

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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SENATE DRS55181-LL-76 (2/23)

Short Title: Personal Representative/Selling Real Property. (Public)

Sponsors: Senator Clodfelter.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW REGARDING THE AUTHORITY OF A
PERSONAL REPRESENTATIVE TO SELL OR TAKE OTHER ACTION WITH
RESPECT TO REAL PROPERTY OF A DECEDENT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 28A-13-3 reads as rewritten:

"§ 28A-13-3. Powers of a personal representative or fiduciary.

(a) Except as qualified by express limitations imposed in a will of the decedent or a court order, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative has the power to perform in a reasonable and prudent manner every act ~~which~~ that a reasonable and prudent ~~man~~ person would perform incident to the collection, preservation, liquidation or distribution of a decedent's estate so as to accomplish the desired result of settling and distributing the decedent's estate in a safe, orderly, accurate and expeditious manner as provided by law, including but not limited to the powers specified in the following subdivisions:

- (1) To take possession, custody or control of the personal property of the decedent. ~~If in the opinion of the personal representative his possession, custody or control of such property is not necessary for purposes of administration, such property may be left with or surrendered to the heir or devisee presumptively entitled thereto. He has the power to take possession, custody or control of the real property of the decedent if he determines such possession, custody or control is in the best interest of the administration of the estate. Prior to exercising such power over real property the procedure as set out in subsection G.S. 28A 13 3(c) shall be followed. If the personal representative determines that such possession, custody or control is not in the best interest of the administration of the estate such property~~

1 ~~may be left with or surrendered to the heir or devisee presumptively~~
2 ~~entitled thereto.~~ The personal representative may leave with or
3 surrender any personal property to the heir or devisee presumptively
4 entitled to it if, in the opinion of the personal representative, the
5 property is not necessary for purposes of administration of the estate.

6 (1a) To take possession, custody, or control of the real property of the
7 decedent, either under subsection (c) of this section or under
8 G.S. 28A-13-3.1.

9 (2) To retain assets owned by the decedent pending distribution or
10 liquidation even though such assets may include items which are
11 otherwise improper for investment of trust funds.

12 (3) To receive assets from other fiduciaries or other sources.

13 (4) To complete performance of contracts entered into by the decedent
14 that continue as obligations of his estate, or to refuse to complete such
15 contracts, as the personal representative may determine to be in the
16 best interests of the estate, but such refusal shall not limit any cause of
17 action which might have been maintained against decedent if he had
18 refused to complete such contract. In respect to enforceable contracts
19 by the decedent to convey an interest in land, the provisions of
20 G.S. 28A-17-9 are controlling.

21 (5) To deposit, as a fiduciary, funds of the estate in a bank, including a
22 bank operated by the personal representative upon compliance with the
23 provisions of G.S. 36A-63.

24 (6) To make, as a fiduciary, any form of investment allowed by law to the
25 State Treasurer under G.S. 147-69.1, with funds of the estate, when
26 such are not needed to meet debts and expenses immediately payable
27 and are not immediately distributable, including money received from
28 the sale of other assets; or to enter into other short-term loan
29 arrangements that may be appropriate for use by trustees or
30 beneficiaries generally. Provided, that in addition to the types of
31 investments hereby authorized, deposits in interest-bearing accounts of
32 any credit union authorized to do business in this State, when such
33 deposits are insured in the same manner as required by G.S. 147-69.1
34 for deposits in a savings and loan association, are hereby authorized.

35 (7) To abandon or relinquish all rights in any property when, in the
36 opinion of the personal representative acting reasonably and in good
37 faith, it is valueless, or is so encumbered or is otherwise in such
38 condition that it is of no benefit to the estate.

39 (8) To vote shares of stock or other securities in person or by general or
40 limited proxy, and to execute waivers, consents or objections with
41 respect to such stock or securities.

42 (9) To pay calls, assessments, and any other sums chargeable or accruing
43 against or on account of securities.

- 1 (10) To hold shares of stock or other securities in the name of a nominee,
2 without mention of the estate in the instrument representing stock or
3 other securities or in registration records of the issuer thereof;
4 provided, that
5 a. The estate records and all reports or accounts rendered by the
6 personal representative clearly show the ownership of the stock
7 or other securities by the personal representative and the facts
8 regarding its holdings, and
9 b. The nominee shall not have possession of the stock or other
10 securities or access thereto except under the immediate
11 supervision of the personal representative or when such
12 securities are deposited by the personal representative in a
13 clearing corporation as defined in G.S. 25-8-102.

14 Such personal representative shall be personally liable for any acts
15 or omissions of such nominee in connection with such stock or other
16 securities so held, as if such personal representative had done such acts
17 or been guilty of such omissions.

