

**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2001**

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**HOUSE BILL 716**

Short Title: Estate Law Changes. (Public)

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Sponsors: Representative Haire.

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Referred to: Judiciary II.

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March 21, 2001

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

4 The General Assembly of North Carolina enacts:

5  
6 **PART I. CLARIFY AUTHORITY OF PERSONAL REPRESENTATIVE TO**  
7 **TAKE POSSESSION OF AND SELL REAL PROPERTY OWNED BY**  
8 **DECEDENT**  
9

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

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

27           **SECTION 1.1.** G.S. 28A-13-3(c) reads as rewritten:

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

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

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

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

19       "(b) Real Property. – The title to and right of possession of real property of a  
20       decedent is vested in his heirs as of the time of his death; but when title to real property  
21       is not devised to the personal representative, the title to and right of possession of real  
22       property of a decedent devised under a valid probated will becomes vested in the  
23       devisees and shall relate back to the decedent's death, subject to the provisions of G.S.  
24       31-39. However, notwithstanding the foregoing provision of this subsection:

- 25           (1) The devisees shall be divested of title upon a sale of real property  
26           without a court order made pursuant to authority granted by that will  
27           as provided in G.S. 28A-17-8, and the personal representative may,  
28           without the joinder or consent of the devisees, execute a deed in favor  
29           of a purchaser for value who shall take title free of any rights of the  
30           devisees.
- 31           (2) The personal representative may take possession, custody, and control  
32           of real property without a court order pursuant to authority granted by  
33           that will."

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

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

37       "**§ 28A-17-8.1. Sale or other disposition pursuant to authority in will.**

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

43       (b) A personal representative who sells, leases, or mortgages real property of a  
44       decedent without a court order pursuant to authority granted by the will is not required

1 to institute a proceeding under this Article or to follow any of the procedures set forth in  
2 Article 29A of Chapter 1 of the General Statutes, entitled "Judicial Sales", but shall  
3 include in the next account, whether annual or final, a record of any receipts and  
4 disbursements incident to any such transaction.

5 (c) A general provision in the will of a decedent granting authority to the personal  
6 representative to sell the decedent's real property without a court order, or the  
7 incorporation by reference of the provisions of G.S. 332-27(2) in the will, is sufficient  
8 to authorize the personal representative to sell that real property without a court order  
9 for any reason that the personal representative deems to be for the best interest of the  
10 estate, including the payment of debts and other claims against the decedent's estate, the  
11 payment of specific cash bequests to devisees, or the distribution of cash to residuary  
12 devisees.

13 (d) Notwithstanding the provisions of subsection (c) of this section, a general  
14 provision in the will of a decedent granting authority to the personal representative to  
15 sell the decedent's property without a court order, or the incorporation by reference of  
16 the provisions of G.S. 32-27(2) in the will, shall not be deemed to authorize the personal  
17 representative to sell specifically devised property without the joinder or consent of the  
18 devisee of that real property.

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

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

25 **"§ 28A-17-10. Title in personal representative for estate; he or successor to convey.**

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

35 **SECTION 1.6.** G.S. 32-27(8) reads as rewritten:

36 "(8) Manage Real Property. –

- 37 a. To take possession, custody, and control, improve, manage,  
38 protect, and subdivide any real property;
- 39 b. To dedicate or withdraw from dedication parks, streets,  
40 highways, or alleys;
- 41 c. To terminate any subdivision or part thereof;
- 42 d. To borrow money for the purposes authorized by this  
43 subdivision for such periods of time and upon such terms and  
44 conditions as to rates, maturities and renewals as the fiduciary

1 shall deem advisable and to mortgage or otherwise encumber  
2 any such property or part thereof, whether in possession or  
3 reversion;

4 e. To lease any such property or part thereof to commence at the  
5 present or in the future, upon such terms and conditions,  
6 including options to renew or purchase, and for such period or  
7 periods of time as the fiduciary deems advisable although such  
8 period or periods may extend beyond the duration of the trust or  
9 the administration of the estate involved;

10 f. To make gravel, sand, oil, gas and other mineral leases,  
11 contracts, licenses, conveyances or grants of every nature and  
12 kind which are lawful in the jurisdiction in which such property  
13 lies;

14 g. To manage and improve timber and forests on such property, to  
15 sell the timber and forest products, and to make grants, leases,  
16 and contracts with respect thereto;

17 h. To modify, renew or extend leases;

18 i. To employ agents to rent and collect rents;

19 j. To create easements and release, convey, or assign any right,  
20 title, or interest with respect to any easement on such property  
21 or part thereof;

22 k. To erect, repair or renovate any building or other improvement  
23 on such property, and to remove or demolish any building or  
24 other improvement in whole or in part; and

