

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 1999

SESSION LAW 1999-270  
SENATE BILL 1003

AN ACT TO AMEND THE STATUTES REGULATING THE ABILITY OF  
GUARDIANS TO MAKE GIFTS FROM INCOMPETENT WARDS' ESTATES  
UNDER CERTAIN CIRCUMSTANCES.

The General Assembly of North Carolina enacts:

Section 1. G.S. 35A-1335 reads as rewritten:

**"§ 35A-1335. Gifts authorized with approval of judge of superior court.**

With the approval of the resident judge of the superior court of the district in which the guardian ~~he~~ was appointed, upon a duly verified petition the guardian ~~or trustee~~ of a person judicially declared to be incompetent may, from the income of the incompetent, make gifts to the State of North Carolina, its agencies, counties or municipalities, or to the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational ~~purposes.~~ purposes, or to individuals including the guardian. References in this Article to the 'guardian' include any Trustee appointed by the court under prior law as fiduciary for the incompetent ward's estate."

Section 2. G.S. 35A-1336 reads as rewritten:

**"§ 35A-1336. Prerequisites to approval by judge. judge of gifts for governmental or charitable purposes.**

The judge shall not approve ~~such~~ gifts from income for governmental or charitable purposes unless it appears to ~~his~~ the judge's satisfaction that all of the following apply:

- (1) After ~~the making of such~~ the gifts and the payment of federal and State income taxes, the remaining income of the incompetent will be reasonable and adequate to provide for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and ~~such~~ those dependents in the manner to which the incompetent and ~~such~~ those dependents are accustomed and in keeping with their station in life ~~(and in no event less than twice the average, for the five calendar years preceding the calendar year of such gifts, of expenditures for the incompetent's support, maintenance, comfort and welfare);~~ life.
- (2) Each donee is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax ~~liability;~~ liability.

- (3) Each donee is a donee qualified to receive tax deductible gifts under federal and State income tax ~~laws;~~ laws.
- (4) The aggregate of ~~such the~~ gifts does not exceed the percentage of income fixed by federal law as the maximum deduction allowable for ~~such the~~ gifts in computing federal income tax liability."

Section 3. Chapter 35A of the General Statutes is amended by adding a new section to read:

**"§ 35A-1336.1. Prerequisites to approval by judge of gifts to individuals.**

The judge shall not approve gifts from income to individuals unless it appears to the judge's satisfaction that both the following requirements are met:

- (1) After making the gifts and paying federal and State income taxes, the remaining income of the incompetent will be reasonable and adequate to provide for the support, maintenance, comfort, and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and those dependents in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life;
- (2) The judge determines that either:
  - a. The incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by the laws of North Carolina for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent, and each donee is entitled to one or more specific legacies, bequests, devises, or distributions of specific amounts of money, income, or property under the paper-writing or the revocable trust or both or is a residuary legatee, devisee, or beneficiary designated in the paper-writing or revocable trust or both; or
  - b. That so far as is known the incompetent has not, prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent, and each donee is a person who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of the approval of the gifts; or
  - c. The donee is the spouse, parent, descendent of the incompetent, or descendant of the incompetent's parent, and the amount of the gift does not exceed the federal annual gift tax exclusion.

The judge may order that the gifts be made in cash or in specific assets and may order that the gifts be made outright, in trust, under the North Carolina Uniform Transfers to Minors Act, under the North Carolina Uniform Custodial Trust Act, or otherwise. The judge may also order that the gifts be treated as an advancement of some or all of the amount the donee would otherwise receive at the incompetent's death."

Section 4. G.S. 35A-1340 reads as rewritten:

**"§ 35A-1340. Gifts authorized with approval of judge of superior court.**

With the approval of the resident judge of the superior court of the district in which the guardian ~~or trustee~~ was appointed upon a duly verified petition, the guardian ~~or trustee~~ of a person judicially declared to be incompetent may, from the principal of the incompetent's estate, make gifts to the State of North Carolina, its agencies, counties or municipalities, or the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational ~~purposes.~~ purposes, or to individuals including the guardian. The incompetent's estate shall consist of all assets owned by the incompetent, including nonprobate assets. For purposes of this Article, nonprobate assets are those which would not be distributable in accordance with the incompetent's valid probated will or the provisions of Chapter 29 at the incompetent's death. The incompetent's nonprobate estate would include nonprobate assets only. References in this Article to the 'guardian' include any Trustee appointed by the court under prior law as fiduciary for the incompetent ward's estate."

