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1. Business Law Section
    a. Amend Various Provisions of Chapter 55, the North Carolina Business Corporation Act
    b. Changes to the North Carolina Business Opportunity Act
    c. Resolution of the Business Law Section Council of the North Carolina Bar Association Endorsing the Enactment of Provisions that Modify the Nonprofit Corporations Act and the Charitable Solicitation Licensing Laws

2. Estate Planning & Fiduciary Law Section
    a. North Carolina's version of the Uniform Law Commission's Uniform Electronic Wills Act
    b. Update to and Reorganization of Spousal and Child's Allowance
    c. Codification of North Carolina Law of Tenancy in Common
    d. Rethinking Guardianship Revisions to G.S. 35A
    e. Amend Guardianship Accounting Laws
    f. Uniform Community Property Disposition at Death Act
    g. Divorce/Treatment of Former Spouse in Wills and Revocable Trusts
    h. Principal not Agent/Motion to Dismiss

3. Family Law Section
    a. Adoption Law Changes
    b. Resolution in Opposition to Presumed Shared Parenting

4. Family Law Section & Real Property Section Joint Proposal
    a. Equitable Distribution Changes

5. Litigation Section
    a. Rule 4/Service of Process

6. Tax Section
    a. Resolution Concerning SALT Cap Workarounds

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BUSINESS LAW SECTION PROPOSALS

From:	Lisa Crandall
To:	Samantha Currin
Cc:	Julianne Dambro
Subject:	Proposed Amendments to Ch. 55
Date:	Friday, October 7, 2022 12:44:16 PM
Attachments:	image001.png image002.png Bill to Amend Chapter 55 (NCBA Business Corporations Committee Proposed for Session 2023) -- Initial Committee Draft(15392770.8)Cl.docx Bill to Amend Chapter 55 (NCBA Business Corporations Committee Proposed for Session 2023) Short Summary -- Initial Committee Draft - October 7, 2022 (CLEAN)(2).docx NCBA Business Corporations Committee Comprehensive Summary (2023 Bill)(15465523.4)Clean.docx NCBA Corporation Committee Members Involved in Drafting Proposed Amendment to Chapter 55.docx NCBA Business Corporations Comm Proposed Bill for Session 2023 to Amend NCGS Chapter 55 Outside Groups -- Committee Draft10.05.docx

[EXTERNAL]

Sam,

In accordance with the NCBA Legislative Policies and Procedures, on behalf of the Business Corporations Committee of the Business Law Section, I am providing the following materials regarding a proposed bill that we wish to have approved as "Association-sponsored legislation":

- Draft bill
- Short summary
- Comprehensive summary
- Business Corporations Committee Members that drafted the legislation
- Statement of groups likely to be interested in the legislation.

This legislation was approved by the Business Law Section Council at its September 21, 2022 meeting, and the Council also approved its submission to the Legislative Advisory Committee for consideration as Association-sponsored legislation.

As a courtesy, the Business Corporations Committee will request review of the legislation by the North Carolina Department of the Secretary of State and which we do not expect to have any objection to the legislation as presented to it.

This is the only bill being offered by the Business Corporations Committee with respect to the 2023 Long Session.

Bob Saunders, on behalf of the Benefits Corporations Committee, requests that the proposed changes submitted in the short session remain on the legislative list for the 2023 long session (i.e., the changes to 55A regarding mergers, dissolution and other matters, the changes to the charitable solicitation laws and the changes to the newly enacted law regarding elected official serving on nonprofit boards).

Please let me know if you have any questions.

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Business Law Section
Business Corporations Committee

Outside Groups Likely to be Interested in Proposed Bill to Amend Various Provisions of Chapter 55, the North Carolina Business Corporation Act

(Proposed for 2023 Session)

The Business Corporations Committee (the "Committee") believes that the North Carolina Chamber is likely to be interested in, and supportive of, the Committee's proposed bill. The provisions of the Committee's bill are measures that will enhance North Carolina's business climate and reputation as a desirable headquarters location for corporations. Strengthening the state's ability to attract, keep and grow jobs is the North Carolina Chamber's highest priority, and its endorsement and support of the Committee's bill would be consistent with that goal.

The Committee also believes that the North Carolina Secretary of State's office is likely to be interested in the bill. The Committee intends to provide the Secretary of State with a copy of the bill, and will request immediate suggestions for changes to the bill.

The Committee is not aware of any outside groups that would likely be opposed to the Committee's proposed bill.

[NCBA Business Corporations Committee Draft 10/07/22]

Business Law Section
Business Corporations Committee

Members involved in the drafting and review of proposed bill
to amend Chapter 55, N.C. Gen. Stat. (Proposed for 2023 Session)

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[Business Corporations Committee Draft 10/7/2022]

SUMMARY OF PROPOSED BILL TO AMEND CHAPTER 55 TO MAKE UPDATING CHANGES

The North Carolina Business Corporation Act, Chapter 55 of the General Statutes (the "NCBCA"), is based upon the Model Business Corporation Act (the "Model Act"). The Business Corporations Committee of the Business Law Section of the North Carolina Bar Association (the "Committee") periodically reviews changes to the Model Act, as well as changes to corporation law in selected other jurisdictions, to evaluate whether conforming changes are appropriate for the NCBCA. The Committee is recommending the changes discussed in greater detail below in response to its recent review. The bill drafted by the Committee would:

- ***permit the board of directors to amend the articles of incorporation without shareholder action to delete a class or series of stock that had been included in the articles of incorporation by the board of directors without shareholder action pursuant to G.S. 55-6-02 if no shares, or rights to acquire shares, of that class or series are outstanding.*** (Section 1)

- ***allow a corporation to send notices and other communications to a shareholder by electronic mail, at the electronic mail address provided in its current records, without the shareholder's prior agreement, unless the shareholder objects in writing, while continuing to permit delivery by the corporation to a shareholder of notice and other communications by other electronic means to the extent the corporation and the shareholder agree.*** (Section 2(a))

- ***provide that a corporation may no longer deliver notices and other communications to a shareholder at an electronic mail address or address for transmission by other electronic means if (i) two consecutive notices or other communications fail to be delivered to such electronic address, and (ii) the corporation is made aware of such non-delivery via its secretary, transfer agent or other responsible person. However, no meeting or action will be invalidated due to inadvertent failure to recognize non-delivery of these communications.*** (Section 2(b))

- ***add definitions of "electronic mail address" and "electronic mail" to G.S. 55-1-40.*** (Section 2(a))

- ***provide that if a corporation is sending meeting notices by electronic communication, that the related shareholder list must include the electronic addresses to which the notices are being sent.*** (Section 2(c))

- ***provide that in addition to the circumstances already enumerated in the statute, a corporation shall be relieved from its obligation to provide notices to a shareholder if (i) the notices cannot be delivered, or (ii) no shareholder address has been provided, and clarify that the corporation shall not be relieved of its obligation to provide notice***

following the enumerated physical delivery failures if it is permitted to provide notice to the shareholder electronically. (Section 2(d))

- ***provide that the default rule for non-public corporations incorporated on or after October 1, 2023 is that unanimous consent is not required for shareholders to take action by written consent without a meeting.*** (Section 3)

- ***remove the technical requirement that written consents of shareholders must bear the date of signature of each shareholder signing the written consent.*** (Section 3)

- ***allow a corporation to provide in its articles of incorporation that no separate class or series vote is required when the corporation creates or increases the rights, preferences or number of authorized shares of any class or series of shares that have rights to distributions or on dissolution that are substantially equal to or superior to any existing class.*** (Section 4)

COMPREHENSIVE SUMMARY OF PROPOSED BILL TO AMEND CHAPTER 55 TO MAKE UPDATING CHANGES

The North Carolina Business Corporation Act, Chapter 55 of the General Statutes (the "NCBCA"), is based upon the Model Business Corporation Act (the "Model Act"), which is the work of the Corporate Laws Committee of the ABA Business Law Section (the "ABA Committee"). The Business Corporations Committee of the Business Law Section of the North Carolina Bar Association (the "Committee") periodically reviews changes to the Model Act, as well as changes to corporation law in selected other jurisdictions, to evaluate whether conforming changes are appropriate for the NCBCA. The Committee is recommending the changes discussed in greater detail below in response to its recent review. The bill drafted by the Committee would:

- permit the board of directors to amend the articles of incorporation without shareholder action to delete a class or series of stock that had been included in the articles of incorporation by the board of directors without shareholder action pursuant to G.S. 55-6-02 if no shares, or rights to acquire shares, of that class or series are outstanding (Section 1);
- facilitate the use of electronic mail and other means of electronic communication for delivery of notices and other communications to shareholders by (Section 2):
    - allowing a corporation to send notices and other communications to a shareholder by electronic mail, at the electronic mail address provided in its current records, without the shareholder's prior agreement unless the shareholder objects in writing, while continuing to permit delivery by the corporation to a shareholder of notice and other communications by other electronic means to the extent the shareholder and the corporation agree(Section 2(a));
    - providing that a corporation may no longer deliver notices and other communications to a shareholder at an electronic mail address or address for transmission by other electronic means if (i) two consecutive notices or other communications fail to be delivered to such electronic address, and (ii) the corporation is made aware of such non-delivery via its secretary, transfer agent or other responsible person. However, no meeting or action will be invalidated due

to inadvertent failure to recognize non-delivery of these electronic communications (Section 2(a));

- adding definitions of "electronic mail address" and "electronic mail" to G.S. 55-1-40 (Section 2(b));
- providing that, if a corporation is sending meeting notices by electronic communication, he related shareholder list must include the electronic addresses to which the notices are being sent (Section 2(c));
- providing that in addition to the circumstances already enumerated in the statute, a corporation shall be relieved from its obligation to provide notices to a shareholder if (i) the notices cannot be delivered, or (ii) no shareholder address has been provided, and clarify that the corporation shall not be relieved of its obligation to provide notice following the enumerated physical delivery failures if it is permitted to provide notice to the shareholder electronically (Section 2(d);

- provide that the default rule for non-public corporations incorporated on or after October 1, 2023 is that unanimous consent is not required for shareholders to take action by written consent without a meeting (Section 3);
- remove the technical requirement that written consents of shareholders must bear the date of signature of each shareholder signing the written consent (Section 3); and
- allow a corporation to provide in its articles of incorporation that no separate class or series vote is required when the corporation creates or increases the rights, preferences or number of authorized shares of any class or series of shares that have rights to distributions or on dissolution that are substantially equal to or superior to any existing class (Section 4).

Permitting a Board of Directors to Remove Board-created Class of Stock without a Shareholder Vote When No Shares Are Outstanding

Under G.S. 55-6-02, if the articles of incorporation so provide, the board of directors may determine, without any shareholder action, the terms of any new class or series of stock if, before the issuance of shares of such class or series, articles of amendment are filed with the Secretary of State setting forth the terms of the new class or series. Under G.S. 55-10-03, amendments to the articles of incorporation generally require that the board of directors adopt the amendment

and recommend its approval to the shareholders and that the shareholders approve the amendment either by a vote taken at a shareholders meeting or pursuant to action by written consent. G.S. 55-10-02 sets forth a number of amendments that are deemed to be so routine and "housekeeping" in nature as not to require action by shareholders. For example, G.S. 55-10-02(5b) permits the board of directors to amend the articles of incorporation to delete a class of shares from the articles of incorporation if all of the authorized shares have been acquired by the corporation and the corporation is prohibited from reissuing the acquired shares.

Section 1 of the Committee's bill would amend G.S. 55-10-02 to authorize the board of directors of a North Carolina corporation to amend the articles of incorporation without shareholder action to delete the provisions for a class or series of stock that had been included in the articles of incorporation by the board of directors without shareholder action pursuant to G.S. 55-6-02 if no shares, or rights to acquire shares, of that class or series are outstanding. This provision of the Committee's bill permits ease in corporate housekeeping, and would be particularly beneficial for public companies. Many public companies have articles of incorporation that permit the issuance of shares of preferred stock having terms, rights and privileges as established by the board of directors pursuant to G.S. 55-6-02. Historically, it was fairly common for public companies to adopt shareholder rights plans (a/k/a "poison pills"), which involved the issuance of rights to acquire a newly created series of preferred stock, though that practice is now not as common as it once was. Those rights plans were designed as deterrents, with the rights never being triggered and expiring in accordance with their terms without any issuance of the underlying preferred stock. Additionally, some public companies used G.S. 55-6-02 to create and issue series of preferred stock with finite terms (similar to debt), and all of such shares have been redeemed. Unless the terms of such series prohibited reissuance after the shares had been redeemed, the articles of incorporation cannot be amended to eliminate the provisions of the now-defunct series unless the amendment is approved by the shareholders. In general, for a public company, the complexities and cost of seeking shareholder approval of an amendment to delete the terms of a defunct class or series of stock outweigh the benefit of mere housekeeping. Accordingly, the amendments to the articles of incorporation adopted pursuant to G.S. 55-6-02 that created a series or class of stock continue to be part of the articles of incorporation even though such series or class is now defunct and of no continuing relevance to the corporation.

Section 151(g) of the Delaware General Corporation Law (the "DGCL") provides for an analogous procedure for the board of directors of a Delaware corporation, without any stockholder action, to eliminate from its certificate of incorporation a class or series of stock created by the board of directors in a manner similar to G.S. 55-6-02 if no shares of the class or series was ever issued or if no issued shares of such class or series remain outstanding. Accordingly, this provision of the Committee's bill would place North Carolina corporations on equal footing with Delaware corporations with respect to the ease of addressing this corporate housekeeping matter.

Facilitating the Use of Electronic Mail and Other Communications with Shareholders

Under G.S. 55-1-41, a corporation must seek formal consent from its shareholders prior to sending notices to them by email or other form of electronic communication. Given the ubiquity and acceptance of business communication by email, the Committee proposes that Subsection (c) of G.S. 55-1-41 be amended to allow a corporation to provide notices to the shareholder's email address, without such prior formal consent, unless and until the shareholder objects in writing. This approach tracks amendments made in 2021 to the Model Act, in which the ABA Committee explained, "Electronic mail and other electronic communications have become a conventional means of communication in business, with reliability comparable, if not superior to postal service. Accordingly, and to facilitate the use of electronic mail and other electronic communications, the Committee is proposing these amendments." (See "Background" to Changes in the Model Business Corporations Act – Proposed Amendments to Sections 1.40, 1.41, 7.20 and 16.01 Relating to Electronic Notice by the ABA Committee.) Under the proposed amendments to G.S. 55-1-41(c), a corporation may still deliver notices and other communications to a shareholder by other electronic means to the extent that the shareholder and the corporation agree.

The proposed amendments to G.S. 55-1-41(c) also remove the reference to "foreign corporations" in the provision addressing the delivery of notices by a corporation to its shareholders. This change is consistent with the well-accepted internal affairs doctrine, which provides that the affairs of a corporation with respect to its shareholders are governed by the laws of the state in which the corporation is incorporated. This change tracks a similar change effected in the Model Act.

The Committee further proposes, in keeping with the Model Act, that Subsection (c) of G.S. 55-1-41 specify that a corporation's authority to deliver notices to an email address or the

address for transmission of electronic communications shall cease if it is unable to deliver two consecutive communications to that address and such failed deliveries become actually known to the officers or agents of the corporation responsible for providing notices or other communications. As the ABA Committee commented in the MBCA, "Implicit in this provision … is that the corporation will seek to keep track of delivery failures." (See Official Comment #2 to MBCA §1.41.)

The Committee further proposes to add the following definitions to G.S. 55-1-41:
"Electronic mail" means an electronic transmission directed to a unique electronic mail address.
"Electronic mail address" means a destination, commonly expressed as a string of characters, consisting of a unique username or mailbox (commonly referred to as the 'local part' of the address) and a reference to an internet domain (commonly referred to as the 'domain part' of the address), whether or not displayed, to which an electronic mail be may sent or delivered."

G.S. 55-7-20 currently requires that a North Carolina corporation prepare an alphabetical list of the names and addresses of all of its shareholders who are entitled to notice of a shareholders meeting. The Committee proposes to add language to G.S. 55-7-20 to require that, if a corporation is sending notices and other communications by email or other means of electronic communication, the shareholder list include the electronic addresses to which such notices and other communications are being sent.

G.S. 55-16-06 enumerates the circumstances in which a corporation may cease providing notices to shareholders, because prior notices or dividend payments could not be delivered to the physical address on record, or the shareholder failed to provide a reliable physical address. The Committee proposes that the duty of the corporation to provide notices to the shareholder shall continue if it is permitted under G.S. 55-1-41(c) to deliver electronic notice or other communications by email or other electronic means, notwithstanding the enumerated circumstances demonstrating an inability to effect delivery to a physical address. This amendment tracks a similar change in the Model Act. As the ABA Committee noted, this section "balances the importance of notice to shareholders under the Act against the practical need to allow corporations to cease providing notices where notices or distributions are being returned undelivered or cannot be delivered and it is clear that the shareholder no longer is located at the address for physical delivery included in the records of the corporation." (See Official Comment #4 to MBCA §1.41.).

Providing Greater Flexibility for the Use of Written Consent Without a Shareholders' Meeting.

Under G.S. 55-7-04(a), the default rule is that action required or permitted by the NCBCA to be taken at a shareholders' meeting may be taken without a meeting, if all the shareholders entitled to vote on the action consent in writing to the action or, if provided in the articles of incorporation of a non-public corporation, if shareholders having not less than the minimum number of votes that would be necessary to approve the action at a meeting at which all shareholders entitled to vote were present and voted consent in writing to the action. Therefore, currently shareholders of a North Carolina corporation must act by unanimous written consent, unless this default rule is altered in the corporation's articles of incorporation.

While the NCBCA allows North Carolina corporations to provide for less than unanimous written consent in their articles of incorporation, entities incorporating in North Carolina are often unaware of the need to specifically provide for this flexibility, which can result in the unexpected need to obtain unanimous shareholder consent or alternatively expend resources to hold a shareholders' meeting.

Section 3 of the Committee's bill would amend G.S. 55-7-04(a) to change the default rule for new non-public corporations incorporated on or after October 1, 2023. For these corporations, unless the articles of incorporation provide otherwise, shareholders may take action without a meeting if shareholders having not less than the minimum number of votes that would be necessary to approve the action at a meeting at which all shareholders entitled to vote were present and voted consent in writing to the action. These corporations could opt out of the default rule for less-than-unanimous shareholder consent to action without a meeting by including a provision in their articles of incorporation requiring a greater threshold, including by requiring unanimous written consent.

The Committee proposes limiting the effect of this change in the default rule to only newly incorporated non-public corporations to avoid interfering with established relationships. Corporations incorporated prior to October 1, 2023 would be unaffected by this amendment to G.S. 55-7-04(a).

The Committee's proposed change in the default rule is conceptually similar to Section 228(a) of DGCL, which provides that unless otherwise provided in a corporation's certificate of incorporation, any action required by the DGCL to be taken at a meeting of stockholders may be

taken without a meeting, if a consent or consents, setting forth the action so taken, are signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Adopting a similar approach to Delaware promotes greater flexibility for the use of written consents by non-public North Carolina corporations without the need to hold a shareholders meeting and demonstrates North Carolina's commitment to maintaining a pro-business environment for companies choosing to organize under North Carolina law.

Removing Requirement that Written Consents of Shareholders Must Bear the Date of Signature.

Under G.S. 55-7-04(b), a shareholder's written consent to action to be taken without a meeting will cease to be effective on the sixty-first day after the date of the signature appearing on the consent unless prior to the sixty-first day, the corporation has received written consents sufficient to take such action. Accordingly, each signature to a shareholder's written consent currently must be dated to track its effectiveness.

In 2017, to address ongoing concerns flowing from a 2003 Delaware Chancery Court opinion which stated that the then-current Section 228(c) of the DGCL provided that each written consent must bear the date of signature of each such stockholder to be valid, DGCL Section 228(c) was amended to remove the signature-date requirement. As amended, DGCL Section 228(c) continues to provide a sixty-day period for the delivery of sufficient consents to take the action; however, the sixty-day period now begins on the first date a consent is delivered to the corporation.

Section 3 of the Committee's bill would amend G.S. 55-7-04(b) to track the approach taken in Delaware by providing that written consents of shareholders would not be required to bear the date of signature and sufficient consents would need to be obtained within sixty days following receipt of the first consent with respect to the relevant action. This change will eliminate any potential concern over technical challenges to the effectiveness of shareholder consents that are properly executed by the requisite number of shareholders.

Providing Flexibility to Eliminate the Requirement for a Separate Class or Series Vote to Create or Increase the Rights, Preferences or Number of Shares of an Equal or Senior Class or Series.

Currently G.S. 55-10-04 provides that the holders of the outstanding shares of a class or series are entitled to vote as a separate voting group on a proposed amendment to a corporation's articles of incorporation if the amendment would (i) create a new class of shares having rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class or series, as applicable, or (ii) increase the rights, preferences, or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class or series, as applicable. Accordingly, in North Carolina, existing classes of shares have a statutory veto right over the creation of a new or senior class or series of shares.

Section 4 of the Committee's bill would amend G.S. 55-10-04 to provide North Carolina corporations with the flexibility to limit (in whole or in part) the statutory veto right granted to existing classes or series of stock by providing for such limitations in (i) the corporation's initial articles of incorporation, (ii) any amendment to the corporation's articles of incorporation that created the applicable class or series or that was adopted prior to the issuance of any shares of such class or series, or (iii) in any amendment to the corporation's articles of incorporation that was authorized by resolutions adopted by the affirmative vote of the holders of a majority of such class or series. By limiting the effect of this change to corporations that affirmatively include such a provision in their articles of incorporation, this change will not interfere with established relationships or result in corporations inadvertently opting out of the statutory protections. Holders of a class of shares that currently are entitled to this statutory veto right will continue to have that right unless those shareholders, voting as a class, approve an amendment to the articles of incorporation eliminating their statutory right.

Adopting this change would help encourage the growth of venture capital backed companies organized under North Carolina law, because such companies could elect to have more flexibility to conduct future equity raises, without having to seek shareholder approval for each new class of stock created.

Constitutional Matters and Impacts on Other Laws

The changes that would be effected by the bill do not present any constitutional issues and do not affect other provisions of North Carolina law other than those sections of Chapter 55 that would be amended by the bill upon its enactment. The Bar Association has not taken any prior position on the matters addressed by the bill.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2023

_____ BILL _____

Short Title: _____
Sponsors: _____
Referred to: _____

_____ __, 2023

A BILL TO BE ENTITLED
AN ACT TO MAKE VARIOUS CHANGES TO
THE NORTH CAROLINA BUSINESS CORPORATION ACT.

The General Assembly of North Carolina enacts:

PART I. PERMIT THE BOARD OF DIRECTORS TO DELETE UNUSED CLASSES OF SHARES CREATED BY THE BOARD FROM THE ARTICLES OF INCORPORATION

SECTION 1. Subsection (5b) of G.S. 55-10-02(b) reads as rewritten:

"(5b) To delete a class of shares from the articles of incorporation,

a. as a result of the operation of G.S. 55-6-31(b), when there are no remaining authorized shares of the class because the corporation has acquired all authorized shares of the class and the articles of incorporation prohibit the reissue of the acquired shares~~.~~; or

b. if such class was created pursuant to G.S. 55-6-02 and no shares of such class, and no rights to acquire shares of such class, are then outstanding."

PART II. FACILITATE THE USE OF ELECTRONIC MAIL AND OTHER COMMUNICATIONS WITH SHAREHOLDERS

SECTION 2(a). Subsection (c) of G.S. 55-1-41 reads as rewritten:

"(c) Written notice by a domestic ~~or foreign~~ corporation to its shareholder is effective when deposited in the United States mail with postage thereon prepaid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders. Unless the shareholder has previously notified a domestic corporation in writing that it objects to receiving notices and other communications by electronic mail, any notice by a domestic corporation may be delivered to its shareholder in the form of electronic mail and is effective when it is sent as provided in G.S. 66-325 to the electronic mail address for the shareholder shown in the corporation's current record of shareholders. To the extent the corporation pursuant to G.S. 55-1-50 and the shareholder have agreed and the shareholder has not provided notice of objection to the corporation, notice by a domestic corporation to its shareholder may be delivered in the form of an electronic record sent by any other electronic means and is effective when it is sent as provided in G.S. 66-325. A shareholder

may ~~terminate any such agreement~~ provide notice to a domestic corporation of its objection to receiving notices and other communications by electronic mail or other electronic means at any time on a prospective basis effective upon written notice ~~of termination~~ to the corporation or upon such later date as may be specified in the notice. A notice or other communication may no longer be delivered to an electronic mail address or address for transmission by other electronic means pursuant to this subsection (c) if (i) the corporation receives notice from the information processing system into which such notice or other communication was entered that two consecutive notices or other communications given by electronic transmission have not been delivered to the electronic mail address or address for transmission by other electronic means to which such notice or other communication was directed, and (ii) such notice of non-delivery becomes known to the secretary, transfer agent, or another person responsible for the giving of notices or other communications for the corporation; provided, however, that the inadvertent failure to recognize such notice of non-delivery as a cessation of authority to provide a shareholder with notice by electronic mail or other electronic means shall not invalidate any meeting or other action."

SECTION 2(b). G.S. 55-1-40 is amended by adding, after subsection (8), subsections to read:

"(8a1) "Electronic mail" means an electronic transmission directed to a unique electronic mail address.

(8a2) "Electronic mail address" means a destination, commonly expressed as a string of characters, consisting of a unique username or mailbox (commonly referred to as the "local part" of the address) and a reference to an internet domain (commonly referred to as the "domain part" of the address), whether or not displayed, to which an electronic mail may be sent or delivered.

SECTION 2(c). Subsection (a) of G.S. 55-7-20 shall read as rewritten:

"(a) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders who are entitled to notice of a shareholders' meeting. The list shall be arranged by voting group, by class or series of shares within each voting group, and shall show the address of and number of shares held by each shareholder and, if the notice or other communications regarding the meeting have been or will be sent by the corporation to a shareholder by electronic mail or other electronic means, the electronic mail address or address for transmission by other electronic means of that shareholder."

SECTION 2(d). Subsection (a) of G.S. 55-16-06 shall read as rewritten:

"(a) Whenever notice is required to be given under any provision of this Chapter to a shareholder, the notice shall not be required to be given if the corporation is not permitted to deliver notice by electronic mail or other electronic means pursuant to G.S 55-1-41(c) and ~~either~~ any of the following apply~~ies~~:

(1) Notice of two consecutive annual meetings, and all notices of meetings during the period between those two consecutive annual meetings, have been sent to the shareholder at the shareholder's address as shown on the records of the corporation and have been returned undeliverable.

(2) All, but not less than two, payments of dividends on securities during a 12-month period, or two consecutive payments of dividends on securities during a period of

more than 12 months, have been sent to the shareholder at the shareholder's address as shown on the records of the corporation and have been returned undeliverable.

(3) No address has been provided to the corporation by or on behalf of a shareholder and the corporation has not otherwise obtained an address for the shareholder it believes is reliable."

PART III. PROVIDE GREATER FLEXIBILITY FOR THE USE OF WRITTEN CONSENT WITHOUT MEETING

SECTION 3(a). Subsection (a) of G.S. 55-7-04 shall read as rewritten:

"(a) Any action required or permitted by this Chapter to be taken at a shareholders' meeting may be taken without a meeting and without prior notice except as required by subsection (d) of this section, if (i) the action is taken by all the shareholders entitled to vote on the action or (ii) subject to subsection (a1) of this section, if (A) the action is taken by shareholders of a ~~so provided in the articles of incorporation of a~~ corporation that is not a public corporation at the time the action is taken, (B) the action is taken by shareholders having not less than the minimum number of votes that would be necessary to take the action at a meeting at which all shareholders entitled to vote were present and voted, and (C) if the corporation was incorporated prior to October 1, 2023, the action is permitted by the corporation's articles of incorporation, or if the corporation was incorporated on or after October 1, 2023, the action is not prohibited by the corporation's articles of incorporation. The action must be evidenced by one or more unrevoked written consents ~~bearing the date of signature and~~ signed by shareholders sufficient to take the action without a meeting, before or after such action, describing the action taken and delivered to the corporation for inclusion in the minutes or filing with the corporate records. To the extent the corporation has agreed pursuant to G.S. 55-1-50, a shareholder's consent to action taken without meeting or revocation thereof may be in electronic form and delivered by electronic means."

SECTION 3(b). Subsection (b) of G.S. 55-7-04 shall read as rewritten:

"(b) A shareholder's written consent to action to be taken without a meeting shall not be effective to take the corporate action referred to therein ~~on the sixty-first day after the date of signature appearing on the consent~~ unless ~~prior to the sixty-first day~~ the corporation has, within sixty days following the first date on which a consent with respect to such corporate action has been delivered to the corporation, received unrevoked written consents sufficient under subsection (a) of this section to take the action without meeting. If not otherwise fixed under G.S. 55-7-03 or G.S. 55-7-07, the record date for determining shareholders entitled to take action without a meeting is the earliest date that ~~of signature appearing on~~ any consent that is to be counted in satisfying the requirements of subsection (a) of this section has been received by the corporation. A shareholder may only revoke a written consent if such shareholder delivers to the corporation a written revocation prior to the corporation's receipt of unrevoked written consents sufficient under subsection (a) of this section to take the action."

PART IV. PERMIT EXCEPTIONS TO CERTAIN REQUIREMENTS FOR SEPARATE VOTES BY VOTING GROUPS

SECTION 4. G.S. 55-10-04 reads as rewritten:

"**§ 55-10-04. Voting on amendments by voting groups**.

(a) Except as otherwise provided in subsection (e) of this section, the~~The~~ holders of the outstanding shares of a class are entitled to vote as a separate voting group (if shareholder voting is otherwise required by this Chapter) on a proposed amendment if the amendment would:

(1) Increase or decrease the aggregate number of authorized shares of the class;

(2) Effect an exchange or reclassification of all or part of the shares of the class into shares of another class;

(3) Effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class;

(4) Change the designation, rights, preferences, or limitations of all or part of the shares of the class;

(5) Change the shares of all or part of the class into a different number of shares of the same class;

(6) Create a new class of shares having rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;

(7) Increase the rights, preferences, or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;

(8) Limit or deny an existing preemptive right of all or part of the shares of the class;

(9) Cancel or otherwise affect rights to distributions or dividends that have accumulated but not yet been declared on all or part of the shares of the class; or

(10) Change the corporation into a nonprofit corporation or a cooperative organization.

(b) Except as otherwise provided in subsections (c) and (e) of this section, if~~If~~ a proposed amendment would affect a series of a class of shares in one or more of the ways described in subsection (a), the shares of that series are entitled to vote as a separate voting group on the proposed amendment.

(c) If a proposed amendment that entitles two or more series of shares to vote as separate voting groups under this section would affect those two or more series in the same or a substantially similar way, the shares of all the series so affected must vote together as a single voting group on the proposed amendment.

(d) A class or series of shares is entitled to the voting rights granted by this section although the articles of incorporation provide that the shares are nonvoting shares.

(e) Notwithstanding the rights to vote as a separate voting group granted by subsections (a)(6) and (a)(7) of this section to holders of the outstanding shares of a class and the corresponding rights with respect to such matters granted by subsection (b) of this section to the holders of the outstanding shares of a series, such rights may be otherwise restricted (in whole or in part) if so provided in the corporation's initial articles of incorporation, in any amendment to the corporation's articles of incorporation that created the applicable class or series or that was adopted prior to the issuance of any shares of such class or series,

or in any amendment to the corporation's articles of incorporation that was authorized by a resolution or resolutions adopted by the affirmative vote of the holders of a majority of such class or series."

SECTION 5. The Revisor of Statutes may cause to be printed all relevant portions of the Official Comments to the Model Business Corporation Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.

SECTION 6. This act is effective as of October 1, 2023.

MANNING FULTON

Attorneys

MEMO

TO: Sam Currin

FROM: Ritchie W. Taylor, Chair, NCBA Business Law Section

DATE: October 7, 2022

RE: Proposed Changes to the North Carolina Business Opportunity Act

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Talking Points

- North Carolina has not revisited its Business Opportunity Act in decades.
- Under North Carolina law, certain franchises also constitute business opportunities.
- Since originally enacted, the method of disclosure to prospective franchisees has matured, but North Carolina law has not kept up with these changes.
- The proposed change accepts the Federal Trade Commission's ("FTC") mandated franchise disclosure document as a substitute for having a North Carolina specific business opportunity disclosure document as an additional disclosure document.
- The proposed changes to the Business Opportunity Act make North Carolina more friendly to franchising in a way that does not reduce in any material respect the information provided to a prospect or adversely impact the revenue the state receives from business opportunity filings.

Comprehensive Analysis

Yesterday, the NCBA Business Law Council unanimously recommended certain changes to the North Carolina Business Opportunity Act ("Act"), which changes are set forth in the marked and clean copy of the revised Act transmitted to you with this memo.

The franchise law committee of the Business Law Section ("Section") established a task force consisting of Ashley Nielsen of the Nielsen Franchise Law Firm as well as Carlie Smith and myself, both of Manning, Fulton, & Skinner, P.A., to work on changes to the Act. The committee considered various changes and elected to recommend a more surgical approach to revising the 40+ year old statute, which has received no legislative attention in decades.

North Carolina was a pioneer in the area of business opportunity regulation as the first state to regulate them. While franchisors who license a seller assisted marketing plan in connection with a federally registered trademark are exempt from the Act, those franchisors who do not have a federally registered trademark also constitute business opportunities under North Carolina law. Accordingly, currently the Act requires them to prepare a separate, state specific disclosure in

addition to their requirement to provide a compliant franchise disclosure document ("FDD") as required under federal law.

The current requirements for the FDD established in the FTC franchise rule substantially incorporate all of the disclosures required under the Act.

Accordingly, it is the view of the Section that it is time for the Act to permit disclosure only with a compliant FDD for those franchises who are also business opportunities under the Act. Doing so makes the disclosure obligation for all franchisors the same without impairing in any material respects the information received by prospective franchisees, makes North Carolina more friendly for new business creation, and reduces the overall cost of compliance with the Act.

The proposed changes would not change who has a filing requirement with the North Carolina Secretary of State or the fees to be paid. The proposal simply eliminates the requirement to have both a North Carolina business opportunity disclosure document and a separate FDD.

The proposed legislation should not adversely impact any current franchise or business opportunity relationship and there are no known constitutional issues. To our knowledge the NCBA has never taken a position previously on the proposal. We do not foresee the proposed changes adversely impacting any other areas of the law.

Parties Involved in Drafting Proposal

- Ashley G. Nielsen, Nielsen Franchise Law, 2749 Manors Edge, New Hill, NC 27562, 919-335-3815
- Carlie A. Smith, Manning Fulton & Skinner, P.A., 3605 Glenwood Ave. Suite 500, Raleigh, NC 27612, 919-787-8880
- Ritchie W. Taylor, Manning Fulton & Skinner, P.A., 3605 Glenwood Ave. Suite 500, Raleigh, NC 27612, 919-787-8880

Interested Outside Parties

- The North Carolina Department of the Secretary of State. The Department of the Secretary of State ("Department") is the agency responsible for administrating the filing of business opportunity filings. They have been notified of the proposal and have not yet provided their position on it. However, considering it is revenue neutral and reduces the paperwork they have to process, it is difficult to see what objection they may have.

- International Franchise Association ("IFA"). The IFA maintains an active government relationship practice focused in part on changes to federal and state franchise related laws. We would not anticipate any opposition as this proposal does not materially change the balance between franchisors and franchisees. Rather, it simply streamlines and harmonizes the disclosure obligations with those imposed nationwide by the Federal Trade Commission.

Article 19.

Business Opportunity Sales.

§ 66-94. Definition.

For purposes of this Article, "business opportunity" means the sale or lease of any products, equipment, supplies or services for the purpose of enabling the purchaser to start a business, and in which the seller represents:

(1) That the seller will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases or other similar devices, or currency-operated amusement machines or devices, on premises neither owned nor leased by the purchaser or seller; or

(2) That it may, in the ordinary course of business, purchase any or all products made, produced, fabricated, grown, bred or modified by the purchaser using in whole or in part the supplies, services or chattels sold to the purchaser; or

(3) The seller guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid for the business opportunity; or that the seller will refund all or part of the price paid for the business opportunity, or repurchase any of the products, equipment, supplies or chattels supplied by the seller, if the purchaser is unsatisfied with the business opportunity and pays to the seller an initial, required consideration which exceeds two hundred dollars ($200.00); or

(4) That it will provide a sales program or marketing program which will enable the purchaser to derive income from the business opportunity which exceeds the price paid for the business opportunity, provided that this subsection shall not apply to the sale of a marketing program made in conjunction with the licensing of a federally registered trademark or a federally registered service mark, or when the purchaser pays less than two hundred dollars ($200.00).

Provided, that "business opportunity" does not include the sale of an on-going business when the owner of that business sells and intends to sell only that one business opportunity; nor does it include the not-for-profit sale of sales demonstration equipment, materials, or samples, for a total price of two hundred dollars ($200.00) or less. (1977, c. 884, s. 1; 1981, c. 817, s. 1; 1983, c. 421, s. 2; 1991, c. 74, s. 1.)

§ 66-94.1. Responsible sellers exemption.

(a) The provisions of Article 19 shall not apply to the sale or lease of any products, equipment, supplies or services where:

(1) The seller has not derived net income from such sales within the State during either of its two previous fiscal years, and does not intend to derive net income from such sales during its current fiscal year; and

(2) The primary commercial activity of the seller or its affiliate is substantially different from the sale of the goods or services to the purchaser, and the gross revenues received by the seller from all such sales during the current and each of the two previous fiscal years do not exceed ten percent (10%) of the total gross revenues from all operations for the same period of the seller and any other affiliated entity contractually obligated to compensate the purchaser for the purchaser's business activities arising from the sale; and

(3) The sale results in an improvement to realty owned or leased by the purchaser which enables the purchaser to receive goods on consignment from the seller or its affiliate. An "improvement to realty" occurs when a building or other structure is constructed or when significant improvements to an existing building or structure are made; and

(4) The seller has either a net worth on a consolidated basis, according to its most recent audited financial statement, of not less than five million dollars ($5,000,000) or has obtained a surety bond from a surety company authorized to do business in this State in an amount equal to or greater than the gross revenues received from the sale or lease of products, equipment, supplies or services in this State during the preceding 12-month period which enabled the purchaser to start a business.

