

## Chapter 31D.

### North Carolina Uniform Powers of Appointment Act.

#### Article 1.

##### General Provisions and Definitions.

#### § 31D-1-101. Short title.

This Chapter may be cited as the North Carolina Uniform Powers of Appointment Act. (2015-205, s. 3(a).)

#### § 31D-1-102. Definitions.

The following definitions apply in this Chapter:

- (1) "Appointee" means a person to whom a power holder makes an appointment of appointive property.
- (2) "Appointive property" means the property or property interest subject to a power of appointment.
- (3) "Blanket-exercise clause" means a clause in an instrument which exercises a power of appointment and is not a specific-exercise clause. The term includes a clause that:
  - a. Expressly uses the words "any power" in exercising any power of appointment the power holder has.
  - b. Expressly uses the words "any property" in appointing any property over which the power holder has a power of appointment.
  - c. Disposes of all property subject to disposition by the power holder.
- (4) "Donor" means a person who creates a power of appointment.
- (5) "Exclusionary power of appointment" means a power of appointment exercisable in favor of any one or more of the permissible appointees to the exclusion of the other permissible appointees.
- (6) "General power of appointment" means a power of appointment exercisable in favor of the power holder, the power holder's estate, a creditor of the power holder, or a creditor of the power holder's estate.
- (7) "Gift-in-default clause" means a clause identifying a taker in default of appointment.
- (8) "Impermissible appointee" means a person that is not a permissible appointee.
- (9) "Instrument" means a writing.
- (10) "Nongeneral power of appointment" means a power of appointment that is not a general power of appointment.
- (11) "Permissible appointee" means a person in whose favor a power holder may exercise a power of appointment.
- (12) "Person" means an individual, estate, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, instrumentality, or other legal entity.
- (13) "Power holder" means a person in whom a donor creates a power of appointment.
- (14) "Power of appointment" means a power that enables a power holder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or

another power of appointment over the appointive property. The power of appointment may be general or nongeneral and presently exercisable or not presently exercisable. The term does not include a power of attorney.

- (15) "Presently exercisable power of appointment" means a power of appointment exercisable by the power holder at the relevant time. The term:
  - a. Includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard relating to an individual's health, education, and support or maintenance within the meaning of section 2041(b)(1)(A) or section 2514(c)(1) of the Internal Revenue Code, as amended, or the passage of a specified time only after one of the following:
    - 1. The occurrence of the specified event.
    - 2. The satisfaction of the ascertainable standard.
    - 3. The passage of the specified time.
  - b. Does not include a power exercisable only at the power holder's death.
- (16) "Specific-exercise clause" means a clause in an instrument which specifically refers to and exercises a particular power of appointment.
- (17) "Taker in default of appointment" means a person who takes all or part of the appointive property to the extent the power holder does not effectively exercise the power of appointment.
- (18) "Terms of the instrument" means the manifestation of the intent of the maker of the instrument regarding the instrument's provisions as expressed in the instrument or as may be established in a judicial proceeding. (2015-205, s. 3(a).)

### **§ 31D-1-103. Governing law.**

(a) The creation, revocation, or amendment of the power of appointment is governed by either of the following:

- (1) The law of the jurisdiction designated in the terms of the instrument creating the power.
- (2) If no jurisdiction's law is designated in the terms of the instrument creating the power or if the jurisdiction's law so designated is contrary to a strong public policy of the law of the jurisdiction of the donor's domicile at the relevant time, then the law of the jurisdiction of the donor's domicile at the relevant time.

(b) The exercise, release, or disclaimer of the power, or the revocation or amendment of the exercise, release, or disclaimer of the power, is governed by either of the following:

- (1) The law of the jurisdiction designated in the terms of the instrument creating the power.
- (2) If no jurisdiction's law is designated in the terms of the instrument creating the power or if the jurisdiction's law so designated is contrary to a strong public policy of the law of the jurisdiction of the power holder's domicile at the relevant time, then the law of the jurisdiction of the power holder's domicile at the relevant time. (2015-205, s. 3(a).)

### **§ 31D-1-104. Common law and principles of equity.**

The common law and principles of equity supplement this Chapter, except to the extent modified by this Chapter or another statute of this State. (2015-205, s. 3(a).)