- 18 (11) To insure, at the expense of the estate, the assets of the estate in his
19 possession, custody or control against damage or loss.
- 20 (12) To borrow money for such periods of time and upon such terms and
21 conditions as to rates, maturities, renewals, and security as the personal
22 representative ~~shall deem~~ deems advisable, including the power of a
23 corporate personal representative to borrow from its own banking
24 department, for the purpose of paying debts, taxes, and other claims
25 against the estate, and to mortgage, pledge or otherwise encumber ~~such~~
26 that portion of the estate as that may be required to secure such the
27 loan or loans. In respect to the borrowing of money on the security of
28 the real property of the decedent, G.S. 28A-17-11 is controlling. loans,
29 except that the personal representative shall obtain an order under
30 G.S. 28A-17-11 before borrowing money on the security of the real
31 property of the decedent unless the authority to mortgage, pledge, or
32 otherwise encumber real property of the decedent to secure loans is
33 granted to the personal representative under G.S. 28A-13-3.1.
- 34 (13) To renew obligations of the decedent for the payment of money.
- 35 (14) To advance his own money for the protection of the estate, and for all
36 expenses, losses and liabilities sustained in the administration of the
37 estate or because of the holding or ownership of any estate assets. For
38 such advances, with any interest, the personal representative shall have
39 a lien on the assets of the estate as against a devisee or heir.
- 40 (15) To compromise, adjust, arbitrate, sue on or defend, abandon, or
41 otherwise deal with and settle claims in favor of or against the estate.
- 42 (16) To pay taxes, assessments, his own compensation, and other expenses
43 incident to the collection, care, administration and protection of the
44 assets of the estate in his possession, custody or control.

- 1 (17) To sell or exercise stock subscription or conversion rights; consent,
2 directly or through a committee or other agent, to the reorganization,
3 consolidation, merger, dissolution, or liquidation of a corporation or
4 other business enterprise.
- 5 (18) To allocate items of income or expense to either estate income or
6 principal, as permitted or provided by law.
- 7 (19) To employ persons, including attorneys, auditors, investment advisors,
8 appraisers or agents to advise or assist him in the performance of his
9 administrative duties.
- 10 (20) To continue any business or venture in which the decedent was
11 engaged at the date of his death, where such continuation is reasonably
12 necessary or desirable to preserve the value, including goodwill, of the
13 decedent's interest in such business. With respect to the use of the
14 decedent's interest in a continuing partnership, the provisions of
15 G.S. 59-71 and 59-72 qualify this power; and with respect to farming
16 operations engaged in by the decedent at the time of his death, the
17 provisions of G.S. 28A-13-4 qualify this power.
- 18 (21) To incorporate or participate in the incorporation of any business or
19 venture in which the decedent was engaged at the time of his death.
- 20 (22) To provide for the exoneration of the personal representative from
21 personal liability in any contract entered into on behalf of the estate.
- 22 (23) To maintain actions for the wrongful death of the decedent according
23 to the provisions of Article 18 of this Chapter and to compromise or
24 settle any such claims, whether in litigation or not. Unless all persons
25 who would be entitled to receive any damages recovered under
26 G.S. 28A-18-2(b)(4) are competent adults and have consented in
27 writing, any such settlement shall be subject to the approval of a judge
28 of the court or tribunal exercising jurisdiction over the action or a
29 judge of the district or superior court in cases where no action has
30 previously been filed. If the claim is brought under Article 31 of
31 Chapter 143 of the General Statutes, the settlement is subject to the
32 approval of the Industrial Commission in accordance with that Article.
33 It shall be the duty of the personal representative in distributing the
34 proceeds of such settlement in any instance to take into consideration
35 and to make a fair allocation to those claimants for funeral, burial,
36 hospital and medical expenses which would have been payable from
37 damages which might have been recovered had a wrongful death
38 action gone to judgment in favor of the plaintiff.
- 39 (24) To maintain any appropriate action or proceeding to recover
40 possession of any property of the decedent, or to determine the title
41 thereto; to recover damages for any injury done prior to the death of
42 the decedent to any of his property; and to recover damages for any
43 injury done subsequent to the death of the decedent to such property.