Section 5. G.S. 35A-1341 reads as rewritten:

**"§ 35A-1341. Prerequisites to approval by judge. judge of gifts for governmental or charitable purposes.**

The judge shall not approve ~~such~~ any gifts from principal for governmental or charitable purposes unless it appears to ~~his~~ the judge's satisfaction that: all of the following requirements are met:

- (1) The making of ~~such~~ the gifts will not leave the incompetent's remaining principal estate insufficient to provide reasonable and adequate income for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and ~~such~~ these dependents in the manner to which the incompetent and ~~such~~ those dependents are accustomed and in keeping with their station in ~~life;~~ life.
- (2) Each donee is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax ~~liability;~~ liability.
- (3) Each donee is a donee qualified to receive tax deductible gifts under federal and State income tax ~~laws;~~ laws.
- (4) The making of ~~such~~ the gifts will not jeopardize the rights of any creditor of the ~~incompetent;~~ and incompetent.
- (5) It is improbable that the incompetent will recover competency during his or her ~~lifetime;~~ lifetime.
- (5a) Sufficient credible evidence is presented to the court that the proposed gift is of a nature which the incompetent would have approved prior to being declared incompetent.
- (6) Either a. or b. applies:
  - a. All of the following apply:
    1. The incompetent, prior to being declared incompetent, executed a ~~paper writing,~~ paper-writing with the

formalities required by the laws of North Carolina for the execution of a valid ~~will; will,~~ including a paper-writing naming as beneficiary a revocable trust created by the incompetent.

2. Specific legacies, ~~bequests or devises~~ bequests, devises, or nondiscretionary distributions of specific amounts of money, income or property included in ~~such the~~ paper-writing or revocable trust or both, will not be jeopardized by making ~~such gifts; the~~ gifts.
  3. All residuary ~~legatees and legatees,~~ devisees and beneficiaries designated in ~~such the~~ paper-writing, paper-writing or revocable trust or both, who would take under the ~~paper writing~~ paper-writing or revocable trust or both, if the incompetent died contemporaneously with the signing of the order of approval of ~~such the~~ gifts and ~~such paper writing~~ the paper-writing was probated as the incompetent's will and the spouse, if any, of ~~such the~~ incompetent have been given at least 10 days' written notice that approval for ~~such the~~ gifts will be sought and that objection may be filed with the clerk of superior court of the county in which the guardian ~~or trustee~~ was appointed, within the 10-day ~~period; period.~~
- b. Both of the following apply:
1. That so far as is known the incompetent has not prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent; and
  2. All persons who would share in the incompetent's intestate estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least 10 days' written notice that approval for ~~such the~~ gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian ~~or trustee~~ was appointed, within the 10-day period.
- (7) If the gift for which approval is sought is of a nonprobate asset, all persons who would share in that nonprobate asset if the incompetent died contemporaneously with the signing of the order of approval have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of superior court of the county in which the guardian was appointed within the 10-day period. This notice requirement shall be in addition to the notice requirements contained in G.S. 35A-1341(6)a.3. and (6)b.2."

Section 6. Chapter 35A of the General Statutes is amended by adding a new section to read:

**"§ 35A-1341.1. Prerequisites to approval by judge of gifts to individuals.**

The judge shall not approve gifts from principal to individuals unless it appears to the judge's satisfaction that all of the following requirements have been met:

- (1) Making the gifts will not leave the incompetent's remaining principal estate insufficient to provide reasonable and adequate income for the support, maintenance, comfort, and welfare of the incompetent in order to maintain the incompetent and any dependents legally entitled to support from the incompetent in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life.
- (2) The making of the gifts will not jeopardize the rights of any existing creditor of the incompetent.
- (3) It is improbable that the incompetent will recover competency during his or her lifetime.
- (4) The judge determines that either a., b., c., or d. applies.
  - a. All of the following apply:
    1. The incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by the laws of North Carolina for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent.
    2. Each donee is entitled to one or more specific legacies, bequests, devises, or distributions of specific amounts of money, income, or property under either the paper-writing or revocable trust or both or is a residuary legatee, devisee, or beneficiary designated in the paper-writing or revocable trust or both.
    3. The making of the gifts will not jeopardize any specific legacy, bequest, devise, or distribution of specific amounts of money, income, or property.
  - b. That so far as is known the incompetent has not, prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent, and each donee is a person who would share in the incompetent's intestate estate, if the incompetent died contemporaneously with the signing of the order of approval of the gifts.
  - c. The donee is a person who would share in the incompetent's nonprobate estate, if the incompetent died contemporaneously with the signing of the order of approval.
  - d. The donee is the spouse, parent, descendant of the incompetent, or descendant of the incompetent's parent, and the amount of the gift does not exceed the federal annual gift tax exclusion.