(b) The provisions of Article 19 shall not apply to the sale or lease of any products, equipment, supplies, or services where:

(1) The seller has a net worth on a consolidated basis, according to its most recent audited financial statement, of not less than five million dollars ($5,000,000); and

(2) The primary commercial activity of the seller is motor carrier transportation and the seller is subject to the jurisdiction of the Interstate Commerce Commission or any other federal agency that regulates motor carrier transportation.

(c) Any seller satisfying the requirements of subsections (a) or (b) of this section shall file with the Secretary of State two copies of a document signed under oath by the seller or one authorized to sign on behalf of the seller containing the following information:

(1) The name of the seller and whether the seller is doing business as an individual, partnership, or corporation;

(2) The principal business address of the seller;

(3) A brief description of the products, equipment, supplies, or services being sold or leased by the seller; and

(4) A statement which explains the manner in which each of the requirements of subsections (a) or (b) of this section are met. (1983, c. 421, s. 1; 1987, c. 325.)

§ 66-95. Required disclosure statement.

At least 48 hours prior to the time the purchaser signs a business opportunity contract, or at least 48 hours prior to the receipt of any consideration by the seller, whichever occurs first, the seller must provide the prospective purchaser with either (i) a franchise disclosure document that complies in all material respects with the trade regulation rule of the Federal Trade Commission relating to "disclosure requirements and prohibitions concerning franchising," 16 C.F.R. 436.1 et seq., as amended from time to time, that is in effect as of the date of the sale of the business opportunity or (ii) a written document, the cover sheet of which is entitled in at least 10-point bold face capital letters "DISCLOSURES REQUIRED BY NORTH CAROLINA LAW." Under this title shall appear the statement in at least 10-point type that "The State of North Carolina has not reviewed and does not approve, recommend, endorse or sponsor any business opportunity. The information contained in this disclosure has not been verified by the State. If you have any questions about this investment, see an attorney before you sign a contract or agreement." Nothing except the title and required statement shall appear on the cover sheet. The disclosure document shall contain the following information:

(1) The name of the seller, whether the seller is doing business as an individual, partnership, or corporation, the names under which the seller has done, is doing or intends to do business, and the name of any parent or affiliated company that

will engage in business transactions with purchasers or who takes responsibility for statements made by the seller.

(2) The names and addresses and titles of the seller's officers, directors, trustees,
general partners, general managers, principal executives, and any other persons charged with responsibility for the seller's business activities relating to the sale of business opportunities. The disclosure document shall additionally contain a statement disclosing who, if any, of the above persons:

a. Has been the subject of any legal or administrative proceeding alleging the violation of any business opportunity or franchise law, or fraud, embezzlement, fraudulent conversion, restraint of trade, unfair or deceptive practices, misappropriation of property or comparable allegations;

b. Has been the subject of any bankruptcy, reorganization or receivership proceeding, or was an owner, a principal officer or a general partner of any entity which has been subject to such proceeding.

The disclosure document shall set forth the name of the person, the penalties or damages assessed and/or terms of settlement, and nature of and the parties to the action or proceeding, the court or other forum, the date, the current status of the action or proceeding, the terms and conditions of any order of decree, the any other information to enable the purchaser to assess the prior business activities of the seller.

(3) The prior business experience of the seller relating to business opportunities
including:

a. The name, address, and a description of any business opportunity previously offered by the seller;

b. The length of time the seller has offered each such business opportunity;

c. The length of time the seller has conducted the business opportunity currently being offered to the purchaser.

(4) A full and detailed description of the actual services that the business opportunity seller undertakes to perform for the purchaser.

(5) A copy of a current (not older than 13 months) financial statement of the seller,
updated to reflect any material changes in the seller's financial condition.

(6) If training of any type is promised by the seller, the disclosure statement must
set forth a complete description of the training and the length of the training.

(7) If the seller promises services to be performed in connection with the placement
of the equipment, product(s) or supplies at various location(s), the disclosure statement must set forth the full nature of those services as well as the nature of the agreements to be made with the owners or managers of these location(s) where the purchaser's equipment, product(s) or supplies will be placed.

(8) If the business opportunity seller is required to secure a bond or establish a trust
deposit pursuant to G.S. 66-96, the document shall state either:

a. "As required by North Carolina law, the seller has secured a bond issued by

(name and address of surety company)

a surety company authorized to do business in this State. Before signing a contract to purchase this business opportunity, you should check with the surety company to determine the bond's current status," or

b. "As required by North Carolina law, the seller has established a trust account_____
(number of account)
with
(name and address of bank or savings institution)
Before signing a contract to purchase this business opportunity, you should check with the bank or savings institution to determine the current status of the trust account."

(9) The following statement:
"If the seller fails to deliver the product(s), equipment or supplies necessary to begin substantial operation of the business within 45 days of the delivery date stated in your contract, you may notify the seller in writing and demand that the contract be cancelled."

(10) If the seller makes any statement concerning sales or earnings, or range of sales or earnings that may be made through this business opportunity, the document must disclose:

a. The total number of purchasers of business opportunities involving the product(s), equipment, supplies or services being offered who to the seller's knowledge have actually received earnings in the amount or range specified, within three years prior to the date of the disclosure statement.

b. The total number of purchasers of business opportunities involving the product(s), equipment, supplies or services being offered within three years prior to the date of the disclosure statement. (1977, c. 884, s. 1; 1981, c. 817, s. 2.)

§ 66-96. Bond or trust account required.

If the business opportunity seller makes any of the representations set forth in G.S. 66-94(3), the seller must either have obtained a surety bond issued by a surety company authorized to do business in this State or have established a trust account with a licensed and insured bank or savings institution located in the State of North Carolina. The amount of the bond or trust account shall be an amount not less than fifty thousand dollars ($50,000). The bond or trust account shall be in favor of the State of North Carolina. Any person who is damaged by any violation of this Article, or by the seller's breach of the contract for the business opportunity sale or of any obligation arising therefrom may bring an action against the bond or trust account to recover damages suffered; provided, however, that the aggregate liability of the surety or trustee shall be only for actual damages and in no event shall exceed the amount of the bond or trust account. (1977, c. 884, s. 1.)

§ 66-97. Filing with Secretary of State.

(a) The seller of every business opportunity shall file with the Secretary of State two copies of the disclosure statement required by G.S. 66-95, accompanied by a fee in the amount of two

hundred fifty dollars ($250.00) made payable to the Secretary of State, prior to placing any advertisement or making any other representations to prospective purchasers in this State. The

seller shall update this filing as any material change in the required information occurs, but no less than annually.

(b) Every seller shall file, in such form as the Secretary of State may prescribe, an irrevocable consent appointing the Secretary of State or his successors in office to be his attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against the seller or his successor, executor or administrator which arises under this Article after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. Service may be made by leaving a copy of the process in the office of the Secretary of State, but is not effective unless (i) the plaintiff, who may be the Attorney General in a suit, action or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his address on file with the Secretary of State, and (ii) the plaintiff 's affidavit of compliance with this section is filed in the case on or before the return date of the process, if any, or within such further time as the court allows.

(c) If the seller of a business opportunity is required by G.S. 66-96 to provide a bond or establish a trust account, he shall file with the Secretary of State two copies of the bond or two copies of the formal notification by the depository that the trust account is established contemporaneously with compliance with subsections (a) or (d).

(d) ~~The~~Instead of filing with the Secretary of State ~~may accept the Uniform Franchise Offering Circular (UFOC) or~~a copy of a disclosure statement as provided in subpart (a) above, a seller may file a copy of a franchise disclosure document that complies in all material respects with the trade regulation rule of the Federal Trade Commission ~~Basic Disclosure Document, provided, that the alternative disclosure document shall be accompanied by a separate sheet setting forth the caption and statement and any other information required by G.S. 66-95.~~relating to "disclosure requirements and prohibitions concerning franchising," 16 C.F.R. 436.1 et seq., as amended from time to time, that is in effect as of the date of the sale of the business opportunity.

(e) Failure to so file shall be a Class 1 misdemeanor. (1977, c. 884, s. 1; 1981, c. 817, s. 3; 1993, c. 539, s. 521; 1994, Ex. Sess., c. 24, s. 14(c); 2003-284, s. 35B.3(a).)

§ 66-98. Prohibited acts.

Business opportunity sellers shall not:

(1) Represent that the business opportunity provides income or earning potential of any kind unless the seller has documented data to substantiate the claims of income or earning potential and discloses this data to the prospective purchaser at the time such representations are made;

(2) Use the trademark, service mark, trade names, logotype, advertising or other commercial symbol of any business which does not either control the ownership interest in the seller or accept responsibility for all representations made by the seller in regard to the business opportunity, unless it is clear from the circumstances that the owner of the commercial symbol is not involved in the sale of the business opportunity;

(3) Make or authorize the making of any reference to its compliance with this Article in any advertisement or other contact with prospective purchasers. (1977, c. 884, s. 1.)

§ 66-99. Contracts to be in writing; form; provisions.

(a) Every business opportunity contract shall be in writing and a copy shall be given to the purchaser at the time he signs the contract.

(b) Every contract for a business opportunity shall include the following:

(1) The terms and conditions of payment;

(2) A full and detailed description of the acts or services that the business opportunity seller undertakes to perform for the purchaser;

(3) The seller's principal business address and the name and address of its agent in the State of North Carolina authorized to receive service of process in addition to the Secretary of State as provided in G.S. 66-97(b);

(4) The approximate delivery date of any product(s), equipment or supplies the business opportunity seller is to deliver to the purchaser. (1977, c. 884, s. 1; 1981, c. 817, s. 4; 1983, c. 721, s. 4.)

§ 66-100. Remedies.

(a) If a business opportunity seller uses any untrue or misleading statements in the sale of a business opportunity, or fails to give the proper disclosures in the manner required by G.S. 66-95, or fails to deliver the equipment, supplies or product(s) necessary to begin substantial operation of the business within 45 days of the delivery date stated in the business opportunity contract, or if the contract does not comply with the requirements of G.S. 66-99, then, within one year of the date of the contract, upon written notice to seller, the purchaser may void the contract and shall be entitled to receive from the business opportunity seller all sums paid to the business opportunity seller. Upon receipt of such sums, the purchaser shall make available to the seller at purchaser's address or at the places at which they are located at the time notice is given, all product(s), equipment or supplies received by the purchaser. Provided, that purchaser shall not be entitled to unjust enrichment by exercising the remedies provided in this subsection.

(b) Any purchaser injured by a violation of this Article or by the business opportunity seller's breach of a contract subject to this Article or any obligation arising therefrom may bring an action for recovery of damages, including reasonable attorneys' fees.

(c) Upon complaint of any person that a business opportunity seller has violated the provisions of this Article, the superior court shall have jurisdiction to enjoin the defendant from further such violations.

(d) The remedies provided herein shall be in addition to any other remedies provided for by law or in equity.

(e) The violation of any provisions of this Article shall constitute an unfair practice under G.S. 75-1.1. (1977, c. 884, s. 1.)

[Link-to-previous setting changed from off in original to on in modified.].

§§ 66-101 through 66-105. Reserved for future codification purposes.

[Link-to-previous setting changed from off in original to on in modified.].

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A RESOLUTION OF THE BUSINESS LAW SECTION COUNCIL OF THE NORTH CAROLINA BAR ASSOCIATION ENDORSING THE ENACTMENT OF PROVISIONS THAT MODIFY THE NONPROFIT CORPORATIONS ACT AND THE CHARITABLE SOLICITATION LICENSING LAWS

WHEREAS, the North Carolina Business Law Section Council of the North Carolina Bar Association reviews and advises the legal community on matters pertaining to business and corporate law, including issues related to Chapter 55A of the North Carolina General Statutes governing North Carolina Nonprofit Corporations;

WHEREAS, it is anticipated bills will be introduced to make various changes to the North Carolina Nonprofit Corporation Act and the charitable solicitation licensing laws;

WHEREAS, the potential legislation related to the North Carolina Nonprofit Corporation Act would likely (a) expressly allow mergers of nonprofit corporations with unincorporated nonprofit associations and with limited liability companies that are treated as 501(c)(3) tax-exempt entities for federal tax purposes; (b) exempt transfers of assets of a dissolving nonprofit from review by the Attorney General if the dissolution is properly approved by the nonprofit's governing board; (c) create a simple, no-fee annual reporting requirement for North Carolina nonprofit corporations; (d) adopting a domestication provision into the North Carolina Nonprofit Corporation Act that is a form of the provision in the Model Nonprofit Corporation Act; (e) require North Carolina nonprofit corporations to have at least three board members with limited exceptions for private foundations and for nonprofits with vacancies in board positions; and (f) replace the current "opt in" provisions for the use of electronic means of communication for actions by unanimous written consent with "opt out" language;

WHEREAS, the potential legislation related to the charitable solicitation licensing laws would likely include provisions that would: (a) increase the qualifying income threshold for exemption from charitable solicitation requirements to be consistent with the threshold for filing a Form 990-N with the Internal Revenue Service; (b) modify the deadlines for license renewal for charitable organizations to track deadlines and extensions for filling of Internal Revenue Service Form 990; and (c) remove the requirement that applications for licensure and certain financial reports be notarized;

NOW, THEREFORE, BE IT RESOLVED BY THE NORTH CAROLINA BUSINESS LAW SECTION COUNCIL, THAT THE FOLLOWING ACTIONS BE TAKEN:

RESOLVED, that the North Carolina Bar Association hereby endorse the enactment of these provisions.

RESOLVED, FURTHER, that the appropriate representatives of the North Carolina Bar Association take any and all action necessary to urge the members of the North Carolina General Assembly to adopt these provisions.

RESOLVED FURTHER, that any action which heretofore has been taken by any of the members of the Council in connection with the foregoing or the matters contemplated thereby or by the resolutions described herein is hereby ratified, approved and confirmed in all respects.

The undersigned confirms that the foregoing resolution was adopted by the Council of the Business Law Section of the North Carolina Bar Association on November 9, 2022. These Resolutions shall become effective immediately when approved by the NCBA Board of Governors.

Ritchie W. Taylor
Chair, Business Law Section Council
North Carolina Bar Association

4884-6522-6558.v1

NORTH CAROLINA
BAR ASSOCIATION
seeking liberty + justice

ESTATE PLANNING & FIDUCIARY LAW SECTION PROPOSALS

MEMORANDUM

TO: NCBA LEGISLATIVE ADVISORY COMMITTEE

FROM: JUDY LINVILLE, CHAIR OF THE LEGISLATIVE COMMITTEE FROM THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

RE: 2023 LONG SESSION PROPOSAL 1 - ENACTMENT OF NEW ARTICLE 11 OF CHAPTER 31 (NORTH CAROLINA UNIFORM ELECTRONIC WILLS ACT) AND AMENDMENT TO CURRENT GS § 28A-2A-8 (MANNER OF PROBATE OF ATTESTED WRITTEN WILL) AND GS § 31.3.2 (KINDS OF WILLS)

CC: CATHERINE WILSON (LEGISLATIVE VICE-CHAIR), ELIE FOY (SECTION CHAIR)

Proposal:	Enactment of new Article 11 of Chapter 31 of North Carolina General Statute adopting North Carolina's version of the Uniform Law Commission's Uniform Electronic Wills Act. Amendment to current GS §28A-2A-8 to include procedures for probating electronic will and amendment to GS § 31-3.2 to include electronic wills.
Purpose:	To establish legislation that governs the laws of electronic wills in North Carolina.
Changes:	Creates a comprehensive body of statutory law to govern the creation and administration of electronic wills in North Carolina. Allows for electronic signing of wills but does not allow remote witnessing or notarization.
Improvements:	The proposed legislation will provide the court system, practitioners, and the public with clear laws on the validity of electronic wills in North Carolina and how they will be administered. It will continue to modernize North Carolina law related to wills as technology advances while maintaining safeguards to help prevent fraud and coercion. This new legislation will be of benefit for all North Carolinians by allowing the execution of wills during a pandemic for example.
Constitutional:	This legislation would not be unconstitutional.

Prior Position: The NCBA has not previously taken a position on the issue.

Affected Areas: Estate planning & fiduciary litigation, elder and special needs law.

Vetting: This proposal was presented to the Section's legislative committee and Council and was discussed and unanimously approved. In addition, this proposal was drafted after receiving input and comments from members of a joint task force between the legislative electronic wills subcommittee and members of the AOC Clerks conference; such joint task force meeting having multiple meeting spanning almost 2 years.

Approval: The proposal was approved by unanimous consent by the Council at its meeting on October 4, 2022.

Other Groups: General Statutes Commission (open docket item), Elder and Special Needs Law Section, North Carolina Conference of Clerks of Superior Court, North Carolina Administrative Office of the Courts

Prioritization: **1 of 8**

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TALKING POINTS

NEW ENACTMENT OF NEW ARTICLE 11 OF CHAPTER 31
(NORTH CAROLINA UNIFORM ELECTRONIC WILLS ACT)

PROPOSED BY THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

The Uniform Law Commission approved the Uniform Electronic Wills Act in July 2019 (UEWA). In September 2020 the NC General Statutes Commission (GSC) opened Docket Item 20-4 to review and study the Uniform Act. The GSC requested the legislative committee of the NCBA EP&FL Section to provided comments and feedback on the Uniform Act. An Electronic Wills Subcommittee (EWSC) was formed. After two years of studying the Uniform Act, electronic wills legislation passed in other jurisdictions, and gathering the comments and feedback from the AOC and Clerks through a joint task force created for this purpose, the EWSC proposed the modified version of the Uniform Act be enacted as the North Carolina Uniform Electronic Wills Act (NCUEWA or the Act). The modifications of the Act consider existing North Carolina laws related to wills, estate administration, and notarization.

The goal of the Act is to allow a testator is to allow a testator to execute an electronic will, while maintaining the same protections for the testator of an electronic will that are available to those executing traditional wills. It covers both the creation of wills and the how they are to be probated in the courts. Florida, Nevada, Arizona, Indiana, and the District of Columbia have laws permitting electronic wills. In addition, the states of Washington, Utah, Colorado, and North Dakota have passed some version of the 2019 UEWA. In addition, UEWA legislation has been introduced and is currently pending legislation in Georgia, New Jersey, Massachusetts, and the District of Columbia.

The EWSC has considered the following in recommending this proposed legislation.

1. North Carolina courts, practitioners, and public will benefit from having laws governing the creation and administration of electronic wills. However, such laws should be consistent with North Carolina's current laws on traditional wills.
2. There is significant advantage to having the proposed legislation introduced by the General Statutes Commission but drafted by NCBA and AOC where experienced and knowledge attorneys and practitioners have drafted the legislation as opposed to law introduced by an outside third party who may more likely have a commercial interest in the introduction and passing of electronic wills legislation and who is not experienced or knowledgeable on North Carolina's current laws.
3. After careful consideration of the current status of North Carolina's existing laws (both temporary and permanent) on electronic and remote notarization and witnessing in North Carolina, the proposed NCUWEA does *not currently permit*

remote signing of the electronic will. It is the EWSC's opinion that adoption of remote signatures should be considered after the permanent remote notarization laws are implemented and effective. For a better understanding of the interplay between these laws a brief summary of the relevant points is included below.

   a. North Carolina has temporary remote laws in place that allow for remote notarization and witnessing of wills. However, this law expires June 30, 2023. It should also be noted that the temporary remote notarization and witnessing laws do not specifically address or govern electronic signatures and do not have the technology safeguards and requirements that the new permanent remote notarization act requires.
   b. North Carolina enacted permanent remote notarization laws in 2022 but the effect date of the remote notarization laws will not be effective until July 1, 2023. This is primarily to ensure the Secretary of State has sufficient time to implement technology requirements. In addition, notarization of wills is currently exempted from the types of remote electronic notarial acts permitted. GS 10B-134.3.

4. The NCUEWA would recognize electronic wills as a valid will for disposition of property at death and would establish the rules and procedures on how electronic wills are created and administered in North Carolina. However, NCUEWA is not intended to otherwise modify or change North Carolinas existing law governing wills. As such, the harmless error provisions of the UEWA have been removed and there are modifications to the UEWA to include terminology and statutory references specific to North Carolina existing law.
5. In the fall of 2022 North Carolina begins implementing an E-courts system that includes estate administrations. This transition to an electronic document system by the North Carolina Courts is further support that now is the time to enact laws governing electronic wills.

Article 11.

North Carolina Uniform Electronic Wills Act

§ 31-64. Short title. This Article may be cited as the North Carolina Uniform Electronic Wills Act.

§ 31-65. Definitions. In this Article:

(1) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(2) "Electronic will" means a will executed electronically in compliance with G.S. 31-68.

(3) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(4) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to affix to or logically associate with the record an electronic symbol or process.

(5) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

§ 31-66. Law applicable to electronic will; principles of equity. An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this Article.

§ 31-67. Choice of law regarding execution. An electronic will executed electronically but not in compliance with 31-68 is governed by the provisions of G.S. 31-46.

§ 31-68. Execution of electronic will.

Subject to G.S. 31-71(b), an electronic will is a record that is readable as text at the time of signing and is signed by the testator and attested by at least two competent witnesses, as provided by G.S. 31-3.3.

§ 31-69. Reserved for future codification purposes.

§ 31-70. Revocation.

(a) An electronic will may revoke all or part of a previous will.

(b) All or part of an electronic will is revoked

(1) in the manner provided by G.S. 31-5.1(1), or

(2) by a physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence.

§ 31-71. Electronic will attested and made self-proving at time of execution.

(a) An electronic will may be executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses as provided by G.S. 31-11.6, except that for an electronic will to be made self-proving, the affidavits of the testator and the witnesses must be made simultaneously with the execution of the electronic will.

(b) A signature physically or electronically affixed to an affidavit that is affixed to or logically associated with an electronic will under this Article is deemed a signature of the electronic will under G.S. 31-68.

§ 31-72. Certification of paper copy. An individual may create a certified paper copy of an electronic will by certifying that a paper copy of the electronic will is a complete, true, and accurate copy of the electronic will. The certification shall be in the form of an affidavit sworn to

or affirmed before an officer authorized to administer oaths. If the electronic will is made self-proving, the certified paper copy of the will must include the self-proving affidavits. The certified paper copy of the electronic will may be created at any time after the electronic will is executed in accordance with G.S. 31-68.

§ 31-73. Uniformity of application and construction. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Transitional provision. This Article becomes effective January 1, 2025 and applies to the will of a decedent who dies on or after that date.

Authorization for the printing of official and drafters' comments. The Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, all relevant portions of the Official Comments to the Uniform Electronic Wills Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

§ 28A-2A-8. Manner of probate of attested written will.

(a) An attested written will other than an electronic will executed as provided by G.S. 31-3.3, may be probated in the following manner:

(1) Upon the testimony of at least two of the attesting witnesses; or

(2) If the testimony of only one attesting witness is available, then

a. Upon the testimony of such witness, and

b. Upon proof of the handwriting of at least one of the attesting witnesses who is dead or whose testimony is otherwise unavailable, and

c. Upon proof of the handwriting of the testator, unless he signed by his mark, and

d. Upon proof of such other circumstances as will satisfy the clerk of the superior court as to the genuineness and due execution of the will; or

(3) If the testimony of none of the attesting witnesses is available, then

a. Upon proof of the handwriting of at least two of the attesting witnesses whose testimony is unavailable, and

b. Upon compliance with paragraphs c. and d. of subsection (a)(2) of this section; or

(4) Upon a showing that the will has been made self-proved in accordance with the provisions of G.S. 31-11.6.

(a1) A certified copy of an electronic will, executed as provided by G.S. 31-68 and created as provided by G.S. 31-72, may be probated in the following manner:

(1) Upon the testimony of at least two of the attesting witnesses; or

(2) If the testimony of only one attesting witness is available, then

a. Upon the testimony of such witness, and

b. Upon proof of such other circumstances as will satisfy the clerk of the superior court as to the genuineness and due execution of the will; or

(3) If the testimony of none of the attesting witnesses is available, then upon compliance with paragraph b. of subsection (a1)(2) of this section; or

(4) Upon a showing that the will has been made self-proved in accordance with the provisions of G.S. 31-71.

(b) Due execution of a will may be established, where the evidence required by subsections (a) and (a1) of this section is unavoidably lacking or inadequate, by testimony of other competent witnesses as to the requisite facts.

(c) The testimony of a witness is unavailable within the meaning of this section when the witness is dead, out of the State, not to be found within the State, incompetent, physically unable to testify or refuses to testify.

Transitional provision. This Article becomes effective January 1, 2025 and applies to the will of a decedent who dies on or after that date.

§ 31-3.2. Kinds of wills.

(a) Personal property and real property may be devised by

(1) An attested written will which complies with the requirements of G.S. 31-3.3,

(2) A holographic will which complies with the requirements of G.S. 31-3.4, or

(3) An electronic will which complies with the requirements of G.S. 31-68.

(b) Personal property may also be devised by a nuncupative will which complies with the requirements of G.S. 31-3.5.

Transitional provision. This Article becomes effective January 1, 2025 and applies to the will of a decedent who dies on or after that date.

UNIFORM ELECTRONIC WILLS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-EIGHTH YEAR
ANCHORAGE, ALASKA
JULY 12-18, 2019

WITHOUT PREFATORY NOTE AND COMMENTS

February 1, 2021

UNIFORM ELECTRONIC WILLS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Electronic Wills Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

[(2) "Electronic presence" means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.]

(3) "Electronic will" means a will executed electronically in compliance with Section 5(a).

(4) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(5) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to affix to or logically associate with the record an electronic symbol or process.

(6) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(7) "Will" includes a codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate

succession.

Legislative Note: *A state that permits an electronic will only if executed with the witnesses in the physical presence of the testator should omit paragraph (2) and renumber the remaining paragraphs accordingly. See also the Legislative Note to Section 5.*

SECTION 3. LAW APPLICABLE TO ELECTRONIC WILL; PRINCIPLES OF EQUITY. An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this [act].

SECTION 4. CHOICE OF LAW REGARDING EXECUTION. A will executed electronically but not in compliance with Section 5(a) is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where the testator is:

(1) physically located when the will is signed; or

(2) domiciled or resides when the will is signed or when the testator dies.

SECTION 5. EXECUTION OF ELECTRONIC WILL.

(a) Subject to Section 8(d)[and except as provided in Section 6], an electronic will must be:

(1) a record that is readable as text at the time of signing under paragraph (2);

(2) signed by:

(A) the testator; or

(B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and

(3) [either:

(A)] signed in the physical [or electronic] presence of the testator by at least two individuals[, each of whom is a resident of a state and physically located in a state at

the time of signing and] within a reasonable time after witnessing:

[(A)] [(i)] the signing of the will under paragraph (2); or

[(B)] [(ii)] the testator's acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will[; or

(B) acknowledged by the testator before and in the physical [or electronic] presence of a notary public or other individual authorized by law to notarize records electronically].

(b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence.

Legislative Note: *A state should conform Section 5 to its will-execution statute.*

A state that enacts Section 6 (harmless error) should include the bracketed language at the beginning of subsection (a).

A state that permits an electronic will only when the testator and witnesses are in the same physical location, and therefore prohibits remote attestation, should omit the bracketed words "or electronic" from subsection (a)(3) and Section 8(c).

A state that has enacted Uniform Probate Code Section 2-502 or otherwise validates an unattested but notarized will should include subsection (a)(3)(B).

[SECTION 6. HARMLESS ERROR.

Alternative A

A record readable as text not executed in compliance with Section 5(a) is deemed to comply with Section 5(a) if the proponent of the record establishes by clear-and-convincing evidence that the decedent intended the record to be:

(1) the decedent's will;

(2) a partial or complete revocation of the decedent's will;

(3) an addition to or modification of the decedent's will; or

(4) a partial or complete revival of the decedent's formerly revoked will or part of the will.

Alternative B

[Cite to Section 2-503 of the Uniform Probate Code or comparable provision of the law of this state] applies to a will executed electronically.

End of Alternatives]

Legislative Note: *A state that has enacted Uniform Probate Code Section 2-503 or another harmless error rule for a non-electronic will, should enact Alternative B. A state that has not enacted a harmless error rule may not want to add a harmless error rule solely for an electronic will, but if it does, it should enact Alternative A.*

SECTION 7. REVOCATION.

(a) An electronic will may revoke all or part of a previous will.

(b) All or part of an electronic will is revoked by:

(1) a subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or

(2) a physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence.

SECTION 8. ELECTRONIC WILL ATTESTED AND MADE SELF-PROVING AT TIME OF EXECUTION.

(a) An electronic will may be simultaneously executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses.

(b) The acknowledgment and affidavits under subsection (a) must be:

(1) made before an officer authorized to administer oaths under law of the state in which execution occurs [or, if fewer than two attesting witnesses are physically present in the

same location as the testator at the time of signing under Section 5(a)(2), before an officer authorized under [cite to Revised Uniform Law on Notarial Acts Section 14A (2018) or comparable provision of the law of this state]]; and

(2) evidenced by the officer's certificate under official seal affixed to or logically associated with the electronic will.

(c) The acknowledgment and affidavits under subsection (a) must be in substantially the following form:

I, _____, the testator, and, being sworn, declare to the
(name)

undersigned officer that I sign this instrument as my electronic will, I willingly sign it or willingly direct another individual to sign it for me, I execute it as my voluntary act for the purposes expressed in this instrument, and I am [18] years of age or older, of sound mind, and under no constraint or undue influence.

_____
Testator

We, _____ and _____,
(name) (name)

witnesses, being sworn, declare to the undersigned officer that the testator signed this instrument as the testator's electronic will, that the testator willingly signed it or willingly directed another individual to sign for the testator, and that each of us, in the physical [or electronic] presence of the testator, signs this instrument as witness to the testator's signing, and to the best of our knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or undue influence.

_____
Witness

_____
Witness

Certificate of officer:

State of _____

[County] of _____

Subscribed, sworn to, and acknowledged before me by _____,
(name)

the testator, and subscribed and sworn to before me by _____ and
(name)

_____, witnesses, this _____ day of _____, ___.
(name)

(Seal)

_____
(Signed)

_____
(Capacity of officer)

(d) A signature physically or electronically affixed to an affidavit that is affixed to or logically associated with an electronic will under this [act] is deemed a signature of the electronic will under Section 5(a).

Legislative Note: *A state that has not enacted the Uniform Probate Code should conform Section 8 to its self-proving affidavit statute. The statements that the requirements for a valid will are met and the language required for the notary's certification should conform with the requirements under state law.*

A state that has authorized remote online notarization by enacting the 2018 version of the Revised Uniform Law on Notarial Acts should cite to Section 14A of that act in subsection (b)(1). A state that has adopted a non-uniform law allowing remote online notarization should cite to the relevant section of state law in subsection (b)(1).

A state that does not permit an electronic will to be executed without all witnesses being physically present should omit the bracketed language in subsection (b)(1) and the words "or electronic" in subsection (c) and Section 5(a)(3).

SECTION 9. CERTIFICATION OF PAPER COPY. An individual may create a certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of the electronic will is a complete, true, and accurate copy of the electronic will. If the electronic will is made self-proving, the certified paper copy of the will must include the self-proving affidavits.

Legislative Note: *A state may need to change its probate court rules to expand the definition of what may be filed with the court to include electronic filings.*

Court procedural rules may require that a certified paper copy be filed within a prescribed number of days of the filing of the application for probate. A state may want to include procedural rules specifically for electronic wills.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. TRANSITIONAL PROVISION. This [act] applies to the will of a decedent who dies on or after [the effective date of this [act]].

SECTION 12. EFFECTIVE DATE. This [act] takes effect . . . .

~~UNIFORM ELECTRONIC WILLS ACT~~

~~drafted by the~~

~~NATIONAL CONFERENCE OF COMMISSIONERS~~

~~ON UNIFORM STATE LAWS~~

~~and by it~~

~~APPROVED AND RECOMMENDED FOR ENACTMENT~~

~~IN ALL THE STATES~~

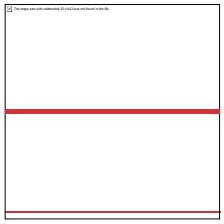
~~at its~~

ANNUAL CONFERENCE

MEETING IN ITS ONE-HUNDRED-AND-TWENTY-EIGHTH YEAR

ANCHORAGE, ALASKA

JULY 12-18, 2019



WITHOUT PREFATORY NOTE AND COMMENTS

February 1, 2021

Article 11.

North Carolina Uniform Electronic Wills Act

§ 31-64. ~~SECTION 1.~~ Short ~~t~~Title. ~~–~~ This ~~[act]~~Article may be cited as the North Carolina Uniform Electronic Wills Act.

§ 31-65. ~~SECTION 2.~~ Definitions. ~~–~~ In this ~~[act]~~Article:

(1) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

~~[(2) "Electronic presence" means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.~~

(2~~3~~) "Electronic will" means a will executed electronically in compliance with G.S. 31-68.~~Section 5(a).~~

(4~~3~~) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(5~~4~~) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to affix to or logically associate with the record an electronic symbol or process.

(6~~5~~) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe~~.~~ or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

~~(76) "Will" includes a codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the~~

~~right of an individual or class to succeed to property of the decedent passing by intestate succession.~~

~~***Legislative Note:*** *A state that permits an electronic will only if executed with the witnesses in the physical presence of the testator should omit paragraph (2) and renumber the remaining paragraphs accordingly. See also the Legislative Note to Section 5.*~~

§ 31-66. ~~SECTION 3.~~ Law applicable t~~T~~o electronic will; principles o~~O~~f equity. An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this Article.~~[act].~~

§ 31-67. ~~SECTION 4.~~ Choice of law regarding execution. An electronic will executed electronically but not in compliance with 31-68 is governed by the provisions of G.S. 31-46. ~~A will executed electronically but not in compliance with Section 5(a) is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where the testator is:~~

~~(1) physically located when the will is signed; or~~

~~(2) domiciled or resides when the will is signed or when the testator dies.~~

§ 31-68. ~~SECTION 5.~~ Execution o~~O~~f electronic will.

Subject to G.S. 31-71(b), ~~(a) Subject to Section 8(d)[and except as provided in Section 6],~~ an electronic will is a record that is readable as text at the time of signing and is signed by the testator and attested by at least two competent witnesses, as provided by G.S. 31-3.3.

§ 31-69. Reserved for future codification purposes.

~~an electronic will must be:~~

~~(1) a record that is readable as text at the time of signing under paragraph (2);~~

~~(2) signed by:~~

~~(A) the testator; or~~

~~(B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and~~

~~(3) [either:~~

~~(A)] signed in the physical [or electronic] presence of the testator by at least two individuals[, each of whom is a resident of a state and physically located in a state at the time of signing and] within a reasonable time after witnessing:~~

~~[(A)] [(i)] the signing of the will under paragraph (2); or~~

~~[(B)] [(ii)] the testator's acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will[; or~~

~~(B) acknowledged by the testator before and in the physical [or electronic] presence of a notary public or other individual authorized by law to notarize records electronically].~~

~~(b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence.~~

~~***Legislative Note:*** *A state should conform Section 5 to its will execution statute.*~~

~~*A state that enacts Section 6 (harmless error) should include the bracketed language at the beginning of subsection (a).*~~

~~*A state that permits an electronic will only when the testator and witnesses are in the same physical location, and therefore prohibits remote attestation, should omit the bracketed words "or*~~

electronic" from subsection (a)(3) and Section 8(c).

A state that has enacted Uniform Probate Code Section 2-502 or otherwise validates an unattested but notarized will should include subsection (a)(3)(B).

[SECTION 6. HARMLESS ERROR.

Alternative A

A record readable as text not executed in compliance with Section 5(a) is deemed to comply with Section 5(a) if the proponent of the record establishes by clear and convincing evidence that the decedent intended the record to be:

(1) the decedent's will;

(2) a partial or complete revocation of the decedent's will;

(3) an addition to or modification of the decedent's will; or

(4) a partial or complete revival of the decedent's formerly revoked will or part of the will.

Alternative B

[Cite to Section 2-503 of the Uniform Probate Code or comparable provision of the law of this state] applies to a will executed electronically.

End of Alternatives]

Legislative Note: A state that has enacted Uniform Probate Code Section 2-503 or another harmless error rule for a non-electronic will, should enact Alternative B. A state that has not enacted a harmless error rule may not want to add a harmless error rule solely for an electronic will, but if it does, it should enact Alternative A.

~~§ 31-70. SECTION 7.~~ **Revocation.**

(a) An electronic will may revoke all or part of a previous will.

(b) All or part of an electronic will is revoked ~~by:~~

(1) in the manner provided by G.S. 31-5.1(1), or~~a subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or~~

(2) by a physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence.

§ 31-71. ~~SECTION 8.~~ Electronic will attested a~~A~~nd made self-proving a~~A~~t time o~~O~~f execution.

(a) ~~(a)~~ A~~A~~n electronic will may be ~~simultaneously~~ executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses as provided by G.S. 31-11.6,~~.~~ except that for an electronic will to be made self-proving, the affidavits of the testator and the witnesses must be made simultaneously with the execution of the electronic will.

~~(b) The acknowledgment and affidavits under subsection (a) must be:~~

~~(1) made before an officer authorized to administer oaths under law of the state in which execution occurs [or, if fewer than two attesting witnesses are physically present in the same location as the testator at the time of signing under Section 5(a)(2), before an officer authorized under [cite to Revised Uniform Law on Notarial Acts Section 14A (2018) or comparable provision of the law of this state]]; and~~

~~(2) evidenced by the officer's certificate under official seal affixed to or logically associated with the electronic will.~~

~~(c) The acknowledgment and affidavits under subsection (a) must be in substantially the following form:~~

~~I, _____, the testator, and, being sworn, declare to the~~
~~(name)~~

~~undersigned officer that I sign this instrument as my electronic will, I willingly sign it or willingly direct another individual to sign it for me, I execute it as my voluntary act for the purposes expressed in this instrument, and I am [18] years of age or older, of sound mind, and under no constraint or undue influence.~~

~~_____~~

~~Testator~~

~~We, _____ and _____,~~
~~(name) (name)~~

~~witnesses, being sworn, declare to the undersigned officer that the testator signed this instrument as the testator's electronic will, that the testator willingly signed it or willingly directed another individual to sign for the testator, and that each of us, in the physical [or electronic] presence of the testator, signs this instrument as witness to the testator's signing, and to the best of our knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or undue influence.~~

~~_____~~

~~Witness~~

~~_____~~

~~Witness~~

~~Certificate of officer:~~

~~State of _____~~

~~[County] of _____~~

~~Subscribed, sworn to, and acknowledged before me by _____,~~

~~(name)~~

~~the testator, and subscribed and sworn to before me by _____ and~~

~~(name)~~

~~_____, witnesses, this _____ day of _____, ___.~~

~~(name)~~

~~(Seal)~~

~~_____~~

~~(Signed)~~

~~_____~~

~~(Capacity of officer)~~

(bd) A signature physically or electronically affixed to an affidavit that is affixed to or logically associated with an electronic will under this [act]Article is deemed a signature of the electronic will under G.S. 31-68.Section 5(a).