- 1 (25) To purchase at any public or private sale of any real or personal
2 property belonging to the decedent's estate or securing an obligation of
3 the estate as a fiduciary for the benefit of the estate when, in his
4 opinion, it is necessary to prevent a loss to the estate.
- 5 (26) To sell or lease personal property of the estate in the manner
6 prescribed by the provisions of Article 16 of this Chapter.
- 7 (27) To sell or lease real property of the estate ~~in the manner prescribed by~~
8 ~~the provisions of Article 17 of this Chapter.~~ decedent, either under
9 G.S. 28A-13-3.1 or under Article 17 of this Chapter.
- 10 (28) To enter into agreements with taxing authorities to secure the benefit
11 of the federal marital deduction pursuant to G.S. 28A-22-6.
- 12 (29) To pay or satisfy the debts and claims against the decedent's estate in
13 the order and manner prescribed by Article 19 of this Chapter.
- 14 (30) To distribute any sum recovered for the wrongful death of the decedent
15 according to the provisions of G.S. 28A-18-2; and to distribute all
16 other assets available for distribution according to the provisions of
17 this Chapter or as otherwise lawfully authorized.
- 18 (31) To exercise such additional lawful powers as are conferred upon him
19 by the will.
- 20 (32) To execute and deliver all instruments which will accomplish or
21 facilitate the exercise of the powers vested in the personal
22 representative.
- 23 (33) To renounce in accordance with the provisions of Chapter 31B of the
24 General Statutes.

25 (a1) Except as qualified by express limitations imposed in a will of the decedent,
26 and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal
27 representatives, a personal representative shall have absolute discretion to make the
28 election as to which items of the decedent's personal and household effects shall be
29 excluded from the carry over basis provision of the federal income tax law and such
30 election shall be conclusive and binding on all concerned.

31 (b) Any question arising out of the powers conferred by subsections (a) and (a1)
32 above shall be determined in accordance with the provisions of Article 18 of this
33 Chapter.

34 (c) ~~Prior~~ Unless the authority to take possession, custody, or control of real
35 property is granted to the personal representative under G.S. 28A-13-3.1, prior to the
36 personal representative exercising possession, custody or control over real property of
37 the estate ~~he~~ decedent, the personal representative shall petition the clerk of court to
38 obtain an order authorizing ~~such~~ that possession, custody or control. The petition shall
39 include:

- 40 (1) A description of the real property ~~which~~ that is the subject of the
41 petition;
- 42 (2) The names, ages, and addresses, if known, of the devisees and heirs of
43 the decedent;

1 (3) A statement by the personal representative that ~~he~~ the personal
2 representative has determined that ~~such~~ the possession, custody or
3 control is in the best interest of the administration of the estate.

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

12 **SECTION 2.** Article 13 of Chapter 28A of the General Statutes is amended
13 by adding a new section to read:

14 "**§ 28A-13-3.1. Power of personal representative to deal with real property without**
15 **a court order.**

16 (a) A personal representative may, without court order, take possession, custody,
17 and control of the decedent's real property or sell, exchange, give options upon,
18 partition, lease, mortgage, or otherwise dispose of the property to the extent the will
19 expressly grants any of these powers to the personal representative by any of the
20 following grants of power:

21 (1) Incorporation by reference of the powers in G.S. 32-27 when title to
22 the real property is devised to the personal representative;

23 (2) An express power granted to the personal representative in the will
24 when title to the real property is devised to the personal representative;
25 or

26 (3) An express power granted to the personal representative in the will
27 when title to the real property is not devised to the personal
28 representative, if the decedent specifically indicates an intent that the
29 power applies to that real property. For purposes of this section,
30 provisions in the will stating that the power applies to the real property
31 "whether or not title is devised to the personal representative" or "even
32 though title is not devised to the personal representative" or other
33 similar language is sufficient to indicate such an intent.

34 (b) Any party dealing with the personal representative is not under any duty to
35 follow the proceeds or other consideration received by the personal representative from
36 the disposition of the real property pursuant to the exercise of a power authorized by
37 this section."

38 **SECTION 3.** Article 13 of Chapter 28A of the General Statutes is amended
39 by adding a new section to read:

40 "**§ 28A-13-3.2. Notice of taking or disposition of real property not devised to the**
41 **personal representative.**

42 (a) If pursuant to G.S. 28A-13-3.1(a)(3) a personal representative exercises a
43 power to take possession, custody, or control of, or to sell, exchange, give options upon,
44 partition, lease, mortgage, or otherwise dispose of real property of the decedent not

1 devised to the personal representative, the personal representative shall file with the
2 clerk of superior court in the county where the estate administration is pending a notice
3 of the exercise of the power. The notice shall be filed not more than 30 days from the
4 date of:

- 5 (1) Recordation of the deed executed to accomplish the sale, exchange, or
6 partition of the real property;
- 7 (2) Recordation of a lease or other instrument as applicable or the
8 execution of the lease or other applicable instrument that is not
9 required to be recorded by G.S. 47-18 and is not recorded; or
- 10 (3) The initial collection of rent or other affirmative act indicating that the
11 personal representative has taken possession, custody, and control.

