property to any individual other than the  
40       attorney-in-fact or to any organization described in sections  
41       170(c) and 2522(a) of the Internal Revenue Code or  
42       corresponding future provisions of federal tax law, or both, in

1 accordance with the principal's personal history of making or  
2 joining in the making of lifetime gifts. As used in this  
3 subdivision "Internal Revenue Code" means the "Code" as  
4 defined in ~~G.S. 105-2.1~~, G.S. 105-228.90.

5 b. Except as provided in G.S. 32A-2(14)c., or unless gifts are  
6 expressly authorized by the power of attorney under G.S.  
7 32A-2(15), a power described in G.S. 32A-2(14)a. may not be  
8 exercised by the attorney-in-fact in favor of the attorney-in-fact  
9 or the estate, creditors, or creditors of the estate of the attorney-  
10 in-fact.

11 c. If the power described in G.S. 32A-2(14)a. is conferred upon  
12 two or more attorneys-in-fact, it may be exercised by the  
13 attorney-in-fact or attorneys-in-fact who are not disqualified by  
14 G.S. 32A-2(14)b. from exercising the power of appointment as  
15 if they were the only attorney-in-fact or attorneys-in-fact.

16 d. An attorney-in-fact expressly authorized by this section to make  
17 gifts of the principal's property may elect to request the clerk of  
18 the superior court to issue an order to make a gift of the  
19 property of the principal."

20 **SECTION 5.2.** G.S. 32A-14.1(a) reads as rewritten:

21 "(a) Except as provided in subsection (b) of this section, if any power of attorney  
22 authorizes an attorney-in-fact to do, execute, or perform any act that the principal might  
23 or could do or evidences the principal's intent to give the attorney-in-fact full power to  
24 handle the principal's affairs or deal with the principal's property, the attorney-in-fact  
25 shall have the power and authority to make gifts in any amount of any of the principal's  
26 property to any individual or to any organization described in sections 170(c) and  
27 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax  
28 law, or both, in accordance with the principal's personal history of making or joining in  
29 the making of lifetime gifts. As used in this subsection, "Internal Revenue Code" means  
30 the "Code" as defined in ~~G.S. 105-2.1~~G.S. 105-228.90."

## 31 32 **PART VI. EFFECTIVE DATES**

33  
34 **SECTION 6.** Parts I through IV of this act are effective when they become  
35 law and apply to actions by personal representatives on or after that date. The remainder  
36 of this act is effective when it becomes law.