## Article 2.

### Creation, Revocation, and Amendment of Power of Appointment.

#### **§ 31D-2-201. Creation of power of appointment.**

- (a) A power of appointment is created only if all of the following apply:
  - (1) The instrument creating the power is valid under applicable law.
  - (2) Except as otherwise provided in subsection (b) of this section, the instrument creating the power transfers the appointive property.
  - (3) The terms of the instrument creating the power manifest the donor's intent to create in a power holder a power of appointment over the appointive property exercisable in favor of a permissible appointee.
- (b) Subdivision (1) of subsection (a) of this section does not apply to the creation of a power of appointment by the exercise of a power of appointment.
- (c) A power of appointment may not be created in a deceased individual.
- (d) Subject to an applicable rule against perpetuities or restraint on alienation, a power of appointment may be created in an unborn or unascertained power holder. (2015-205, s. 3(a).)

#### **§ 31D-2-202. Nontransferability.**

A power holder may not transfer a power of appointment. If a power holder dies without exercising or releasing a power, the power lapses. (2015-205, s. 3(a).)

#### **§ 31D-2-203. Presumption of unlimited authority.**

Subject to the provisions of G.S. 31D-2-205, and unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is all of the following:

- (1) Presently exercisable.
- (2) Exclusionary.
- (3) Except as otherwise provided in G.S. 31D-2-204, general. (2015-205, s. 3(a).)

#### **§ 31D-2-204. Exception to presumption of unlimited authority.**

Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is nongeneral if both of the following apply:

- (1) The power is exercisable only at the power holder's death.
- (2) The permissible appointees of the power are a defined and limited class that does not include the power holder's estate, the power holder's creditors, or the creditors of the power holder's estate. (2015-205, s. 3(a).)

#### **§ 31D-2-205. Rules of classification.**

(a) In this section, the term "adverse party" means a person with a substantial beneficial interest in property who would be affected adversely by a power holder's exercise or nonexercise

of a power of appointment in favor of the power holder, the power holder's estate, a creditor of the power holder, or a creditor of the power holder's estate.

(b) If a power holder may exercise a power of appointment only with the consent or joinder of an adverse party, the power is nongeneral.

(c) If the permissible appointees of a power of appointment are not defined and limited, the power is exclusionary. (2015-205, s. 3(a).)

#### **§ 31D-2-206. Power to revoke or amend.**

A donor may revoke or amend a power of appointment only to the extent that either of the following apply:

- (1) The instrument creating the power is revocable by the donor.
- (2) The donor reserves a power of revocation or amendment in the instrument creating the power of appointment. (2015-205, s. 3(a).)

### Article 3.

#### Exercise of Power of Appointment.

#### **§ 31D-3-301. Requisites for exercise of power of appointment.**

A power of appointment is exercised only to the extent that the appointment is a permissible exercise of the power, and only if all of the following apply:

- (1) The instrument exercising the power is valid under applicable law.
- (2) The terms of the instrument exercising the power manifest the power holder's intent to exercise the power.
- (3) Subject to the provisions of G.S. 31D-3-304, the terms of the instrument exercising the power satisfy the requirements of exercise, if any, imposed by the donor. (2015-205, s. 3(a).)

#### **§ 31D-3-302. Intent to exercise; determining intent from residuary clause.**

A residuary clause that does not contain a blanket-exercisable clause or specific-exercise clause manifests the power holder's intent to exercise a power of appointment only if all of the following apply:

- (1) The terms of the instrument containing the residuary clause (including any valid codicil or amendment to the instrument) do not manifest a contrary intent.
- (2) The power is a general power exercisable in favor of the power holder's estate.
- (3) There is no gift-in-default clause or the clause is ineffective.
- (4) The power holder did not release the power. (2015-205, s. 3(a).)

#### **§ 31D-3-303. Intent to exercise after-acquired power.**

Unless the terms of an instrument exercising a power of appointment manifest a contrary intent:

- (1) If the power holder is not also the donor of the power, a blanket-exercise clause in the instrument extends to a power acquired by the power holder after executing the instrument containing the clause.
- (2) If the power holder is also the donor of the power, the blanket-exercise clause extends to the power acquired by the power holder after executing the instrument only if there is no gift-in-default clause or the gift-in-default clause is ineffective. The blanket-exercise clause does not extend to the power if there is a gift-in-default clause that is effective. (2015-205, s. 3(a).)

**§ 31D-3-304. Substantial compliance with donor-imposed formal requirement.**

A power holder's substantial compliance with a formal requirement of appointment imposed by the donor, including a requirement that the instrument exercising the power of appointment make reference or specific reference to the power, is sufficient if both of the following apply:

- (1) The power holder knows of and intends to exercise the power.
- (2) The power holder's manner of attempted exercise of the power does not impair a material purpose of the donor in imposing the requirement. (2015-205, s. 3(a).)

