

## Article 19.

Declaring Revocable Trust Irrevocable and Making Gift of Incompetent's Life Interest Therein.

### **§ 35A-1350. Declaration and gift for certain purposes authorized with approval of judge of superior court.**

When a person has created a revocable trust, reserving the income for life, and thereafter has been judicially declared to be incompetent, the guardian or trustee of such incompetent, with the approval of the resident judge of the superior court of the district in which he was appointed, upon a duly verified petition may declare the trust to be irrevocable and make a gift of the life interest of the incompetent 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. (1963, c. 113, s. 1; 1987, c. 550, s. 6.)

### **§ 35A-1351. Prerequisites to approval of gift.**

The judge shall not approve the gift unless it appears to the judge's satisfaction that:

- (1) It is improbable that the incompetent will recover competency during his or her lifetime;
- (2) The estate of the incompetent, after making the gift and after payment of any gift taxes which may be incurred by reason of the declaration of irrevocability, will be sufficient 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 dependents in the manner to which the incompetent and such 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 gift, of expenditures for the incompetent's support, maintenance, comfort and welfare);
- (3) Each donee of any part of the life interest 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;
- (4) Each donee of any part of the life interest is a donee qualified to receive tax deductible gifts under federal and State income tax laws.
- (5) Either:
  - a. 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;
  2. Specific devises of specific amounts of money, income or property included in such paper-writing, will not be jeopardized by making such gifts;
  3. All residuary devisees designated in such paper-writing, who would take under the paper-writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts, and such paper-writing was probated as the incompetent's will and the spouse, if any, of such incompetent have been given at least 10 days' written notice that approval for such 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; or
- b. 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 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 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. (1963, c. 113, s. 2; 1987, c. 550, s. 6; 2011-284, s. 43.)

**§ 35A-1352. Who deemed specific and residuary devisees of incompetent under § 35A-1351.**

For purposes of G.S. 35A-1351(5)a. of this Article, if such paper-writing provides for the residuary estate to be placed 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 designated beneficiaries shall be deemed to be specific devisees and those taking the remaining income of the trust and, at the end of the term, the remaining principal shall be deemed to be residuary devisees who would take under the paper-writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts. In no case shall any prospective executor or trustee be considered either a specific or residuary devisee. (1963, c. 113, s. 3; 1987, c. 550, s. 6; 2011-284, s. 44.)

**§ 35A-1353. Notice to minors and incompetents under § 35A-1351.**

If any person, to whom notice must be given under the provisions of G.S. 35A-1351(5) of this Article, is a minor or is incompetent, then the notice shall be given to his duly appointed guardian or other duly appointed representative: Provided, that if a minor or incompetent has no such guardian or representative, then a guardian ad litem shall be appointed by the judge and such guardian ad litem shall be given the notice herein required. (1963, c. 113, s. 4; 1987, c. 550, s. 6.)

**§ 35A-1354. Objections to proposed declaration and gift; fact that incompetent had not previously made similar gifts.**

If any objection is filed by one to whom notice has been given under the terms of this Article, the clerk shall bring it to the attention of the judge, who shall hear the same, and determine the validity and materiality of such objection and make his order accordingly. If no such objection is filed, the judge shall include a finding to that effect in such order as he may make. The judge shall not withhold his approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type. (1963, c. 113, s. 5; 1987, c. 550, s. 6.)

**§ 35A-1355. Validity of declaration and gift.**

Such declaration and gift, when made with the approval of the judge and under the provisions of this Article, shall be deemed to be the declaration and gift of the incompetent and shall be as valid in all respects as if made by a competent person. (1963, c. 113, s. 6; 1987, c. 550, s. 6.)

**§§ 35A-1356 through 35A-1359: Reserved for future codification purposes.**