Legislative Note: *A state that has not enacted the Uniform Probate Code should conform Section 8 to its self-proving affidavit statute. The statements that the requirements for a valid will are met and the language required for the notary's certification should conform with the requirements under state law.*

A state that has authorized remote online notarization by enacting the 2018 version of the Revised

~~*Uniform Law on Notarial Acts should cite to Section 14A of that act in subsection (b)(1). A state that has adopted a non-uniform law allowing remote online notarization should cite to the relevant section of state law in subsection (b)(1).*~~

~~*A state that does not permit an electronic will to be executed without all witnesses being physically present should omit the bracketed language in subsection (b)(1) and the words "or electronic" in subsection (c) and Section 5(a)(3).*~~

§ 31-72.~~SECTION 9.~~ Certification o~~O~~f paper copy. ~~—~~ An individual may create a certified paper copy of an electronic will ~~by affirming under penalty of perjury that a~~by certifying that a paper copy of the electronic will is a complete, true, and accurate copy of the electronic will. The certification shall be in the form of an affidavit sworn to or affirmed before an officer authorized to administer oaths. If the electronic will is made self-proving, the certified paper copy of the will must include the self-proving affidavits. The certified paper copy of the electronic will may be created at any time after the electronic will is executed in accordance with G.S. 31-68.

~~***Legislative Note:*** *A state may need to change its probate court rules to expand the definition of what may be filed with the court to include electronic filings.*~~

~~*Court procedural rules may require that a certified paper copy be filed within a prescribed number of days of the filing of the application for probate. A state may want to include procedural rules specifically for electronic wills.*~~

§ 31-73~~SECTION 10~~. **Uniformity o~~O~~f application a~~A~~nd construction.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

~~**SECTION 11.**~~ **Transitional p~~P~~rovision.** This ~~[act]~~Article becomes effective January 1, 2025 and applies to the will of a decedent who dies on or after ~~[the effective date of this [act]]~~.

~~**SECTION 12. Effective Date.** This [act] takes effect~~that date.

Authorization for the printing of official and drafters' comments. The Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, all relevant portions of the Official Comments to the Uniform Electronic Wills Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.~~. . . .~~

§ 28A-2A-8. Manner of probate of attested written will.

(a) An attested written will other than an electronic will , executed as provided by G.S. 31-3.3, may be probated in the following manner:

(1) Upon the testimony of at least two of the attesting witnesses; or

(2) If the testimony of only one attesting witness is available, then

a. Upon the testimony of such witness, and

b. Upon proof of the handwriting of at least one of the attesting witnesses who is dead or whose testimony is otherwise unavailable, and

c. Upon proof of the handwriting of the testator, unless he signed by his mark, and

d. Upon proof of such other circumstances as will satisfy the clerk of the superior court as to the genuineness and due execution of the will; or

(3) If the testimony of none of the attesting witnesses is available, then

a. Upon proof of the handwriting of at least two of the attesting witnesses whose testimony is unavailable, and

b. Upon compliance with paragraphs c. and d. of subsection (a)(2) of this section; or

(4) Upon a showing that the will has been made self-proved in accordance with the provisions of G.S. 31-11.6.

(a1) A certified copy of an electronic will, executed as provided by G.S. 31-68 and created as provided by G.S. 31-72, may be probated in the following manner:

(1) Upon the testimony of at least two of the attesting witnesses; or

(2) If the testimony of only one attesting witness is available, then

a. Upon the testimony of such witness, and

b. Upon proof of such other circumstances as will satisfy the clerk of the superior court as to the genuineness and due execution of the will; or

(3) If the testimony of none of the attesting witnesses is available, then upon compliance with paragraph b. of subsection (a1)(2) of this section; or

(4) Upon a showing that the will has been made self-proved in accordance with the provisions of G.S. 31-71.

(b) Due execution of a will may be established, where the evidence required by subsections (a) and (a1) of this section is unavoidably lacking or inadequate, by testimony of other competent witnesses as to the requisite facts.

(c) The testimony of a witness is unavailable within the meaning of this section when the witness is dead, out of the State, not to be found within the State, incompetent, physically unable to testify or refuses to testify.

Transitional provision. This Article becomes effective January 1, 2025 and applies to the will of a decedent who dies on or after that date.

§ 31-3.2. Kinds of wills.

(a) Personal property and real property may be devised by

(1) An attested written will which complies with the requirements of G.S. 31-3.3,

(2) A holographic will which complies with the requirements of G.S. 31-3.4,~~.~~ or

(3) An electronic will which complies with the requirements of G.S. 31-68.

(b) Personal property may also be devised by a nuncupative will which complies with the requirements of G.S. 31-3.5.

Transitional provision. This Article becomes effective January 1, 2025 and applies to the will of a decedent who dies on or after that date.

MEMORANDUM

TO: NCBA LEGISLATIVE ADVISORY COMMITTEE

FROM: JUDY LINVILLE, CHAIR OF THE LEGISLATIVE COMMITTEE FROM THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

RE: 2023 LONG SESSION PROPOSAL 2 - UPDATE TO AND REORGANIZATION OF SPOUSAL AND CHILD'S ALLOWANCE, GS 30-15 THROUGH GS 30-33

CC: CATHERINE WILSON (LEGISLATIVE VICE-CHAIR), ELIE FOY (SECTION CHAIR)

Proposal:	Update to and Reorganization of Spousal and Child's Allowance, GS 30-15 through GS 30-33
Purpose:	To clarify and simplify the procedure for obtaining spousal and child's allowance.
Changes:	Allowances must be filed with the clerk of court only. Sets deadline of 6 months to file if letters have been granted; no time limit to file if letters have not been granted. Gives priority of payment to spouse. Limits children who are eligible for allowance to those under age 18. Allows clerk to set a hearing and directs use of contested estates proceedings to serve parties. Removes use of magistrates to assign allowance.
Improvements:	The proposed legislation will assist clerks, the public, and practitioners by giving clear and easy to follow rules as to when a spousal or child's allowance is warranted, how a person may apply for such an allowance, and how the clerk should award the allowance.
Constitutional:	This legislation would not be unconstitutional.
Prior Position:	The NCBA has not previously taken a position on this issue.
Affected Areas:	Elder and Special Needs Law, Family Law.
Vetting:	This proposal was presented to the Section's legislative committee and Council and was discussed and unanimously approved. During the drafting process, this proposal also

	received valuable input from the clerks, as Hon. James Yancey Washington, Hon. Mark J. Kleinschmidt, Lisa Smith, and Jamie Lassiter participated in the subcommittee's meetings.
Approval:	The proposal was unanimously approved by the Council at its October 4, 2022 meeting.
Other Groups:	Elder and Special Needs Law Section, Family Law Section, North Carolina Conference of Clerks of Superior Court, North Carolina Administrative Office of the Courts
Prioritization:	**2 of 8**

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TALKING POINTS

UPDATE TO AND REORGANIZATION OF SPOUSAL AND CHILD'S ALLOWANCE,

GS 30-15 THROUGH GS 30-33

PROPOSED BY THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

Spousal and child's allowances are designed to provide support to immediate family members in the months after the death of a loved one. The current statute has evolved over time, with numerous piecemeal amendments over the last 150 years. As a result, the law is difficult to use, leading to confusion by the public and practitioners and a lack of uniformity in implementation.

By completely rewriting and reorganizing this statute, it is our hope that it will be easier to use and will produce uniform results upon application. In the process of reorganizing the statute, the drafting subcommittee also took the opportunity to make several clarifications and improvements:

1. A simplified procedure to promote uniform application among counties.
    a. Surviving spouse or person filing on behalf of a child has the burden to file a petition for allowance.
    b. The petition for allowance must be filed with the clerk of superior court.
    c. Prior to awarding the allowance, the clerk has discretion to set a hearing and direct the spouse to serve interested persons under the rules applicable to contested estate proceedings.
    d. Objections by outside parties are limited to 1 year from the order awarding the allowance.
2. New time limits.
    a. If Letters of Administration/Testamentary HAVE been granted, a petitioner must file within six (6) months of the issuance of letters. The original 1-year time limit was shortened to allow open estates to be closed more quickly, rather than require a personal representative to hold an estate open for one year in case the spouse or child should file for allowance.
    b. If Letters have NOT been granted, there is no time limit to file. Because allowances are often used in lieu of a full administration in order to pass a limited amount of assets, lifting the deadline allows the allowance to be available for this purpose, or in situations where assets may later be discovered.
3. Eliminate the use of a magistrate to assign allowance, as NC counties no longer use this method.
4. Give clear priority to a surviving spouse:

    a. Rather than require a pro rata division of assets if are insufficient to fund both spouse and child's allowances, the spouse's allowance would be paid before funding the child's allowance.
    b. This reflects long-standing NC public policy preferencing the rights of spouses; it also makes the statue easier to apply when the only assets to be awarded are tangible personal property (i.e., an automobile).
5. Reduces scope of child's allowance to minors under 18, removing allowances for full-time students and older disabled children.
    a. Due to the relatively small amount of the child's allowance and difficulty and potential inequity in applying the full-time versus part-time rules, the committee felt that simplification of the statute to apply only to children under 18 was appropriate.
    b. As to children with disabilities over age 18, the entitlement of a child's allowance could reduce or eliminate means-tested government benefits for which the child would otherwise qualify, such as Supplemental Security Income and Medicaid; thus, the choice was made to remove disabled children over 18 as a potential category of recipients, as this could actually harm the child instead of providing assistance as originally intended.
6. Reorder list of priority of who can receive allowance on a child's behalf:
    a. Allowance is first paid to a general guardian or guardian of the estate (if one has been appointed), followed by the surviving parents with whom the child lives, and then to the person with whom the child is then living.
    b. However, the clerk has the discretion to pay to a different person if the clerk determines it to be in the child's best interest.

§ 30-15. When spouse entitled to allowance

(a) Every surviving spouse of a decedent, whether or not the surviving spouse has petitioned for an elective share, shall be entitled to receive an allowance having a value of sixty thousand dollars ($60,000) for the surviving spouse's support for one year after the death of the deceased spouse unless the spouse is barred from seeking an allowance under G.S. 31A-1 or other applicable law. The spouse's allowance shall be in addition to the spouse's share of the decedent's estate if the decedent died intestate but shall be charged against the spouse's share of the decedent's estate if the decedent died testate.

(b) The right of a surviving spouse to file a claim for an allowance must be exercised during the lifetime of the surviving spouse by the surviving spouse, by the surviving spouse's agent under a durable power of attorney, or, with approval of court, by the guardian of the surviving spouse's estate or general guardian. A claim for an allowance must be made by filing a verified petition with the clerk of court of the county in which venue would be proper under G.S. 28A-3-1. There is no time limitation on bringing a claim for an allowance except that, if a personal representative has been appointed for the decedent's estate, the claim must be made within six months after the issuance of letters testamentary or letters of administration. In addition, if a personal representative has been appointed for the decedent's estate, a copy of the verified petition must be personally delivered or sent by first-class mail by the petitioner to the personal representative.

(c) If the surviving spouse dies after the petition is filed but before the claim for an allowance has been fully satisfied, any deficiency judgment existing at the time of the surviving spouse's death shall not expire.

(d) The spouse's allowance shall be exempt from any lien by judgment or execution against the property of the decedent or any other claim made against or owed by the decedent's estate. The spouse's allowance takes priority over any child's allowance under G.S. 30-17.

§ 30-16. Duty of clerk to assign allowance.

REPEALED

§ 30-17. When children entitled to an allowance.

(a) Every child of a decedent who is under the age of 18 years at the time of the decedent's death, including an adopted child and a child in utero, and every child who is under the age of 18 years at the time of the decedent's death with whom the decedent stood in loco parentis at the time of death, shall be entitled to receive an allowance having a value of five thousand dollars ($5,000) for the child's support for one year after the death of the decedent. The allowance shall be in addition to the child's share of the decedent's estate regardless of whether the decedent died testate or intestate.

(b) The right of a child to file a claim for an allowance must be exercised during the lifetime of the child by the person with priority to file on behalf of the child as set forth in subsection (c). A claim for an allowance must be made by filing a verified petition with the clerk of court of the county in which venue would be proper under G.S. 28A-3-1. There is no time limitation on

bringing a claim for an allowance except that, if a personal representative has been appointed for the decedent's estate, the claim must be made within six months after the issuance of letters testamentary or letters of administration. In addition, if a personal representative has been appointed for the decedent's estate, a copy of the verified petition must be personally delivered or sent by first-class mail by the petitioner to the personal representative.

(c) The person entitled to file a petition on behalf of the child for a child's allowance shall be in order of priority: (i) the general guardian or guardian of the estate of the child, if any, (ii) the surviving parent of the child if the child resides with the surviving parent, and (iii) the person with whom the child resides. Notwithstanding the foregoing, if the clerk of court believes that none of the individuals entitled to petition on behalf of the child is a fit or suitable individual, the clerk, on the clerk's own motion, can appoint another individual whom the clerk of court determines better represents the best interests of the child as the representative.

(d) The child's allowance shall be exempt from any lien by judgment or execution against the property of the decedent or any other claim made against or owed by the decedent's estate except that the spouse's allowance under G.S. 30-15 shall take priority over any child's allowance. A child's allowance shall only be awarded after the full spouse's allowance under G.S. 30-15 has been awarded.

§ 30-18. From what property allowance assigned.

(a) An allowance under this Article shall be awarded only out of cash or personal property of the decedent's estate except as set forth in subsection (b). Personal property of the decedent's estate is any property other than real property.

(b) In the case of a spouse's allowance, the cash or other personal property so awarded shall be distributed to the spouse. In the case of a child's allowance, the cash or other personal property so awarded shall be distributed to the person entitled to file for the allowance on behalf of the child as set forth in G.S. 30-17.

Part 2. Assigned by Clerk.

§ 30-19. Property awarded to surviving spouse and children.

The determination of the personal property to be awarded to the surviving spouse and children and the value thereof shall be made by the clerk of court of the county in which venue would be proper under G.S. 28A-3-1.

§ 30-20. Procedure for assignment; order of clerk.

(a) The clerk of court shall first ascertain if the surviving spouse is entitled to an allowance according to the provisions of this Article, and, if so, enter an order setting forth the personal property of the estate to be awarded to the surviving spouse. Once the spouse's allowance has been awarded, the clerk of court shall next ascertain if any children of the decedent are entitled to an allowance according to the provisions of this Article, and, if so, enter an order setting forth the

personal property of the estate to be awarded for the child's allowance. If a personal representative has been appointed for the decedent's estate, the clerk of court shall provide a copy of any order awarding an allowance to the personal representative of the decedent's estate.

(b) If the personal property of the estate shall be insufficient to satisfy the allowances awarded, the clerk of the superior court shall enter judgment against the decedent's estate for the amount of the deficiency. If a personal representative has been appointed for the decedent's estate, the deficiency shall be satisfied by the personal representative when a sufficiency of such assets shall come into the possession of the personal representative.

(c) The clerk of court may, on the clerk's own motion, determine that a hearing is necessary to determine whether a year's allowance should be awarded according to the provisions of this Article and, if so, what personal property should be awarded. If the clerk makes such a determination, the clerk shall direct the petitioner to commence a contested estate proceeding under G.S. 30-23 in order to determine the year's allowance.

§ 30-21. Reporting of allowances by personal representative.

If the assets awarded as part of a spouse's allowance or a child's allowance are distributed directly to the spouse or the petitioner for the child and never come into the possession of the personal representative, such assets shall not be reported on the inventory for the decedent's estate or on any subsequent accounting.

§ 30-22. [Repealed]

§ 30-23. Contested Proceeding regarding Allowance.

(a) If no contested estate proceeding under G.S. 30-20(c) was commenced to determine an award of an allowance under this Article, any person, including the personal representative of the decedent's estate, may bring a proceeding to challenge the award of a spousal allowance or a child's allowance, including but not limited to a proceeding to challenge the validity of an award of a year's allowance, a proceeding to challenge the amount of a year's allowance awarded, and a proceeding to challenge the assets awarded as part of a year's allowance. If a contested estate proceeding was commenced under G.S. 30-20(c), then any person, including the personal representative of the decedent's estate, who was not a party to the contested estate proceeding may bring a proceeding.

(b) Any such proceeding shall be conducted as an estate proceeding in accordance with the provisions of Article 2 of Chapter 28A and must be brought within one year of the date the order awarding the year's allowance was entered.

§ 30-24. [Repealed]

§ 30-25. Personal representative entitled to credit.

REPEAL

§ 30-26. [Repealed]

Part 3. Additional Year's Allowance.

§ 30-27. Surviving spouse or child may apply for additional allowance.

A surviving spouse or child may file an estate proceeding with the clerk of court seeking an award of an additional allowance in excess of the amount allowed to the spouse or child under G.S. 30-15 or G.S. 30-17. Any such proceeding must be filed within one year of the date of the decedent's death except that if a personal representative was appointed for the decedent's estate, any such proceeding must be filed within six months after the issuance of letters testamentary or letters of administration.

§ 30-28. Nature of proceeding; parties.

Any proceeding under G.S. 30-27 shall proceed as a contested estate proceeding under Article 2 of Chapter 28A.

§ 30-29. What petition must show.

REPEALED

§ 30-30. Judgment.

The clerk of court shall hear the matter and determine whether the surviving spouse or child is entitled to some or all of the relief sought and, if the clerk determines that the spouse or child is so entitled, the clerk shall enter judgment against the estate for the amount of such deficiency. If a personal representative has been appointed for the decedent's estate, the deficiency shall be satisfied by the personal representative when a sufficiency of such assets shall come into the possession of the personal representative. Any judgment so rendered shall have the same priority over other debts and claims against the estate as an allowance assigned pursuant to G.S. 30-15 or G.S. 30-17.

§ 30-31. Amount of Allowance

In determining the amount of an additional allowance to award pursuant to G.S. 30-27, the clerk of court may assign to the petitioner an amount sufficient for the support of the petitioner and without regard to the dollar limitations set forth in this Article, provided that:

(a) The amount allowed shall be fixed with due consideration for other persons entitled to an allowance from the decedent's estate under this Article and the financial condition of the decedent's estate; and

(b) The total amount of all allowances that may be assigned shall not in any case exceed one-half of the decedent's annual after-tax income, averaged over the three calendar years preceding

the calendar year of the decedent's death. The phrase "annual after-tax income" shall mean income remaining after all applicable deductions against such income, including deductions for federal and state income taxes attributable to such income, are taken.

(c) Attorneys' fees and costs awarded the petitioner under G.S. 6-21 shall be paid as an administrative expense of the estate.

§ 30-31.1. Service of judgment and appeal.

REPEALED

§ 30-31.2. Execution.

REPEALED

§ 30-32. [Repealed]

§ 30-33. [Repealed]

Change to § 28A-15-10

Add a new subsection (b1) to G.S. 28A-15-10 to read as follows:

(b1) Any asset acquired by a personal representative or collector under this section shall first be used to pay the allowances allowed to a spouse and children under G.S. 30-15 to 30-33 and only after such allowances are fully satisfied be used to satisfy other claims against a decedent's estate.

MEMORANDUM

TO: NCBA LEGISLATIVE ADVISORY COMMITTEE

FROM: JUDY LINVILLE, CHAIR OF THE LEGISLATIVE COMMITTEE FROM THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

RE: 2023 LONG SESSION PROPOSAL 3 - CODIFICATION OF NORTH CAROLINA LAW OF TENANCY IN COMMON, GS 41-80 THROUGH 41-98

CC: CATHERINE WILSON (LEGISLATIVE VICE-CHAIR), ELIE FOY (SECTION CHAIR)

Proposal:	Codification of North Carolina Law of Tenancy in Common, GS 41-80 Through 41-98
Purpose:	North Carolina's law of tenancy in common ownership is contained in both statutes and case law. The recent project of revision and codifying North Carolina joint tenancy and North Carolina tenancy by the entireties brought to the attention of the subcommittee the value of reviewing and bringing together the law related to tenancy in common, which is a particular type of co-ownership of property.
Changes:	None. This proposal is a codification of existing North Carolina statutes and case law.
Improvements:	The proposed legislation will make the law concerning tenancy in common ownership clearer for practitioners and more accessible to the general public.
Constitutional:	This legislation does not change property rights, and therefore would not be unconstitutional.
Prior Position:	The NCBA has not previously taken a position on this issue.
Affected Areas:	Estate planning, Real Property, Debtor/creditor, Elder and special needs law.
Vetting:	This proposal was presented to the Section's legislative committee and Council and was discussed and unanimously approved. The subcommittee worked extensively with the

Real Property Section in developing and reviewing this proposal.

Approval: The proposal was unanimously approved by the Council at its meeting on October 4, 2022.

Other Groups: North Carolina Conference of Clerks of Superior Court, North Carolina Administrative Office of the Courts.

Prioritization: **3 of 8**

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TALKING POINTS

CODIFICATION OF NORTH CAROLINA LAW OF TENANCY IN COMMON, GS 41-80 THROUGH 41-98

PROPOSED BY THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

The attached proposal represents a careful codification of the laws regarding tenancy in common. The contents of the proposal are designed to represent current North Carolina law and have been reviewed and vetted to ensure an accurate statement of North Carolina law. For reference, the provisions have been extensively annotated to show the source material and case law references where applicable.

This codification will make the law on this issue more accessible to the general public and to practitioners, ensure uniform application, and promote principles of fairness and equity.

STATUTE FOR TENANCY IN COMMON IN REAL PROPERTY

CHAPTER 41

ARTICLE 7

TENANCY IN COMMON IN REAL PROPERTY

§ 41-80. Definitions.

(a) The following definitions apply in this Article:

(1) Conveyance – A transfer of title to real property by deed, devise, assignment, or other means of transferring title.

(2) Actual ouster – An entry onto or possession of the property by a tenant in common that is a clear, positive, and unequivocal act, equivalent to an open denial of the cotenant's rights or title in the property and putting the cotenant out of seisin.[1]

(3) Constructive ouster[2] – A presumption of ouster when a tenant in common has sole possession of the property for twenty years

[1] *Dobbins v. Dobbins*, 141 N.C. 210, 53 S.E. 870 (1906) (applying the definition of actual ouster of a cotenant from Blackstone. "There may be an entry or possession of one tenant in common which may amount to an actual ouster, so as to enable his co-tenant to bring ejectment against him, but it must be by some clear, positive and unequivocal act equivalent to an open denial of his right and to putting him out of seizin"). For cases ruling that an actual ouster occurred, see *infra* note 34.

[2] Also known as "presumptive ouster." See William E. Wheeler, *Adverse Possession Between Tenants in Common and the Rule of Presumptive Ouster*, 10 Wake Forest L. Rev. 300 (1974).

a. without acknowledgment on the part of that tenant in common of the rights or title of the cotenant in the property,

b. without any demand or claim on the part of the cotenant for rents, profits and possession, and

c. with the cotenant under no disability to act at the time the possession commenced.[3]

(b) The following rules of construction apply in this Article, unless the statutory context requires otherwise:

(1) References to "property" mean the real property held in a tenancy in common as a whole.

(2) Reference to a "cotenant" means the cotenant of a tenant in common, and reference to the singular "cotenant" of a tenant in common means the plural "cotenants" if there is more than one cotenant of a tenant in common.

[3] E.g., *Covington v. Stewart*, 77 N.C. 148 (1877); *Thomas v. Garvan*, 15 N.C. 223 (1883); *Dobbins v. Dobbins, supra* note 1. A subsequent disability does not prevent a constructive ouster. *Seawell v. Bunch*, 51 N.C. 195, 197-198 (1858); *Dobbins v. Dobbins, supra* note 1, 141 N.C. at 218-19, 53 S.E. at 873. For other cases ruling on the issue of constructive ouster see *infra* note 36.

§ 41-81. Nature of tenancy in common in general.

Tenancy in common ownership includes the following characteristics:

(1) Two or more persons hold separate undivided interests in the property. [4]

(2) The interests of the tenants in common in the property may be equal or unequal percentages.[5] The interests are deemed to be equal unless otherwise specified in the instrument of conveyance.[6]

(3) The tenants in common hold by several and distinct titles with each tenant in common having a right to possession of the property.[7]

(4) The tenants in common need not take from the same instrument or at the same time.[8]

(5) The tenants in common do not have a right of survivorship.[9]

[4] *Godette v. Godette*, 146 N.C. App. 737, 740, 554 S.E.2d 8, 10 (2001) (quoting, with approval, Black's Law Dictionary (7th ed. 1999)).

[5] *Id*.

[6] *Powell v. Malone*, 22 F. Supp. 300, 302 (M.D.N.C. 1938).

[7] *Dobbins v. Dobbins*, *supra* note 1. "Such tenants hold their estates by several and distinct titles, but by unity of possession, because none of them can know his own severalty, or … no one of them can tell which part is his own, and for this reason they occupy promiscuously; the only unity being that of possession." 141 N.C. at 214, 53 S.E at 871.

[8] JAMES A. WEBSTER, WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA, § 7.03 (6 ed.), hereinafter cited as "WEBSTER."

[9] *See Godette v. Godette*, *supra* note 4.

§ 41-82. Creation of a tenancy in common.

(a) A tenancy in common is created by a conveyance

(1) to two or more grantees that expresses an intent that the grantees hold separate undivided interests in the property[10];

(2) to one or more grantees that expresses an intent that the grantor and the grantee or grantees hold separate undivided interests in the property; or[11]

(3) that does not express an intent described in subdivision (1) or (2) and, with nothing else appearing, does not under the circumstances create an estate in property other than a tenancy in common.[12]

The following words in the instrument of conveyance shall be deemed to express an intent to create a tenancy in common unless the instrument provides otherwise: "equal portions", "share equally", "their respective portions", "equally divided", and "share and share alike".[13]

[10] *Midgett v. Midgett*, 117 N.C. 8, 10, 23 S.E.2d 37, 38 (1985); *Hollowell v. Hollowell*, 333 N.C. 706, 713, 430 S.E.2d 235, 240 (1993) and cases cited; *In re Gonzales* 2013 W.L. 3185534 (Bankr. E.D. N.C. 2013).

[11] *Smith v. Watson*, 71 N.C. App. 351, 357, 322 S.E.2d 588, 592 (1984) *disc. rev. denied*, 313 N.C. 509, 329 S.E.2d 394 (1985); *Council v. Pitt,* 272 N.C. 222, 226, 158 S.E.2d 34, 36 (1967).

[12] *Powell v. Malone*, *supra* note 6 at 302 ("tenancy in common arises whenever an estate in real or personal property is owned concurrently by two or more persons under a conveyance or under circumstances which do not either expressly or by necessary implication call for some other form of cotenancy."); *Long v. Eddelman,* 22 N.C. App. 43, 44, 205 S.E.2d 598 599 (1974).

[13] See *Hollowell v Hollowell*, *supra* note 10; *In re Gonzales*, *supra* note 10.

(b) An interest in property held by tenants in common who subsequently marry each other remains held as tenancy in common unless by separate instrument the spouses convey the interest to themselves to create a tenancy by the entirety or a joint tenancy with right of survivorship.[14]

(c) Unless otherwise provided in the instrument of conveyance, a tenancy in common interest conveyed to grantees married to each other shall be held in a tenancy by the entirety, and the married grantees shall be treated as a single tenant in common, including where:

(a) The tenancy in common interest is conveyed to the married grantees and to one or more other grantees as tenants in common in the same instrument, [15] or

(b) A tenant in common's interest in the property is conveyed by that tenant in common to the married grantees.[16]

[14] *Isley v. Sellars*, 153 N.C. 374, 376-77, 69 S.E. 279, 280 (1910); *Davis v. Bass*, 188 N.C. 200, 207, 124 S.E. 566, 570 (1924). See also 41 C.J.S. Husband and Wife § 23 ("A subsequent marriage of the grantees will not convert their ownership into a tenancy by entirety," citing *Young v. Young,* 37 Md. App. 211, 376 A.2d 1151 (1977)).

[15] Although no cases have been found directly on point, the same rule is applicable where a joint tenancy interest is conveyed to married persons and one or more other joint tenants. See G.S. 41-72(d).

[16] *Morton v. Blades Lumber Co.*, 154 N.C. 278, 280, 70 S.E. 467, 468 (1911), cited by *Smith v. Smith*, 248 N.C. 194, 198, 102 S.E. 868, 871 (1958), and 249 N.C. 669, 678, 107 S.E.2d 530, 536 (1959), where the court said "if one tenant in common conveys his share to another tenant in common and the wife of the other tenant in common, the grantees hold such shares as tenancy by the entirety."

(d) A tenancy in common may be created by operation of law, including the following:

(1) When two or more individuals take undivided interests in real property upon intestate succession under Chapter 29 of the General Statutes or other law of intestate succession.[17]

(2) Upon termination of a joint tenancy with right of survivorship as provided in G.S. 41-73(c).

(3) Upon termination of a tenancy by the entirety by voluntary sale or conveyance, voluntary partition, or divorce as provided in G.S. 41-63(1), (2) and (5).

[17] *Smith v. Smith*, 272 N.C. App. 539, 551, 846 S.E.2d 819, 828 (2020); *Miller v. Brooks*, 123 N.C. App. 20, 29, 472 S.E.2d 350, 356 (1996), *disc. rev. denied*, 345 N.C. 344, 483 S.E.2d 172 (1997).

§ 41-83. Possession of property held as tenants in common.

(a) Each tenant in common has a right to enter upon the property and to occupy and use it subject to the rights of the cotentant.[18]

(b) The possession of one tenant in common is the possession of the cotenant.[19] Without an actual ouster, one tenant in common cannot bring an action against a cotenant for taking possession of property to which each has an equal right.[20]

(c) An agreement between tenants in common giving one tenant in common the right to exclusive possession of all or part of the property is valid and enforceable, and binding on them, their heirs, personal representatives and assigns with notice.[21]

[18] *Dearman v. Bruns*, 11 N.C. App. 564, 566, 181 S.E.2d 809, 810 (1971); see also *Lowe v. Bradford*, 305 N.C. 366, 370, 289 S.E.2d 363, 366-67 (1982).

[19] *E.g., Covington v. Stewart, supra* note 3; *Dearman v. Bruns*, *supra* note *18.*

[20] *Morehead v. Harris*, 262 N.C. 330, 343-44, 137 S.E.2d 174, 186 (1964).

[21] *Stanley v. Cox*, 253 N.C. 620, 634, 117 S.E.2d 826, 836 (1961); *Smith v. Watson*, *supra* note 11.

§ 41-84. Authority of a tenant in common to bind cotenant.

(a) Subject to subsection (b) of this section, a tenant in common dealing with third parties may not bind a cotenant by any act with relation to the property not previously authorized or subsequently ratified by the cotenant.[22]

(b) An act by a tenant in common with relation to the property is presumed to have been done by authority and for the benefit of the cotenant if there are circumstances upon which to base that presumption.[23]

(c) An agreement between tenants in common giving one tenant in common authority to take action with relation to the property is valid and enforceable, and binding on the tenants in common, their heirs, personal representatives and assigns with notice.[24]

[22] *Hinson v. Shugart*, 224 N.C. 207, 210, 29 S.E. 2d 694, 696 (1944), citing 62 C.J.S. *Tenancy in Common*, p. 533-35, §§ 209, 210; *c.f. Hudson v. Cozart*, 179 N.C. 247, 102 S.E.2d 278 (1920).

[23] *Hinson v. Shugart, supra* note 22. *Id.*

[24] *Stanley v. Cox*, *supra* note 21; *Smith v. Watson*, *supra* note 21.

§ 41-85. Rents and profits from property held as tenants in common.

(a) Tenants in common share proportionally in the rents and profits of the property received from third parties according to their interests in the property.[25]

(b) If a tenant in common has received more than that tenant in common's share of the rents and profits from the property, a cotenant may bring an action for an accounting to recover the cotenant's share of the rents and profits.[26]

(c) This section does not prohibit the tenants in common from making an agreement varying the provisions of subsections (a) and (b) of this section.

[25] *Whitehurst v. Hinton*, 209 N.C. 392, 403, 184 S.E. 66, 72-73 (1936); *Etheridge v. Etheridge*, 41 N.C. App. 44, 49, 255 S.E.2d 729, 732 (1979), *disc. rev. denied,* 267 S.E.2d 660 (1980).

[26] *Hunt v. Hunt*, 261 N.C. 437, 442, 135 S.E.2d 195, 199 (1964); *Whitehurst v. Hinton*, *supra* note 25; *McPherson v. McPherson*, 33 NC 391, 401-02 (1850).

§ 41-86. Reimbursement of a tenant in common for costs of repairs and improvements to the property.

(a) With respect to repairs to the property,

(1) Except as provided in subdivision (2) of this subsection (a), if repairs become necessary, and one tenant in common pays for the repairs, that tenant in common is entitled to contribution from the cotenant.[27]

(2) If the tenant in common who pays for the repairs is in exclusive possession of the property, that tenant in common is not entitled to contribution for repairs while in exclusive possession.[28]

(3) If the property is income-producing, the tenant in common is allowed a credit for necessary repairs in an action or partition where the cotenant seeks an accounting of rents and profits from the property.[29]

(b) With respect to improvements to the property,

(1) Except as provided in subdivision (2) of this subsection (b), a tenant in common who pays for improvements is not entitled to contribution toward their costs, nor is that

[27] *Craver v. Craver*, 41 N.C. App. 606, 607, 255 S.E.2d 253, 254 (1979) quoting with approval WEBSTER, *supra* note 8; *Holt v. Couch*, 125 N.C. 456, 459-60, 34 S.E. 703, 704 (1899).

[28] *Craver v. Craver, supra* note *27; "In such cases the value of the possession and enjoyment of the common property is deemed to compensate the repairing co-tenant."* WEBSTER, *supra* note 8 at § 7.11.

[29] WEBSTER, *supra* note 8 at § 7.11.

tenant in common credited with such payment in an accounting action for rents and profits.[30]

(2) A tenant in common has the right of contribution for the lesser of the value added to the property or the costs of the improvements in a partition action as provided in G.S. 46A-27, or, as an alternative, the right to have the improved part of the property allocated to the tenant in common if the allocation can be done without prejudice to the cotenant.[31]

(c) This section does not prohibit the tenants in common from making an agreement varying the provisions of subsections (a) and (b) of this section.

[30] WEBSTER, *supra* note 8 at § 7.11, *citing* 4 American Law of Property § 6.18 (Casner, ed. 1952); see *Holt v. Couch, supra* note *27.*

[31] *Jenkins v. Strickland*, 214 N.C. 441, 444, 199 S.E. 612 614 (1938) and cases cited.

§ 41-87. Reimbursement of a tenant in common for taxes and interest.

(a) The payment by any tenant in common of that portion of taxes, interest, and costs constituting a lien upon that tenant in common's undivided interest in the property is governed by G.S. 105-363(a).

(b) The payment by any tenant in common of the entire amount of any taxes, interest, and costs constituting a lien on the property is governed by G.S. 105-363(b).

(c) A tenant in common is entitled to reimbursement for interest paid by that tenant in common on an existing encumbrance of the property.[32]

(d) If a tenant in common pays taxes assessed against the common property, or interest on an existing encumbrance, and is in exclusive possession of the property, that tenant in common is not entitled to contribution for expenditures made for the taxes and the interest during that tenant in common's exclusive possession.[33]

(e) This section does not prohibit the tenants in common from making an agreement varying the provisions of subsections (a) through (d) of this section.

[32] *Henson v. Henson*, 236 N.C. 429, 72 S.E.2d 873 (1952) (tenant entitled to credit during partition action for amounts paid toward interest on encumbrance). WEBSTER, *supra* note 8 at § 7.10 citing 2 American Law of Property § 6.17 (Casner ed. (1952)).

[33] WEBSTER, *supra* note 8 at § 7.10, *citing* 2 American Law of Property § 6.17 (Casner, ed. 1952).

§ 41-88. Actual ouster; action for ejectment.

A tenant in common claiming ouster by a cotenant may bring an action for ejectment, but not for partition, seeking to compel the cotenant in possession to admit the ousted tenant in common into possession.[34]

[34] See, e.g., *Thomas v. Garvan, supra* note 3; *McCann v. Travis*, 63 N.C. App. 447, 451-53, 305 S.E.2d 197, 200-01 (1983); *Beck v. Beck*, 125 N.C. App. 402, 404-05, 481 S.E.2d 317, 319-20 (1997); *Willis v. Mann*, 96 N.C. App. 450, 453-54, 386 S.E.2d 68, 70-71 (1989), *disc. rev. denied,* 326 N.C. 327, 389 S.E.2d 820 (1990).

§ 41-89. Adverse possession by a tenant in common.

(a) A tenant in common without color of title may acquire title to the cotenant's interest in the property by 20 years' adverse possession as provided by G.S. 1-40. For purposes of G.S. 1-40:

(1) Subject to subdivision (2) of this subsection (a), the possession of the property is not considered adverse until there is an actual ouster of the cotenant by the tenant in common.[35]

(2) The common-law rules of constructive ouster apply which presume that there was an actual ouster at the beginning of the period of sole possession of the property by the tenant in common.[36]

(3) If a tenant in common purports to convey the whole estate, the grantee receives only the grantor's interest, the instrument of conveyance is not color of title as

[35] *See*, e.g., *Beck v. Beck*, *supra* note 33; *McCann v. Travis*, *supra* note 33.