- (5) If the incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by the laws of North Carolina for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent; then all residuary legatees, devisees, and beneficiaries designated in the paper-writing or revocable trust or both, who would take under the paper-writing or revocable trust or both if the incompetent died contemporaneously with the signing of the order of approval of the gifts and the paper-writing was probated as the incompetent's will, the spouse, if any, of the incompetent and all persons identified in G.S. 35A-1341.1(7) have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of superior court of the county in which the guardian was appointed, within the 10-day period.
- (6) If so far as is known, the incompetent has not, prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent, all persons who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of the superior court of the county in which the guardian was appointed, within the 10-day period.
- (7) If the gift for which approval is sought is of a nonprobate asset, all persons who would share in that nonprobate asset if the incompetent died contemporaneously with the signing of the order of approval have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of the superior court of the county in which the guardian was appointed within the 10-day period. This notice requirement shall be in addition to the notice requirements contained in G.S. 35A-1341.1(5) and (6) above.

The judge may order that the gifts be made in cash or in specific assets and may order that the gifts be made outright, in trust, under the North Carolina Uniform Transfers to Minors Act, under the North Carolina Uniform Custodial Trust Act, or otherwise. The judge may also order that the gifts be treated as an advancement of some or all of the amount the donee would otherwise receive at the incompetent's death."

Section 7. G.S. 35A-1342 reads as rewritten:

**"§ 35A-1342. Who deemed specific and residuary legatees and devisees of incompetent under § 35A-1341.**

For purposes of G.S. 35A-1341(6)a and G.S. 35A-1341.1(4) and (5), ~~of this Article, if such paper-writing~~ the paper-writing provides for the residuary estate to be placed in trust for a term of years, or if the paper-writing names as beneficiary a revocable trust created by the incompetent, and the trust or trusts include dispositive provisions which

provide that assets continue in trust for a term of years with stated amounts of income payable to designated beneficiaries during the term and stated amounts payable to designated beneficiaries upon termination of the trust, such trust or trusts, the designated beneficiaries shall be deemed to be specific legatees and devisees, legatees, devisees, and beneficiaries and those taking the remaining income of the trust or trusts and, at the end of the term, the remaining principal shall be deemed to be residuary legatees and devisees, legatees, devisees, and beneficiaries who would take under the paper writing paper-writing or revocable trust or both if the incompetent died contemporaneously with the signing of the order of approval of such the gifts. In no case shall any prospective executor or trustee be considered either a specific or residuary legatee and devisee legatee, devisee, or beneficiary on the sole basis of prospective service as executor or trustee."

Section 8. G.S. 35A-1343 reads as rewritten:

**"§ 35A-1343. Notice to minors and incompetents under ~~§ 35A-1341~~, § 35A-1341 and § 35A-1341.1.**

If any person, to whom notice must be given under the provisions of G.S. ~~35A-1341(6)~~ 35A-1341 and G.S. 35A-1341.1 ~~of this Article~~, is a minor or is incompetent, or is an unborn or unascertained beneficiary, then the notice shall be given to his duly appointed guardian or other duly appointed representative: Provided, that if a ~~minor or incompetent~~ minor, incompetent, unborn, or unascertained beneficiary has no such guardian or ~~representative~~ representative, then a guardian ad litem shall be appointed by the judge and ~~such the~~ guardian ad litem shall be given the notice herein required."

Section 9. G.S. 35A-1251 reads as rewritten:

**"§ 35A-1251. Guardian's powers in administering incompetent ward's estate.**

In the case of an incompetent ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:

- (1) To take possession, for the ward's use, of all the ward's estate, as defined in G.S. 35A-1202(5).
- (2) To receive assets due the ward from any source.
- (3) To maintain any appropriate action or proceeding to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.
- (4) To complete performance of contracts entered into by the ward that continue as obligations of the ward or his estate, or to refuse to complete ~~such the~~ contracts, as the guardian determines to be in the ward's best interests, taking into account any cause of action that might

be maintained against the ward for failure to complete ~~such~~the contract.

- (5) To abandon or relinquish all rights in any property when, in the guardian's opinion, acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in ~~such~~a condition that it is of no benefit or value to the ward or his estate.
- (5a) To renounce any interest in property as provided in Chapter 31B of the General Statutes, or as otherwise allowed by law.
- (6) To vote shares of stock or other securities in person or by general or limited proxy, and to pay sums chargeable or accruing against or on account of securities owned by the ward.
- (7) To insure the ward's assets against damage or loss, at the expense of the ward's estate.
- (8) To pay the ward's debts and obligations that were incurred prior to the date of adjudication of incompetence or appointment of a guardian when the debt or obligation was incurred for necessary living expenses or taxes; or when the debt or obligation involves a specific lien on real or personal property, if the ward has an equity in the property on which there is a specific lien; or when the guardian is convinced that payment of the debt or obligation is in the best interest of the ward or his estate.
- (9) To renew the ward's obligations for the payment of money. The guardian's execution of any obligation for the payment of money pursuant to this subsection shall not be held or construed to be binding on the guardian personally.
- (10) To pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the ward's estate.
- (11) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.
- (12) To expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal.
- (13) To pay from the ward's estate necessary expenses of administering the ward's estate.
- (14) To employ persons, including attorneys, auditors, investment advisors, appraisers, or agents to advise or assist him in the performance of his duties as guardian.
- (15) To continue any business or venture or farming operation in which the ward was engaged, where ~~such~~that continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the ward's interest in ~~such~~the business.
- (16) To acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the



generality of the foregoing, bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.