12 The notice shall include a description of the real property that is the subject of the
13 notice and a summary of the action taken.

14 (b) The failure of the personal representative to file the notice within the 30-day
15 period shall not affect the validity of the personal representative's authority to exercise
16 the power."

17 **SECTION 4.** G.S. 28A-13-10 reads as rewritten:

18 **"§ 28A-13-10. Liability of personal representative.**

19 (a) Property of Estate. – A personal representative shall is be liable for and
20 chargeable in his the personal representative's accounts with all of the estate of the
21 decedent which that comes into his the personal representative's possession at any time,
22 including all the income therefrom; but he shall not be the personal representative is not
23 liable for any debts due to the decedent or other assets of the estate which that remain
24 uncollected without his the personal representative's fault. Except for commissions
25 allowable by law, he shall not be the personal representative is not entitled to any profits
26 caused by an increase in values, nor be values and is not chargeable with loss by a
27 decrease in value or destruction–destruction, without his the personal representative's
28 fault, of any part of the estate.

29 (b) Property Not a Part of Estate. – A personal representative shall be is
30 chargeable in his the personal representative's accounts with property not a part of the
31 estate which that comes into his the personal representative's possession at any time and
32 shall be is liable to the persons entitled thereto if:

- 33 (1) The property was received under a duty imposed on him the personal
34 representative by law in the capacity of personal representative; or
- 35 (2) He The personal representative has commingled such the property with
36 the assets of the estate.

37 (c) Breach of Duty. – A personal representative shall be is liable and chargeable
38 in his the personal representative's accounts for any loss to the estate arising from his
39 the personal representative's embezzlement or commingling of the estate with other
40 property; for loss to the estate through self-dealing; for any loss to the estate from
41 wrongful acts or omissions of his the personal representative's joint personal
42 representatives which he that the personal representative could have prevented by the
43 exercise of ordinary care; and for any loss to the estate arising from his the personal
44 representative's failure to act in good faith and with such the care, foresight and

1 diligence as that an ordinarily reasonable and prudent ~~man~~ person would act with his the
2 person's own property under like circumstances. If the exercise of power concerning the
3 estate is improper, the personal representative is liable for breach of fiduciary duty to
4 interested persons for resulting damage or loss to the same extent as a trustee of an
5 express trust."

6 **SECTION 5.** G.S. 28A-15-1 reads as rewritten:

7 "**§ 28A-15-1. Assets of the estate generally.**

8 (a) All of the real and personal property, both legal and equitable, of a decedent
9 shall be assets available for the discharge of debts and other claims against his the
10 decedent's estate in the absence of a statute expressly excluding any such property.
11 ~~Provided that before~~ Before real property is ~~selected~~ selected, however, the personal
12 representative must determine that ~~such~~ the selection is in the best interest of the
13 administration of the estate.

14 (b) In determining what property of the estate shall be sold, leased, pledged,
15 mortgaged or exchanged for the payment of the debts of the decedent and other claims
16 against his the decedent's estate, the personal representative shall select the assets which
17 in his the personal representative's judgment are calculated to promote the best interests
18 of the estate. In the selection of assets for this purpose, there shall be no necessary
19 distinction between real and personal property, absent any contrary provision in the will.

20 (c) ~~If it shall be determined by the personal representative~~ the personal
21 representative determines that it is in the best interest of the administration of the estate
22 to sell, lease, or mortgage any real estate or interest therein to obtain money for the
23 payment of debts and other claims against the decedent's estate, the personal
24 representative shall institute a special proceeding before the clerk of superior court ~~for~~
25 ~~such purpose pursuant to~~ under Article 17 of this Chapter, except that no such
26 proceeding shall be required for a ~~sale made pursuant to authority given by will. A~~
27 ~~general provision granting authority to the personal representative to sell the testator's~~
28 ~~real property, or incorporation by reference of the provisions of G.S. 32-27(2) shall be~~
29 ~~sufficient to eliminate the necessity for a proceeding under Article 17.~~ sale, lease, or
30 mortgage under G.S. 28A-13-3.1. If a special proceeding has been instituted by the
31 personal representative ~~pursuant to~~ under G.S. 28A-13-3(c), the personal representative
32 may petition for sale, lease, or mortgage of any real property as a part of that proceeding
33 and is not required to institute a separate special proceeding.