[36] *Casstevens v. Casstevens*, 63 N.C. App. 169, 171, 304 S.E.2d 623, 625 (1983); *Collier v. Welker*, 19 N.C. App. 617, 621, 199 S.E.2d 691, 694-95 (1973) (constructive ouster occurred when the adverse possessor claimed peaceful and exclusive possession without a claim by the co-tenant for twenty years); *Atlantic Coast Properties*, *Inc. v. Saunders*, 243 N.C. App. 211, 777 S.E.2d 292 (2015) (a grant of summary judgement that relied on constructive ouster was improper when there was evidence of the adverse possessor recognizing title in a phone call to the co-tenant and historic evidence that the previous generations recognized title); *Herbert v. Babson*, 74 N.C. App. 519, 522, 328 S.E.2d 796, 798-99 (1985) (paying property taxes and insurance premiums in the name of the heirs, which included the cotenant, acknowledged title of the cotenant, preventing application of constructive ouster).

against the grantor's cotenant, and adverse possession by the grantee for twenty years is required to bar entry of the grantor's cotenant.[37]

(b) A tenant in common with color of title may acquire title to the interest of a cotenant by seven years' adverse possession as provided by G.S. 1-38. For purposes of G.S. 1-38:

(1) Possession of the property is not considered adverse until there is an actual ouster of the cotenant by the tenant in common.

(2) Subject to subdivision (3) of this subsection (b), if a tenant in common purports to convey the whole estate, the grantee receives only the grantor's interest, the instrument of conveyance is not color of title against the grantor's cotenant, and seven years' possession by the grantee under the deed will not ripen into title to the whole estate.[38]

(3) If the grantee receives a deed purporting to convey the whole estate in a judicial proceeding to sell the interest of a tenant in common, including a sale for partition, a tax foreclosure, or a sale to pay debts, the deed is deemed color of title and the grantee can acquire title as against all tenants in common by seven years' adverse possession.[39]

[37] *Cox v. Wright*, 218 N.C. 342, 349, 11 S.E.2d 158, 162 (1940); *Johnson v. McLamb*, 247 N.C. 534, 356-57, 101 S.E.2d 311, 313-14 (1958).

[38] *Id*.

[39] *See, e.g., Johnson v. McLamb*, *supra* note 37.

§ 41-90. Alienation of tenant in common's undivided interest in the property

(a) Each tenant in common may convey, lease, or mortgage that tenant in common's undivided interest in the property either to a cotenant or to a third party without the joinder of any other cotenant.[40]

(b) The grantee of an interest in the property from a tenant in common acquires only the interest of the grantor and becomes a tenant in common with the cotenant, even if the instrument of conveyance from the tenant in common purports to convey the whole estate.[41]

[40] WEBSTER, *supra* note 8, at §7.06, *citing* WASHBURN, REAL PROPERTY § 880 (6th ed. 1902).

[41] *E.g., Bullin v. Hancock*, 138 N.C. 198, 200-201, 50 S.E. 621, 622-23 (1905); *Young v. Young*, 43 N.C. App. 419, 427, 259 S.E.2d 348, 352-53 (1979).

§ 41-91. Relationship of trust and confidence among tenants in common; fiduciary relationship

(a) Tenants in common occupy a relationship of trust and confidence to each other as to the property that obligates all the tenants in common to put forth their best efforts to protect and secure the common interest.[42]

(b) Tenancy in common does not create a fiduciary relationship among the tenants in common unless a tenant in common undertakes to act for the benefit of a cotenant or otherwise engages in conduct creating a fiduciary relationship.[43]

[42] *Bailey v. Howell*, 209 N.C. 712, 715, 184 S.E. 476, 478 (1936), and *Smith v. Smith*, 150 N.C. 81, 82, 63 S.E. 177, 177 (1908) (both opinions quoting with approval A.C. FREEMAN COTENANCY AND PARTITION § 151 (1874)).

[43] *Moore v. Bryson*, 11 N.C. App. 260, 265, 181 S.E.2d 113, 116 (1971) (quoting with approval 86 C.J.S. Tenancy in Common p. 377, § 17); *Smith v. Smith*, *supra* note 17.

§ 41-92. Acquisition of title by one tenant in common.

(a) The relationship of trust and confidence described in G.S. 41-91 is a foundation for the following rules:[44]

(1) If a tenant in common acquires title to the property under an outstanding title[45] or under an encumbrance[46] for which the tenant in common is partially liable as a cotenant or all of the tenants in common are liable, the title inures to the benefit of all the tenants in common.[47]

[44] *See Moore v. Bryson*, 11 N.C. App. at 266-267, 181 S.E.2d at 117, where the court said, "The foundation of the doctrine which disables a fellow tenant from asserting an adverse title as against the other cotenants is that, while the relation continues, there is a community of interest which gives rise to a community of duty and creates a relation of trust and confidence, which disables each cotenant from doing anything which would prejudice the others in reference to the common property (quoting with approval THOMPSON ON REAL PROPERTY p. 141, § 1802)."

[45] *Gentry v. Gentry,* 187 N.C. 29, 31, 121 S.E.2d 188, 189 (1924); *Moore v. Bryson*, *supra* note 43.

[46] *Gentry v. Gentry, supra* note 45 (dealing with mortgages); *Smith v. Smith*, *supra* note 42 (dealing with a tax claim); see also other cases regarding mortgages cited in WEBSTER, *supra* note 8 at § 7.09.

[47] *Tilley v. Tilley*, 24 N.C. App. 424, 427-28, 210 S.E.2d 872, 874-75 (1975); *Hatcher v. Allen*, 220 N.C. 407, 409-10, 17 S.E. 2d 454, 455-56 (1941).

(2) If a third party acquires title to the property under an encumbrance and subsequently conveys it to a tenant in common with collusion between the tenant in common and the third party, the title inures to the benefit of all the tenants in common.[48]

(b) If a third person, without collusion, purchases the property at a sale for the debt of all of the tenants in common, and afterward conveys title to one of the tenants in common, that tenant in common will take title to the property in that tenant in common's own right, valid as against the cotenant of the acquiring tenant in common.[49]

(c) A tenant in common who receives an interest in the property because of the death of an ancestor may acquire title to the property upon a sale to pay a debt of the deceased ancestor secured by the property.[50]

(d) A tenant in common may acquire title to a cotenant's interest in the property from a sale of the cotenant's interest in the property to pay the debt of the cotenant.[51]

[48] *Hatcher v. Allen*, *supra* note *47*; *Jackson v. Baird,* 148 N.C. 29, 31, 61 S.E. 632 (1908).

[49] *Hatcher v. Allen*, *supra* note *47*.

[50] *Id.; Jackson v. Baird, supra* note *47.*

[51] *Id.*

§ 41-93. Rights of judgment creditors in a tenancy in common property

(a) The interest of a tenant in common in the property may be sold in satisfaction of a creditor's claim in the following ways:

(1) In an execution sale where the creditor has obtained a judgment lien against the tenant in common.[52]

(2) Under a power of sale in a mortgage or deed of trust against the tenant in common's interest in the property.[53]

(3) In a judicial sale where the tenant in common's interest in the property is ordered to be sold.[54]

(b) A sale of an interest of a tenant in common described in subsection (a) of this section does not affect the title of a cotenant's interest in the property.[55]

[52] *Ward v. Farmer*, 92 N.C. 93 (1885); *Southerland v. Cox*, 14 N.C. 394 (1832). The procedure for execution sales generally is set forth in G.S. Chapter 1, Article 29B.

[53] *Bailey v. Howell*, *supra* note 42; *Branch Banking & Trust Co. v. Wright*, 74 N.C. App. 550, 328 S.E. 2d 840 (1985). The procedure for sales pursuant to a power of sale is set forth generally in G.S. Chapter 45, Article 2A.

[54] *Holly v. White*, 172 N.C. 77 (1916). The procedure for judicial sales generally is set forth in G.S. Chapter 1, Article 29A.

[55] *Southerland v. Cox*, *supra* note 52; Branch Banking & Trust Co. v. Wright, *supra* note 53; Bailey v. Howell, *supra* note 42.

§ 41-94. Action against a tenant in common for waste.

A tenant in common may bring an action against a cotenant who commits waste as provided in G.S. 1-536.

§ 41-95. Action of tenant in common against third persons.

(a) One tenant in common may recover possession of the property for the benefit of all of the tenants in common as against a third party claiming adversely to the tenants in common.[56]

(b) One tenant in common may recover only for that tenant in common's proportional part of the damages recovered in an action against a third party for trespass.[57]

[56] *Lance v. Cogdill*, 238 N.C. 500, 505, 78 S.E. 2d 319, 323 (1953) and cases cited therein.

[57] *Lance v. Cogdill, supra* note *56.* See also *Winborne v. Elizabeth City Lumber Co*., *supra* note 56; *Baldwin v. Hinton*, 243 N.C. 113, 118, 90 S.E.2d 316, 319 (1955).

§ 41-96. Termination of a tenancy in common.

Events terminating a tenancy in common include the following:

(a) Partition of the property under Chapter 46A of the General Statutes.

(b) Voluntary partition of the property among tenants in common executing one or more instruments conveying the common property held as tenants in common to themselves in separate tracts.[58]

(c) Conveyance of all interests in the property to one owner.

(d) Acquisition by one tenant in common of the ownership of the property by adverse possession.

[58] *Sutton v. Sutton*, 236 N.C. 495, 497-98 73 S.E.2d 157, 159 (1952); *Smith v. Smith*, 249 N.C. 669, 677, 107 S.E.2d 530, 536 (1959); *Miller v. Miller*, 34 N.C. App. 209, 211, 237 S.E.2d 552, 554 (1977).

§ 41-97. Inapplicability of article.

This Article does not apply to the following:

(a) Property in a general partnership governed by Chapter 59 of the General Statutes.

(b) An action for partition and its effect under Chapter 46A of the General Statutes.

(c) Tenancy in common in personal property.

§ 41-98. Common law of tenancy in common; equitable principles.

The common law of tenancy in common and principles of equity supplement this Article, except to the extent they conflict or are inconsistent with the provisions in this Article or the laws of this State.

MEMORANDUM

TO: NCBA LEGISLATIVE ADVISORY COMMITTEE

FROM: JUDY LINVILLE, CHAIR OF THE LEGISLATIVE COMMITTEE FROM THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

RE: 2023 LONG SESSION PROPOSAL 4 - RETHINKING GUARDIANSHIP REVISIONS TO G.S. 35A

CC: CATHERINE WILSON (LEGISLATIVE VICE-CHAIR), ELIE FOY (SECTION CHAIR)

Proposal:	Rethinking Guardianship Revisions to G.S. 35A
Purpose:	To promote the rights and independence of persons subject to the guardianship process and to improve judicial oversight and accountability for guardians of the person.
Changes:	Requires delivery of notice of rights to respondent once an adjudication petition has been filed; requires guardian ad litem to review the notice with petitioner. Requires petitioners to show that less restrictive alternatives to guardianship have been considered and are insufficient. Gives clerks ability to dismiss petition if respondent can sufficiently manage affairs through a less restrictive alternative; gives clerks additional procedural discretion in awarding attorneys' fees and tools to require additional hearings for review and oversight of guardians of the person. Requires guardians of the person to report a change of ward's address to the court.
Improvements:	The proposed legislation will ensure that (i) respondents who are undergoing the guardianship process will be made aware of their rights, (ii) petitioners seeking a guardianship show that less restrictive alternatives to guardianship have been considered and are not sufficient before being able to obtain a guardianship, and (iii) clerks of superior court have the necessary procedural tools to monitor and oversee guardians in North Carolina.
Constitutional:	This legislation would not be unconstitutional.

Prior Position: The NCBA has not previously taken a position on this issue.

Affected Areas: Elder and special needs law.

Vetting: This proposal was presented to the Section's legislative committee and Council and was discussed and unanimously approved. The proposal also received input and assistance from members of the Elder Law and Special Needs Section's legislative committee, particularly Section Chair Nicki Applefield Engel, past Section Chair Kathleen R. Rodberg, and Legislative Co-Chairs Andrew D. Atherton and Anthony D. Nicholson.

Approval: The proposal was unanimously approved by the Council at its meeting on October 4, 2022.

Other Groups: Disability Rights NC, Rethinking Guardianship, NC DHHS – Division of Aging and Adult Services, AARP, North Carolina Association of County Directors of Social Services, North Carolina Conference of Clerks of Superior Court, North Carolina Administrative Office of the Courts.

Prioritization: **4 of 8**

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TALKING POINTS

RETHINKING GUARDIANSHIP REVISIONS TO G.S. 35A.

PROPOSED BY THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

A series of high-profile guardianship cases have made national headlines in recent years, bringing public attention to the rights of persons deemed unable to manage their own affairs. These cases have also highlighted the potential for abuse within guardianships, particularly as to the consideration of the rights and wishes of the person subject to guardianship and the ability of the court to monitor and oversee guardians of the person.

For the past three years, Rethinking Guardianship (RG)—a statewide coalition of disability advocates and stakeholders have been engaged in discussion about how North Carolina guardianship law can be improved so that:

(1) Every person who is subject to guardianship has a clear understanding of their rights, both before and after the guardianship is created;
(2) Guardianship is used only as a last resort after considering whether a less restrictive alternative is available; and
(3) Clerks have effective tools for review and oversight to make sure guardians are fulfilling their responsibilities.

Working in conjunction with the Estate Planning & Fiduciary Law Section, a draft was developed to address these issues within existing statutory framework.

Summary of Key Provisions

1. Notice of Rights. A notice of rights was drafted as an accurate statement of current NC law, covering both the rights (i) of the respondent prior to adjudication and (ii) of a ward after adjudication. Modifications to specific statutes are as follows:

    a. 35A-1107: Updates GAL duties to review notice of rights with respondent.
    b. 35A-1108: Requires service of notice of rights along with petition and notice of hearing before hearing on adjudication can be held.
    c. 35A-1109: Requires service of notice of rights along with petition and notice of hearing for respondent and for next of kin and other interested persons.

d. 35A-1117: This is a brand-new section stating the rights available under current NC law. It is presented as a recommended form for use and not intended to be an additional codification of rights.
e. 35A-1214: This update recognizes a person's right to nominate his or her own guardian in a power of attorney and directs the court to give such nomination the highest priority of consideration.
f. 35A-1217: Incorporates same requirement of review and explanation of notice of rights in proceedings subsequent to adjudication.

2. Consideration of Alternatives. This update requires petitioners to show that they have considered less restrictive alternatives to guardianship and to demonstrate why alternatives to guardianship are not sufficient to assist the person for whom guardianship is sought. Modifications to specific statutes are as follows:

a. 35A-1101(7, 8, 11a): Definitions have been updated to include consideration of less restrictive alternatives. Also gives clerk authority to dismiss if less restrictive alternatives allow a respondent to fully manage affairs and communicate decisions, as the respondent would not then meet the definition of incompetency.
b. 35A-1106: Updates petition requirements to place a burden on petitioner to show that less restrictive alternatives have been considered and are insufficient.
c. 35A-1201(a)(7): Makes explicit that NC public policy is that guardianship should be a last resort after less restrictive alternatives have been considered.

3. Tools for Review & Oversight. This update seeks to introduce strong public policy and preference for guardian of the person (GOP) status reports; to enhance the clerk's authority to ensure guardian compliance through hearings; to improve how attorneys' fees are charged in guardianship cases; and to implement registration/change of address requirement for GOP to file on behalf of the person subject to guardianship.

a. 35A-1116: Seeks to improve attorney's fees standard and give clerks more discretionary authority in awarding fees. Similar to matters involving trusts and estates in G.S. 6-21(2), it gives the clerk discretion to award fees as appropriate. Use of the term parties is to include intervenors as well as petitioners and respondents. Second sentence has been added to give guidance to clerks in assessing costs, the polestar being whether costs have benefitted

the respondent. The structure of this sentence was largely borrowed from the new partition statute, G.S. 46A-3, which applies a common benefit standard to attorneys' fees.

b. 35A-1207: Goal is to give clerks more discretion in enforcing guardianships and holding guardians accountable by allowing the clerk to bring a motion in the cause on its own motion. This is broader than the limited ability to bring a motion in the cause under 35A-1242.
c. 35A-1201(8): Incorporates strong public policy preference for GOP status reports (although they are not mandated).
d. 35A-1242(e): While GOP status reports are not mandated, there was support to include a requirement for GOPs to notify the court of a change in the ward's address. Reporting a change of address is customary and required in other areas of disability law, as both Social Security and NC Medicaid require prompt reporting of a change of address for anyone who is receiving benefits; thus, it is logical for NC guardianships to adopt a similar standard. At this time, there is no requirement for court tracking or supervision. It would simply be the guardian's responsibility to file the change of address into the existing E file and, if not filed in accordance with the statute, could become grounds for a guardian's removal.

§ 35A-1101. Definitions.

The following definitions apply in this Subchapter:

(7) Incompetent adult. - An adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition. An adult or emancipated minor does not lack capacity if, by means of a less restrictive alternative, he or she is able to sufficiently manage his or her affairs and sufficiently make and communicate important decisions concerning his or her person, family, and property.

(8) Incompetent child. - A minor who is at least 17 1/2 years of age and who, other than by reason of minority, lacks sufficient capacity to make or communicate important decisions concerning the child's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition. An incompetent child does not lack capacity if, by means of a less restrictive alternative, he or she is able to sufficiently manage his or her affairs and sufficiently make and communicate important decisions concerning his or her person, family, and property.

(11a) Less restrictive alternative. – An arrangement enabling a respondent to manage his or her affairs or make or communicate important decisions concerning his or her person, property, and family that restricts fewer rights of the respondent than would the adjudication of incompetency and appointment of a guardian. The term includes supported decision making, appropriate and available technological assistance, appointment of a representative payee, and appointment of an agent by the respondent, including appointment under a power of attorney for health care or power of attorney for finances.

NOTES: Definitions have been updated to include consideration of less restrictive alternatives. Also gives clerk authority to dismiss if less restrictive alternatives are able to fully manage and communicate on behalf of the respondent, as the respondent would not then meet the definition of incompetency.

§ 35A-1106. Contents of petition.

The petition shall set forth, to the extent known:

(1) The name, age, address, and county of residence of the respondent;

(2) The name, address, and county of residence of the petitioner, and the petitioner's~~his~~ interest in the proceeding;

(3) A general statement of the respondent's assets and liabilities with an estimate of the value of any property, including any compensation, insurance, pension, or allowance to which the respondent~~he~~ is entitled;

(4) A statement of the facts tending to show that the respondent is incompetent and the reason or reasons why the adjudication of incompetence is sought;

(5) A statement identifying what less restrictive alternatives have been considered prior to seeking adjudication and why those less restrictive alternatives are insufficient to meet the needs of the respondent;

(6~~5~~) The name, address, and county of residence of the respondent's next of kin and other persons known to have an interest in the proceeding;

(7~~6~~) Facts regarding the adjudication of respondent's incompetence by a court of another state, if an adjudication is sought on that basis pursuant to G.S. 35A-1113(1).

(1987, c. 550, s. 1.)

NOTES: Updates petition requirements to place a burden on petitioner to show that less restrictive alternatives have been considered and are insufficient.

§ 35A-1107. Right to counsel or guardian ad litem.

(a) The respondent is entitled to be represented by counsel of the respondent's own choice or by an appointed guardian ad litem. Upon filing of the petition, an attorney shall be appointed as guardian ad litem to represent the respondent unless the respondent retains counsel, in which event the guardian ad litem may be discharged. Appointment and discharge of an appointed guardian ad litem shall be in accordance with rules adopted by the Office of Indigent Defense Services.

(b) An attorney appointed as a guardian ad litem under this section shall represent the respondent until the any of the following occurs:

(1) The petition is dismissed.
(2) A guardian is appointed under Subchapter II of this Chapter.
(3) Other relief is granted under Article 2 of this Subchapter.

(c) After being appointed, the guardian ad litem shall personally visit the respondent as soon as possible and shall make every reasonable effort to determine the respondent's wishes regarding the incompetency proceeding and any proposed guardianship. The guardian ad litem shall explain the notice to the respondent during the guardian ad litem's personal visit with the respondent and at any time upon request by the respondent. The guardian ad litem shall present to the clerk the respondent's express wishes at all relevant stages of the proceedings. The guardian ad litem also may make recommendations to the clerk concerning the respondent's best interests if those

interests differ from the respondent's express wishes. In appropriate cases, the guardian ad litem shall consider the possibility of a limited guardianship and shall make recommendations to the clerk concerning the rights, powers, and privileges that the respondent should retain under a limited guardianship.

NOTES: Updates GAL duties to review notice of rights with respondent.

§ 35A-1108. Issuance of notice.

(a) Within five days after filing of the petition, the clerk shall issue a written notice of the date, time, and place for a hearing on the petition, which shall be held not less than 10 days nor more than 30 days after service of the notice of hearing, notice of rights set forth in G.S. 35A-1117(a), and petition on the respondent, unless the clerk extends the time for good cause, for preparation of a multidisciplinary evaluation as provided in G.S. 35A-1111, or for the completion of a mediation.

(b) If a multidisciplinary evaluation or mediation is ordered after a notice of hearing has been issued, the clerk may extend the time for hearing and issue a notice to the parties that the hearing has been continued, the reason therefor, and the date, time, and place of the new hearing, which shall not be less than 10 days nor more than 30 days after service of such notice on the respondent.

(c) Subsequent notices to the parties shall be served as provided by G.S. 1A-1, Rule 5, Rules of Civil Procedure, unless the clerk orders otherwise. (1987, c. 550, s. 1; 2005-67, s. 2.)

NOTES: Requires service of notice of rights along with petition and NOH before hearing on adjudication can be held.

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

(a) Copies of the petition, the notice of rights set forth in G.A. 35A-1117(a), and initial notice of hearing shall be personally served on the respondent. Respondent's counsel or guardian ad litem shall be served pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure. A sheriff who serves the notice and petition shall do so without demanding his fees in advance. The petitioner, within five days after filing the petition, shall mail or cause to be mailed, by first-class mail, copies of the notice of hearing, notice of rights set forth in G.S. 35A-1117(a), and petition to the respondent's next of kin alleged in the petition and any other persons the clerk may designate, unless such person has accepted notice. Proof of such mailing or acceptance shall be by affidavit or certificate of acceptance of notice filed with the clerk. The clerk shall mail, by first-class mail, copies of subsequent notices to the next of kin alleged in the petition and to such other persons as the clerk deems appropriate.

(b) Expired August 1, 2020, pursuant to Session Laws 2020-3, s. 4.11(b). (1987, c. 550, s. 1; 1989, c. 473, s. 18; 2020-3, s. 4.11(a).)

NOTES: Requires service of notice of rights along with petition and NOH for respondent and for next of kin and other interested persons.

§ 35A-1116. Costs and fees.

(a) Costs. - Except as otherwise provided herein, costs shall be assessed as in special proceedings. Costs, including any reasonable fees and expenses of counsel, shall be taxed against any party, or apportioned among the parties, in the discretion of the court. In exercising such discretion, the court shall tax such costs incurred by any party against the respondent if such costs were incurred for the benefit of the respondent, unless doing so would be inequitable. In the event the respondent is indigent, costs shall be waived by the clerk if not taxed against a party other than respondent as provided above or otherwise paid as provided in subsection (b) or (c).~~for the petitioner which the clerk, in his discretion, may allow, may be taxed against either party in the discretion of the court unless:~~

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

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

(b) Multidisciplinary Evaluation. - The cost of a multidisciplinary evaluation order pursuant to G.S. 35A-1111 shall be assessed as follows:

(1) If the respondent is adjudicated incompetent and is not indigent, the cost shall be assessed against the respondent;

(2) If the respondent is adjudicated incompetent and is indigent, the cost shall be borne by the Department of Health and Human Services;

(3) If the respondent is not adjudicated incompetent, the cost may be taxed against either party, apportioned among the parties, or borne by the Department of Health and Human Services, in the discretion of the court.

(c) Witness. - Witness fees shall be paid by:

(1) The respondent, if the respondent is adjudicated incompetent and is not indigent;

(2) The petitioner, if the respondent is not adjudicated incompetent and the clerk finds that there were not reasonable grounds to bring the proceeding;

(2a) The petitioner for any of the petitioner's witnesses, and the respondent for any of the respondent's witnesses, when the clerk finds all of the following:

a. There were reasonable grounds to bring the proceeding.

b. The respondent was not adjudicated incompetent.

c. The respondent is not indigent.

(3) The Administrative Office of the Courts for witness fees for the respondent, if the respondent is indigent.

(c1) Mediator. - Mediator fees and other costs associated with mediation shall be assessed in accordance with G.S. 7A-38.3B.

(c2) Guardian Ad Litem. - The fees of an appointed guardian ad litem shall be paid by:

(1) The respondent, if:

a. The respondent is adjudicated incompetent; and

b. The respondent is not indigent.

(2) The respondent, if:

a. The respondent is not adjudicated incompetent;

b. The clerk finds that there were reasonable grounds to bring the proceeding; and
c. The respondent is not indigent.

(3) The petitioner, if:
a. The respondent is not adjudicated incompetent; and
b. The clerk finds that there were not reasonable grounds to bring the proceedings.

(4) The Office of Indigent Defense Services in all other cases.

(d) The provisions of this section shall also apply to all parties to any proceedings under this Chapter, including a guardian who has been removed from office and the sureties on the guardian's bond. (1987, c. 550, s. 1; 1989, c. 473, s. 15; 1995, c. 235, s. 9; 1997-443, s. 11A.118(a); 2005-67, s. 3; 2009-387, s. 1.)

NOTE: This section was an attempt to clarify attorneys' fees award and line it up with matters involving trusts and estates in GS 6-21(2), to give the clerk discretion to award fees as appropriate. Use of parties is to include intervenors as well as petitioners and respondents. Second sentence has been added to give guidance to clerks in assessing costs, the polestar being whether costs have benefitted the respondent. The structure of this sentence was largely borrowed from the new partition statute, which applied a common benefit approach to attorneys' fees.

§ 35A-1117. Notice of Rights of Respondent.

(a) Notice of Rights – Every respondent in a proceeding under this chapter shall be given a notice of his or her rights which shall be set forth in a conspicuous manner and substantially similar to the following language:

THE LAWS GOVERNING INCOMPETENCY AND GUARDIANSHIP ARE COMPLEX. THIS IS A SUMMARY OF RIGHTS FOR INFORMATIONAL PURPOSES ONLY. IT IS NOT INTENDED TO BE A COMPLETE DISCUSSION OF ALL RIGHTS. THE RIGHTS LISTED MAY NOT APPLY IN ALL CASES AND SHOULD NOT BE CITED AS LAW IN A COURT PROCEEDING. YOU SHOULD CONSULT WITH AN ATTORNEY OF YOUR CHOOSING IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS.

a. Rights of Respondents Before Adjudication of Incompetence:

1. **Right to Notice** – You have a right to receive a copy of the petition, the initial notice of hearing, and this notice of rights before the hearing. You also have the right at any time to request a copy of this notice of rights from your court appointed guardian ad litem or the court.
2. **Right to an Attorney –** You have the right to hire an attorney of

your choice to represent you in the proceeding. If you do not hire your own attorney, you will be represented by an attorney called a guardian ad litem. The guardian ad litem will present your express wishes to the court and consider the possibility of a limited guardianship, making recommendations to the court regarding the rights that you should keep if the guardianship is limited. The guardian ad litem may also make recommendations to the court that the guardian ad litem feels are in your best interest, *even if those recommendations differ from your express wishes*.

3. **Right to Gather Evidence** – You have a right to require witnesses to appear and to gather documents concerning your ability to make decisions. You have a right to request an evaluation (called a multidisciplinary evaluation) to assist the court in determining the extent of your ability to make decisions and to assist in making an appropriate guardianship plan. You or your attorney must request a multidisciplinary evaluation in writing no later than 10 days after you are served with the petition.
4. **Right to a Hearing** – A hearing must be held before you can be adjudicated to be incompetent. The hearing will be held between 10 and 30 days after you receive a copy of the petition, notice of hearing and this notice of rights unless the court delays the hearing for a good reason. You have the right to request the date of the hearing be changed for a good reason. You have a right to attend the hearing if you choose to do so. You can give up your right to attend the hearing. You have a right to have your express wishes communicated to the court by the court appointed guardian ad litem at all relevant stages of the proceedings.
5. **Right to a Jury** – You have the right to request that a jury hear your case. You lose that right to a jury if you wait too long to ask.
6. **Right to a Closed Hearing** – The hearing is open to the public unless you or your attorney ask for it to be private. You or your attorney have the right to ask the court to close the hearing and exclude anyone who is not directly involved or testifying at the hearing.
7. **Right to Present Evidence and Testimony** – You have a right to present evidence at the hearing. You have a right to testify at the hearing. ~~.~~
8. **Right to Call Witnesses and Right to Question Witnesses** – You have the right to call and question witnesses at the hearing, including family members and medical providers. You have the right to question witnesses anyone else calls at the hearing.
9. **Right to Express Wishes Regarding Your Rights** – If you are adjudicated to be incompetent, you will lose the right to direct your healthcare, employment, interpersonal relationships, and religious, social, and community activities unless the court

specifically agrees to allow you to keep those rights. You have the right to tell the court what rights you would like to keep. The court will consider your wishes, but the court is not required to follow your wishes.

10. **Right to Express Wishes as to Who Serves As Your Guardian** – If the court decides that you need a guardian, you have the right to tell the court who you want to be your guardian. The court will consider your wishes, but the court is not required to follow your wishes.
11. **Right to Appeal** – If you have a good reason believe that your case was wrongly decided, (i) you have the right to appeal the decision adjudicating you to be incompetent by filing a written notice of appeal with the clerk within 10 days of the clerk entering the order, (ii) you have the right to appeal the clerk's decision about who is appointed as your guardian by filing a written notice of appeal with the clerk within 10 days of the order being served on you. You lose your rights to appeal any decision made by the clerk if you do not file a written notice of appeal in time.

b. Rights of Wards After Adjudication of Incompetence

1. **Right to a Qualified, Responsible Guardian** – You have the right to a qualified, responsible guardian.
2. **Right to Request Transfer to Another County** – If you have a good reason to believe that your guardianship should be administered in a different county, you have the right to request that your guardianship be transferred to another county.
3. **Right to Request Restoration of Competency** – If there has been a change in your circumstances and you believe that you can show to the court that you have regained your competency, you have the right to request that the court restore your competency and end your guardianship.
4. **Rightto Request Review or Modification of Your Guardianship** – If there has been a change in your circumstances and you believe that your guardianship should be modified or reviewed, you have the right to file a motion to request that the court review or modify your guardianship.
5. **Right to Vote** – You have a right to register to vote and vote in elections if you are otherwise qualified.
6. **Right to Request a Hearing In a Petition for Procedure to Permit Sterilization** – If your guardian asks the court for an order to sterilize you, you have the right to know about it, to participate in the hearing, to have an attorney at the hearing, and to appeal the court's decision by filing a written notice of appeal with the clerk within 10 days of the clerk entering the order.

7. **Ability to Drive –** You may lose your ability to drive a car or other vehicle. The clerk must notify the Department of Motor Vehicles (DMV) that you have been adjudicated incompetent, and the clerk will make a recommendation on whether you should keep your driver's license. The DMV will contact you and you may get a letter from the DMV revoking your license. You have the right to make a written request to the DMV to review a decision to revoke your license.
8. **Additional Rights –** ***Some rights depend on whether you have the capacity to exercise the right. Different rights have different tests for capacity. Examples of rights where you need to demonstrate you have the required capacity are the right to marry, make a last will and testament, and testify as a witness. You should consult with an attorney of your choosing to discuss whether you have the capacity to exercise these rights.***

(b) The court shall provide a copy of the notice of rights set out in subsection (a) to the respondent, the respondent's next of kin, and any interested party upon request.

(c) The Administrative Office of the Courts shall develop a form notice of the rights set forth in subsection (a) and make a Spanish translation of the form available.

NOTES: This is a brand-new section stating the rights available under current NC law.

§§ 35A-1117~~8~~ through 35A-1119: Reserved for future codification purposes.

§ 35A-1201. Purpose.

(a) The General Assembly of North Carolina recognizes that:

(1) Some minors and incompetent persons, regardless of where they are living, require the assistance of a guardian in order to help them exercise their rights, including the management of their property and personal affairs.

(2) Incompetent persons who are not able to act effectively on their own behalf have a right to a qualified, responsible guardian.

(3) The essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.

(4) Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights.

(5) Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities,

an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.

(6) Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their minor children, but unemancipated minors, when they do not have natural guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.

(7) For adults, guardianship should always be a last resort, and should only be imposed after less restrictive alternatives have been considered and found to be insufficient to meet the adult's needs.

(8) The filing of regular status reports by the guardian of the person or general guardian concerning the conditions and welfare of an incompetent person is encouraged and should be required whenever appropriate.

(b) The purposes of this Subchapter are:

(1) To establish standards and procedures for the appointment of guardians of the person, guardians of the estate, and general guardians for incompetent persons and for minors who need guardians;

(2) To specify the powers and duties of such guardians;

(3) To provide for the protection of the person and conservation of the estate of the ward through periodic accountings and reports; and

(4) To provide for the termination of guardianships. (1987, c. 550, s. 1.)

NOTES: This incorporates policy preference for guardianship as last resort (i.e., consideration of less restrictive alternatives), and strong public policy preference for GOP status reports (although they are not mandated).

§ 35A-1207. Motions in the cause.

(a) Any interested person or the clerk, on the clerk's own motion, may file a motion in the cause with the clerk in the county where a guardianship is docketed to request modification of the order appointing a guardian or guardians or consideration of any matter pertaining to the guardianship.

(b) The clerk shall treat all such requests, however labeled, as motions in the cause.

(c) A movant under this section shall obtain from the clerk a time, date, and place for a hearing on the motion, and shall serve the motion and notice of hearing on all other parties and such other persons as the clerk directs as provided by G.S. 1A-1, Rule 5 of the Rules of Civil Procedure, unless the clerk orders otherwise.

(d) If the clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate, the clerk may enter an appropriate ex parte order to address the emergency pending disposition of the matter at the hearing. (1987, c. 550, s. 1.)

NOTES: Goal is to give clerks more discretion in enforcing guardianships and holding guardians accountable. This is broader than limited ability to bring a MitC under GS-35A-1242.

§ 35A-1214. Priorities for appointment.

The clerk shall consider appointing a guardian according to the following order of priority: an individual or entity nominated under G.S. 32C-1-108(a) or G.S. 32A-22(b), as applicable; an individual recommended under G.S. 35A-1212.1; an individual; a corporation; or a disinterested public agent. No public agent shall be appointed guardian until diligent efforts have been made to find an appropriate individual or corporation to serve as guardian, but in every instance the clerk shall base the appointment of a guardian or guardians on the best interest of the ward. (1987, c. 550, s. 1; 2005-333, s. 2.)

NOTES: This update recognizes a person's ability to nominate his or her own guardian in a power of attorney and directs the court to give such nomination the highest priority of consideration.

§ 35A-1217. Appointment of guardian ad litem for incompetent ward.

The clerk shall appoint a guardian ad litem to represent a ward in a proceeding under this Subchapter if the ward has been adjudicated incompetent under Subchapter I and the clerk determines that the ward's interests are not adequately represented. Appointment and discharge of the guardian ad litem shall be in accordance with rules adopted by the Office of Indigent Defense Services. Nothing herein shall affect the ward's right to retain counsel of his or her own choice. The guardian ad litem shall explain the notice of rights as part of the guardian ad litem's representation of the ward in connection with all proceedings under this Subchapter.

NOTES: Incorporates same requirement of review and explanation of notice of rights in proceedings subsequent to adjudication.

§ 35A-1242. Status reports for incompetent wards.

(a) Any corporation or disinterested public agent that is guardian of the person for an incompetent person, within six months after being appointed, shall file an initial status report with the clerk and submit a copy of the initial status report to the designated agency, if there is one. Such guardian shall file a second status report with the clerk one year after being appointed, and subsequent reports annually thereafter. The clerk may order any other guardian of the person to file status reports. If a guardian required by this section to file a status report is employed by the

designated agency, the guardian shall file any required status report with the clerk and submit a copy of the status report to the designated agency.

(a1) Each status report shall include all of the following:

(1) A report or summary of recent medical and dental examinations of the ward by one or more physicians and dentists. In instances when the guardian has made diligent but unsuccessful attempts to secure this information, the guardian shall include in the status report an explanation and documentation of all actions taken to attempt to secure this information.

(2) A report on the guardian's performance of the duties set forth in this Chapter and in the clerk's order appointing the guardian.

(3) A report on the ward's residence, education, employment, and rehabilitation or habilitation.

(4) A report of the guardian's efforts to restore competency.

(5) A report of the guardian's efforts to seek alternatives to guardianship.

(6) If the guardian is a disinterested public agent or corporation, a report of the efforts to identify alternative guardians.

(7) The guardian's recommendations for implementing a more limited guardianship, preserving for the ward the opportunity to exercise rights that are within the ward's comprehension and judgment.

(8) Any additional reports or information required by the clerk.

(a2) The guardian may include in each status report additional information pertaining to the ward's best interests.

(b) Each status report shall be filed (i) under the guardian's oath or affirmation that the report is complete and accurate so far as the guardian is informed and can determine or (ii) with the signature of a disinterested, competent witness to a statement by the guardian that the report is complete and accurate so far as the guardian is informed and can determine. Status reports filed with the signature of a disinterested, competent witness shall include the full name, address, and telephone number of the witness.

(b1) The clerk shall make status reports submitted by corporations or disinterested public agents available to the Director, or the Director's designee, of the Division of Aging and Adult Services within the Department of Health and Human Services. The Director, or the Director's designee, shall review the status reports in connection with the Department's regular program of oversight for these categories of guardians.

(c) A clerk or designated agency that receives a status report shall not make the status report available to anyone other than the guardian, the ward, the court, or State or local human services agencies providing services to the ward.

(d) The clerk, on the clerk's own motion, or any interested party, may file a motion in the cause pursuant to G.S. 35A-1207 with the clerk in the county where the guardianship is filed to request modification of the order appointing the guardian or guardians or for consideration of any matters contained in the status report.