25 l. To deal with any such property and every part thereof in all  
26 other ways and for such other purposes or considerations as it  
27 would be lawful for any person owning the same to deal with  
28 such property either in the same or in different ways from those  
29 specified elsewhere in this subdivision (8)."  
30

## 31 PART II. AUTHORIZE COMBINATION OF HEARINGS FOR CONTROL OF 32 REAL PROPERTY BY PERSONAL REPRESENTATIVE

### 33 SECTION 2. G.S. 28A-13-3(c) reads as rewritten:

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

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

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

9 **SECTION 2.1.** G.S. 28A-15-1(c) reads as rewritten:

10 "(c) If it shall be determined by the personal representative that it is in the best  
11 interest of the administration of the estate to sell, lease, or mortgage any real estate or  
12 interest therein to obtain money for the payment of debts and other claims against the  
13 decedent's estate, the personal representative shall institute a special proceeding before  
14 the clerk of superior court for such purpose pursuant to Article 17 of this Chapter,  
15 except that no such proceeding shall be required for a sale made pursuant to authority  
16 given by will. A general provision granting authority to the personal representative to  
17 sell the testator's real property, or incorporation by reference of the provisions of G.S.  
18 32-27(2) shall be sufficient to eliminate the necessity for a proceeding under Article 17.  
19 If a special proceeding has been instituted by the personal representative pursuant to  
20 G.S. 28A-15-1(c), the personal representative may petition for possession, custody, or  
21 control of any real property as a part of that proceeding and is not required to institute a  
22 separate special proceeding."

### 23 24 **PART III. PROVIDE FOR DISTRIBUTION OF ASSETS OF INOPERATIVE** 25 **TRUSTS**

26  
27 **SECTION 3.** Article 22 of Chapter 28A of the General Statutes is amended  
28 by adding a new section to read:

29 **"§ 28A-22-10. Distribution of assets of inoperative trust.**

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

41 **SECTION 3.1.** Article 13 of Chapter 36A is amended by adding a new  
42 section to read:

43 **"§ 36A-141. Distribution of assets of inoperative trust.**

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

3  
4 **PART IV. PROVIDE THAT A FIDUCIARY EXPRESSLY EXCLUDED FROM**  
5 **INVESTMENT DECISIONS IS NOT LIABLE FOR DECISIONS MADE BY**  
6 **THOSE AUTHORIZED TO MAKE INVESTMENT DECISIONS**

7  
8 **SECTION 4.** G.S. 36A-3 is amended by adding a new subsection to read:

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

19  
20 **PART V. TECHNICAL CORRECTIONS TO REFERENCES TO THE**  
21 **INTERNAL REVENUE CODE**

22  
23 **SECTION 5.** G.S. 32-34(a) reads as rewritten:

24 "(a) For purposes of this section:

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

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

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

- 35 a. Except as provided in G.S. 32A-2(14)b., to make gifts of any of  
36 the principal's property to any individual other than the  
37 attorney-in-fact or to any organization described in sections  
38 170(c) and 2522(a) of the Internal Revenue Code or  
39 corresponding future provisions of federal tax law, or both, in  
40 accordance with the principal's personal history of making or  
41 joining in the making of lifetime gifts. As used in this  
42 subdivision "Internal Revenue Code" means the "Code" as  
43 defined in ~~G.S. 105-2-1.~~ G.S. 105-228.90.

- 1                   b.     Except as provided in G.S. 32A-2(14)c., or unless gifts are  
2                   expressly authorized by the power of attorney under G.S. 32A-  
3                   2(15), a power described in G.S. 32A-2(14)a. may not be  
4                   exercised by the attorney-in-fact in favor of the attorney-in-fact  
5                   or the estate, creditors, or creditors of the estate of the attorney-  
6                   in-fact.
- 7                   c.     If the power described in G.S. 32A-2(14)a. is conferred upon  
8                   two or more attorneys-in-fact, it may be exercised by the  
9                   attorney-in-fact or attorneys-in-fact who are not disqualified by  
10                  G.S. 32A-2(14)b. from exercising the power of appointment as  
11                  if they were the only attorney-in-fact or attorneys-in-fact.
- 12                  d.     An attorney-in-fact expressly authorized by this section to make  
13                  gifts of the principal's property may elect to request the clerk of  
14                  the superior court to issue an order to make a gift of the  
15                  property of the principal."

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

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

27  
28                  **PART VI. EFFECTIVE DATES**

29  
30                  **SECTION 6.** Parts I through IV of this act are effective when they become  
31                  law and apply to actions by personal representatives on or after that date. The remainder  
32                  of this act is effective when it becomes law.