- (17) a. Without a court order to lease any of the ward's real estate for a term of not more than three years, or to sell, lease or exchange any of the ward's personal property including securities, provided that the aggregate value of all items of the ward's tangible personal property sold without court order over the duration of the estate shall not exceed one thousand five hundred dollars (\$1,500). When any item of the ward's tangible personal property has a value which when increased by the value of all other tangible personal property previously sold in the estate without a court order would exceed one thousand five hundred dollars (\$1,500), a guardian may sell the item only as provided in subdivision (17)b.
- b. A guardian who is required by subdivision (17)a to do so shall, and any other guardian who so desires may, by motion in the cause, request the court to issue him an order to lease any of the ward's real estate or to sell any item or items of the ward's personal property. Notice of the motion and of the date, time and place of a hearing thereon shall be served, as provided in G.S. 1A-1, Rule 5, Rules of Civil Procedure, upon all parties of record and upon ~~such any~~ other persons as the clerk may direct, and the court may issue the order after conducting a hearing and upon ~~such any~~ conditions as that the court may require; provided that:
1. A sale, lease, or exchange under this subdivision may not be subject to Article 29A of Chapter 1 of the General Statutes unless the order so requires; and
  2. The power granted in this subdivision shall not affect the power of the guardian to petition the court for prior approval of expenditures from estate principal under subdivision (12) of this section.
- (18) To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed or trust, or other lien securing ~~such the~~ bond, note or other obligation, and to bid in the property at ~~such a~~ foreclosure sale, or to acquire the property deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

- (19) To borrow money for ~~such~~ any periods of time and upon ~~such~~ the terms and conditions as to rates, maturities, renewals, and security as the guardian shall deem advisable, including the power of a corporate guardian to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the ward, and to mortgage, pledge, or otherwise encumber ~~such~~ that portion of the ward's estate as may be required to secure ~~such~~ the loan or loans; provided, in respect to the borrowing of money on the security of the ward's real property, Subchapter III of this Chapter is controlling.
- (20) To execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian.
- (21) To expend estate income for the support, maintenance, and education of the ward's minor children, spouse, and dependents, and to petition the court for prior approval of expenditures from estate principal for these purposes; provided, the clerk, in the original order appointing the guardian or a subsequent order, may require that the expenditures from estate income also be approved in advance. In determining whether and in what amount to make or approve these expenditures, the guardian or clerk shall take into account the ward's legal obligations to his minor children, spouse, and dependents; the sufficiency of the ward's estate to meet the ward's needs; the needs and resources of the ward's minor children, spouse, and dependents; and the ward's conduct or expressed wishes, prior to becoming incompetent, in regard to the support of these persons.
- (22) To transfer to the spouse of the ward those amounts authorized for transfer to the spouse pursuant to 42 United States Code § 1396r-5.
- (23) To create a trust for the benefit of the ward pursuant to 42 United States Code § 1396p(d)(4), provided that all amounts remaining in the trust upon the death of the ward, other than those amounts which must be paid to a state government, are to be paid to the estate of the ward.
- (24) To petition the court for prior approval of transfers of assets of the ward to a revocable trust executed by the ward prior to the ward being declared incompetent, provided that the ward executed a paper-writing with all the formalities required by the laws of North Carolina for the execution of a valid will prior to the ward being declared incompetent and that will directs that the assets that are being transferred to the trust are to be distributed to the trust at the ward's death or the revocable trust has the same dispositive provisions as the ward's will or provides that the assets in the trust are to be distributed to the ward's estate upon the death of the ward. The guardian may at any time withdraw any assets (or the proceeds of the sale of any assets) transferred by the guardian to the trust upon 30 days' written notice to the trustee of the trust; provided, however, no assets which have been distributed or otherwise disposed of by the trustee (before the notice is received by

the trustee) in accordance with the terms of the trust can be so withdrawn."

Section 10. This act becomes effective October 1, 1999.

In the General Assembly read three times and ratified this the 28th day of June, 1999.

s/ Dennis A. Wicker  
President of the Senate

s/ James B. Black  
Speaker of the House of Representatives

s/ James B. Hunt, Jr.  
Governor

Approved 2:05 p.m. this 9th day of July, 1999