(e) Every guardian of the person, upon knowledge of a ward's change of residence, shall file a notice of change of ward's address with the court within thirty (30) days. The notice shall include the ward's previous address, the ward's new address, and the date the ward moved to the new address. (1987, c. 550, s. 1; 2014-100, s. 12D.4(b).)

NOTES: While GOP status reports are not being mandated, there was support to include a requirement for GOPs to notify the court of a change in the ward's address. This is an attempt at including that requirement. Reporting a change of address is not a new concept in disability law, as both Social Security and NC Medicaid require prompt reporting of a change of address for anyone who is receiving benefits.

MEMORANDUM

TO: NCBA LEGISLATIVE ADVISORY COMMITTEE

FROM: JUDITH U. LINVILLE, CHAIR OF THE LEGISLATIVE COMMITTEE FROM THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

RE: 2023 LONG SESSION PROPOSAL 5 - AMEND 35A-1264 GUARDIANSHIP ACCOUNTING

CC: CATHERINE WILSON (LEGISLATIVE VICE-CHAIR), ELIE FOY (SECTION CHAIR)

Proposal:	Amend current G.S. 35A-1264 to (1) grant the clerks discretionary authority to extend deadlines for annual guardianship accountings, (2) allow the guardian to elect a fiscal year end for purposes of guardianship annual accountings, and (3) update the statute to make it gender neutral.
Purpose:	To update the guardianship accounting statute allowing for month end fiscal year elections and extensions to file when appropriate and approved by the Clerk.
Changes:	A guardian has the option to elect a month-end annual accounting period. The clerk has the authority to grant an extension of time to file an annual accounting if facts and circumstances warrant. The statute will be gender neutral.
Improvements:	By allowing the guardian to elect a month-end fiscal accounting period, guardians can match their accounting period with receipt of bank and investment statements making in more practical and efficient to meet the 30-day filing deadline. By authorizing the Clerk to grant extensions, the court can properly address those situations where an extension if warranted. It also creates consistency between extensions for guardianship accountings under 35A-1264 and extensions for estate accountings permitted under existing GS §28A-21-1.
Constitutional:	This legislation would not be unconstitutional.

Prior Position:	The NCBA has not previously taken a position on this issue.
Affected Areas:	Elder and special needs law
Vetting:	This proposal was presented to the Section's legislative committee and Council and was discussed and unanimously approved.
Approval:	The proposal was approved by unanimous consent by the Council at its meeting on October 4, 2022.
Other Groups:	Elder and Special Needs Law Section, North Carolina Conference of Clerks of Superior Court, North Carolina Administrative Office of the Courts.
Prioritization:	**5 of 8**

Subcommittee Members:

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TALKING POINTS

AMENDMENT TO GS § 35A-1264 (GUARDIANSHIP ANNUAL ACCOUNTINGS)

PROPOSED BY THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

The Problems:

1. A guardian is required to file an annual account within 30 days of the anniversary of the guardian's appointment. Often, financial statements are not received until close to this deadline, resulting in a very short window in which the guardian must prepare and file the accounting. The clerk does not have the authority to extend the time to file an annual account, even if presented with a duly verified petition to extend time for good cause shown.

2. The guardian is not permitted to elect a fiscal year that could simplify the accounting burden by matching the accounting period with the financial statements or tax filing deadline for the Ward/taxpayer.

The Solutions: Amend the statutes to give the clerk the authority to extend the time for filing an account. Amend the statutes to authorize the guardian to elect a fiscal year. These changes would mirror what is done for probate estates in GS §28A-21-1. The clerks currently have authority to extend time for filing a final account for probate estates, but they do not have authority extend the time for filing an annual account.

Proposed Amended G.S. §35A-1264 (Clean)

Unless the time for filing the annual account has been extended by the clerk of superior court, every guardian shall, for so long as any of the estate remains in the control of the guardian, file annually in the office of the clerk an inventory and account, under oath, of the amount of property received by the guardian, or invested by the guardian, and the manner and nature of such investment, and the receipts and disbursements of the guardian for the past year in the form of debit and credit. Such accounts shall be due within 30 days after the close of the fiscal year selected by the guardian, and annually thereafter. The election of a fiscal year shall be made by the guardian upon filing of the first annual account. In no event may a guardian select a fiscal year-end which is fewer than eleven months nor more than twelve months from the date of the guardian's qualification or appointment. Any fiscal year selected may not be changed without the permission of the clerk.

The guardian shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate. The clerk must carefully review and audit such account, and, if the clerk approves the same, the clerk must endorse the approval of the clerk thereon, which shall be deemed prima facie evidence of correctness, and cause the same to be recorded.

Current GS §35A-1264

Every guardian shall, within 30 days after the expiration of one year from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file in the office of the clerk an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. The guardian shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must endorse his approval thereon, which shall be deemed prima facie evidence of correctness.

Redline comparison
Proposed Amended G.S. §35A-1264 with Current GS §35A-1264

~~Every~~Unless the time for filing the annual account has been extended by the clerk of superior court, every guardian shall, ~~within 30 days after the expiration of one year from the date of his qualification or appointment, and annually,~~for so long as any of the estate remains in ~~his~~the control of the guardian, file annually in the office of the clerk an inventory and account, under oath, of the amount of property received by ~~him~~the guardian, or invested by ~~him~~the guardian, and the manner and nature of such investment, and ~~his~~the receipts and disbursements of the guardian for the past year in the form of debit and credit. Such accounts shall be due within 30 days after the close of the fiscal year selected by the guardian, and annually thereafter. The election of a fiscal year shall be made by the guardian upon filing of the first annual account. In no event may a guardian select a fiscal year-end which is fewer than eleven months nor more than twelve months from the date of the guardian's qualification or appointment. Any fiscal year selected may not be changed without the permission of the clerk. The guardian shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate~~; and having~~ . The clerk must carefully ~~revised~~review and ~~audited~~audit such account, and, if ~~he approve~~the clerk approves the same, ~~he~~the clerk must endorse ~~his~~the approval of the clerk thereon, which shall be deemed prima facie evidence of correctness~~.~~, and cause the same to be recorded.

MEMORANDUM

TO: NCBA LEGISLATIVE ADVISORY COMMITTEE

FROM: JUDY LINVILLE, CHAIR OF THE LEGISLATIVE COMMITTEE FROM THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

RE: 2023 LONG SESSION PROPOSAL 6 - ENACTMENT OF NEW CHAPTER 31E UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT (TO REPLACE EXISTING CHAPTER 31C UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT) AND AMENDMENT TO CURRENT GS §28A-2-4(a)(4) (SUBJECT MATTER JURISDICTION OF CLERKS IN ESTATE PROCEEDINGS)

CC: CATHERINE WILSON (LEGISLATIVE VICE-CHAIR), ELIE FOY (SECTION CHAIR)

Proposal: Enactment of new Chapter 31E Uniform Community Property Disposition at Death Act (hereinafter referred to as "Chapter 31E" or "UCPDDA") and repeal of current Chapter 31C Uniform Disposition of Community Property Rights at Death Act). Also, amend GS §28A-2-4(a)(4) to grant clerks of superior court subject matter jurisdiction over claims for relief under Chapter 31E.

Purpose: In 1981 NC adopted the Uniform Disposition of Community Property Rights at Death Act to govern the legal status of property owned by a married couple when the first spouse dies. In July 2021 the Uniform Law Commission approved the Uniform Community Property Disposition at Death Act that updated the prior uniform laws governing this subject matter. The purpose of the proposed legislation is to update and modernize existing Chapter 31C which was enacted in over 40 years ago with the more modernize and updated Uniform Property Disposition at Death Act.

Changes: Broadens the applicability of the current law by preserving rights that spouses would have had in the community property jurisdiction for some reimbursement claims and for certain bad faith acts or acts of mismanagement of community property by a spouse, whereas existing Chapter 31C only defines the dispositive rights, at death, of a married person as to their interest at death in property. It also includes updates that provide overall modernizing and

clarifying language (and terminology) for situations and circumstances not in existence when the 1981 act was passed, including the existence of same sex marriages and registered domestic partners, and the existence of new laws in certain states that permit spouses to elect by agreement to acquire community property.

Improvements: The proposed legislation will modernize and improve the existing North Carolina laws governing a spouse's property rights at the death of the first spouse where there exist community property rights.

Constitutional: This legislation would not be unconstitutional.

Prior Position: The NCBA has not previously taken a position on the issue.

Affected Areas: Elder and special needs law; family law, real property

Vetting: This proposal was presented to the Section's legislative committee and Council and was discussed and unanimously approved.

Approval: The proposal was approved by unanimous consent by the Council at its meeting on October 4, 2022.

Other Groups: Elder and special needs law Section, Family Law Section, Real Property Section, General Statutes Commission (currently an open docket item and GSC has asked for feedback and comments from NCBA sections); North Carolina Conference of Clerks of Superior Court, North Carolina Administrative Office of the Courts.

Prioritization: **6 of 8**

Subcommittee Members:

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TALKING POINTS

ENACTMENT OF NEW CHAPTER 31E UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT (TO REPLACE EXISTING CHAPTER 31C UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT)

AND

AMENDMENT TO CURRENT GS §28A-2-4(A)(4) (SUBJECT MATTER JURISDICTION OF CLERKS IN ESTATE PROCEEDINGS)

See the August 17, 2022 memorandum prepared by the Uniform Community Property Disposition at Death Act Subcommittee.

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TO: **NCBA Estate Planning & Fiduciary Law Section Legislative Committee**

FROM: **Uniform Community Property Disposition at Death Act Subcommittee:**

John Forneris,
Debra Foster,
Linda Johnson,
Paula Kohut,
Larry Rocamora, and
Holly Norvell, Chair.

DATE: **August 17, 2022**

RE: **Uniform Community Property Disposition At Death Act**

At the request of the General Statutes Commission, our subcommittee reviewed the Uniform Community Property Disposition At Death Act (UCPDDA). We believe the UCPDDA offers significant and needed updates to our General Statutes and support its enactment, with certain revisions. We offer the following observations and recommendations.

Summary of Proposed Act

North Carolina enacted the Uniform Disposition of Community Property Rights at Death Act in 1981. In the decades since the Act was passed, many changes in marital property law and estate planning practice have occurred. Today revocable trusts, payable-on-death accounts, and other nonprobate transfers are popular. These changes could not have been foreseen at the time the Uniform Law Commission recommended the old Uniform Act 51 years ago.

The new Uniform Community Property Disposition At Death Act (UCPDDA) revises and updates the prior Act. Like its predecessor, the UCPDDA preserves the community property character of property acquired by spouses while domiciled in a community property jurisdiction, even after their move to a non-community property state. Unlike its predecessor, however, the UCPDDA broadens applicability of the Act. The UCPDDA preserves some rights that spouses would have had in the community property jurisdiction for some reimbursement claims and for certain bad faith acts or acts of mismanagement of community property by a spouse, whereas the prior Act "only define[d] the dispositive rights, at death, of a married person as to his interests at death in property" subject to the Act. In addition, the UCPDDA has the potential to benefit a larger number of individuals than the prior Act, as today a greater number of states allow for the creation of community property through opt-in community property statutes or by broadened definitions of spouses eligible to accumulate community property. (See Prefatory Note of the Uniform Law Commission to the UCPDDA.)

The subcommittee notes the attached statement of the Uniform Law Commission, "Why Your State Should Adopt the Uniform Community Property Disposition at Death Act." The subcommittee notes that the new UCPDDA preserves existing community property rights and does not create new community property rights. The UCPDDA is not an opt-in community property law.

Recommendations

For the reasons listed above, the subcommittee supports enactment of the UCPDDA and makes the following recommendations to the new Act.

1. **Section 31E-1, Title.** We recommend adoption as drafted.
2. **Section 31E-2, Definitions.** Unless good reason exists, the subcommittee agrees that definitions should be consistent among Chapters. To that end, we recommend deleting the existing definition of each term below and inserting the following:

   "(5) Person. – An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity."

   As revised, this definition is expanded to include a trust, partnership, limited liability company, association, joint venture, public corporation and commercial entity and is identical to the definitions of "person" in Chapters 28A, 32C, and 36C.

   "(6) Personal Representative. – As defined in G.S. 28A-1-1(5)."

   The revised definition includes an executor and an administrator but excludes a collector, limited personal representative, and an affiant proceeding under Article 25 of Chapter 28A.

   "(7) Property. – Anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest or right therein."

   The revised definition mirrors the definition of the same term in Chapter 32C.

   …

   "(11) State. – A state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe or band recognized by federal law or formally acknowledged by a state."

   The revised definition includes "a band recognized by federal law or formally acknowledged by state" and matches the definition of the term "state" in Chapter 32C.

   The term "nonprobate transferee" is not defined in the UCPDDA. The subcommittee studied and weighed whether to propose a definition of the term. Interestingly, the subcommittee found that no universal definition of "nonprobate transfer" or "nonprobate transferee" appears in the Uniform Probate Code. The subcommittee surmises that the drafters of the UCPDDA likely decided to leave the term undefined in order to avoid inadvertently curtailing the rights of a community property spouse. The subcommittee concurs with this approach.
3. **Section 31E-3, Included and excluded property.** We recommend adoption as drafted.
4. **Section 31E-4, Form of partition, reclassification or waiver.** The subcommittee considered including in the statute a non-exclusive form for partition, reclassification or waiver of community property. The subcommittee researched and reviewed a form. After

further discussion, and due to concern that including a statutory form would not be well received by other Sections of the NCBA, the subcommittee decided to omit inclusion of a statutory form and instead will plan to make a form available through the NCBA Fiduciary Litigation Manual or Estate Administration Manual.

In addition, the subcommittee considered recommending inclusion of a non-exclusive paragraph in a deed to indicate when real property was acquired with community property funds. After discussion with the NCBA Real Property Section, the subcommittee agreed that the Real Property Section's recommended insertion at Section 31E-10 (addressed below) adequately addresses the issue of notice of community property character in the real property record.

Finally we recommend appending the following clarifying sentence to the end of subsection (a):

> "Unless spouses agree otherwise, partition of community property is presumed to result in each spouse owning a one-half separate property interest in each item of property addressed by the agreement."

5. **Section 31E-5, Community property presumption.** We recommend adoption as drafted. In response to comments of the NCBA Real Property Section to Section 5, the subcommittee notes the following: (i) the laws of the traditional community property states (AZ, CA, ID, LA, NV, NM, TX, WA) plus Wisconsin by enactment of the Uniform Marital Property Act, include a presumption of community property, while the laws of the opt-in states (AK, SD, TN, KY, FL) do not, (ii) Section 5 provides that the presumption is applied to "all property acquired by a community-property spouse when domiciled in a jurisdiction where property acquired by the community-property spouse was presumed to be community property under the law of that jurisdiction." Accordingly, in order for the presumption of community property to attach, the property must have been acquired in a jurisdiction with a similar presumption, (iii) the presumption is one of procedural convenience and neither changes the nature of the property interests nor prevents the presentation of proof that the property is separate property, and (iv) in the absence of such a presumption, proof of the application of the Uniform Community Property Disposition At Death Act may be unduly difficult given the passage of time, the absence of records, and failing recollections between the time the property was acquired and the death of the decedent.

6. **Section 31E-6, Disposition of property at death.** We agree with the General Statutes Commission's recommendation to adopt Alternative A under Section 6(c) and to delete parenthetical language in Section 6(d).

7. **Section 31E-7, Other remedies available at death.** We recommend adoption as drafted because this section preserves rights that a community property spouse has under the law of the community property state.

8. **Section 31E-8, Right of surviving community-property spouse, Section 31E-9, Right of heir, devisee, or nonprobate transferee, and Section 28A-2-4(a).** The subcommittee recommends tailoring the procedural aspects of the Act to read as follows:

"**§ 31E-8. Right of surviving community-property spouse.**
The surviving community-property spouse of the decedent may assert a claim for relief with respect to a right under this Chapter in accordance with the following rules:

(1) With respect to a claim for relief asserting a right in or to property, the surviving spouse must do either of the following:
   a. Within one year of the decedent's date of death, commence an action in the superior court trial division against an heir, devisee or nonprobate transferee who is in possession of the property; or
   b. Within six months after the issuance of letters testamentary or letters of administration in connection with the decedent's testate or intestate proceeding, (i) file a petition with the clerk of superior court or an action in the superior court trial division in the county in which the primary administration of the decedent's estate lies, and (ii) mail or deliver a copy of the pleading to the personal representative of the decedent's estate. A petition with the clerk of superior court shall be filed as an estate proceeding, estate proceeding summonses shall issue, and the proceedings shall be conducted in accordance with the procedures of Article 2 of Chapter 28A of the General Statutes.

(2) With respect to a claim for relief other than a claim under subdivision (1) of this section, the surviving community-property spouse must do either of the following:
   a. Within one year of the decedent's date of death if a personal representative of the decedent's estate is not appointed, commence an action in the superior court trial division; or
   b. Within six months after the issuance of letters testamentary or letters of administration in connection with the decedent's testate or intestate proceeding, (i) file a petition with the clerk of superior court or an action in the superior court trial division in the county in which the primary administration of the decedent's estate lies, and (ii) mail or deliver a copy of the pleading to the personal representative of the decedent's estate. A petition with the clerk of superior court shall be filed as an estate proceeding, estate proceeding summonses shall issue, and the proceedings shall be conducted in accordance with the procedures of Article 2 of Chapter 28A of the General Statutes.

(3) The incapacity of the surviving spouse shall not toll the time for commencing an action or filing a petition as provided in this Section."

The subcommittee's recommendations to this section address (i) statute of limitations, (ii) jurisdiction, and (iii) tolling of the statute of limitations.

First, regarding the statute of limitations, the subcommittee considered the public interest in quickly and efficiently settling estates to recommend that a statute of limitations of one year after the decedent's date of death apply to a surviving spouse's claim to recover community property or other claim involving community property (such as a right of reimbursement). In cases in which letters testamentary or letters of administration are

issued, the subcommittee recommends a statute of limitations of six months after the date letters are issued, which corresponds to the statute of limitations applicable to a surviving spouse's claim for elective share.

Second, regarding jurisdiction and procedure, the subcommittee concluded that the clerk of superior court's jurisdiction should not be exclusive. A party asserting a claim against an estate may so do by either (i) a civil action in the superior court trial division, or (ii) an estate proceeding before the clerk of court (subject to the right of any party to transfer the matter to superior court). The subcommittee weighed whether a claim for relief against an estate under Section 31E-8 or Section 31E-9 should be an estate proceeding within the exclusive jurisdiction of the clerk of court or if parties should have the right to file in (or transfer to, in the case of a respondent) the superior court trial division. The subcommittee concluded that the clerk of court's jurisdiction over proceedings to enforce rights under the UCPDDA should be non-exclusive with the superior court trial division. The proposed revision clarifies the proper jurisdiction and venue—superior court trial division or clerk of superior court of the county in which the estate administration lies.

Third, in the interest of efficiently resolving estates, the subcommittee recommends that incapacity of the surviving spouse not toll the applicable statute of limitations similar to the elective share statute.

Consistent with the changes proposed to the prior section, the subcommittee proposes the following language for the following section:

"**§ 31E-9. Right of heir, devisee, or nonprobate transferee.**
An heir, devisee, or nonprobate transferee of a deceased community-property spouse may assert a claim for relief with respect to a right under this Chapter in accordance with the following rules:

(1) With respect to a claim asserting a right in or to property, the heir, devisee, or nonprobate transferee must do either of the following:
   a. Within one year of the decedent's date of death, commence an action in the superior court trial division against the surviving community-property spouse of the decedent who is in possession of the property; or
   b. Within six months after the issuance of letters testamentary or letters of administration in connection with the decedent's testate or intestate proceeding, (i) file a petition with the clerk of superior court or action in the superior court trial division in the county in which the primary administration of the decedent's estate lies, and (ii) mail or deliver a copy of the pleading to the personal representative of the decedent's estate. A petition with the clerk of superior court shall be filed as an estate proceeding, estate proceeding summonses shall issue, and the proceedings shall be conducted in accordance with the procedures of Article 2 of Chapter 28A of the General Statutes.

(2) With respect to a claim for relief other than a claim under subdivision (1) of this section, the heir, devisee, or nonprobate transferee must do either of the following:
   a. Within one year of the decedent's date of death if a personal representative of the decedent's estate is not appointed, commence an action in the superior court trial division; or

b. Within six months after the issuance of letters testamentary or letters of administration in connection with the decedent's testate or intestate proceeding, (i) file a petition with the clerk of superior court or an action in the superior court trial division in the county which the primary administration of the decedent's estate lies, and (ii) mail or deliver a copy of the pleading to the personal representative of the decedent's estate. A petition with the clerk of superior court shall be filed as an estate proceeding, estate proceeding summonses shall issue, and the proceedings shall be conducted in accordance with the procedures of Article 2 of Chapter 28A of the General Statutes.

(3) The incapacity of the heir, devisee or nonprobate transferee shall not toll the time for commencing an action or filing a petition as provided in this Section."

The subcommittee recommends that the procedures to enforce the rights of an heir, devisee or nonprobate transferee mirror the procedures to enforce the rights of the surviving community-property spouse from which the rights of the heir, devisee or nonprobate transferee emanated.

Finally, to coordinate the procedural aspects of both Section 8 and Section 9, the subcommittee recommends the following revision to Section 28A-2-4(a)(4) to provide the clerk of court with jurisdiction to hear a claim for relief regarding community property as an estate proceeding and also to permit any party or the clerk to request the proceeding to be transferred to the superior court trial division.

"§ 28A-2-4. Subject matter jurisdiction of the clerk of superior court in estate proceedings.

(a) The clerks of superior court of this State, as ex officio judges of probate, shall have original jurisdiction of estate proceedings. Except as provided in subdivision (4) of this subsection, the jurisdiction of the clerk of superior court is exclusive. Estate proceedings include, but are not limited to, the following:

(1) Probate of wills.

(2) Granting and revoking of letters testamentary and letters of administration, or other proper letters of authority for the administration of estates.

(3) Determination of the elective share for a surviving spouse as provided in G.S. 30-3.1.

(4) Proceedings to ascertain heirs or devisees, to approve settlement agreements pursuant to G.S. 28A-2-10, to determine questions of construction of wills, to determine priority among creditors, to determine whether a person is in possession of property belonging to an estate, to order the recovery of property of the estate in possession of third parties, to determine a claim for relief regarding the disposition of community property at death as provided in Chapter 31E, and to determine the existence or nonexistence of any immunity, power, privilege, duty, or right. Any party or the clerk of superior court may file a notice of transfer of a proceeding pursuant to this subdivision to the Superior Court Division of the General Court of Justice as provided in G.S. 28A-2-6(h). In the absence of a transfer to superior court, Article 26 of Chapter 1 of the General Statutes shall apply to an estate

proceeding pending before the clerk of superior court to the extent consistent with this Article."

9. **Section 31E-10, Protection of third person.** The subcommittee agrees with the policies behind this section, including the Real Property's proposed subsection 31E-10(c). We recommend wordsmithing as follows:

   "(c) With respect to real property~~,~~ to which this Chapter ~~does not apply against~~applies, a lien creditor or a purchaser for value of ~~the~~such real property is not liable under this Chapter but from the time the community-property spouses give notice in a registered instrument of their intention for this Chapter to apply to the property [pursuant to G.S. 31E-4]. Priority among this registered instrument and other registered instruments is governed by G.S. 47-18."

   We discussed the awkward phrase "but from the time" and decided to leave it as proposed, as the language is consistent with other recording statutes.

10. **Section 31E-11, Principles of law and equity.** We recommend adoption as drafted.

11. **Section 31E-12, Uniformity of application and construction.** We recommend adoption as drafted. The subcommittee notes in response to comments by the NCBA Real Property Section that encouraging uniformity among the enacting jurisdictions is a principal purpose of the Uniform Law Commission and that similar language appears in the North Carolina enactment of other uniform acts.

12. **Section 6, Uniform Act Section 17, Effective Date.** We recommend adoption as drafted.

Comments

We recommend adopting the Uniform Comments to the Act. We further recommend including in the draft legislation authority to write and adopt North Carolina comments explaining the few but significant differences between our enactment and the UCPDDA. For example, many states have dedicated probate courts, and the UCPDDA provisions relating to jurisdiction and venue envision different judicial procedures than those that apply to the judicial system of our state. We strongly recommend adoption of North Carolina comments to explain these differences and propose to add following language to the draft session law:

"The Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, all relevant portions of the Official Comments to the Uniform Community Property Disposition At Death Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Other Enactments

Sixteen states, including North Carolina, have enacted the prior Act. To date, Nebraska is the only state that has introduced draft legislation to enact the new UCPDDA. In addition, we understand that Alaska, Illinois, Michigan, Missouri, Oregon, Vermont, and West Virginia all are considering introducing the new UCPDDA.

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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WHY YOUR STATE SHOULD ADOPT THE UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT

The Uniform Community Property Disposition at Death Act (UCPDDA) clarifies the legal status of property owned by a married couple when the first spouse dies. It should be adopted in non-community property states because:

- ***The UCPDDA protects property rights for married couples.*** The United States has two different systems of property law. Nine states and two U.S. territories treat all property acquired by a married couple during their marriage as community property – the remaining states do not. The UCPDDA ensures spouses will retain their rights in community property even if they relocate to a non-community property state.

- ***The UCPDDA prevents unnecessary litigation.*** If the legal status of a married couple's property is unclear at the time the first spouse dies, disputes between potential recipients can arise. The UCPDDA clarifies the status of property with a set of default rules that apply unless the couple made other arrangements in their estate plan. Clear rules lead to fewer disputes and help preserve court resources

- ***The UCPDDA modernizes the law.*** The increased popularity of nonprobate transfers and the recognition of same-sex marriage have made obsolete many older statutes in non-community property states governing the disposition of community property. The UCPDDA addresses these issues in a manner consistent with modern estate planning practices.

- ***The UCPDDA is flexible.*** Every couple's situation is different. The UCPDDA allows married couples to make their own plans for property distribution by deferring to valid pre-marital and post-marital agreements between spouses. The UCPDDA's default rules apply only if the couple has not made their own arrangements.

- ***The UCPDDA is more necessary than ever.*** In our increasingly mobile world, many couples live in multiple states over the course of their marriage. Therefore, these couples will often acquire a mix of community property and non-community property, complicating the distribution to heirs when one spouse dies. The UCPDDA provides clear and effective rules that will prevent distributions of property to persons who are not entitled to receive it.

For more information about the UCPDDA, please contact ULC Chief Counsel Benjamin Orzeske at (312) 450-6621 or borzeske@uniformlaws.org.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2021

U **D**

BILL DRAFT 2021-MUz-34 [v.14]

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
05/12/2022 01:59:17 PM

Short Title: GSC Unif. Community Prop. Disp. at Death Act. (Public)

Sponsors:

Referred to:

A BILL TO BE ENTITLED

AN ACT TO ENACT THE UNIFORM COMMUNITY PROPERTY DISPOSITION AT DEATH ACT.

The General Assembly of North Carolina enacts:

[Staff Note: Redlining in this draft represents changes to the Uniform Act, not current law. GSC staff also made non-redlined changes to conform to the General Statutes numbering system and conventions for internal citations and capitalization.]

SECTION 1. Chapter 31C of the General Statutes is repealed.

SECTION 2. The General Statutes are amended by adding a new chapter to read as follows:

"**Chapter 31E.**

"**Uniform Community Property Disposition at Death Act.**

"**§ 31E-1. Title.**

This ~~[act]~~ Chapter may be cited as the Uniform Community Property Disposition at Death Act.

"**§ 31E-2. Definitions.**

In this ~~[act]:~~ Chapter, the following definitions apply:

(1) ~~"Community-property spouse" means an~~ Community-property spouse. – An individual in a marriage or other ~~relationship:~~ relationship that satisfies all the following:

a. ~~Under which community property could be acquired during the existence of the relationship; and~~ Community property could be acquired under the relationship.

b. ~~That~~ The relationship remains in existence at the time of death of either party to the relationship.

(2) ~~"Electronic" means relating~~ Electronic. – Relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) ~~"Jurisdiction" means the~~ Jurisdiction. – The United States, a state, a foreign country, or a political subdivision of a foreign country.

(4) ~~"Partition" means voluntarily~~ Partition. – Voluntarily divide property to which this ~~[act]~~ Chapter otherwise would apply.

(5) ~~"Person" means an~~ Person. – An individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(6) ~~"Personal representative" includes~~ Personal representative. – Includes an executor, administrator, successor personal representative, special administrator, and other person that performs substantially the same function.

(7) ~~"Property" means anything~~ Property. – Anything that may be the subject of ownership, whether real or personal, tangible or intangible, legal or equitable, or any interest therein.

(8) ~~"Reclassify" means change~~ Reclassify. – To change the characterization or treatment of community property to property owned separately by community-property spouses.

(9) ~~"Record" means information:~~ Record – Either of the following:

a. ~~Inscribed~~ Information inscribed on a tangible~~ medium; or~~ medium.

b. ~~Stored~~ Information stored in an electronic or other medium and retrievable in perceivable form.

(10) "~~Sign" means, with~~ Sign. – With present intent to authenticate or adopt a ~~record:~~ record, to do either of the following:

a. Execute or adopt a tangible~~ symbol; or~~ symbol.

b. Attach to or logically associate with the record an electronic symbol, sound, or process.

(11) ~~"State" means a~~ State. – A state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

"**§ 31E-3. Included and excluded property.**

(a) Subject to subsection (b) of this section, this ~~[act]~~ Chapter applies to all the following property of a community-property spouse, without regard to how the property is titled or held:

(1) If a decedent was domiciled in this State at the time of~~ death:~~ death, all the following property:

a. All or a proportionate part of each item of personal property, wherever located, that was community property under the law of the jurisdiction where the decedent or the surviving community-property spouse was domiciled either when the~~ property:~~ community property was acquired or, after acquisition, became community property.

~~1. Was acquired; or~~

~~2. After acquisition, became community property;~~

b. Income, rent, profit, appreciation, or other increase derived from or traceable to property described in sub-subdivision a. of this ~~subdivision; and~~ subdivision.

c. Personal property traceable to property described in sub-subdivisions a. or b. of this~~ subdivision; and~~ subdivision.

(2) Regardless whether a decedent was domiciled in this State at the time of~~ death:~~ death, all the following property:

a. All or a proportionate part of each item of real property located in this State traceable to community property or acquired with community property under the law of the jurisdiction where the decedent or the surviving community-property spouse was domiciled either when the ~~property:~~ community property was acquired or, after acquisition, became community property.

~~1. Was acquired; or~~

~~2. After acquisition, became community property; and~~

b. Income, rent, profit, appreciation, or other increase, derived from or traceable to property described in sub-subdivision a. of this subdivision.

(b) If community-property spouses acquired community property by complying with the law of a jurisdiction that allows for creation of community property by transfer of property to a trust, this ~~[act]~~ Chapter applies to the property only to the extent the property is held in the trust or characterized as community property by the terms of the trust or the law of the jurisdiction under which the trust was created.

(c) This ~~[act]~~ Chapter does not apply to ~~property that:~~ the following property:

(1) ~~Community property~~ Property that community-property spouses have partitioned or ~~reclassified; or~~ reclassified.

(2) ~~Is~~ Property that is the subject of a waiver of rights granted by this ~~[act].~~ Chapter.

"**§ 31E-4. Form of partition, reclassification, or waiver.**

(a) Community-property spouses domiciled in this State may partition or reclassify property to which this ~~[act]~~ Chapter otherwise would apply. The partition or reclassification must be in a record signed by both community-property spouses.

(b) A community-property spouse domiciled in this State may waive a right granted by this ~~[act]~~ Chapter only by complying with the law of this State, including this State's choice-of-law rules, applicable to waiver of a spousal property right.

[Staff Note: Below is a preliminary comment from the Real Property Section of the North Carolina Bar Association (NCBA):

The trust provisions in Sec. 4 seem to be an improvement, but our section is not the best to opine on this.]

"**§ 31E-5. Community property presumption.**

~~All~~ This Chapter is presumed to apply to all property acquired by a community-property spouse when domiciled in a jurisdiction where ~~community property then could be acquired by the community-property spouse by operation of law is presumed to be community property.~~ property acquired by the community-property spouse was presumed to be community property under the law of that jurisdiction. This presumption may be rebutted by a preponderance of the evidence.

[Staff Note: The Real Property Section of the NCBA earlier commented: "Section 5's presumption of community property seems overly broad. I believe there are states where community property ownership is allowed, but not presumed. I would suggest this section be limited to jurisdictions where community property is presumed. (The comment even states the presumption is "common" and not universal.)"

Staff followed up with the Real Property Section and pointed out the phrase "by operation of law"; the Section responded that it still has the same concern and added: "Not all states presume property acquisition is intended to be community property. I would think that real estate obtained via operation of law would more likely be intended to be non-community property. For example, a lot inherited via intestacy from your parents is not likely intended to be community property."]

"**§ 31E-6. Disposition of property at death.**

(a) One-half of the property to which this ~~[act]~~ Chapter applies belongs to the surviving community-property spouse of a decedent and is not subject to disposition by the decedent at death.

(b) One-half of the property to which this ~~[act]~~ Chapter applies belongs to the decedent and is subject to disposition by the decedent at death.

Alternative A

(c) The property that belongs to the decedent under subsection (b) of this section is not subject to the ~~elective-share right of the surviving community-property spouse.~~ surviving community-property spouse's right to petition for an elective share under Article 1A of Chapter 30 of the General Statutes or the surviving community-property spouse's right to elect a life estate under Article 8 of Chapter 29 of the General Statutes.

Alternative B

(c) For the purpose of calculating the augmented estate of the decedent and the elective-share right of the surviving community-property ~~spouse:~~ spouse, the following applies:

(1) Property under subsection (a) of this section is deemed to be property of the surviving community-property ~~spouse; and~~ spouse.

(2) Property under subsection (b) of this section is deemed to be property of the decedent.

End of Alternatives

(d) [Except for the purpose of calculating the augmented estate of the decedent and the elective-share right of the surviving community-property spouse, this] [This] section does not apply to property transferred by right of survivorship or under a revocable trust or other nonprobate transfer.

(e) This section does not limit the right of a surviving community-property spouse to ~~[insert statutory allowances].~~ the year's allowance under Article 4 of Chapter 30 of the General Statutes or the property exemptions under Article X of the North Carolina Constitution and Article 16 of Chapter 1C of the General Statutes.

(f) If at death a decedent purports to transfer to a third person property that, under this section, belongs to the surviving community-property spouse and transfers other property to the surviving community-property spouse, this section does not limit the authority of the court under other law of this state to require that the community-property spouse elect between retaining the property transferred to the community-property spouse or asserting rights under this ~~[act].~~ Chapter.

[Legislative Note: A traditional elective-share state should adopt Alternative A and adopt the language beginning with "This" in subsection (d).

An augmented-estate, elective-share state whose statute does not address rights in community property adequately should adopt Alternative B and adopt the language beginning with "Except" in subsection (d). In subsection (e), a state should insert the statutory reference to the applicable allowances, such as homestead, exempt property, or family.]

[Staff Note: Alternative A is comparable to current G.S. 31C-3:

§ 31C-3. Disposition of community property upon death.

Upon death of a married person, one half of the property to which this Chapter applies is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this State. One half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this State. With respect to property to which this Chapter applies, the one half of the property of the decedent is not subject to the surviving spouse's right to petition for an elective share under the provisions of Article 1A of Chapter 30, and is not subject to the right to elect a life estate under the provisions of Article 8 of Chapter 29.]

[Staff Note: Below are some preliminary comments from the Real Property Section of the NCBA:

Section 6 needs review by the domestic bar and the estate section. Alternative A seems much simpler. Subsection f seems to be asking for litigation and disputes – keep it simple and simply say the transfer is ineffective as to the share belonging to the surviving community-property spouse.]

"**§ 31E-7. Other remedies available at death.**

(a) At the death of a community-property spouse, the surviving community-property spouse or a personal representative, heir, or nonprobate transferee of the decedent may assert a right based on ~~an act of:~~ either of the following acts:

(1) ~~The~~ An act of the surviving community-property spouse or decedent during the marriage or other relationship under which community property then could be ~~acquired; or~~ acquired.

(2) ~~The~~ An act of the decedent that takes effect at the death of the decedent.

(b) In determining a right under subsection (a) of this section and corresponding remedy, the ~~court:~~ court shall apply equitable principles and may

~~(1) Shall apply equitable principles; and~~

~~(2) May~~ consider the community property law of the jurisdiction where the decedent or surviving community-property spouse was domiciled when the property was acquired or enhanced.

[Staff Note: Below are some comments from the Family Law Section of the NCBA:

The only issue that would be an issue while the spouses are living is Section 7. Section 7 is new and has no analogue in the UDCPRDA. It expands the scope of the act to allow a court to recognize reimbursement rights and rights of redress for certain bad faith actions by one community-property spouse that might impair the rights of the other community property spouse. One such example could be the unauthorized transfer of property during life or at death by means of a nonprobate transfer to the prejudice of the other community-property spouse. This section allows for a damage or equitable claim to be brought at the death of one community-property spouse by the other or by the community-property spouse's personal representative, provided a community-property spouse's interest in property was prejudiced by the actions of the other community-property spouse.]

[Staff Note: Below are some preliminary comments from the Real Property Section of the NCBA:

Section 7 also seems to be overly complex. Either the property is community-property or it isn't. Trace it under Section 3 and don't introduce a method to cast doubt in the process.]

"**§ 31E-8. Right of surviving community-property spouse.**

(a) The surviving community-property spouse of the decedent may assert a claim for relief with respect to a right under this ~~[act]~~ Chapter in accordance with the following rules:

(1) In an action asserting a right in or to property, the surviving community-property spouse ~~must:~~ must do either of the following:

a. Not later than [three years] after the death of the decedent, commence an action against an heir, devisee, or nonprobate transferee of the decedent that is in possession of the ~~property; or~~ property.

b. Not later than [six months] after appointment of the personal representative of the decedent, send a demand in a record to the personal representative.

(2) In an action other than an action under subdivision (1) of this section, the surviving community-property spouse ~~must:~~ must do either of the following:

a. Not later than [six months] after appointment of the personal representative of the decedent, send a demand in a record to the personal ~~representative; or~~ representative.

b. If a personal representative is not appointed, commence the action not later than [three years] after the death of the decedent.