**§ 31D-3-305. Permissible appointment.**

(a) If a power holder of a general power of appointment permits appointment to the power holder or the power holder's estate, the power holder may make any appointment, including an appointment in trust or an appointment that creates a new power of appointment that the power holder could make in disposing of the power holder's own property.

(b) If a power holder of a general power of appointment permits appointment only to the creditors of the power holder or the creditors of the power holder's estate, or both, the power holder may appoint only to those creditors.

(c) Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power holder of a nongeneral power may:

- (1) Make an appointment in any form, including an appointment in trust, in favor of a permissible appointee.
- (2) Create a general power in a permissible appointee.

(d) The terms of the instrument may permit the power holder of a nongeneral power to create a nongeneral power in any person to appoint to one or more of the permissible appointees of the original nongeneral power. (2015-205, s. 3(a).)

**§ 31D-3-306. Appointment to deceased appointee.**

An appointment to a deceased appointee is ineffective. (2015-205, s. 3(a).)

**§ 31D-3-307. Impermissible appointment.**

(a) An exercise of a power of appointment in favor of an impermissible appointee is ineffective.

(b) An exercise of a power of appointment in favor of a permissible appointee is ineffective to the extent that the appointment is a fraud on the power. (2015-205, s. 3(a).)

**§ 31D-3-308. Selective allocation doctrine.**

If a power holder exercises a power of appointment in a disposition that also disposes of property the power holder owns, the owned property and the appointive property must be allocated in the permissible manner that best carries out the power holder's intent. (2015-205, s. 3(a).)

**§ 31D-3-309. Capture doctrine; disposition of ineffectively appointed property under general power.**

To the extent a power holder of a general power of appointment, other than a power to withdraw property from, revoke, or amend a trust, makes an ineffective appointment:

- (1) The gift-in-default clause controls the disposition of the ineffectively appointed property.
- (2) If there is no gift-in-default clause or to the extent the clause is ineffective, the ineffectively appointed property passes as follows:
  - a. To the power holder if the power holder is a permissible appointee and living.
  - b. If the power holder is an impermissible appointee or deceased, to the power holder's estate if the estate is a permissible appointee.
  - c. If the power holder is an impermissible appointee or deceased and if the estate is not a permissible appointee, under a reversionary interest to the donor or the donor's transferee or successor in interest. (2015-205, s. 3(a).)

**§ 31D-3-310. Disposition of unappointed property under released or unexercised general power.**

(a) To the extent that a power holder releases a general power of appointment other than a power to withdraw property from, revoke, or amend a trust, the gift-in-default clause controls the disposition of the unappointed property. If there is no gift-in-default clause or to the extent that the clause is ineffective, the unappointed property passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

(b) To the extent a power holder fails to exercise a general power of appointment other than a power to withdraw property from, revoke, or amend a trust, the gift-in-default clause controls the disposition of the unappointed property. If there is no gift-in-default clause or to the extent the clause is ineffective, the unappointed property passes as follows:

- (1) To the power holder if the power holder is a permissible appointee and living.
- (2) If the power holder is an impermissible appointee or deceased, to the power holder's estate if the estate is a permissible appointee.
- (3) If the power holder is an impermissible appointee or deceased and if the estate is not a permissible appointee, under a reversionary interest to the donor or the donor's transferee or successor in interest. (2015-205, s. 3(a).)

**§ 31D-3-311. Disposition of unappointed property under released or unexercised nongeneral power.**

To the extent that a power holder releases, ineffectively exercises, or fails to exercise a nongeneral power of appointment:

- (1) The gift-in-default clause controls the disposition of the unappointed property.

- (2) If there is no gift-in-default clause, or to the extent that the clause is ineffective, the unappointed property:
  - a. Passes to the permissible appointees, if both of the following apply:
    1. The permissible appointees are defined and limited.
    2. The terms of the instrument creating the power do not manifest a contrary intent.
  - b. If there is no taker under sub-subdivision a. of this subdivision, passes under a reversionary interest to the donor or the donor's transferee or successor in interest. (2015-205, s. 3(a).)