34 (d) ~~The~~ A decedent's crops ~~of every deceased person, remaining~~ that remain
35 ungathered at ~~his~~ the decedent's death, ~~shall, in all cases,~~ belong to the personal
36 representative or ~~collector,~~ collector as part of the personal assets of the decedent's
37 estate; and shall estate and do not pass to the devisee by virtue of any devise of the land,
38 unless ~~such~~ a contrary intent be is manifest and specified in the will."

39 **SECTION 6.** G.S. 28A-15-2 reads as rewritten:

40 "**§ 28A-15-2. Title and possession of property.**

41 (a) Personal Property. ~~Subsequent to~~ After the death of the decedent and ~~prior~~
42 ~~to~~ before the appointment and qualification of the personal representative or collector,
43 the title and the right of possession of personal property of the decedent is vested in his
44 the decedent's heirs; but upon the appointment and qualification of the personal

1 representative or collector, the heirs ~~shall be~~ are divested of such title and right of
2 ~~possession-possession~~, which ~~shall be~~ becomes vested in the personal representative or
3 collector relating back to the time of the decedent's death for purposes of administering
4 the estate of the decedent. But, if in the opinion of the personal representative, ~~his~~ the
5 personal representative's possession, custody and control of any item of personal
6 property is not necessary for purposes of administration, such possession, custody and
7 control may be left with or surrendered to the heir or devisee presumptively entitled
8 thereto.

9 (b) ~~Real Property: Property; Title.~~ Property; Title. – The title to real property of a decedent is
10 ~~vested in his heirs as of the time of his death; but the title to real property of a decedent~~
11 ~~devised under a valid probated will becomes vested in the devisees and shall relate back~~
12 ~~to the decedent's death,~~ subject to the provisions of G.S. 31-39, vests as follows:

13 (1) Subject to subdivisions (2) and (3) of this subsection, title to real
14 property of a decedent is vested in the decedent's heirs as of the time of
15 the decedent's death.

16 (2) Subject to subdivision (3) of this subsection and the provisions of
17 G.S. 28A-17-12 and G.S. 31-39, title to real property of a decedent
18 devised under a valid probated will becomes vested in the devisees and
19 relates back to the decedent's death.

20 (3) If a decedent's will grants the personal representative a power under
21 G.S. 28A-13-3.1 to sell, exchange, or partition decedent's real
22 property, the exercise of that power divests the devisees or heirs of title
23 to the real property and vests title in the personal representative. The
24 devisees' or heirs' title is divested, and the title becomes vested in the
25 personal representative, immediately prior to the recordation of a valid
26 deed executed by the personal representative.

27 (c) Real Property: Leases or Mortgages. – A lease or mortgage of the decedent's
28 real property by the personal representative under G.S. 28A-13-3.1 or under Article 17
29 of this Chapter encumbers the devisee's or heir's title upon the recordation of the lease
30 or other instrument as applicable or upon the execution of the lease or other applicable
31 instrument that is not required to be recorded by G.S. 47-18 and is not recorded.

32 (d) Real Property: Docketed Judgments Against Heir or Devisee. – The interest
33 of any heir or devisee and any person claiming through or against any heir or devisee,
34 including a person holding a docketed judgment against an heir or devisee, is subject to
35 the personal representative's right to sell, exchange, give options upon, partition, lease,
36 mortgage, or otherwise dispose of the real property of the decedent, either under
37 G.S. 28A-13-3.1 or under Article 17 of this Chapter."

38 **SECTION 7.** G.S. 28A-22-1 reads as rewritten:

39 **"§ 28A-22-1. Scheme of distribution; testate and intestate estates.**

40 After the payment of costs of administration, taxes and other valid claims against the
41 decedent's estate, the personal representative shall distribute the remaining assets of the
42 estate in accordance with the terms of decedent's valid probated will or the provisions of
43 Chapter 29 of the General Statutes or as otherwise lawfully authorized. Assets

1 remaining from the sale of real property by the personal representative retain the
2 character of real property for purposes of distribution to the devisee only."

3 **SECTION 8.** G.S. 28A-23-3(b) reads as rewritten:

4 "(b) In determining the amount of ~~such commissions, the commission,~~ both upon
5 personal property received and upon expenditures made, the clerk of superior court shall
6 consider the time, responsibility, trouble and skill involved in the management of the
7 estate. ~~Where~~ When real property is sold to pay debts or legacies, and other claims
8 against the decedent's estate, including costs of administration, the commission shall be
9 computed only on the proceeds actually applied ~~in the payment of debts or legacies. to~~
10 the payment of debts and legacies or other claims. When real property is sold for other
11 reasons under G.S. 28A-13-3.1, the proceeds of the sale shall not be considered in
12 computing the commission."

13 **SECTION 9.** This act becomes effective January 1, 2006, and applies to
14 actions by personal representatives on or after that date.