(b) Unless a timely demand is made under sub-subdivision (a)(1)b. or (a)(2)a. of this section, the personal representative may distribute the assets of the decedent's estate without personal liability for a community-property spouse's claim under this ~~[act].~~ Chapter.

[Legislative Note: A state should insert in subsection (a)(1)(A) and (2)(B) and Section 9(1)(A) and (2)(B) the time for asserting a claim to a nonprobate asset, probating a will, or challenging a revocable trust and in subsection (a)(1)(B) and (2)(A) and Section 9(1)(B) and (2)(A) the time for asserting a claim in a probate proceeding.]

[Staff Note: The bracketed time periods match similar time periods in current law. Under G.S. 31-32, the time period to file a caveat to a will ends three years after application for probate of a will, and under G.S. 31C-6 (part of the chapter that would be replaced by this act), the time to file a written demand to the personal representative ends six months after the will has been admitted to probate.]

[Staff Note: Below are some preliminary comments from the Real Property Section of the North Carolina Bar Association:

Sections 8 and 9's limitation periods may need to be thought about to make sure they conform to existing NC limitation periods. I would think the estate section would be able to make appropriate suggestions.]

"**§ 31E-9. Right of heir, devisee, or nonprobate transferee.**

An heir, devisee, or nonprobate transferee of a deceased community-property spouse may assert a claim for relief with respect to a right under this ~~[act]~~ Chapter in accordance with the following rules:

(1) In an action asserting a right in or to property, the heir, devisee, or nonprobate transferee ~~must:~~ must do either of the following:

a. Not later than [three years] after the death of the decedent, commence an action against the surviving community-property spouse of the decedent who is in possession of the ~~property; or~~ property.

b. Not later than [six months] after appointment of the personal representative of the decedent, send a demand in a record to the personal representative.

(2) In an action other than an action under subdivision (1) of this section, the heir, devisee, or nonprobate transferee ~~must:~~ must do either of the following:

a. Not later than [six months] after the appointment of the personal representative of the decedent, send a demand in a record to the personal ~~representative; or~~ representative.

b. If a personal representative is not appointed, commence the action not later than [three years] after the death of the decedent.

[Staff Note: Please see the staff notes under the previous section.]

"**§ 31E-10. Protection of third person.**

(a) With respect to property to which this ~~[act]~~ Chapter applies, a person is not liable under this ~~[act] to the extent the person:~~ Chapter if all the following apply:

(1) ~~Transacts~~ The person transacts in good faith and for ~~value:~~ value with either of the following:

a. ~~With a community property spouse; or~~ A community-property spouse.

b. After the death of the decedent, ~~with~~ a surviving community-property spouse, personal representative, heir, devisee, or nonprobate transferee of the ~~decedent; and~~ decedent.

(2) ~~Does~~ The person does not know or have reason to know that the other party to the transaction is exceeding or improperly exercising the party's authority.

(b) Good faith under subdivision (a)(1) of this section does not require the person to inquire into the extent or propriety of the exercise of authority by the other party to the transaction.

(c) With respect to real property, this Chapter does not apply against a lien creditor or a purchaser for value of the property but from the time the community-property spouses give notice in a registered instrument of their intention for this Chapter to apply to the property. Priority among this registered instrument and other registered instruments is governed by G.S. 47-18.

[Staff Note: Below are some preliminary comments from the Real Property Section of the North Carolina Bar Association:

Section 10 – I would suggest that there be an affirmative duty on parties to expressly identify real estate in NC that they intend to hold as community-property. If the property is not so identified in the vesting instrument, then I would suggest that any lender or purchaser for value be protected under the Conner Act so long as they get all vested owners to join in the grant (and they would have no duty to inquire as to the dispensation of the funds).]

[Staff Note: The Connor Act of 1885 is codified as G.S. 47-18, which provides:

§ 47-18. Conveyances, contracts to convey, options, and leases of land.

(a) No (i) conveyance of land, (ii) contract to convey, (iii) option to purchase or convey, (iv) lease of land for more than three years, (v) right of first refusal, or (vi) right of first offer is valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor but from the time of its registration in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county. Unless otherwise stated either on the registered instrument or on a separate registered instrument duly executed by the party whose priority interest is adversely affected, (i) instruments registered in the office of the register of deeds have priority based on the order of registration as determined by the time of registration, and (ii) if instruments are registered simultaneously, then the instruments are presumed to have priority determined as follows:

(1) The earliest document number set forth on the registered instrument.

(2) The sequential book and page number set forth on the registered instrument if no document number is set forth on the registered instrument.

The presumption created by this subsection is rebuttable.

(b) This section shall not apply to contracts, leases or deeds executed prior to March 1, 1885, until January 1, 1886; and no purchase from any such donor, bargainor or lessor shall

avail or pass title as against any unregistered deed executed prior to December 1, 1885, when the person holding or claiming under such unregistered deed shall be in actual possession and enjoyment of such land, either in person or by his tenant, at the time of the execution of such second deed, or when the person claiming under or taking such second deed had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person holding or claiming thereunder. (Code, s. 1245; 1885, c. 147, s. 1; Rev., s. 980; C.S., s. 3309; 1959, c. 90; 1975, c. 507; 2003-219, s. 2; 2005-212, s. 2; 2021-91, s. 10.)]

"**§ 31E-11. Principles of law and equity.**

The principles of law and equity supplement this ~~[act]~~ Chapter except to the extent inconsistent with this ~~[act].~~ Chapter.

"**§ 31E-12. Uniformity of application and construction.**

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it."

[Staff Note: Below are some preliminary comments from the Real Property Section of the North Carolina Bar Association:

Section 12 seems odd. Why should an NC court care what other jurisdictions would do when if it is interpreting the rights of NC citizens. Applying the law of the jurisdiction that gave rise to the community-property rights is one thing, but to promote uniformity is not what the court should be doing = that is the job of the legislature if it so chooses.]

SECTION 3. If a provision of this ~~[act]~~ act or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.

[Legislative Note: Include this section only if the state lacks a general severability statute or a decision by the highest court of the state adopting a general rule of severability.]

[Staff Note: Please see the following excerpt from Pope v. Easley*, 354 N.C. 544, 548, 556 S.E. 2d 265, 268 (2001):*

"The test for severability is whether the remaining portion of the legislation can stand on its own and whether the General Assembly would have enacted the remainder absent the offending portion. See, e.g., Jackson v. Guilford Cty. Bd. of Adjust.*, 275 N.C. 155, 168, 166 S.E.2d 78, 87 (1969) ("When the statute, ... [can] be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone."). Additionally, the inclusion of a severability clause within legislation will be interpreted as a clear statement of legislative intent to strike an unconstitutional provision and to allow the balance to be enforced independently.* Fulton Corp. v. Faulkner*, 345 N.C. 419, 421, 481 S.E.2d 8, 9 (1997)."]*

SECTION 4. The Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, all relevant portions of the Official Comments to the Uniform Community Property Disposition at Death Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

SECTION 5. If a right with respect to property to which this ~~[act]~~ act applies is acquired, extinguished, or barred on the expiration of a limitation period that began to run under another statute before ~~[the effective date of this [act]],~~ the effective date of this act, that statute

continues to apply to the right even if the statute has been repealed or superseded by this ~~[act].~~ act.

SECTION 6. This act becomes effective October 1, 2023. Except as provided in Section 5 of this act, this ~~[act]~~ act applies to a judicial proceeding ~~with respect to property to which this [act] applies~~ commenced on or after ~~[the effective date of this [act]],~~ that date, regardless of the date of death of the decedent.

§ 31E-1. Title. This Chapter may be cited as the North Carolina Uniform Community Property Disposition at Death Act.

§ 31E-2. Definitions. In this Chapter, the following definitions apply:

(1) Community-property spouse. – An individual in a marriage or other relationship that satisfies all of the following:

a. Community property count be acquired under their relationship.

b. The relationship remains in existence at the time of death of either party to the relationship.

(2) Electronic. - Relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) Jurisdiction. - The United States, a state, a foreign country, or a political subdivision of a foreign country.

(4) Partition. - Voluntarily divide property to which this Chapter otherwise would apply.

(5) Person. – An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(6) Personal Representative. – As defined in G.S. 28A-1-1(5).

(7) Property. Anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest or right therein.

(8) Reclassify. – To change the characterization or treatment of community property

to property owned separately by community-property spouses.

(9) Record – Either of the following

a. Information inscribed on a tangible medium.

b. Information stored in an electronic or other medium and retrievable in perceivable form.

(10) Sign - With present intent to authenticate or adopt a record, to do either of the following:

a. Execute or adopt a tangible symbol.

b. Attach to or logically associate with the record an electronic symbol, sound, or process.

(11) State. - A state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe or band recognized by federal law or formally acknowledged by a state.

§31E-3. Included and excluded property.

(1) Subject to subsection (b), this Chapter applies to all following property of a community-property spouse, without regard to how the property is titled or held:

(1) If a decedent was domiciled in this state at the time of death, all of the following property:

a. All or a proportionate part of each item of personal property, wherever located, that was community property under the law of the jurisdiction where the decedent or the surviving community-property spouse was domiciled either when the community property was acquired or, after

acquisition, became community property.

b. Income, rent, profit, appreciation, or other increase derived from or traceable to property described in sub-subdivision a. of this subdivision.

c. Personal property traceable to property described in sub-subdivisions a. or b. of this subdivision.

(2) Regardless whether a decedent was domiciled in this state at the time of death, all the following property:

a. All or a proportionate part of each item of real property located in this state traceable to community property or acquired with community property under the law of the jurisdiction where the decedent or the surviving community-property spouse was domiciled either when the community property was acquired or, after acquisition, became community property.

b. Income, rent, profit, appreciation, or other increase, derived from or traceable to property described in sub-subdivision a. of this subdivision.

(b) If community-property spouses acquired community property by complying with the law of a jurisdiction that allows for creation of community property by transfer of property to a trust, this Chapter applies to the property only to the extent the property is held in the trust or characterized as community property by the terms of the trust or the law of the jurisdiction under which the trust was created.

(c) This Chapter does not apply to the following property:

(1) Property that community-property spouses have partitioned or reclassified.

(2) Property that is the subject of a waiver of rights granted by this Chapter.

§ 31E-4. Form of partition, reclassification, or waiver.

(a) Community-property spouses domiciled in this state may partition or reclassify property to which this Chapter otherwise would apply. The partition or reclassification must be in a record signed by both community-property spouses. Unless spouses agree otherwise, partition of community property is presumed to result in each spouse owning a one-half separate property interest in each item of property addressed by the agreement

(b) A community-property spouse domiciled in this state may waive a right granted by this Chapter only by complying with the law of this state, including this state's choice-of-law rules, applicable to waiver of a spousal property right.

§ 31E-5 Community property presumption.

This Chapter is presumed to apply to all property acquired by a community-property spouse when domiciled in a jurisdiction where property acquired by the community-property spouse was presumed to be community property under the law of that jurisdiction. This presumption may be rebutted by a preponderance of the evidence.

§ 31E-6 Disposition of property at death.

(a) One-half of the property to which this Chapter applies belongs to the surviving community-property spouse of a decedent and is not subject to

disposition by the decedent at death.

(b) One-half of the property to which this Chapter applies belongs to the decedent and is subject to disposition by the decedent at death.

(c) The property that belongs to the decedent under subsection (b) is not subject to the surviving community-property spouse's right to petition for an elective share under Article 1A of Chapter 30 of the General Statues or the surviving community-property spouse's right to elect a life estate under Article 8 of Chapter 29 of the General Statutes.

(d) This section does not apply to property transferred by right of survivorship or under a revocable trust or other nonprobate transfer.

(e) This section does not limit the right of a surviving community-property spouse to the year's allowance under Article 4 of Chapter 30 of the General Statutes or the property exemptions under Article X of the North Carolina Constitution and Article 16 of Chapter 1C of the General Statutes.

(f) If at death a decedent purports to transfer to a third person property that, under this section, belongs to the surviving community-property spouse and transfers other property to the surviving community-property spouse, this section does not limit the authority of the court under other law of this state to require that the community-property spouse elect between retaining the property transferred to the community-property spouse or asserting rights under this Chapter.

§ 31E-7. Other remedies available at death.

(a) At the death of a community-property spouse, the surviving community-property spouse or a personal representative, heir, or nonprobate transferee of the decedent may assert a right based on either of the following acts:

(1) An act of the surviving community-property spouse or decedent during the marriage or other relationship under which community property then could be acquired.

(2) An act of the decedent that takes effect at the death of the decedent.

(b) In determining a right under subsection (a) and corresponding remedy, the court shall apply equitable principles and may consider the community property law of the jurisdiction where the decedent or surviving community-property spouse was domiciled when property was acquired or enhanced.

§ 31E-8. Right of surviving community-property spouse.

The surviving community-property spouse of the decedent may assert a claim for relief with respect to a right under this Chapter in accordance with the following rules:

(1) With respect to a claim for relief asserting a right in or to property, the surviving spouse must do either of the following:

a. Within one year of the decedent's date of death, commence an action in the superior court trial division against an heir, devisee or nonprobate transferee who is in possession of the property; or

b. Within six months after the issuance of letters testamentary or letters of

administration in connection with the decedent's testate or intestate proceeding, (i) file a petition with the clerk of superior court or an action in the superior court trial division in the county in which the primary administration of the decedent's estate lies, and (ii) mail or deliver a copy of the pleading to the personal representative of the decedent's estate. A petition with the clerk of superior court shall be filed as an estate proceeding, estate proceeding summonses shall issue, and the proceedings shall be conducted in accordance with the procedures of Article 2 of Chapter 28A of the General Statutes.

(2) With respect to a claim for relief other than a claim under subdivision (1) of this section, the surviving community-property spouse must do either of the following:

a. Within one year of the decedent's date of death if a personal representative of the decedent's estate is not appointed, commence an action in the superior court trial division; or

b. Within six months after the issuance of letters testamentary or letters of administration in connection with the decedent's testate or intestate proceeding, (i) file a petition with the clerk of superior court or an action in the superior court trial division in the county in which the primary administration of the decedent's estate lies, and (ii) mail or deliver a copy of the pleading to the personal representative of the decedent's estate. A petition with the clerk of superior court shall be filed as an estate proceeding, estate proceeding summonses shall issue, and the proceedings

shall be conducted in accordance with the procedures of Article 2 of Chapter 28A of the General Statutes.

(3) The incapacity of the surviving spouse shall not toll the time for commencing an action or filing a petition as provided in this Section.

§ 31E-9 Right of heir, devisee, or nonprobate transferee.

An heir, devisee, or nonprobate transferee of a deceased community-property spouse may assert a claim for relief with respect to a right under this Chapter in accordance with the following rules:

(1) With respect to a claim asserting a right in or to property, the heir, devisee, or nonprobate transferee must do either of the following:

a. Within one year of the decedent's date of death, commence an action in the superior court trial division against the surviving community-property spouse of the decedent who is in possession of the property; or

b. Within six months after the issuance of letters testamentary or letters of administration in connection with the decedent's testate or intestate proceeding, (i) file a petition with the clerk of superior court or action in the superior court trial division in the county in which the primary administration of the decedent's estate lies, and (ii) mail or deliver a copy of the pleading to the personal representative of the decedent's estate. A petition with the clerk of superior court shall be filed as an estate proceeding, estate proceeding summonses shall issue, and the proceedings shall be conducted in accordance with the procedures of Article 2 of

Chapter 28A of the General Statutes.

(2) With respect to a claim for relief other than a claim under subdivision (1) of this section, the heir, devisee, or nonprobate transferee must do either of the following:

a. Within one year of the decedent's date of death if a personal representative of the decedent's estate is not appointed, commence an action in the superior court trial division; or

b. Within six months after the issuance of letters testamentary or letters of administration in connection with the decedent's testate or intestate proceeding, (i) file a petition with the clerk of superior court or an action in the superior court trial division in the county which the primary administration of the decedent's estate lies, and (ii) mail or deliver a copy of the pleading to the personal representative of the decedent's estate. A petition with the clerk of superior court shall be filed as an estate proceeding, estate proceeding summonses shall issue, and the proceedings shall be conducted in accordance with the procedures of Article 2 of Chapter 28A of the General Statutes.

(3) The incapacity of the heir, devisee or nonprobate transferee shall not toll the time for commencing an action or filing a petition as provided in this Section.

§ 31 E-10. Protection of third person.

(a) With respect to property to which this Chapter applies, a person is not liable under this Chapter if all of the following apply:

(1) The person transacts in good faith and for value with either of the following:

a. A community-property spouse.

b. After the death of the decedent, a surviving community-property spouse, personal representative, heir, devisee, or nonprobate transferee of the decedent.

(2) The does not know or have reason to know that the other party to the transaction is exceeding or improperly exercising the party's authority.

(b) Good faith under subsection (a)(1) does not require the person to inquire into the extent or propriety of the exercise of authority by the other party to the transaction.

(c) With respect to real property to which this Chapter applies, a lien creditor or a purchaser for value of such real property is not liable under this Chapter but from the time the community-property spouses give notice in a registered instrument of their intention for this Chapter to apply to the property [pursuant to G.S. 31E-4]. Priority among this registered instrument and other registered instruments is governed by G.S. 47-18.

§ 31E-11 Principles of law and equity.

The principles of law and equity supplement this [act] except to the extent inconsistent with this Chapter.

§ 31E-12 Uniformity of application and construction.

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Effective Date – October 1, 2023

Proposed Amendment to Current GS 28A-2-4
Subject matter jurisdiction of the clerk of superior court in estate proceedings
(To include claims under New Chapter 31E - NCUCPDDA)

Proposed Amended GS 28A-2-4 (clean version)

28A-2-4. Subject matter jurisdiction of the clerk of superior court in estate proceedings.

(a) The clerks of superior court of this State, as ex officio judges of probate, shall have original jurisdiction of estate proceedings. Except as provided in subdivision (4) of this subsection, the jurisdiction of the clerk of superior court is exclusive. Estate proceedings include, but are not limited to, the following:
  (1) Probate of wills.
  (2) Granting and revoking of letters testamentary and letters of administration, or other proper letters of authority for the administration of estates.
  (3) Determination of the elective share for a surviving spouse as provided in G.S. 30-3.1.
  (4) Proceedings to ascertain heirs or devisees, to approve settlement agreements pursuant to G.S. 28A-2-10, to determine questions of construction of wills, to determine priority among creditors, to determine whether a person is in possession of property belonging to an estate, to order the recovery of property of the estate in possession of third parties, to determine a claim for relief regarding the disposition of community property at death as provided in Chapter 31E, and to determine the existence or nonexistence of any immunity, power, privilege, duty, or right. Any party or the clerk of superior court may file a notice of transfer of a proceeding pursuant to this subdivision to the Superior Court Division of the General Court of Justice as provided in G.S. 28A-2-6(h). In the absence of a transfer to superior court, Article 26 of Chapter 1 of the General Statutes shall apply to an estate proceeding pending before the clerk of superior court to the extent consistent with this Article.

Proposed Amended GS 28A-2-4 (redline version comparing proposed legislation with current statute)

"§ 28A-2-4. Subject matter jurisdiction of the clerk of superior court in estate proceedings.

(a) The clerks of superior court of this State, as ex officio judges of probate, shall have original jurisdiction of estate proceedings. Except as provided in subdivision (4) of this subsection, the jurisdiction of the clerk of superior court is exclusive. Estate proceedings include, but are not limited to, the following:
  (1) Probate of wills.
  (2) Granting and revoking of letters testamentary and letters of administration, or other proper letters of authority for the administration of estates.

(3) Determination of the elective share for a surviving spouse as provided in G.S. 30-3.1.
(4) Proceedings to ascertain heirs or devisees, to approve settlement agreements pursuant to G.S. 28A-2-10, to determine questions of construction of wills, to determine priority among creditors, to determine whether a person is in possession of property belonging to an estate, to order the recovery of property of the estate in possession of third parties, to determine a claim for relief regarding the disposition of community property at death as provided in Chapter 31E, and to determine the existence or nonexistence of any immunity, power, privilege, duty, or right. Any party or the clerk of superior court may file a notice of transfer of a proceeding pursuant to this subdivision to the Superior Court Division of the General Court of Justice as provided in G.S. 28A-2-6(h). In the absence of a transfer to superior court, Article 26 of Chapter 1 of the General Statutes shall apply to an estate proceeding pending before the clerk of superior court to the extent consistent with this Article.

MEMORANDUM

TO: NCBA LEGISLATIVE ADVISORY COMMITTEE

FROM: JUDY LINVILLE, CHAIR OF THE LEGISLATIVE COMMITTEE FROM THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

RE: 2023 LONG SESSION PROPOSAL 7 - CHANGES TO G.S. 31-5.4 (WILLS) AND G.S. 36C-6-606 (REVOCABLE TRUSTS) TO PROVIDE THAT AFTER DIVORCE THE FORMER SPOUSE IS DEEMED TO HAVE DIED FIRST FOR ALL PURPOSES UNDER THE INSTRUMENT

CC: CATHERINE WILSON (LEGISLATIVE VICE-CHAIR), ELIE FOY (SECTION CHAIR)

Proposal: Amend G.S. 31-5.4 so that it will provide that if a couple divorces and one of the parties to the marriage does not change their will after they divorce and then dies, then, unless the will provided otherwise, the former spouse will be deemed to have predeceased the testator for all purposes under the will. In addition, amend G.S. 36C-6-606, which governs revocable trusts, so that it is more clear and so that its provisions track G.S. 31-5.4 in both form and substance.

Purpose: In the recent case of Parks v. Johnson, 2022-NCCOA-129 our Court of Appeals held that under G.S. 31-5.4 where a couple is divorced and one member of the couple dies without changing their will, then the divorce only revokes the provisions of the will in favor of the former spouse and does not affect any other provision of the will. This result is different from the result that would have occurred under the current G.S. 36C-6-606 which provides that with respect to revocable trusts a divorced spouse is deemed to a predeceased the settlor. The purpose of the proposed revisions to the G.S. 31-5.4 is to make the rules for wills the same as the rules for revocable trusts. The purpose of the proposed amendment to G.S. 36C-6-606 is to make the statute more clear and to cause its language to conform to the language of G.S. 31-5.4 in form and substance.

Changes: The proposed changes to the G.S.31-5.4 will change the statute so that it will not only revoke any gifts made to a former spouse as a result of the divorce, but the former spouse will also be deemed to have predeceased the testator for all

purposes under the will. The proposed changes to G.S.36C-6-606 will make the statute more clear and will cause it to conform with G.S.31-5.4 in form as well as substance.

Improvements: The proposed legislation will make the law more clear and will cause the law applicable to wills to be the same as the law applicable to revocable trusts with respect to the effect of a divorce on the terms of the testamentary instrument.

Constitutional: This legislation would not be unconstitutional.

Prior Position: The NCBA has not previously taken a position on this issue.

Affected Areas: Elder and special needs law.

Vetting: This proposal was presented to the Section's legislative committee and Council and was discussed and approved.

Approval: The proposal was unanimously approved by the Council at its meeting on October 4, 2022.

Other Groups: Elder and Special Needs Law Section, North Carolina Conference of Clerks of Superior Court, North Carolina Administrative Office of the Courts.

Prioritization: **7 of 8**

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TALKING POINTS

CHANGES TO G.S. 31-5.4 (WILLS) AND G.S. 36C-6-606 (REVOCABLE TRUSTS) TO PROVIDE THAT IN EVENT OF A DIVORCE THE FORMER SPOUSE IS DEEMED TO HAVE DIED FIRST FOR ALL PURPOSES UNDER THE TESTAMENTARY INSTRUMENT.

PROPOSED BY THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

Many people will execute a will to provide for their family upon their death. Most will give their spouse top priority to receive all or most of the assets of their estate upon death, which is a common way for spouses to provide for their partners. However, 50 percent of all marriages in the United States will end in divorce. If a decedent does not update his or her will and the will continues to name an ex-spouse an important question becomes how to construe the decedent's will. Does the ex-spouse receive a portion of the estate? North Carolina law is clear that provisions in a will in favor of the ex-spouse are revoked. A related question, however, is how should the will be construed in light of the revoked provisions in favor of the ex-spouse. A recent decision from the North Carolina Court of Appeals provides an answer to this question with some potentially serious consequences. *See Parks v. Johnson*, 2022-NCCOA-129.

In *Parks*, the spouses married in 1982 and divorced in 2016. *Id.* ¶ 3. No children were born from the marriage. *Id.* On the couple's one-year anniversary, the husband executed a will. *Id.* ¶ 4. The will provided a three-tiered disposition based on who the husband wanted his beneficiaries to be. *Id.* First, Item Two in the will provided that all of his property goes to his wife. *Id.* Second, Item Three of the will provided that, if his wife predeceased him, then all of his property should go to his children. *Id.* Finally, Item Four of the will provided that if the wife predeceased her husband and if the couple had no children, then the husband's estate would be divided in two. *Id.* One share of the husband's estate would go to his mother-in-law or her descendants and the other share would go to the husband's parents or their descendants. *Id.*

At the time that the husband died, his parents had already passed away; however, he was survived by four siblings. *Id.* ¶¶ 5, 6. The husband's mother-in-law had passed away as well, leaving two daughters including the divorced spouse. *Id.* ¶ 5. After the will was admitted to probate, the divorced spouse's sister claimed an interest in the husband's estate under Item Four of the will. *Id.* ¶ 7. As a result, the husband's siblings filed an action for Declaratory Judgment *Id.*

The siblings argued that the direct devise to the divorced spouse in Item Two of the will must be revoked because N.C. Gen. Stat. § 31-5.4 removes all provisions in a will in favor of

a divorced spouse. *Id.* ¶ 8. Then, because the divorced spouse was still alive and they had no children, Items Three and Four of the will were inoperative. *Id.* As a result, the siblings argued, the husband's estate should pass to them as his intestate heirs because the will provided no effective residuary disposition. *Id.* This would result in the divorced spouse's sister receiving nothing under the will.

The divorced spouse's sister argued for a different reading of N.C. Gen. Stat. § 31-5.4 that would result in the removal of all provisions in the will that mentioned the divorced spouse, both the direct devise to her in Item Two and the provisions in Items Three and Four that required her to predecease the husband. *Id.* ¶ 9. If the divorced spouse's sister's argument prevailed, she would take half of the husband's estate and the husband's siblings would take the other half. *Id.*

The trial court agreed with the divorced spouse's sister and concluded that N.C. Gen. Stat. § 31-5.4 removes all references of the divorced spouse in the will. *Id.* ¶ 10. As a result, the trial court concluded that the divorced spouse's sister took one-half of the husband's estate. *Id.* The siblings appealed to the Court of Appeals. *Id.*

The statute at issue, N.C. Gen. Stat. § 31-5.4, provides that

> [d]issolution of marriage by absolute divorce or annulment after making a will does not revoke the will of any testator but, unless otherwise specifically provided in the will, it revokes all provisions in the will in favor of the testator's former spouse or purported former spouse, including, but not by way of limitation, any provision conferring a general or special power of appointment on the former spouse or purported former spouse and any appointment of the former spouse or purported former spouse as executor, trustee, conservator, or guardian. If provisions are revoked solely by this section, they are revived by the testator's remarriage to the former spouse or purported former spouse.

N.C. Gen. Stat. § 31-5.4 (2021). Accordingly, this law provides that a divorce does not revoke a will executed prior to the divorce, but it does "revoke[ ] all provisions in the will in favor of the testator's former spouse or purported former spouse." *Id.* However, a testator can reverse this provision by specifically providing in his will that he wants his or her divorced spouse to take under the will. *Id.* This statute also removes a divorced spouse who is appointed an executor of the estate or provided some other power under the will. *Id.* The statute also provides that any revoked provisions are reinstated if the divorced spouses remarry. *Id.*

In deciding this case, the Court of Appeals had to answer the question of what "in favor of" the divorced spouse means. Does this statute mean that only provisions in a will that provide a direct benefit to the divorced spouse are revoked? Or are all references to a divorced spouse erased from the will? Both sides agreed that the direct devise to the divorced spouse in Item Two was revoked by N.C. Gen. Stat. § 31-5.4. *Parks*, ¶ 11. However, the husband's siblings argued that by removing all provisions in the will that referenced the divorced spouse, "the trial court revoked provisions beyond the statute's scope" and undermined the husband's intent. *Id.* Ultimately, the Court of Appeals agreed and employed a very narrow reading of "in favor of." *Id.*

Judge Lucy Inman, writing for a unanimous panel that included Chief Judge Donna Stroud and Judge Jeffrey Carpenter stated that N.C. Gen. Stat. § 31-5.4 "plainly provides that divorce revokes only those provisions in a will which are 'in favor' of a former spouse" and that "[w]e cannot interpret the statute to nullify all provisions in a will which simply refer to a former spouse." *Id.* ¶ 14 (citing *Burgess v. Your House of Raleigh, Inc.,* 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) ("Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning."); *Gibboney v. Wachovia Bank, N.A.,* 174 N.C. App. 834, 837, 622 S.E.2d 162, 165 (2005) ("[Section 31-5.4] . . . clearly mandates that unless the testator expressly indicates in his will that even if he divorces his spouse she would remain a beneficiary, the former spouse is denied any testate disposition.").

The Court of Appeals concluded that this result "g[a]ve effect to the testator's intent." *Id.* ¶ 15. Further, the Court of Appeals concluded that the provision in the will that required the divorced spouse to predecease the husband for anyone else to take under the will "is a condition precedent that cannot be interpreted to favor [the divorced spouse], because the residuary is operative only if [she] has died." *Id.* ¶ 16. As a result, "she would not be alive to benefit from the estate passing to her relatives." *Id.* Because the divorced spouse survived the husband, the Court of Appeals determined that the condition precedent in Item Four failed and, as a result, the husband's estate passed by intestacy given that the will contained no effective residuary clause. *Id.* ¶¶ 18, 19, 25.

Importantly, if this were a revocable trust instead of a will, a different result would have occurred. North Carolina's Trust Code provides that

> Dissolution of the settlor's marriage by absolute divorce or annulment after executing a revocable trust revokes all provisions in the trust in favor of the settlor's former spouse, including, but not by way of limitation, any provision conferring a general or special power of appointment on the former spouse and any appointment of the former spouse as trustee. *Property prevented from passing to the former spouse because of revocation*

> *by divorce or absolute annulment passes as if the former spouse failed to survive the settlor*, and other provisions conferring some power or office on the former spouse are interpreted as if the former spouse failed to survive the settlor. If provisions are revoked solely by this section, they are revived by the settlor's remarriage to the former spouse. The reference to "former spouse" in this section includes a purported former spouse.

N.C. Gen. Stat. § 36C-6-606 (2021) (emphasis added). Note the language in the statute that provides that if a marriage ends in divorce, the divorced spouse will be treated as predeceasing the settlor of the trust. No such corresponding language exists in the same statute for wills in N.C. Gen. Stat. § 31-5.4.

The proposed revision to N.C. Gen. Stat. § 31-5.4 causes the statute to conform to the provisions of N.C. Gen. Stat. §36C-6-606 in that after a divorce a former spouse will be deemed to have predeceased the testator for all purposes under the will. The proposed revision also provides that the statute does not apply if the spouses remarry to each other prior to the death of the testator. This provision is carried over from the prior statute. The new statute adds a provision which states the statute does not apply if the testator executes a subsequent valid testamentary document which makes express reference to the will and which modifies the will. The committee recommends that this statute apply to all wills which are probated after the effective date of the statute.

The revisions to N.C. Gen. Stat. § 36C-6-606 are intended to make the statute more clear and to use the same language and structure as will be found in the new N.C. Gen. Stat. § 31-5.4. The new statute also adds a provision stating that the statute does not apply to a revocable trust if the settlor executes a valid amendment to the revocable trust after the divorce. This language was added so that the statute would conform to the language in N.C. Gen. Stat. § 31-5.4. The statute also carries over the provision from the former statute that the statute does not apply if the spouses remarry to each other prior to the settlor's death. The committee recommends that the statute apply to all trusts.

Proposed G.S. 31-5.4

> Unless a contrary intent is expressly indicated in the will, if the testator's marriage dissolved by absolute divorce or annulment after the execution of a will, then the testator's former spouse shall be deemed to have predeceased the testator for all purposes related to the construction, interpretation, or administration of that will. This section shall apply to all provisions of the testator's will, including, but not by way of limitation, any provision conferring a general or special power of appointment on the former spouse and any appointment of the former spouse as executor, trustee, conservator, guardian, or any other fiduciary or non-fiduciary position. This section shall not apply to a will if testator executes a

subsequent valid testamentary document which makes express reference to the will, such as by date of the will, and which modifies the will. This section shall not apply to a will if the testator remarries the former spouse prior to the testator's death but shall apply to the will if the new marriage is subsequently dissolved by absolute divorce or annulment. Any reference to "former spouse" in this section includes a purported former spouse.

Proposed G.S. 36C-6-606

Unless a contrary intent is expressly indicated in the revocable trust, if the settlor's marriage is dissolved by absolute divorce or annulment after the execution of a revocable trust, then the settlor's former spouse shall be deemed to have predeceased the settlor for all purposes related to the construction, interpretation, or administration of that revocable trust. This section shall apply to all provisions of the settlor's revocable trust, including, but not by way of limitation, any provision conferring a general or special power of appointment on the former spouse and any appointment of the former spouse as executor, trustee, conservator, guardian, or any other fiduciary or non-fiduciary position. This section shall not apply to a revocable trust if settlor executes a subsequent valid amendment to the revocable trust which makes express reference to the revocable trust, such as by date of the revocable trust, and which modifies the revocable trust. This section shall not apply to a revocable trust if the settlor remarries the former spouse prior to the settlor's death but shall apply to the revocable trust if the new marriage is subsequently dissolved by absolute divorce or annulment. Any reference to "former spouse" in this section includes a purported former spouse.

MEMORANDUM

TO: NCBA LEGISLATIVE ADVISORY COMMITTEE

FROM: JUDY LINVILLE, CHAIR OF THE LEGISLATIVE COMMITTEE FROM THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

RE: 2023 LONG SESSION PROPOSAL 8 - AMENDMENT TO G.S. 32C 1-116(f)

CC: CATHERINE WILSON (LEGISLATIVE VICE-CHAIR), ELIE FOY (SECTION CHAIR)

Proposal:	Amend current GS 32C 1-116(f) to expressly state only the principal, and not an agent acting on behalf of the principal, may make a motion to dismiss under GS 32C 1-116(f).
Purpose:	Clarifying amendment to prevent any construction under the current statute that an agent may act under the authority of a valid power of attorney to bring a motion to dismiss under GS 32C 1-116(f) dismissing an action brought against the agent.
Changes:	To amend the current statute making clear the principal (and not an agent acting on behalf of the principal), is the only permissible person to make a motion to dismiss under GS 32C 1-116(f).
Improvements:	The proposed legislation will prevent potential abuse or misuse of GS 32C 1-116(f) by an agent attempting to use the agent's authority under a power of attorney to improperly file a motion to dismiss an action brought against the agent.
Constitutional:	This legislation would not be unconstitutional.
Prior Position:	The NCBA has not previously taken a position on the issue.
Affected Areas:	Elder and special needs law
Vetting:	This proposal was presented to the Section's legislative committee and Council and was discussed and unanimously approved.

Approval:	The proposal was unanimously approved by the Council at its October 4, 2022 meeting.
Other Groups:	Elder and Special Needs Law, North Carolina Conference of Clerks of Superior Court, North Carolina Administrative Office of the Courts.
Prioritization:	**8 of 8**

Subcommittee Member:

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TALKING POINTS

AMENDMENT TO GS 32C 1-116(f)

PROPOSED BY THE ESTATE PLANNING AND FIDUCIARY LAW SECTION

The Problem: Under current GS 32C 1-116(f), there is potential for abuse or misuse by an agent who attempts to act on behalf of the principal to file a motion to dismiss an action against the same agent under GS 32C 1-116.

The Solution: This potential abuse or unintended use of the statute can be alleviated by enactment of a simple amendment to GS 32C 1-116(f) that expressly stated that a motion to dismiss under GS 32C 1-116(f) can be brought by the principal only, and not through an agent.

Proposed Amendment to G.S. GS 32C-1-116(f) (Clean)

(f) Upon motion by the principal individually and not through an agent, the clerk of superior court shall dismiss a petition filed under subsection (a) of this section, unless the clerk of superior court determines the principal is incapacitated within the meaning of G.S. 32C-1-102(6).

Proposed Amendment to G.S. GS 32C-1-116(f) (Redline – comparison of proposed amendment to current statute)

(f) Upon motion by the principal individually and not through an agent, the clerk of superior court shall dismiss a petition filed under subsection (a) of this section, unless the clerk of superior court determines the principal is incapacitated within the meaning of G.S. 32C-1-102(6).

NORTH CAROLINA
BAR ASSOCIATION
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FAMILY LAW SECTION PROPOSALS

TALKING POINTS
NCBA ADOPTION LEGISLATIVE PROPOSALS

I. Proposal Regarding Adoption of Adult Adoptee by Former Stepparent

Adult stepparent adoptions are common. They often occur after the death of the parent who was not married to the stepparent and are driven by the adoptee's desire for a legal relationship with a person who raised the adoptee that aligns with a longstanding emotional relationship.

This proposal is intended to help adults who wish to be adopted by a former stepparent for that same reason, but are prevented from going forward under current law because the adoption would sever the legal relationship with the parent who also raised the adoptee.

This proposal would help by providing that adoption of an adult by the adoptee's former stepparent won't terminate the parental rights of the parent to whom the former stepparent was married. A stepparent adoption will never result in a person having more than two parents at the same time.

II. Proposal to Remove Restrictions on Who May Redact Information from an Adoption Home Study Given to a Parent or Guardian Who is Placing a Minor For Adoption.

In an independent adoption, a copy of the preplacement assessment (adoption home study) must be given to the parent(s) or guardian of a minor who is placing the minor for adoption.

These documents contain the kind of information that is risky to share, so certain information which is specified in the statute (including Social Security numbers and detailed financial information) may be redacted from the placing parent or guardian's copy.

Current law states that the agency that prepared the preplacement assessment may redact the information. This change will allow the lawyer, who is ultimately responsible for making sure the documents are in compliance, to redact the information specified in the statute. This will be especially helpful in placements made on short notice when there is no redacted preplacement assessment.