**§ 31D-3-312. Disposition of unappointed property if partial appointment to taker in default.**

Unless the terms of the instrument creating or exercising a power of appointment manifest a contrary intent, if the power holder makes a valid partial appointment to a taker in default of appointment, then the taker in default of appointment may share fully in unappointed property. (2015-205, s. 3(a).)

**§ 31D-3-313. Appointment to taker in default.**

If a power holder makes an appointment to a taker in default of appointment and the appointee would have taken the property under a gift-in-default clause had the property not been appointed, then the power of appointment is deemed not to have been exercised and the appointee takes under the clause. (2015-205, s. 3(a).)

**§ 31D-3-314. Power holder's authority to revoke or amend exercise.**

If the terms of an instrument creating a power of appointment do not prohibit the power holder from revoking or amending an exercise of the power, a power holder may revoke or amend the exercise of a power only if one of the following apply:

- (1) The instrument creating the exercise of the power of appointment may be revoked or amended.
- (2) The power holder reserves a power of revocation or amendment in the instrument exercising the power of appointment. (2015-205, s. 3(a).)

Article 4.

Disclaimer or Release; Contract to Appoint or Not to Appoint.

**§ 31D-4-401. Disclaimer.**

Consistent with Chapter 31B of the General Statutes:

- (1) A power holder may disclaim all or part of a power of appointment.
- (2) A permissible appointee, appointee, or taker in default of appointment may disclaim all or part of an interest in appointive property. (2015-205, s. 3(a).)

**§ 31D-4-402. Authority to release.**

A power holder may release a power of appointment, in whole or in part, except to the extent that the terms of the instrument creating the power prevent the release. (2015-205, s. 3(a).)

**§ 31D-4-403. Method of release.**

A power holder of a releasable power of appointment may release the power in whole or in part as follows:

- (1) By substantial compliance with a method provided in the terms of the instrument creating the power.
- (2) If the terms of the instrument creating the power do not provide a method or the method provided in the terms of the instrument is not expressly made exclusive, by an instrument manifesting the power holder's intent by clear and convincing evidence. (2015-205, s. 3(a).)

**§ 31D-4-403.1. Necessity for actual notice of release or limitation to bind fiduciary.**

No fiduciary having possession or control of property over which a power of appointment is exercisable shall be bound or affected by any release or limitation of such power without actual notice thereof. (1943, c. 665, s. 4; 2017-102, s. 13(c).)

**§ 31D-4-404. Revocation or amendment of release.**

A power holder may revoke or amend a release of a power of appointment only to the extent that one of the following applies:

- (1) The instrument of release is revocable by the power holder.
- (2) The power holder reserves a power of revocation or amendment in the instrument of release. (2015-205, s. 3(a).)

**§ 31D-4-405. Power to contract; presently exercisable power of appointment.**

A power holder of a presently exercisable power of appointment may contract:

- (1) Not to exercise the power.
- (2) To exercise the power if the contract when made does not confer a benefit on an impermissible appointee. (2015-205, s. 3(a).)

**§ 31D-4-406. Power to contract; power of appointment not presently exercisable.**

A power holder of a power of appointment that is not presently exercisable may contract to exercise or not to exercise the power only if the power holder both:

- (1) Is also the donor of the power.
- (2) Has reserved the power in a revocable trust. (2015-205, s. 3(a).)

**§ 31D-4-407. Remedy for breach of contract to appoint or not to appoint.**

The remedy for a power holder's breach of a contract to appoint or not to appoint appointive property is limited to damages payable out of the appointive property or, if appropriate, specific performance of the contract. (2015-205, s. 3(a).)



## Article 5.

### Rights of Power Holder's Creditors in Appointive Property.

#### **§ 31D-5-501. Creditor claim; general power created by power holder.**

(a) In this section, "power of appointment created by the power holder" includes a power of appointment created in a transfer by another person to the extent the power holder contributed value to the transfer.

(b) Appointive property subject to a general power of appointment created by the power holder is subject to a claim of a creditor of the power holder or of the power holder's estate to the extent provided in the Uniform Voidable Transactions Act, Article 3A of Chapter 39 of the General Statutes.

(c) Subject to subsection (b) of this section, appointive property subject to a general power of appointment created by the power holder is not subject to a claim of a creditor of the power holder or the power holder's estate to the extent the power holder irrevocably appointed the property in favor of a person other than the power holder or the power holder's estate.

