

Article 18.

Gifts from Principal for Certain Purposes.

**§ 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 was appointed upon a duly verified petition, the guardian 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, 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. (1963, c. 112, s. 1; 1987, c. 550, s. 5; 1999-270, s. 4.)

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

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

- (1) The making of 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 these dependents in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in 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.
- (3) Each donee is a donee qualified to receive tax deductible gifts under federal and State income tax laws.
- (4) The making of the gifts will not jeopardize the rights of any creditor of the incompetent.
- (5) It is improbable that the incompetent will recover competency during his or her 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 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. Specific devises, or nondiscretionary distributions of specific amounts of money, income or property included in the

paper-writing or revocable trust or both, will not be jeopardized by making the gifts.

3. All residuary 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 and the spouse, if any, of the incompetent 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.
- 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 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 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. (1963, c. 112, s. 2; 1987, c. 550, s. 5; 1999-270, s. 5; 2011-284, s. 40.)

**§ 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 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 devisee or beneficiary designated in the paper-writing or revocable trust or both.
    3. The making of the gifts will not jeopardize any specific 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 gift qualifies either for the federal annual gift tax exclusion under section 2503(b) of the Internal Revenue Code or is a qualified transfer for tuition or medical expenses under section 2503(e) of the Internal Revenue Code.
- (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 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. (1999-270, s. 6; 2011-284, s. 41; 2013-91, s. 3(d).)

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

For purposes of G.S. 35A-1341(6)a and G.S. 35A-1341.1(4) and (5), if 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 or trusts, the designated beneficiaries shall be deemed to be specific 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 devisees and beneficiaries 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. In no case shall any prospective executor or trustee be considered either a specific or residuary devisee or beneficiary on the sole basis of prospective service as executor or trustee. (1963, c. 112, s. 3; 1987, c. 550, s. 5; 1999-270, s. 7; 2011-284, s. 42.)

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

If any person, to whom notice must be given under the provisions of G.S. 35A-1341 and G.S. 35A-1341.1 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, incompetent, unborn, or unascertained beneficiary has no guardian or representative, then a guardian ad litem shall be appointed by the judge and the guardian ad litem shall be given the notice herein required. (1963, c. 112, s. 4; 1987, c. 550, s. 5; 1999-270, s. 8.)

**§ 35A-1344. Objections to proposed gift; fact that incompetent had 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. 112, s. 5; 1987, c.550, s. 5.)

**§ 35A-1345. Validity of gift.**

A gift made with the approval of the judge under the provisions of this Article shall be deemed to be a gift made by the incompetent, and shall be as valid in all respects as if made by a competent person. (1963, c. 112, s. 6; 1987, c. 550, s. 5.)

**§§ 35A-1346 through 35A-1349: Reserved for future codification purposes.**