III. Proposal Regarding Acknowledgment of Agency Relinquishments for Adoption

This is a technical amendment. Current law provides expanded means for a notary public to establish the identity of a parent who is placing a child for adoption in an independent adoption. This amendment clarifies that the same expanded means can be used by a notary public to establish the identity of a parent who is relinquishing a child to an adoption agency so that the agency can place the child for adoption.

DESCRIPTION OF ADOPTION COMMITTEE LEGISLATIVE PROPOSALS FOR 2023

I. Proposal Regarding Adoption of Adult Adoptee by Former Stepparent

A. Current Law. If an adult raised by her biological parent and her stepparent is adopted by her stepparent, the adoption will not sever the relationship of parent and child between the adult adoptee and her biological parent who is married to the stepparent. However, if an adult adoption takes place after a divorce between the former stepparent and the adoptee's biological parent who was married to the former stepparent, the adoption will sever the relationship of parent and child between the biological parent who was married to the former stepparent and the adoptee.

B. Need or Condition Addressed. Adults who wish to be adopted by a former stepparent generally wish to establish a parent and child relationship with the former stepparent without severing the parent and child relationship between the adoptee and the parent who was married to the former stepparent. This prevents parties from going forward with otherwise very much desired adoptions

C. How the Law would be Revised and Improved. The proposed legislation would add a definition of former stepparent and provide that adoption of an adult by the adoptee's former stepparent without the joinder of any current spouse of the former stepparent will not sever the parental rights of the parent to whom the former stepparent was married. This would allow ex-stepparent adoptions to take place without disturbing that existing parental relationship.

D. Constitutional Issues. No federal or State constitutional issues have been identified.

E. Previous Position of the Association. None.

F. Possible Impact on Other Areas of the Law. The effect of an adoption by a former stepparent on intestate succession and on other laws affected by the parent and child relationship between adults would be the same as in the case of an adult adoption by a current stepparent.

G. How the Proposal was Vetted and Adopted. See Schedule A attached.

H. Other Groups That May Be Affected. The Clerks of Superior Court take an interest in all proposed adoption legislation. The author of this statement believes this proposal will not be controversial with the clerks.

I. Members of Committee that Drafted this Proposal. See Schedule B attached.

II. Proposal to Remove Restrictions on Who May Redact Information from an Adoption Home Study to be Given to a Parent Who is Placing a Minor For Adoption.

A. Current Law. G.S. § 48-3-303 (c) lists the information required to be included in a preplacement assessment (adoption home study). G.S. § 48-3-303 (c) (12) states that the agency that prepared the preplacement assessment may redact certain limited information which is specified in the statute (such as Social Security numbers and detailed financial information) from the copy of the preplacement assessment that is intended to be given to the parent or guardian of a minor who is placing the minor for adoption

B. Need or Condition Addressed. In practice, agencies tend to redact more information than the statute allows, sometimes much more, which could put an adoption at risk if excessive redactions cause the preplacement assessment given to the placing parent or guardian not to be in substantial compliance with the statutory requirements. Responsibility falls on the lawyer to make sure the documents are in compliance. As redacting a preplacement assessment is often a "last-minute" problem in "last-minute" adoptions, allowing the ministerial process of redaction to be done by persons other than the agency will help the adopting parent's lawyer have a redacted copy of the preplacement assessment in time for the copy to be delivered to the placing parent or guardian when the child is placed for adoption.

C. How the Law would be Revised and Improved. This change would remove the requirement in G.S. § 48-3-303 (c) (12) that only the agency may perform redactions to an adoption home study to be given to a placing birth parent.

D. Constitutional Issues. None have been identified.

E. Previous Position of the Association. None.

F. Possible Impact on Other Areas of the Law. None has been identified.

G. How the Proposal was Vetted and Adopted. See Schedule A attached.

H. Other Groups That May Be Affected. The Clerks of Superior Court take an interest in all proposed adoption legislation. The author of this statement believes this proposal will not be controversial with the clerks. This proposal would allow attorneys to perform a function hitherto reserved to licensed adoption agencies. The author of this statement believes this proposal will not be controversial with the agencies.

I. Members of Committee that Drafted this Proposal. See Schedule B attached.

III. Proposal Regarding Acknowledgment of Agency Relinquishments for Adoption

A. Current Law. In order to facilitate the signing of documents in adoption placements, subsection (h) of G.S. § 48-3-605 (procedure for signing consents) expands the ways a minor parent may be identified to a notary, to include "an affidavit of an adult relative of the minor, a teacher, a social worker employed by an agency or a county department of social services, a licensed professional social worker, a health service provider, or, if none of the foregoing persons to whom the minor does not object is available, an adult who has known the minor for more than two years."

B. Need or Condition Addressed. Because a minor parent who is relinquishing an adoptee to an agency or county department of social services signs a "relinquishment" instead of a "consent", and G.S. § 48-3-702 (procedure for signing relinquishments) incorporates some of the provisions of G.S. § 48-3-605 (procedure for signing consents) but not the notary identification provisions of subsection (h), a change is needed to clarify that the expanded ways in which a minor parent may be identified to a notary for an adoption consent may also be employed to identify a minor parent for the purpose of a relinquishment of a child to an agency or county department of social services.

C. How the Law would be Revised and Improved. The change would amend G.S. § 48-3-702 (procedure for signing relinquishments) by adding a cross reference incorporating G.S. § 48-3-605 (h) into the procedure for signing relinquishments.

D. Constitutional Issues. None have been identified.

E. Previous Position of the Association. The Association supported the addition of the provision expanding the ways in which a minor parent may be identified to a notary for an adoption consent. The change should have been applied to the acknowledgment of relinquishments at that time.

F. Possible Impact on Other Areas of the Law. None has been identified.

G. How the Proposal was Vetted and Adopted. See Schedule A attached.

H. Other Groups That May Be Affected. The Clerks of Superior Court take an interest in all proposed adoption legislation. The author of this statement believes this proposal will not be controversial with the clerks. This proposal would be helpful to adoption agencies and departments of social services accepting relinquishments for adoption. The author of this statement believes this proposal will be supported by adoption agencies and by the NC Department of Health and Human Services on behalf of the departments of social services.

I. Members of Committee that Drafted this Proposal. See Schedule B attached.

SCHEDULE A

HOW THE PROPOSED CHANGES WERE STUDIED, VETTED AND APPROVED BY THE FAMILY LAW COUNCIL

The Adoption Committee of the Family Law Section annually reviews a number of proposed adoption law changes and determined which ones are considered worthy of being drafted and given further consideration. Drafts are prepared and circulated to members of the Adoption Committee for comments. Drafts are amended in response to the comments and, if approved by the Adoption Committee, recommended to the Family Law Council. The proposed changes were provided to the Family Law Council for its September 8, 2022 meeting. As the agenda at that meeting was full, it was decided that the proposed changes would be circulated to the Council for voting by email. Questions that arose during the process were answered and one proposed change was withdrawn by the Adoption Committee. The proposals received a majority vote of the Council. Proposal I and Proposal III passed by unanimous vote. Proposal II passed but the vote was not unanimous.

SCHEDULE B
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NCBA FAMILY LAW SECTION ADOPTION PROPOSALS IN BILL FORM

I. Proposal Regarding Adoption of Adult Adoptee by Former Stepparent

§ 48-1-101. Definitions.

In this Chapter, the following definitions apply:

* * *

(18) "Stepparent" means an individual who is the spouse of a parent of a child, but who is not a legal parent or adoptive parent of the child. "Former stepparent" means an individual who was the spouse of a parent of a child, but who is not a genetic parent or adoptive parent of the child, and who has become divorced from the parent of the child.

§ 48-1-106. Legal effect of decree of adoption.

* * *

(c) Subject to subsection (d) of this section, a ~~A~~ decree of adoption severs the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents. After the entry of a decree of adoption, the former parents are relieved of all legal duties and obligations due from them to the adoptee, except that a former parent's duty to make past-due payments for child support is not terminated, and the former parents are divested of all rights with respect to the adoptee.

(d) Notwithstanding any other provision of this section, ~~neither~~ an adoption by a stepparent, an adoption of an adult adoptee by a former stepparent who is unmarried or whose current spouse does not join in the petition, or a readoption pursuant to G.S. 48-6-102 ~~has any effect on~~ shall not affect the relationship of parent and child between the child and the parent who is the stepparent's spouse or the stepparent's former spouse.

§ 48-5-101. Who may file for a petition to adopt an adult.

(a) An adult may adopt another adult, except for the spouse of the adopting adult, pursuant to this Article.

(b) If a prospective adoptive parent is married, both spouses must join in the petition unless the prospective adoptive parent is the adoptee's stepparent or former stepparent or unless the court waives this requirement for cause.

II. Proposal Regarding Redaction of Information from Adoption Home Studies

§ 48-3-303. Content and timing of preplacement assessment.

* * *

(c) The preplacement assessment shall, after a reasonable investigation, report on the following about the individual being assessed:

(1) Nationality, race, or ethnicity, and any religious preference;
(2) Marital and family status and history, including the presence of any children born to or adopted by the individual and any other children in the household;
(3) Date of birth and physical and mental health, including any addiction to alcohol or drugs;
(4) Educational and employment history and any special skills;
(5) Property and income, and current financial information provided by the individual;
(6) Reason for wanting to adopt;
(7) Any previous request for an assessment or involvement in an adoptive placement and the outcome of the assessment or placement;
(8) Whether the individual has ever been a respondent in a domestic violence proceeding or a proceeding concerning a minor who was allegedly abused, dependent, neglected, abandoned, or delinquent, and the outcome of the proceeding;
(9) Whether the individual has ever been convicted of a crime other than a minor traffic violation;
(10) Whether the individual has located a parent interested in placing a child with the individual for adoption and a brief, nonidentifying description of the parent and the child; and
(11) Any other fact or circumstance that may be relevant to a determination of the individual's suitability to be an adoptive parent, including the quality of the environment in the home and the functioning of any children in the household.
(12) The ~~agency preparing the preplacement assessment may redact~~ following information may be redacted from the preplacement assessment provided to a placing parent or guardian: detailed information reflecting the prospective adoptive parent's income, expenditures, assets, liabilities, and social security numbers, and detailed information about the prospective adoptive parent's extended family members, including surnames, names of employers, names of schools attended, social security numbers, telephone numbers and addresses, and other similarly detailed information about extended family members obtained under subsections (b) and (c) of this section.

III. Proposal Regarding Acknowledgment of Agency Relinquishments for Adoption

§ 48-3-702. Procedures for relinquishment.

(a) A relinquishment executed by a parent or guardian must conform substantially to the requirements in this Part and must be signed and acknowledged under oath before an individual authorized to administer oaths or take acknowledgments.

(b) The provisions of G.S. 48-3-605(b), (e), (f), ~~and~~ (g), and (h) also apply to a relinquishment executed under this Part.

RESOLUTION IN OPPOSITION TO PRESUMED SHARED PARENTING

WHEREAS, the purpose of the Family Law Section of the North Carolina Bar Association is to bring together members of the North Carolina Bar Association with a special interest in Family Law practice;

WHEREAS, the Family Law Section of the North Carolina Bar Association is governed by the Family Law Section Council;

WHEREAS, North Carolina General Statute 50-13.2 requires the Court to determine what will best promote the interest and welfare of the child is in the best interests of the minor child when determining physical and legal custody of the minor child;

WHEREAS, in prior years, members of the Legislature have repeatedly proposed legislation that would adopt a "presumption of shared parenting;"

WHEREAS, said legislation has included a "rebuttable presumption that joint custody and shared parenting is in the best interest of the child."

WHEREAS, a rebuttable presumption requires the Court to assume a decision before hearing the facts regarding the child;

WHEREAS, a rebuttable presumption takes away the Court's authority to do what is in the best interests of the child;

WHEREAS, each custody case is different and the Court should hear all of the relevant facts before deciding what is best for the child;

WHEREAS, the Family Law Section of the North Carolina Bar Association has previously opposed any such legislation that proposes a presumption of shared parenting and/or a rebuttable presumption that joint and shared parenting is in the best interest of the child;

WHEREAS, the Family Law Section of the North Carolina Bar Association continues to oppose any such legislation that proposes a presumption of shared parenting and/or a rebuttable presumption that joint and shared parenting is in the best interest of the child;

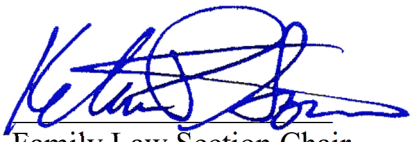
WHEREAS, the Family Law Section of the North Carolina Bar Association opposes all such future legislation that proposes a presumption of shared parenting and/or a rebuttable presumption that joint and shared parenting is in the best interest of the child.

THEREFORE, BE IT RESOLVED, that the Family Law Section Council of the North Carolina Bar Association does not believe it is in the best interests of the child for there to be a presumption of shared parenting now or in the future;

THEREFORE, BE IT FURTHER RESOLVED, that the Family Law Section Council of the North Carolina Bar Association opposes any such legislation now or in the future that proposes a

presumption of shared parenting and/or a rebuttable presumption that joint and shared parenting is in the best interest of the child.

Adopted this 29th day of September, 2022.
by the Family Law Section Council of the North Carolina Bar Association



Family Law Section Chair
North Carolina Bar Association

NORTH CAROLINA
BAR ASSOCIATION
seeking liberty + justice

FAMILY LAW SECTION & REAL PROPERTY SECTION JOINT PROPOSAL

October 7, 2022

VIA EMAIL ONLY rrawlings@ncbar.org
Russell Rawlings
Director of External Affairs and Communications
North Carolina Bar Association

Re: Proposed amendments to G.S. 29-30, 39-13.3, and 41-63

Dear Mr. Rawlings:

Attached you will find proposed legislation to amend G.S. 29-30, 39-13.3, and 41-63. These statutes respectively deal with the ability of a surviving spouse to elect a life estate, with conveyances between spouses, and with termination of a tenancy by the entirety. Also attached is a brief summary of major points of the amendments. All of these statutes were amended in 2020, in Session Laws 2020-23 and 2020-50.

The current proposed legislation consists of refinements to the changes made in S.L. 2020-50, specifically refinements with respect to waivers of certain marital rights in instruments executed by one or both spouses. After analyzing these statutes in light of the recent changes adopted in S.L. 2020-50, the Real Property Section and the Family Law Section realized that they have a common interest, although for different reasons, in legislation that would clarify and distinguish situations in which both spouses must join in executing and acknowledging a legal instrument. The changes sought in the proposed legislations are as follows:

G.S. 29-30: This statute establishes the right of a surviving spouse to elect a life estate in one third in value of the of the real property the survivor's deceased spouse owned while the spouses were married. The proposed legislation adds to subsection 29-30(a) an additional circumstance in which the surviving spouse is not entitled to take a life estate – when the surviving spouse conveyed his or her interest in real estate to the decedent and waived or released the right to take a life estate in the instrument of conveyance (i.e., the deed).

G.S. 39-13.3: This statute governs conveyances between husband and wife, and generally provides that such a conveyance vests the property or interest in the grantee spouse. The proposed legislation adds a provision to subsection 39-13.3(a) to the effect that (1) the conveyance does not waive the right to an elective life estate unless the instrument waives the right; and (2) the conveyance may not waive a right or claim to equitable distribution with respect to the property. In other words, the added provision would permit the right to a life estate to be waived in the instrument of conveyance, and would prohibit the right to equitable distribution from being waived in the instrument of conveyance alone.

G.S. 41-63: This statute deals with events that terminate a tenancy by the entirety and the effects of termination. Subsection 41-63(4) provides that a conveyance by one spouse to the other of his/her interest vests the property or interest in the grantee spouse, and that the joinder of the grantee spouse is not necessary. The proposed legislation adds a provision to subsection 41-63(4) that mirrors the proposed addition to G.S. 39-13.3(a). The added provision would essentially permit the right to a life estate to be waived in the instrument of conveyance without the joinder of the grantee spouse, and prohibit the right to equitable distribution from being waived in the instrument of conveyance alone.

Family Law Section's Position on Issues the Proposed Changes Address:

The Family Law Section's interest in the proposed legislation concentrates on the elimination of the possibility that one spouse could waive his or her equitable distribution rights to the value of a property by signing a deed conveying title to the property to his or her spouse, without both spouses executing the acknowledged written agreement otherwise required by G.S. §§50-20(d), 52-10, and 52-10.1.

G.S. 50-20 et seq. governs equitable distribution of marital and divisible property. G.S. 50-20(d) provides:

> "Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the povisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property or divisible property, or both, in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties."

G.S. 52-10(a) provides:

> "Contracts between husband and wife not inconsistent with public policy are valid, and any persons of full age about to be married and married persons may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released. No contract or release between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of either spouse, or the accruing income thereof for a longer time than three years next ensuing the making of such contract or release, unless it is in writing and is acknowledged by both parties before a certifying officer."

G.S. 52-10.1, concerning separation agreements, similarly requires both spouses to sign and acknowledge a separation agreement before a certifying officer.

G.S. 50-20(d), 52-10, and 52-10.1 together show a clear policy that equitable distribution rights, as well as other rights arising under Chapter 50, such as alimony, should be settled or waived only in a manner that is deliberate and knowing, and not accidental. The requirement of a written agreement, executed by both parties, and acknowledged by both parties before a certifying officer, all go to at least attempt to require that the process of settling or releasing these marital property rights must involve some thought and consideration.

G.S. 39-13.3 and G.S. 41-63 expressly provide that an instrument of conveyance (i.e., a deed) transferring an interest in property between spouses vests the interest or property in the grantee spouse without the joinder of the grantee spouse. The Family Law Section is concerned that these statutes might be interpreted to mean that rights to equitable distribution of the value of real property can be inadvertently released by a spouse transferring title to the other spouse.

Spouses may transfer title to real estate between themselves during their marriage for a variety of reasons, without intending to change the character of the property as marital property. For example, a couple owning jointly-titled real estate may decide for estate planning purposes to transfer the title into the name of only one of the spouses. This property may be unquestionably marital property, and the couple have absolutely no intention to change its status as marital property. However, the attorney preparing the deed might add "boilerplate" language waiving various marital rights of the grantor in the property, including equitable distribution rights under G.S. 50-20, and the grantor spouse may sign without understanding or even reading the text of the deed. Ten years later, after the couple separates, that spouse will be surprised to learn that the other spouse is now claiming the property to be his/her separate property, exempt from equitable distribution. In addition, that real property could be one of the parties' most valuable assets.

Under G.S. 50-20(d), the deed described above would not be effective to waive equitable distribution rights if it was not signed and acknowledged by both spouses. However, many real property practitioners understood that they needed to have both spouses sign and acknowledge in order to have a valid waiver of the elective life estate. If the attorney drafting the deed had both spouses had both spouses sign and acknowledge, there was an argument that the deed could function as the written agreement required by G.S. 50-20(d). The Family Law Section seeks to eliminate that potential argument as well with this proposed legislation.

The Family Law Section's position is that when a couple actually desires to change marital real estate (or a marital interest in real property) into the separate property of one of the spouses, that couple should have to take the step of executing an agreement as required by G.S. 50-20(d), which can be a relatively simple document. Executing the written agreement requires the spouses to give at least some short consideration to the rights being waived. We believe that the risk of unintentional waivers occurring is greater than the burden of executing a written agreement in those cases where waiver of equitable distribution rights is in fact intended.

Further, deeds between spouses do not need to contain waivers of equitable distribution rights in order to convey marketable title. Rights to equitable distribution do not vest until separation, as provided in G.S. 50-20(k). After separation, as provided in G.S. 50-20(h), unless the other party has filed a notice of lis pendens with respect to particular real property, the party holding title to that property may convey the property to a grantee free of any claim resulting from the equitable distribution proceeding.

Real Property Section's Position on Issues the Proposed Changes Address:

The Real Property Section's interest is in clarifying that a spouse who grants the other spouse title to real property may also waive the spousal elective life estate provided under G.S. 29-30 without joinder of the grantee spouse in the deed.

G.S. 29-30, which is effectively the statutory successor to common-law curtesy and dower, generally provides a surviving spouse a right to elect a life estate in one third of the real property the

survivor's deceased spouse owned while the spouses were married. Accordingly, a third-party grantee of an interest in real property in North Carolina needs the grantor's spouse to release the spouse's inchoate right under G.S. 29-30. Otherwise, the grantor's spouse could assert that spouse's inchoate life estate claim under G.S. 29-30, potentially years after the conveyance by the title-holding spouse to the third-party grantee.

G.S. 29-30(a) sets out certain methods by which a spouse may release that spouse's potential right to an elective life estate. The right is commonly waived by requiring both the spouse who is in title and the spouse with the potential elective life estate to join in an instrument of conveyance of real property, typically a deed or deed of trust to a third party. The proposed legislation deals with conveyances between spouses, whether in the form of a conveyance of title from the titled spouse to the non-titled spouse, or of a severance of tenancy by the entirety between the spouses.

Under G.S. 39-13.3(d), a spouse who is in sole title to an interest real property may deed the title to the other, grantee spouse, without the grantee's execution of the deed. If spouses hold title in tenancy by the entirety (TBE), under G.S. 41-63(4), the TBE may be severed by one spouse conveying the grantor's interest to the grantee spouse without the grantee spouse's joining in execution of the deed to that grantee spouse. G.S. 39-13.3(e) and 41-63(4) each provide that a conveyance under either section "is subject to the provisions of G.S. 52-10 or 52-10.1, except that acknowledgment by the spouse of the grantor is not necessary."

G.S. 41-63(4) was spun off from G.S. 39-13.3(c) by S.L. 2020-50. This law carried forward into N.C.G.S. 41-63(4) the distinction made in G.S. 39-13.3(d) and (e) between only one spouse's execution being needed to convey, but both spouses' execution being needed to release the grantor spouse's elective life estate.

Reference in N.C.G.S. 39-13 and 41-63(4) to N.C.G.S. 52-10 suggests that a deed in which a grantor spouse both conveys title and releases the grantor's elective life estate interest to the grantee spouse, requires joinder by the grantee spouse for the release of the elective life estate to be valid. Applying such a requirement, however, presents a clear anomaly: if a grantor spouse executes an otherwise valid deed under G.S. 39-13.3 or 41-63(4) without joinder of the grantee spouse, the grantee acquires the grantor's *title* to the property conveyed, but the property may be subject to the grantor's elective life estate in the event that the grantor spouse survives the grantee spouse – even if the deed expresses a waiver of the grantor's elective life-estate rights.

The proposed revision of G.S. 39-13.3 and 41-63(4) would address this technical hurdle to effectuating the intent of the parties to an inter-spousal deed, by deleting the references within these statutes to G.S. 52-10 and 52-10.1. The proposal should thus clarify that waiver of the elective life estate right under G.S. 29-30 may be accomplished in an otherwise valid deed from the grantor spouse to the grantee spouse which expresses the waiver, and which deed does not require the grantee's joinder.

In S.L. 2020-23, the General Assembly expanded the list of circumstances in which a spouse in title would be recognized as having released the grantor spouse's elective life estate interest. However, none of the present circumstances in the statute expressly provide for unilateral release by the grantor spouse in the instrument of conveyance under GS 39-13.3 or 41-63(4). The proposed legislation adds a new subsection (2a) to GS 29-30(a) which expressly provides for release in an instrument of conveyance, and cross-references revised sections 39-13.3 and 41-63(4).

The proposed legislation does not present constitutional problems.

The proposed legislation was originally drafted by the Real Property Section, with cooperation and comment from the Family Law Section. James Saintsing was lead contact for the Real Property Section and Charles Clanton lead contact for Family Law, with participation of Rebecca Smitherman and Graham Holding of the Estate Planning and Probate Section and Nancy Ferguson of Real Property. The proposed legislation was approved unanimously by the Real Property Section Council at its meeting on August 23, 2022. The Family Law Section Council unanimously voted to endorse the legislation with one change which was agreed on, and subsequently voted to jointly submit the proposed legislation.

The proposed legislation has been submitted to and considered by the General Statutes Commission ("GSC") in different forms over several months, in at least three GSC meetings, including a meeting held the date of this letter, October 7, 2022. The GSC has voted to hold or table the proposal in each meeting.

James Saintsing, one of the drafters, is with Fidelity National Title Company, LLC and Commonwealth Land Title Company, LLC. The proposed legislation has not been formally presented to other title companies for comment. We are not aware of other sections or organizations that would oppose the proposed legislation.

Thank you.

Sincerely,

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Jill Jackson (via email only w/attachment)

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MAJOR POINTS OF PROPOSED AMENDMENTS TO G.S. 29-30(a), 39-13.3, and 41-63(4a)

1. Clarifies that a grantor spouse may release the grantor spouse's elective life estate interest under G.S. 29-30 in a deed of conveyance to the grantee spouse, whether title had previously been held solely by the grantor or held by both spouses in tenancy by the entirety, without joinder of the grantee spouse.

2. Provides that one spouse, in conveying his or her interest in real property to the other spouse, cannot waive or release his or her equitable distribution rights with respect to that property in the deed of conveyance alone, without the written agreement executed and acknowledged by both spouses required by G.S. 50-20(d), G.S. 52-10, and G.S. 52-10.1.

3. Helps to protect spouses from unintentional or unknowing waivers of equitable distribution rights.

4. Effectuates the policy of Chapter 50 and Chapter 52, which calls for settlements of marital property and waivers of equitable distribution rights to be knowing and deliberate.

SECTION #.(a) G.S. 29-30(a) reads as rewritten:

"**§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.**

(a) Except as provided in this subsection, in lieu of the intestate share provided in G.S. 29-14 or G.S. 29-21, or of the elective share provided in G.S. 30-3.1, the surviving spouse of an intestate or the surviving spouse who has petitioned for an elective share is entitled to take as the surviving spouse's intestate share or elective share a life estate in one third in value of all the real estate of which the deceased spouse was seised and possessed of an estate of inheritance at any time during coverture. The surviving spouse is not entitled to take a life estate in any of the following circumstances:

(1) The surviving spouse has waived the surviving spouse's rights by joining with the other spouse in a conveyance of the real estate.

(1a) The surviving spouse has waived the right to take a life estate in lieu of an intestate or elective share by an express written waiver.

(2) The surviving spouse has waived, released, or conveyed the surviving spouse's interest in the real estate in accordance with G.S. 52-10.

(2a) The surviving spouse conveyed the surviving spouse's interest in the real estate to the deceased spouse pursuant to G.S. 39-13.3 or G.S. 41-63(4) and waived or released the surviving spouse's right to take a life estate in the real estate in the instrument of conveyance.

(3) The surviving spouse was not required by law to join in a conveyance of the real estate in order to bar the elective life estate.

(3a) The surviving spouse has executed a written declaration permitting the deceased spouse to convey or encumber the real estate without the consent or joinder of the surviving spouse.

(3b) The real estate in which the deceased spouse had an interest was either apportioned to or sold to another person in a partition proceeding initiated before the deceased spouse's death.

(4) The surviving spouse is otherwise not legally entitled to the election provided in this section.

SECTION #.(b) G.S. 39-13.3 reads as rewritten:

"**§ 39-13.3. Conveyances between husband and wife.**

(a) A conveyance from a husband or wife to the other spouse of real property or any interest ~~therein~~ in real property owned by the grantor alone vests ~~such~~ the property or interest in the grantee. The conveyance does not waive or release any of the following rights or claims that the grantor may have acquired by marriage in the property conveyed:

(1) A right to an elective life estate under G.S. 29-30, unless the instrument of conveyance waives the right, as provided in G.S. 29-30(a)(2a).

(2) A right or claim to an equitable distribution ~~under G.S. 50-20, unless the instrument of conveyance waives the right or claim and complies with the requirements of G.S. 52-10 or G.S. 52-10.1~~ with respect to the property under G.S. 50-20. A right or claim for equitable distribution may not be waived or released in the instrument of conveyance.

(b) Recodified as G.S. 41-56(b) by Session Laws 2020-50, s. 1(b), effective June 30, 2020.

(c) Recodified as G.S. 41-63(4) by Session Laws 2020-50, s. 1(b), effective June 30, 2020.

(d) The joinder of the spouse of the grantor in any conveyance made by a husband or a wife pursuant to ~~the foregoing provisions of~~ this section is not necessary.

~~(e) Any conveyance authorized by this section is subject to the provisions of G.S. 52-10 or 52-10.1, except that acknowledgment by the spouse of the grantor is not necessary.~~ " (1957, c. 598, s. 1; 1965, c. 878, s. 3; 1977, c. 375, s. 9; 2020-50, s. 1(b).)

SECTION #.(c) G.S. 41-63 reads as rewritten:

"**§ 41-63. Termination of tenancy by the entirety other than upon death of a spouse; effects of termination.**

Events terminating a tenancy by the entirety other than the death of a spouse and the effects of termination include the following:

(1) The voluntary sale and conveyance of property held as tenants by the entirety to a third party, including a foreclosure sale pursuant to a power of sale in a deed of trust. Proceeds of the sale, including surplus funds generated from a foreclosure sale, are personal property held by the spouses as tenants in common.

(2) The voluntary partition between ~~the~~ spouses executing a joint instrument conveying the property held as tenants by the entirety to themselves as tenants in common or in severalty.

(3) The involuntary transfer of title of property held by spouses as tenants by the entirety. The proceeds resulting from the transfer are held by the spouses as tenants by the entirety. An involuntary transfer of title includes:
   a. A sale pursuant to Article 15 of Chapter 35A of the General Statutes as to an incompetent spouse.
   b. An appropriation in a condemnation proceeding by the North Carolina State Highway Commission.

(4) The conveyance from one spouse to the other spouse of his or her interest in property held as tenants by the entirety. The conveyance vests the property or interest formerly held as tenants by the entirety in the other spouse. The joinder of a spouse in a conveyance made by the grantor pursuant to this subdivision is not ~~necessary, but the conveyance is subject to the provisions of G.S. 52-10 or G.S. 52-10.1, except that an acknowledgment by the spouse of the grantor is not necessary.~~necessary. The conveyance does not waive or release any of the following rights or claims that the grantor may have acquired by marriage in the property conveyed:
   a. A right to an elective life estate under G.S. 29-30, unless the instrument of conveyance waives the right, as provided in G.S. 29-30(a)(2a).
   b. A right or claim to an equitable distribution ~~under G.S. 50-20, unless the instrument of conveyance waives the right or claim and complies with the requirements of G.S. 52-10 or G.S. 52-10.1~~ with respect to the property under G.S. 50-20. A right or claim for equitable distribution may not be waived or released in the instrument of conveyance.

(5) An absolute divorce of the spouses. An absolute divorce converts property held as tenants by the entirety to a tenancy in common.

(6) A judgment of forfeiture ordering divestment of an interest in tenancy by the entirety pursuant to Chapter 75D of the General Statutes. The effect of a judgment when one spouse is an innocent person as defined in G.S. 75D-5(i) is governed by G.S. 75D-8(a)." (1957, c. 598, s. 1; 1965, c. 878, s. 3; 1977, c. 375, s. 9; 2020-50, s. 1(a)-(c).)

Existing G.S. 29-30(a):

§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.

(a) Except as provided in this subsection, in lieu of the intestate share provided in G.S. 29-14 or G.S. 29-21, or of the elective share provided in G.S. 30-3.1, the surviving spouse of an intestate or the surviving spouse who has petitioned for an elective share is entitled to take as the surviving spouse's intestate share or elective share a life estate in one third in value of all the real estate of which the deceased spouse was seised and possessed of an estate of inheritance at any time during coverture. The surviving spouse is not entitled to take a life estate in any of the following circumstances:

(1) The surviving spouse has waived the surviving spouse's rights by joining with the other spouse in a conveyance of the real estate.

(1a) The surviving spouse has waived the right to take a life estate in lieu of an intestate or elective share by an express written waiver.

(2) The surviving spouse has waived, released, or conveyed the surviving spouse's interest in the real estate in accordance with G.S. 52-10.

(3) The surviving spouse was not required by law to join in a conveyance of the real estate in order to bar the elective life estate.

(3a) The surviving spouse has executed a written declaration permitting the deceased spouse to convey or encumber the real estate without the consent or joinder of the surviving spouse.

(3b) The real estate in which the deceased spouse had an interest was either apportioned to or sold to another person in a partition proceeding initiated before the deceased spouse's death.

(4) The surviving spouse is otherwise not legally entitled to the election provided in this section.

...

Existing G.S. 39-13.3:

§ 39-13.3. Conveyances between husband and wife.

(a) A conveyance from a husband or wife to the other spouse of real property or any interest therein owned by the grantor alone vests such property or interest in the grantee.

(b) Recodified as G.S. 41-56(b) by Session Laws 2020-50, s. 1(b), effective June 30, 2020.

(c) Recodified as G.S. 41-63(4) by Session Laws 2020-50, s. 1(b), effective June 30, 2020.

(d) The joinder of the spouse of the grantor in any conveyance made by a husband or a wife pursuant to the foregoing provisions of this section is not necessary.

(e) Any conveyance authorized by this section is subject to the provisions of G.S. 52-10 or 52-10.1, except that acknowledgment by the spouse of the grantor is not necessary.

Existing G.S. 41-63:

§ 41-63. Termination of tenancy by the entirety other than upon death of a spouse; effects of termination.

Events terminating a tenancy by the entirety other than the death of a spouse and the effects of termination include the following:

(1) The voluntary sale and conveyance of property held as tenants by the entirety to a third party, including a foreclosure sale pursuant to a power of sale in a deed of trust. Proceeds of the sale, including surplus funds generated from a foreclosure sale, are personal property held by the spouses as tenants in common.

(2) The voluntary partition between the spouses executing a joint instrument conveying the property held as tenants by the entirety to themselves as tenants in common or in severalty.

(3) The involuntary transfer of title of property held by spouses as tenants by the entirety. The proceeds resulting from the transfer are held by the spouses as tenants by the entirety. An involuntary transfer of title includes:

a. A sale pursuant to Article 15 of Chapter 35A of the General Statutes as to an incompetent spouse.

b. An appropriation in a condemnation proceeding by the North Carolina State Highway Commission.

(4) The conveyance from one spouse to the other spouse of his or her interest in property held as tenants by the entirety. The conveyance vests the property or interest formerly held as tenants by the entirety in the other spouse. The joinder of a spouse in a conveyance made by the grantor pursuant to this subdivision is not necessary, but the conveyance is subject to the provisions of G.S. 52-10 or G.S. 52-10.1, except that an acknowledgment by the spouse of the grantor is not necessary.

(5) An absolute divorce of the spouses. An absolute divorce converts property held as tenants by the entirety to a tenancy in common.

(6) A judgment of forfeiture ordering divestment of an interest in tenancy by the entirety pursuant to Chapter 75D of the General Statutes. The effect of a judgment when one spouse is an innocent person as defined in G.S. 75D-5(i) is governed by G.S. 75D-8(a).

NORTH CAROLINA
BAR ASSOCIATION
seeking liberty + justice

LITIGATION LAW SECTION PROPOSAL

MEMORANDUM

To: NCBA Legislative Advisory Committee

CC: David Ferrell, NCBA Lobbyist, LT Legislative Co-Chair

From: The Litigation Committee

Sub-Committee Members/Drafters:

Kelly Wilburn King Law Firm 112 Old Bridge Street Jacksonville, NC 28540 Cell Phone: 301-233-3189	Audrey Snyder Ward Black Law 208 W Wendover Ave Greensboro, NC 27401 Cell Phone:

Proposal: (1) Amendment allowing for Acceptance of Service via AOC Form

Purpose: (1) To provide clarity as to another acceptable form of receiving service using a uniform service form acknowledging service provided by the AOC

Changes: (1) A Uniform AOC form is an additional option to accept service

Improvements: Rule 4(j)(5) will allow for acceptance of service by using a form created by the AOC.

Constitutional: No Constitutional issues are being addressed

Prior Position: N/A

Affected Areas: This rule is applicable for all practitioners and will be beneficial to all who utilize Rule 4 when analyzing methods of service.

Vetting: To be voted on and revised before sending to the Legislature

Approval: Approval will be unanimous

Other Groups:	Real Property, Estate Planning, Family Law, Construction. Service of pleadings directly affects clients when preparing to litigate.
Prioritization:	Service of Process – Uniform AOC acceptance form

TALKING POINTS
(Max 2 pages)

Rule 4(j)(5) acknowledges that an acceptance of service is required, however, there is no uniform acceptance form. This amendment will allow for the AOC to create a form that all defendants, or their counsel, can sign to prove they have received service.

(j2) Proof of service. – Proof of service of process shall be as follows: (1) Personal Service. – Before judgment by default may be had on personal service, proof of service must be provided in accordance with the requirements of G.S. 1-75.10(a)(1). (2) Registered or Certified Mail, Signature Confirmation, or Designated Delivery Service. – Before judgment by default may be had on service by registered or certified mail, signature confirmation, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. 1-75.10(a)(4), 1-75.10(a)(5), or 1-75.10(a)(6), as appropriate. This affidavit together with the return receipt, copy of the proof of delivery provided by the United States Postal Service, or delivery receipt, signed by the person who received the mail or delivery if not the addressee raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discretion residing in the addressee's dwelling house or usual place of abode. In the event the presumption described in the preceding sentence is rebutted by proof that the person who received the receipt at the addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein, the statute of limitation may not be pleaded as a defense if the action was initially commenced within the period of limitation and service of process is completed within 60 days from the date the service is declared invalid. Service shall be complete on the day the summons and complaint are delivered to the address. As used in this subdivision, "delivery receipt" includes an electronic or facsimile receipt provided by a designated delivery service.

(j5) Personal jurisdiction by acceptance of service. – Any party personally, or through the persons provided in Rule 4(j), may accept service of process in the following ways: (1) by an acceptance of service form provided by the AOC; or (2) by notation of acceptance of service together with the signature of the party accepting service and the date thereof on an original or copy of a summons, and such acceptance shall have the same force and effect as would exist had the process been served by delivery of copy and summons and complaint to the person signing said acceptance.