(d) Subject to subsections (b) and (c) of this section, and notwithstanding the presence of a spendthrift provision or whether the claim arose before or after the creation of the power of appointment, appointive property subject to a general power of appointment created by the power holder is subject to a claim of a creditor of:

- (1) The power holder, to the same extent as if the power holder owned the appointive property, if the power is presently exercisable.
- (2) The power holder's estate, to the extent that the estate is insufficient to satisfy the claim and subject to the right of a decedent to direct the source from which liabilities are paid, if the power is exercisable at the power holder's death. (2015-205, s. 3(a).)

#### **§ 31D-5-502. Creditor claim; general power not created by power holder.**

(a) Except as otherwise provided in subsection (b) of this section, and only when and to the extent that the power holder exercises the power, appointive property subject to a general power of appointment created by a person other than the power holder is subject to a claim of a creditor of:

- (1) The power holder, to the extent the power holder's property is insufficient, if the power is presently exercisable.
- (2) The power holder's estate, to the extent the estate is insufficient, subject to the right of a decedent to direct the source from which liabilities are paid.

(b) Subject to the provisions of G.S. 31D-5-504(c), a power of appointment created by a person other than the power holder which is subject to an ascertainable standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or section 2514(c)(1) of the Internal Revenue Code, as amended, is treated for purposes of this Article as a nongeneral power. (2015-205, s. 3(a).)

#### **§ 31D-5-503. Power to withdraw.**

(a) For purposes of this Article, a power to withdraw property from a trust is treated as a presently exercisable general power of appointment to the extent of the property subject to the power to withdraw.

(b) The lapse, release, or waiver of a power to withdraw property from a trust shall not be deemed to be an exercise of the power. (2015-205, s. 3(a).)

**§ 31D-5-504. Creditor claim; nongeneral power.**

(a) Except as otherwise provided in subsections (b) and (c) of this section, appointive property subject to a nongeneral power of appointment is exempt from a claim of a creditor of the power holder or the power holder's estate.

(b) Appointive property subject to a nongeneral power of appointment is subject to a claim of a creditor of the power holder or the power holder's estate to the extent that the power holder owned the property and, reserving the nongeneral power, transferred the property in violation of the Uniform Voidable Transactions Act, Article 3A of Chapter 39 of the General Statutes.

(c) If the initial gift in default of appointment is to the power holder or the power holder's estate, a nongeneral power of appointment is treated for purposes of this Article as a general power. (2015-205, s. 3(a).)

**§ 31D-5-505. Requisites of release as against creditors and purchasers for value.**

No release of a power of appointment after March 8, 1943, which is made by the owner of the legal title to real property in this State shall be valid as against creditors and purchasers for a valuable consideration until an instrument in writing setting forth the release is executed and acknowledged in the manner required for a deed and recorded in the county where the real property is. (1943, c. 665, s. 3; 2017-102, s. 13(b); 2017-212, s. 8.4(a).)

Article 6.

Miscellaneous Provisions.

**§ 31D-6-601. Uniformity of application and construction.**

In applying and construing this Chapter, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. (2015-205, s. 3(a).)

**§ 31D-6-602. Relation to Electronic Signatures in Global and National Commerce Act.**

This Chapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq., but does not modify, limit, or supersede section 101(c) of 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of 15 U.S.C. § 7003(b). (2015-205, s. 3(a).)

**§ 31D-6-603. Application to existing relationships.**

(a) Except as otherwise provided in this Chapter, on or after August, 11, 2015:

- (1) This Chapter applies to a power of appointment created before, on or after August 11, 2015.
- (2) This Chapter applies to a judicial proceeding concerning a power of appointment commenced on or after August 11, 2015.
- (3) This Chapter applies to a judicial proceeding concerning a power of appointment commenced before August 11, 2015, unless the court finds that application of a particular provision of this Chapter would interfere substantially with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the particular provision of this Chapter does not apply and the superseded law applies.
- (4) A rule of construction or presumption provided in this Chapter applies to an instrument executed before August 11, 2015, unless there is a clear indication of a contrary intent in the terms of the instrument or unless application of that rule of construction or presumption would impair substantial rights of a party created under North Carolina law in effect prior to August 11, 2015, in which case that rule of construction or presumption does not apply and the superseded rule of construction or presumption applies.
- (5) Except as otherwise provided in subdivisions (1) through (4) of this subsection, an action taken before August 11, 2015, is not affected by this Chapter.
  - (b) If a right is acquired, extinguished, or barred on the expiration of a prescribed period that commenced under law of this State other than this Chapter before August 11, 2015, the law continues to apply to the right. (2015-205, s. 3(a).)