UNITED STATES DISTRICT COURT

for the

_____)
Plaintiff)
v.) Civil Action No.
_____)
Defendant)

WAIVER OF THE SERVICE OF SUMMONS

To: _____
(Name of the plaintiff's attorney or unrepresented plaintiff)

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: _____

_____
Signature of the attorney or unrepresented party

_____
Printed name of party waiving service of summons

_____
Printed name

_____
Address

_____
E-mail address

_____
Telephone number

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

Print Save As... Reset

Samantha Currin

From: Lucy Austin <ltaustinlegal@gmail.com>
Sent: Thursday, October 27, 2022 6:33 PM
To: Samantha Currin
Subject: Legislative Proposals - Feedback from Government & Public Sector Section

Follow Up Flag: Follow up
Flag Status: Flagged

[EXTERNAL]
The Government & Public Sector Section had the following comments regarding the Litigation Section proposal located on pages 215-220 of the draft proposals.

Multiple members indicated their support for this proposal. It was noted that service by certified mail is often used by government attorneys in condemnation cases or as required by local ordinances as proof of notice. One member noted that the US Postal Service has been less vigilant about obtaining signatures on green cards; another agreed that no one gets good news by certified mail and that defendants refuse to sign for it.

A question was raised regarding whether and how this would impact substitute service of process through the Secretary of State's office.

Thank you for your consideration,

Lucy Austin
NCBA Government & Public Sector Section Chair 2022-23

NORTH CAROLINA
BAR ASSOCIATION
seeking liberty + justice

TAX SECTION PROPOSAL

From:	Allie Petrova
To:	Samantha Currin
Cc:	David McCallum; W. Y. Alex Webb; BreAnne Shieh; dferrell@nexsenpruet.com; Michelle L. Frazier; Cheyenne Merrigan
Subject:	NCBA Tax: Legislative Initiative
Date:	Wednesday, October 5, 2022 5:59:26 PM
Attachments:	PastedGraphic-3.png image004.png NCBA Tax Resolution re SALT Cap Workarounds 10.5.2022.pdf 2022.05.18 Letter to Finance Chairs - PTET.cleaned.pdf S105v8 (2).pdf

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[EXTERNAL]

Dear Samantha:

I am enclosing a signed resolution on behalf of the Tax Section, which supports a legislative action undertaken by the North Carolina Association of Certified Public Accountants (NCACPA). Please see the additional information enclosed below.

These items are needed with the proposal:
i) A copy of the proposed legislation in bill form;
See attached Resolution and NCACPA Letter.

ii) A "talking points" memorandum no more than 2 pages in length that provides the main points and changes to the existing law associated with the proposed legislation;
See attached Resolution and NCACPA Letter.

iii) A comprehensive explanatory statement describing the need or condition to which the proposed legislation is addressed, the manner in which the proposed legislation would revise and improve current law, whether or not it poses any constitutional problems, whether or not the Association has taken a previous position on the issues raised by the proposal and any change the proposal would make to the previous position, and its possible impact on other areas of law;
See attached Resolution and NCACPA Letter.

iv) A clear explanation as to how the legislative proposal was studied and vetted within the council itself and whether it was a unanimous vote by the council to advance this legislation;
The Tax Section's NCACPA Liaison and Ethics/Legislative Liaison studied the NCACPA's legislative proposal and recommended that we support this advocacy initiative. We typically vote unanimously when all Council members are in the same room. Voting was by email after the Council's meeting August, and we have a quorum.

v) A list of the names, addresses and telephone numbers of the members of the committee or subcommittee that drafted the proposed legislation;
The NCACPA drafted the proposed legislation. The Tax Section supports this legislation as drafted. David McCallum drafted the Tax Section's Resolution.

David M. McCallum
Special Counsel
Nexsen Pruet, PLLC
T: 919.573.7440, F: 919.882.7886
DMcCallum@nexsenpruet.com

vi) A list of all groups outside the Association likely to be interested in this proposal and a brief indication of their support or opposition (and likely reasons for the same); and
The NCACPA, which originated the proposed legislative revisions.

vii) In the event that the section, division or committee is seeking approval and sponsorship of more than one bill, a preferred prioritization of its legislation, including the reasons.
Not applicable. Only one bill.

Thank you,
Allie Petrova

Galina (Allie) Petrova, J.D., LL.M. in Taxation
Attorney at Law
Chair, NCBA, Tax 2022-2023

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806 Green Valley Road | Suite 200 | Greensboro, NC 27408

Protect your investment. Optimize your tax results.

Resolution of the Tax Law Council of the North Carolina Bar Association to Advocate for Changes to Session Law 2021-180 Concerning SALT Cap Workarounds

WHEREAS, with the enactment of Session Law 2021-180 on November 18, 2021, North Carolina became one of at least 27 states that allow certain pass-through entities ("PTEs"), specifically eligible S-corporations and partnerships, to elect to pay state income tax at the entity level ("Taxed PTEs"), which legislation is also known as a state and local tax ("SALT") cap workaround because its purpose is to reduce the impact of the federal SALT deduction cap on an individual's federal income tax return; and

WHEREAS, the North Carolina Association of Certified Public Accountants ("NCACPA") in a letter of May 18, 2022 to the Senate and House Finance Committee Chairs at the North Carolina General Assembly, which is attached as Exhibit A, recommended a series of changes to the State tax code to address the NCACPA's concerns with Session Law 2021-180, § 42.5, as enacted; and

WHEREAS, the Tax Law Council agrees with the concerns raised and changes recommended by the NCACPA in Exhibit A regarding Session Law 2021-180, § 42.5, as enacted; and

WHEREAS, the implementation of the NCACPA's recommended changes to the State tax code would make North Carolina's SALT cap workaround: (1) more closely align with the majority of other states that have enacted similar SALT cap workaround legislation; (2) more broadly applicable by increasing the number of eligible Owners of eligible PTEs; (3) less complicated by correcting the inconsistent treatment of separately stated items of income and deduction in the calculation of Taxed PTE's taxable income; (4) more flexible for a Taxed PTE that does not elect to maintain its Taxed PTE status to pass to its Owners any carryforward of any unused portion of a tax credit claimed by the Taxed PTE; and (5) more flexible by creating a mechanism for transferring payments made by Owners based on their expected share of PTE income to a PTE that elects to be a Taxed PTE;

NOW, THEREFORE, BE IT RESOLVED, that the North Carolina Bar Association actively supports the NCACPA's recommended changes to Session Law 2021-180, § 42.5, as enacted, and will advocate, along with the NCACPA, for those recommended changes to be implemented via new legislation and/or administrative guidance issued by the North Carolina Department of Revenue.

Adopted this 5th day of October, 2022.

The undersigned confirms that the foregoing resolution was adopted by the Council of the Tax Law Section of the North Carolina Bar Association as of the date indicated.

Galina Petrova, Chair, Tax Law Section
North Carolina Bar Association

The undersigned confirms that the foregoing resolution was adopted by the North Carolina Bar Association Board of Governors on this ____ day of October, 2022.

Clayton D. Morgan
President, North Carolina Bar Association

May 18, 2022

The Honorable Warren Daniel
300 North Salisbury Street, Rm. 627
Raleigh, NC 27603

The Honorable John Bradford
300 North Salisbury Street, Rm. 530
Raleigh, NC 27603

The Honorable Paul Newton
300 North Salisbury Street, Rm. 300-C
Raleigh, NC 27603

The Honorable Mitchell Setzer
16 West Jones Street, Rm. 2204
Raleigh, NC 27601

The Honorable Bill Rabon
16 West Jones Street, Rm. 2010
Raleigh, NC 27601

The Honorable John Szoka
16 West Jones Street, Rm. 2207
Raleigh, NC 27601

RE: Taxed Pass-Through Entity Law Concerns and Recommendations

Dear Senate and House Finance Committee Chairs,

On behalf of the more than 12,000 members of the North Carolina Association of Certified Public Accountants and the taxpayers they serve, we are writing to share our concerns regarding the recently enacted law to allow certain pass-through entities (PTEs) to elect to pay state income tax at the entity level (a "Taxed PTE"). Further, we ask for your consideration of recommended changes to the state tax code to address these concerns.

Background

With the enactment of Session Law 2021-180, North Carolina became one of at least 27 states that allow certain PTEs—eligible S-corporations and partnerships—to elect to pay state income tax at the entity level. This law and similar laws in other states are known as SALT workarounds because their purpose was to reduce the impact of the federal state and local tax (SALT) deduction cap on an individual's federal income tax return.

Section 42.5 of S.L. 2021-180 adds and revises statutes in the tax code to allow a Taxed PTE to pay income tax at the individual income tax rate on the share of income for all its shareholders or partners (collectively, "Owners"). The North Carolina Department of Revenue has published guidance that the North Carolina taxable income of a Taxed PTE is calculated as the unapportioned income of the PTE for the resident Owners and the apportioned North Carolina income for the non-resident Owners. The guidance further notes that separately stated items

are not included for purposes of this tax calculation. Comments on this implication are noted later in this letter. An eligible PTE may elect on an annual basis to become a Taxed PTE for taxable years that begin on or after January 1, 2022.

Each Owner of the Taxed PTE is allowed to deduct the Owner's share of the Taxed PTE's income on the Owner's North Carolina income tax return. Under current federal law, a PTE that elects to pay state income tax at the entity level may generally deduct the full amount of its state income tax on the PTE's federal income tax return.

Concern: North Carolina significantly differs from most states in the treatment of the Owner's income on the North Carolina individual tax return

As noted above, North Carolina provides the Owner of a Taxed PTE with a deduction of the amount of the taxpayer's share of income from the Taxed PTE on the individual North Carolina return. The intention is to mitigate the double taxation in North Carolina of this income at both the entity and individual levels. However, most states with a Taxed PTE law provide that the Owner's income from the Taxed PTE and the respective tax paid by the PTE is passed to the individual to mitigate the double taxation. For North Carolina resident Owners of multi-state PTEs, the current statutes will result in double taxation of the same income for Owners of PTEs filing in multiple states because they will not be able to utilize the credit for taxes paid to other states on the same income. Further, without passing the income through to the Owners, the Owners forego the benefit of any separately stated items (see later example).

NCACPA recommends consideration of amending the existing PTE statutes to allow for the pass-through of income, PTE taxes paid, separately stated items, and credits to create parity between resident and non-resident Owners of multi-state PTEs. Such mechanism reduces complexity, increases parity with other states, and may alleviate several of the concerns expressed below.

Concern: Owners' eligibility for credit for income taxes paid in other states is dependent on the type of PTE

G.S. § 105-153.9(a) provides residents a credit for income tax paid to another state on income that is taxed both by the other state and North Carolina. G.S. § 105-131.8(a) provides that where another state imposes tax directly upon an S-corporation rather than upon its shareholders, a resident shareholder may claim a credit for their pro rata share of tax paid by the S-corporation.

There is no provision in state law providing a corresponding benefit to resident partners of a partnership. Therefore, a resident partner in a multi-state partnership that is required to pay or elects to pay income tax at the entity level to another state cannot claim a pro rata share of the

tax paid by the partnership on the partner's North Carolina tax return. As a result, the resident partner could be subjected to tax twice on the same income.

> *Example*: A construction company based in Dillon, South Carolina, operates as a partnership and performs work in both South Carolina and North Carolina. The company has two partners; a 60% controlling interest is owned by a South Carolina resident and a 40% minority interest is owned by a North Carolina resident. The majority owner makes an election to be a Taxed PTE for South Carolina purposes. As in many states, a PTE election in South Carolina applies on an all-or-nothing basis with no variation between partners allowed, meaning the North Carolina partner will pay tax on his earnings in South Carolina at the entity level. Under current law, the North Carolina partner will receive no credit for the taxes already paid on income that was also taxable in South Carolina and will effectively be forced to pay state income taxes twice on the same income.

The negative consequences of this inequity were realized by resident partners of multi-state partnerships that were required to pay or elected to pay income tax at the entity level in another state effective for tax year 2021.

NCACPA recommends the adoption of statutory language that provides that where another state imposes tax directly upon a partnership rather than upon its partners, a resident partner may claim a credit for their pro rata share of tax paid by the taxed partnership.

Concern: Certain partnerships are ineligible to become a Taxed PTE

It is not unusual for partnerships (particularly private equity-owned) to have a multi-tiered flow-through entity setup that includes ownership by other partnerships or S-corporations. G.S. § 105-154.1 limits the election to become a Taxed PTE to those partnerships wholly owned by individuals, estates, trusts, and certain tax-exempt organizations. A partnership owned even in part by another partnership or S-corporation is ineligible to make a Taxed PTE election.

This limitation on eligible Owners will significantly limit the potential benefits of the SALT workaround to many North Carolina partnerships. Furthermore, it will potentially limit future sources of capital and transfer of ownership. Any partnerships that plan to elect to be a Taxed PTE would be rendered ineligible if the ownership structure changes during the taxable year to include partners that are other partnerships or S-corporations. There will be a cascading negative impact on the original Owners, as estimated tax payments would have been made throughout the year at the entity level, as required by G.S. § 105-163.39.

Sixteen of the 27 states that have enacted a SALT workaround allow a Taxed PTE election by partnerships provided that all Owners are either individuals, estates, trusts, charitable organizations, *or are themselves PTEs with all eligible owners*.

NCACPA recommends the adoption of statutory language that allows a Taxed PTE election for partnerships owned in whole or in part by other PTEs, thus ensuring broader applicability of the SALT workaround benefit for North Carolina businesses.

Concern: Inconsistent treatment of separately stated items of income and deduction in the calculation of a Taxed PTE's taxable income

The North Carolina taxable income of a Taxed PTE is determined by adding the following:

1. Each Owner's share of the Taxed PTE's income or loss, subject to the adjustments provided in G.S. §§ 105-153.5 and 105-153.6, attributable to North Carolina, and
2. Each resident Owner's share of the Taxed PTE's income or loss, subject to the adjustments provided in G.S. §§ 105-153.5 and 105-153.6, not attributable to North Carolina.

Separately stated items of deduction are not included when calculating each Owner's share of the Taxed PTE's taxable income, and the adjustments required by G.S. § 105-153.5(c3) (for Owners of Taxed PTEs) are not included in the calculation of the Taxed PTE's taxable income.

Separately stated items of deduction are generally deductible expenses but are required to be separately reported to PTE Owners as their deductibility may be subject to certain limitations determined by the Owner. Common examples include Section 179 expensing, charitable contributions, and certain types of interest as well as some more complicated items within partnerships.

While these items may still be deducted on an Owner's return, there may not be sufficient income from other sources after excluding the Taxed PTE income to deduct these separately stated items. Therefore, taxed PTE Owners may not receive a benefit from otherwise deductible separately stated items, and their total North Carolina tax expense may increase.

> *Example:* Individual A owns a landscaping business that he operates as an S-corporation (XYZ Corp.) with Individual A being the sole shareholder. XYZ Corp is Individual A's only source of income. XYZ Corp reports ordinary income of $80,000; has a Section 179 expense deduction (new lawn equipment) totaling $25,000. The computation under each scenario is presented below. Under the current method, the total North Carolina tax liability is increased by $1,313, more

than 45%. While the net loss may be carried forward to offset future North Carolina income, the taxpayer would not have other sources of North Carolina taxable income so long as the entity continued to elect to be taxed at the PTE level. Further, with the planned reduction in tax rate, the loss will be of less value in the future.

	No PTE Election	PTE Election (Current Method)	PTE Election (Credit Method)
Ordinary Income	80,000	80,000	80,000
Section 179 Expense	(25,000)	(25,000)	(25,000)
Federal AGI	55,000	55,000	55,000
PTE Tax Base	N/A	80,000	80,000
Electing PTE Tax	N/A	4,200	4,200
Federal AGI	55,000	55,000	55,000
Less: Income taxed to PTE	-	(80,000)	-
North Carolina Taxable Income	55,000	(25,000) *	55,000
North Carolina Tax	2,888	-	2,888
Less: NC Credits	-	-	(4,200)
Tax Due/(Refund)	2,888	-	(1,313)
Cummulative NC Tax	**$ 2,888**	**$ 4,200**	**$ 2,888**

*The $25,000 loss may be carried forward, but may only be deducted against future NC income

NCACPA recommends changing the way the Owners of electing entities are taxed such that the Owner still reports all distributable income on their return but receives a credit for their proportionate share of tax paid by the entity. This action would alleviate the issue without resulting in double taxation. Alternatively, the issue may be mitigated by the adoption of statutory language that allows separately stated items of deduction to be included when calculating each Owner's share of the Taxed PTE's taxable income.

Concern: Taxed PTEs will effectively be bound to maintain a Taxed PTE election or else lose tax credits taken in installments

Taxed PTEs will effectively be bound to maintain a Taxed PTE election or else lose tax credits taken in installments. Credits that are earned in installments must continue to be claimed either by the Owner or the Taxed PTE consistent with the original treatment. As a result, an Owner with existing credits may not be able to use them if the PTE elects to become a Taxed PTE. When new credits are earned by a Taxed PTE, the Owners must continue to elect on an annual basis or otherwise lose any unutilized carryforward or future installments.

NCACPA recommends the adoption of statutory language that allows flexibility for a Taxed PTE that does not elect to maintain its Taxed PTE status to pass to its Owners any carryforward of any unused portion of a tax credit that was claimed by the Taxed PTE on the Taxed PTE's NC Tax Return. Alternatively, changing to a pass-through credit mechanism in lieu of the taxed income deduction as described above would allow for all excess credits to pass through to Owners, and the utilization of current credits and prior carryforwards would not be impacted by the PTE election.

Concern: No mechanism for transferring estimated payments

There does not appear to be a clear-cut mechanism for transferring estimated payments made by resident Owners based on their expected share of PTE income to a PTE that elects to be a Taxed PTE. Conversely, there is no mechanism for a PTE that makes estimated payments (under the belief that the entity will make the Taxed PTE election) to transfer those payments to its Owners if an election is not made.

It seems inefficient and incongruent that an Owner who made estimated payments would have to request a refund on their North Carolina return and the Taxed PTE would have to make a large tax payment—along with penalties and interest—with their annual North Carolina return once the Taxed PTE election was made.

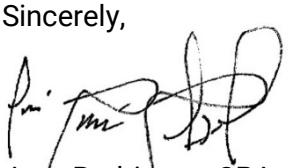
NCACPA recommends the adoption of statutory language that allows a method to transfer payments from one taxpayer (or group of taxpayers) to another. Preferably, this would be accomplished with a form that delineates the taxpayer(s), the payment amounts, and where payments should be transferred. California has a form (Schedule 1067B) that allows payments to be transferred to/from individuals to a composite return.

Even if payment transfer is not broadly allowed, we recommend that some payment transfer mechanism from the PTE to the Owner should be allowed. Should a change in ownership of a partnership occur that renders the partnership ineligible to make a Taxed PTE election (as explained above), the partnership would show a large overpayment on its return, and the Owners could potentially owe interest and penalties resulting from underpayment of estimated taxes.

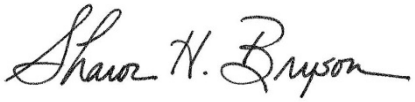
NCACPA respectfully requests that the General Assembly consider acting as soon as possible to address these concerns.

Thank you for your attention to the matter and your consideration of this request. If you have any questions or need additional information, please contact NCACPA Director of Advocacy Robert Broome at (919) 481-5160 or rbroome@ncacpa.org. We look forward to your response.

Sincerely,



Jose Rodriguez, CPA
Board Chair



Sharon H. Bryson, M.Ed.
CEO

cc: The Honorable Phil Berger, Senate President *Pro Tempore*
The Honorable Tim Moore, Speaker of the House
The Honorable Dan Blue
The Honorable Michael Wray
The Honorable Ronald Penny, Secretary of Revenue
Arleen Thomas, NCACPA Board Chair-Elect

"(32) ~~The~~ For taxable years beginning on or after January 1, 2023, the amount of any expense deducted under the Code to the extent ~~that payment of the expense results in forgiveness of a covered loan pursuant to section 1106(b) of the CARES Act and the income associated with the forgiveness is excluded from gross income pursuant to section 1106(i) of the CARES Act. The term "covered loan" has the same meaning as defined in section 1106 of the CARES Act.~~the expense is allocable to income that is either wholly excluded from gross income or wholly exempt from the taxes imposed by this Part."

SECTION 42.4.(e) Except as otherwise provided, this section is effective when it becomes law.

REDUCE IMPACT OF FEDERAL SALT CAP BY ALLOWING CERTAIN PASS-THROUGHS TO ELECT TO PAY TAX AT THE ENTITY LEVEL

SECTION 42.5.(a) G.S. 105-131(b) reads as rewritten:

"(b) For the purpose of this Part, unless otherwise required by the context:

…

(11) "Taxed S Corporation" means an S Corporation for which a valid election under G.S. 105-131.1A(a) is in effect."

SECTION 42.5.(b) G.S. 105-131.1 reads as rewritten:

"**§ 105-131.1. Taxation of an S Corporation and its shareholders.**

(a) An S Corporation shall not be subject to the tax levied under G.S. 105-130.3. A taxed S Corporation shall be subject to tax under G.S. 105-131.1A.

(b) ~~Each~~ Except with respect to a taxed S Corporation, each shareholder's pro rata share of an S Corporation's income attributable to the State and each resident shareholder's pro rata share of income not attributable to the State, shall be taken into account by the shareholder in the manner and subject to the adjustments provided in Parts 2 and 3 of this Article and section 1366 of the Code and shall be subject to the tax levied under Parts 2 and 3 of this Article."

SECTION 42.5.(c) Part 1A of Article 4 of Chapter 105 of the General Statutes is amended by adding a new section to read:

"**§ 105-131.1A. Taxation of S Corporation as a taxed pass-through entity.**

(a) Taxed S Corporation Election. – An S Corporation may elect, on its timely filed annual return required under G.S. 105-131.7, to have the tax under this Article imposed on the S Corporation for any taxable period covered by the return. An S Corporation may not revoke the election after the due date of the return including extensions.

(b) Taxable Income of Taxed S Corporation. – A tax is imposed for the taxable period on the North Carolina taxable income of a taxed S Corporation. The tax shall be levied, collected, and paid annually. The tax is imposed on the North Carolina taxable income at the rate levied in G.S. 105-153.7. The North Carolina taxable income of a taxed S Corporation is determined as follows:

(1) The North Carolina taxable income of a taxed S Corporation with respect to such taxable period shall be equal to the sum of the following:

a. Each shareholder's pro rata share of the taxed S Corporation's income or loss, subject to the adjustments provided in G.S. 105-153.5 and G.S. 105-153.6, attributable to the State.

b. Each resident shareholder's pro rata share of the taxed S Corporation's income or loss, subject to the adjustments provided in G.S. 105-153.5 and G.S. 105-153.6, not attributable to the State with respect to such taxable period.

(2) Separately stated items of deduction are not included when calculating each shareholder's pro rata share of the taxed S Corporation's taxable income. For

purposes of this subdivision, separately stated items are those items described in section 1366 of the Code and the regulations under it.

(3) The adjustments required by G.S. 105-153.5(c3) are not included in the calculation of the taxed S Corporation's taxable income.

(c) Tax Credit. – A taxed S Corporation that qualifies for a credit may apply each shareholder's pro rata share of the taxed S Corporation's credits against the shareholder's pro rata share of the taxed S Corporation's income tax imposed by subsection (b) of this section. An S Corporation must pass through to its shareholders any credit required to be taken in installments by this Chapter if the first installment was taken in a taxable period that the election under subsection (a) of this section was not in effect. An S Corporation shall not pass through to its shareholders any of the following:

(1) Any credit allowed under this Chapter for any taxable period the S Corporation makes the election under subsection (a) of this section and the carryforward of the unused portion of such credit.

(2) Any subsequent installment of such credit required to be taken in installments by this Chapter after the S Corporation makes an election under subsection (a) of this section and the carryforward of any unused portion of such installment.

(d) Tax Credit for Income Taxes Paid to Other States. – With respect to resident shareholders, a taxed S Corporation is allowed a credit against the taxes imposed by this section for income taxes imposed by and paid to another state or country on income taxed under this section. The credit allowed by this subsection is administered in accordance with the provisions of G.S. 105-153.9.

(e) Deduction Allowed for Shareholders of a Taxed S Corporation. – The shareholders of a taxed S Corporation are allowed a deduction as specified in G.S. 105-153.5(c3)(1). This adjustment is only allowed if the taxed S Corporation complies with the provisions of subsection (g) of this section.

(f) Addition Required for Shareholders of a Taxed S Corporation. – The shareholders of a taxed S Corporation must make an addition as provided in G.S. 105-153.5(c3)(2).

(g) Payment of Tax. – Except as provided in Article 4C of this Chapter, the full amount of the tax payable as shown on the return of the taxed S Corporation must be paid to the Secretary within the time allowed for filing the return. In the case of any overpayment by a taxed S Corporation of the tax imposed under this section, only the taxed S Corporation may request a refund of the overpayment. If the taxed S Corporation files a return showing an amount due with the return and does not pay the amount shown due, the Department may collect the tax from the taxed S Corporation pursuant to G.S. 105-241.22(1). The Secretary must issue a notice of collection for the amount of tax debt to the taxed S Corporation. If the tax debt is not paid to the Secretary within 60 days of the date the notice of collection is mailed to the taxed S Corporation, the shareholders of the S Corporation are not allowed the deduction provided in G.S. 105-153.5(c3)(1). The Secretary must send the shareholders a notice of proposed assessment in accordance with G.S. 105-241.9. For purposes of this subsection, the term "tax debt" has the same meaning as defined in G.S. 105-243.1(a).

(h) Basis. – The basis of both resident and nonresident shareholders of a taxed S Corporation in their stock and indebtedness of the taxed S Corporation shall be determined as if the election under subsection (a) of this section had not been made and each of the shareholders of the taxed S Corporation had properly taken into account each shareholder's pro rata share of the taxed S Corporation's items of income, loss, and deduction in the manner required with respect to an S Corporation for which no such election is in effect."

SECTION 42.5.(d) G.S. 105-131.7 is amended by adding a new subsection to read:

"(g) Taxed S Corporation. – Subsections (b) through (f) of this section do not apply to an S Corporation with respect to any taxable period for which it is a taxed S Corporation under G.S. 105-131.1A."

SECTION 42.5.(e) G.S. 105-131.8(a) reads as rewritten:

"(a) ~~For~~ Except as otherwise provided in G.S. 105-153.9(a)(4) with respect to a taxed S Corporation, for purposes of G.S. 105-153.9 and G.S. 105-160.4, each resident shareholder is considered to have paid a tax imposed on the shareholder in an amount equal to the shareholder's pro rata share of any net income tax paid by the S Corporation to a state that does not measure the income of S Corporation shareholders by the income of the S Corporation. For purposes of the preceding sentence, the term "net income tax" means any tax imposed on or measured by a corporation's net income."

SECTION 42.5.(f) G.S. 105-153.3 reads as rewritten:

"**§ 105-153.3. Definitions.**

The following definitions apply in this Part:

…

(18a) Taxed partnership. – A partnership for which a valid election under G.S. 105-154.1 is in effect.

(18b) Taxed pass-through entity. – A taxed S Corporation or a taxed partnership.

(18c) Taxed S Corporation. – Defined in G.S. 105-131(b).

…."

SECTION 42.5.(g) G.S. 105-154(d) reads as rewritten:

"(d) Payment of Tax on Behalf of Nonresident Owner or Partner. – If a business conducted in this State is owned by a nonresident individual or by a partnership having one or more nonresident members, the manager of the business shall report information concerning the earnings of the business in this State, the distributive share of the income of each nonresident owner or partner, and any other information required by the Secretary. The distributive share of the income of each nonresident partner includes any guaranteed payments made to the partner. The manager of the business shall pay with the return the tax on each nonresident owner or partner's share of the income computed at the rate levied on individuals under G.S. 105-153.7. The business may deduct the payment for each nonresident owner or partner from the owner or partner's distributive share of the income of the business in this State. If the nonresident partner is not an individual and the partner has executed an affirmation that the partner will pay the tax with its corporate, partnership, trust, or estate income tax return, the manager of the business is not required to pay the tax on the partner's share. In this case, the manager shall include a copy of the affirmation with the report required by this subsection. The affirmation must be annually filed by the nonresident partner and submitted by the manager by the due date of the report required in this subsection. Otherwise, the manager of the business is required to pay the tax on the nonresident partner's share. Notwithstanding the provisions of G.S. 105-241.7(b), the manager of the business may not request a refund of an overpayment made on behalf of a nonresident owner or partner if the manager of the business has previously filed the return and paid the tax due. The nonresident owner or partner may, on its own income tax return, request a refund of an overpayment made on its behalf by the manager of the business within the provisions of G.S. 105-241.6. This subsection does not apply to a partnership with respect to any taxable period for which it is a taxed partnership."

SECTION 42.5.(h) Part 2 of Article 4 of Chapter 105 of the General Statutes is amended by adding a new section to read:

"**§ 105-154.1. Taxation of partnership as a taxed pass-through entity.**

(a) Taxed Partnership Election. – A partnership may elect, on its timely filed annual return required under G.S. 105-154(c), to have the tax under this Article imposed on the partnership for any taxable period covered by the return. A partnership may not revoke the election after the due date of the return, including extensions. This election cannot be made by a publicly traded partnership that is described in section 7704(c) of the Code or by a partnership that has at any time during the taxable year a partner who is not one of the following:

(1) An individual.

(2) An estate.

(3) A trust described in section 1361(c)(2) of the Code.

(4) An organization described in section 1361(c)(6) of the Code.

(b) Taxable Income of Taxed Partnership. – A tax is imposed for the taxable period on the North Carolina taxable income of a taxed partnership. The tax shall be levied, collected, and paid annually. The tax is imposed on the North Carolina taxable income at the rate levied in G.S. 105-153.7. The North Carolina taxable income of a taxed partnership is determined as follows:

(1) The North Carolina taxable income of a taxed partnership with respect to such taxable period shall be equal to the sum of the following:

a. Each partner's distributive share of the taxed partnership's income or loss, subject to the adjustments provided in G.S. 105-153.5 and G.S. 105-153.6, attributable to the State.

b. Each resident partner's distributive share of the taxed partnership's income or loss, subject to the adjustments provided in G.S. 105-153.5 and G.S. 105-153.6, not attributable to the State with respect to such taxable period.

(2) Separately stated items of deduction are not included when calculating each partner's distributive share of the taxed partnership's taxable income. For purposes of this subdivision, separately stated items are those items described in section 702 of the Code and the regulations adopted under it.

(3) The adjustments required by G.S. 105-153.5(c3) are not included in the calculation of the taxed partnership's taxable income.

(c) Tax Credit. – A taxed partnership that qualifies for a credit may apply each partner's distributive share of the taxed partnership's credits against the partner's distributive share of the taxed partnership's income tax imposed by subsection (b) of this section. A partnership must pass through to its partners any credit required to be taken in installments by this Chapter if the first installment was taken in a taxable period that the election under subsection (a) of this section was not in effect. A partnership shall not pass through to its partners any of the following:

(1) Any credit allowed under this Chapter for any taxable period the partnership makes the election under subsection (a) of this section and the carryforward of the unused portion of such credit.

(2) Any subsequent installment of such credit required to be taken in installments by this Chapter after the partnership makes an election under subsection (a) of this section and the carryforward of any unused portion of such installment.

(d) Deduction Allowed for Partners of a Taxed Partnership. – The partners of a taxed partnership are allowed a deduction as specified in G.S. 105-153.5(c3)(3). This adjustment is only allowed if the taxed partnership complies with the provisions of subsection (f) of this section.

(e) Addition Required for Partners of a Taxed Partnership. – The partners of a taxed partnership must make an addition as provided in G.S. 105-153.5(c3)(4).

(f) Payment of Tax. – Except as provided in Article 4C of this Chapter, the full amount of the tax payable as shown on the return of the taxed partnership must be paid to the Secretary within the time allowed for filing the return. In the case of any overpayment by a taxed partnership of the tax imposed under this section, only the taxed partnership may request a refund of the overpayment. If the taxed partnership files a return showing an amount due with the return and does not pay the amount shown due, the Department may collect the tax from the taxed partnership pursuant to G.S. 105-241.22(1). The Secretary must issue a notice of collection for the amount of the tax debt to the taxed partnership. If the tax debt is not paid to the Secretary within 60 days of the date the notice of collection is mailed to the taxed partnership, the partners of the partnership are not allowed the deduction provided in G.S. 105-153.5(c3)(3). The

Secretary must send the partners a notice of proposed assessment in accordance with G.S. 105-241.9. For purposes of this subsection, the term "tax debt" has the same meaning as defined in G.S. 105-243.1(a).

(g) Basis. – The basis of both resident and nonresident partners of a taxed partnership shall be determined as if the election under subsection (a) of this section had not been made and each of the partners of the taxed partnership had properly taken into account each partner's distributive share of the taxed partnership's items of income, loss, and deduction in the manner required with respect to a partnership for which no such election is in effect."

SECTION 42.5.(i) G.S. 105-153.5 is amended by adding a new subsection to read:

"(c3) Taxed Pass-Through Entities. – In calculating North Carolina taxable income, a taxpayer must make the following adjustments to the taxpayer's adjusted gross income:

(1) A taxpayer that is a shareholder of a taxed S Corporation may deduct the amount of the taxpayer's pro rata share of income from the taxed S Corporation to the extent it was included in the taxed S Corporation's North Carolina taxable income and the taxpayer's adjusted gross income.

(2) A taxpayer that is a shareholder of a taxed S Corporation must add the amount of the taxpayer's pro rata share of loss from the taxed S Corporation to the extent it was included in the taxed S Corporation's North Carolina taxable income and the taxpayer's adjusted gross income.

(3) A taxpayer that is a partner of a taxed partnership may deduct the amount of the taxpayer's distributive share of income from the taxed partnership to the extent it was included in the taxed partnership's North Carolina taxable income and the taxpayer's adjusted gross income.

(4) A taxpayer that is a partner of a taxed partnership must add the amount of the taxpayer's distributive share of loss from the taxed partnership to the extent it was included in the taxed partnership's North Carolina taxable income and the taxpayer's adjusted gross income."

SECTION 42.5.(j) G.S. 105-153.9(a) reads as rewritten:

"(a) An individual who is a resident of this State is allowed a credit against the taxes imposed by this Part for income taxes imposed by and paid to another state or country on income taxed under this Part, subject to the following conditions:

…

(4) Shareholders of a taxed S Corporation shall not be allowed a credit under this section for taxes paid by the taxed S Corporation to another state or country on income that is taxed to the taxed S Corporation. For purposes of allowing the credit under this section for taxes paid to another state or country by a taxed S Corporation's shareholders, a shareholder's pro rata share of the income of the taxed S Corporation shall be treated as income taxed to the shareholder under this Part and a shareholder's pro rata share of the tax imposed on the taxed S Corporation under G.S. 105-131.1A shall be treated as tax imposed on the shareholder under this Part.

(5) Partners of a taxed partnership shall not be allowed a credit under this section for taxes paid by the taxed partnership to another state or country on income that is taxed to the taxed partnership. The taxed partnership as defined in G.S. 105-153.3(18a) is entitled to a credit under this section for all such taxes paid. For purposes of allowing the credit under this section for taxes paid to another state or country by a taxed partnership's partners, a partner's pro rata share of the income of the taxed partnership shall be treated as income taxed to the partner under this Part and a partner's pro rata share of the tax imposed on the taxed partnership under G.S. 105-154.1 shall be treated as tax imposed on the partner under this Part."

SECTION 42.5.(k) G.S. 105-160.4 reads as rewritten:

"**§ 105-160.4. Tax credits for income taxes paid to other states by estates and trusts.**

…

(f) Fiduciaries and beneficiaries of estates and trusts who are shareholders of a taxed S Corporation are not allowed a credit under this section for taxes paid by the estates and trusts or by the taxed S Corporation to another state or country on income that is taxed to the taxed S Corporation. The taxed S Corporation is entitled to a credit under G.S. 105-153.9(a)(4) for all such taxes paid. For purposes of this subsection, the term "taxed S Corporation" is the same as defined in G.S. 105-131(b).

(g) Fiduciaries and beneficiaries of estates and trusts who are partners of a taxed partnership are not allowed a credit under this section for taxes paid by the estates and trusts or by the taxed partnership to another state or country on income that is taxed to the taxed partnership. The taxed partnership is entitled to a credit under G.S. 105-153.9(a)(5) for all such taxes paid. For purposes of this subsection, the term "taxed partnership" is the same as defined in G.S. 105-153.3."

SECTION 42.5.(*l*) G.S. 105-163.38 is amended by adding a new subdivision to read:

"(6) Taxed pass-through entity. – Defined in G.S. 105-153.3."

SECTION 42.5.(m) G.S. 105-163.39 is amended by adding a new subsection to read:

"(d) Taxed Pass-Through Entity. – This Article applies to every taxed pass-through entity in the same manner as a corporation subject to tax under Article 4 of this Chapter, except that G.S. 105-163.41(d)(5) shall not apply with respect to a taxable year of a taxed pass-through entity if it was not a taxed pass-through entity during its preceding taxable year."

SECTION 42.5.(n) This section is effective for taxable years beginning on or after January 1, 2022.

CREATE SEPARATE STATE NET OPERATING LOSS CALCULATION FOR INDIVIDUAL INCOME TAX PURPOSES

SECTION 42.6.(a) G.S. 105-153.5 reads as rewritten:

"**§ 105-153.5. Modifications to adjusted gross income.**

…

(b) Other Deductions. – In calculating North Carolina taxable income, a taxpayer may deduct from the taxpayer's adjusted gross income any of the following items that are included in the taxpayer's adjusted gross income:

…

(16) A State net operating loss as allowed under G.S. 105-153.5A.

(c) Additions. – In calculating North Carolina taxable income, a taxpayer must add to the taxpayer's adjusted gross income any of the following items that are not included in the taxpayer's adjusted gross income:

…

(6) ~~The~~ Any amount ~~of~~ allowed as a net operating loss ~~carried to and deducted on the federal return but not absorbed in that year and carried forward to a subsequent year.~~deduction under the Code.

…."

SECTION 42.6.(b) Part 2 of Article 4 of Chapter 105 of the General Statutes is amended by adding a new section to read:

"**§ 105-153.5A. Net operating loss provisions.**

(a) State Net Operating Loss. – A taxpayer's State net operating loss for a taxable year is the amount by which business deductions for the year exceed gross business income for the year as determined under the Code adjusted as provided in G.S. 105-153.5 and G.S. 105-153.6. The