

UNIFORM PROBATE CODE

CHAPTER 322

HOUSE BILL NO. 1111

(Judiciary Committee)

(At the request of the Commission on Uniform State Laws)

UNIFORM PROBATE CODE CHANGES

AN ACT to create and enact section 30.1-05-08 of the North Dakota Century Code, relating to protection of payers and other third parties under the Uniform Probate Code; to amend and reenact sections 30.1-12-02, 30.1-12-08, 30.1-15-12, 30.1-22-01, and 30.1-22-02 of the North Dakota Century Code, relating to the provisions of the Uniform Probate Code Article III which pertain to general provisions of probate of wills and administration; to amend and reenact subsections 4, 5, and 53 of section 30.1-01-06, chapter 30.1-05, section 30.1-06-01, subsection 3 of section 30.1-06-02, subsection 2 of section 30.1-07-03, sections 30.1-09-05, 30.1-09-07, 30.1-09-08, 30.1-09-10, 30.1-09.1-02, subdivision b of subsection 1 and subdivision b of subsection 2 of section 30.1-09.1-06, sections 30.1-09.1-07, 30.1-09.1-09, 30.1-09.1-11, subsection 4 of section 30.1-10-01, subsections 5, 8, and 9 of section 30.1-10-03, and subsections 4, 7, and 8 of section 30.1-10-04 of the North Dakota Century Code as amended or created by sections 2, 15, 16, 20, 31, 33, 34, 36, 39, and 40 of chapter 334 of the 1993 Session Laws, relating to the provisions of the Uniform Probate Code Articles I and II which pertain to definitions, augmented estate, elective share, entitlement of spouse, requirement of survival, nonademption, power of appointment, and probate and nonprobate transfers; to amend and reenact section 51 of chapter 334 of the 1993 Session Laws, relating to the effective date of amendments to the Uniform Probate Code; to repeal section 30.1-04-06 of the North Dakota Century Code, relating to representation; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 4 of section 30.1-01-06 of the North Dakota Century Code as amended by section 2 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

4. "Beneficiary", as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a beneficiary of a beneficiary designation, refers to a beneficiary of an ~~insurance or annuity policy~~, of an account with a payable on death designation, of a security registered in beneficiary form transferable on death, or of a ~~pension, profit-sharing, retirement, or similar benefit plan~~, or other nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing instrument", includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, ~~appointee, or taker in default of a~~

~~power of appointment~~; or a person in whose favor a power of attorney or a power held in any individual, fiduciary, or representative capacity is exercised.

SECTION 2. AMENDMENT. Subsections 5 and 53 of section 30.1-01-06 of the North Dakota Century Code as created by section 2 of chapter 334 of the 1993 Session Laws are amended and reenacted as follows:

5. "Beneficiary designation" refers to a governing instrument naming a beneficiary of an ~~insurance annuity policy~~, of an account with payable on death designation, of a security registered in beneficiary form transferable on death, or of a ~~pension; profit-sharing; retirement; or similar benefit plan~~; or other nonprobate transfer at death.
53. "Survive"; ~~except for purposes of sections 30.1-31-21 through 30.1-31-30~~; means that an individual has neither predeceased an event, including the death of another individual, nor predeceased an event under sections 30.1-04-04 and 30.1-09.1-02. The term includes its derivatives, such as "survives", "survived", "survivor", and "surviving".

SECTION 3. AMENDMENT. Chapter 30.1-05 of the North Dakota Century Code as created by section 15 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

30.1-05-01. (2-201) Elective share.

1. The surviving spouse of a decedent who dies domiciled in this state has a right of election, under the limitations and conditions stated in this chapter, to take an ~~elective share amount equal to the value of the elective share percentage~~ elective share of one-half of the augmented estate; ~~determined by the length of time the spouse and the decedent were married to each other; in accordance with the following schedule:~~

If the decedent and the spouse were married to each other:	The elective share percentage is:
less than 1 year	Supplemental amount only
1 year but less than 2 years	3% of the augmented estate
2 years but less than 3 years	6% of the augmented estate
3 years but less than 4 years	9% of the augmented estate
4 years but less than 5 years	12% of the augmented estate
5 years but less than 6 years	15% of the augmented estate
6 years but less than 7 years	18% of the augmented estate
7 years but less than 8 years	21% of the augmented estate
8 years but less than 9 years	24% of the augmented estate
9 years but less than 10 years	27% of the augmented estate
10 years but less than 11 years	30% of the augmented estate
11 years but less than 12 years	34% of the augmented estate
12 years but less than 13 years	38% of the augmented estate
13 years but less than 14 years	42% of the augmented estate
14 years but less than 15 years	46% of the augmented estate
15 years or more	50% of the augmented estate.

2. If the sum of the amounts described in ~~subdivisions e and subdivision d~~ of subsection 2 of section 30.1-05-02, ~~subdivisions~~ subdivision a and e of subsection 1 of section ~~30.1-05-07~~ 30.1-05-03, and that part of the elective-share amount payable from the decedent's probate estate and

~~reclaimable estates~~ nonprobate transfers to others under subsections 2 and 3 of section ~~30.1-05-07~~ 30.1-05-03 is less than fifty thousand dollars, the surviving spouse is entitled to a supplemental elective-share amount equal to fifty thousand dollars minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent's probate estate and from recipients of the decedent's ~~reclaimable estate~~ nonprobate transfers to others in the order of priority set forth in subsections 2 and 3 of section ~~30.1-05-07~~ 30.1-05-03.

3. If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead allowance, exempt property, and family allowance, if any, are not charged against but are in addition to the elective-share and supplemental elective-share amounts.
4. The right, if any, of the surviving spouse of a decedent who dies domiciled outside this state to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

30.1-05-02. (2-202) Augmented estate.

1. a. In this section:
 - (1) "Bona fide purchaser" means a purchaser for value in good faith and without notice of an adverse claim. Any recorded instrument on which a state documentary fee is noted is prima facie evidence that the transfer described therein was made to a bona fide purchaser. "Decedent's nonprobate transfers to others" means the decedent's nonprobate transfers to persons, other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors, that are included in the augmented estate under subdivision b of subsection 2.
 - (2) "Fractional interest in property held in joint tenancy with the right of survivorship", whether the fractional interest is unilaterally severable or not, means the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants who survive the decedent and which, if the decedent was not a joint tenant, is the number of joint tenants.
 - (3) "Marriage", as it relates to a transfer by the decedent during marriage, means any marriage of the decedent to the decedent's surviving spouse.
 - ~~(2)~~ (4) "Nonadverse party" means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that the person possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.
 - (5) "Power" or "power of appointment" includes a power to designate the beneficiary of a beneficiary designation.

- (3) (6) "Presently exercisable general power of appointment" means a power of appointment under which, at the time in question, the decedent by an exercise of the, whether or not the decedent then had the capacity to exercise the power, held a power could have created an to create a present or future interest; present or future; in the decedent or, the decedent's creditors, the decedent's estate, or the creditors of the decedent's estate, and includes a power to revoke or invade the principle of a trust or other property arrangement.
- (4) (7) "Probate estate" means property, whether movable or immovable, wherever situated, that would pass by intestate succession if the decedent died without a valid will.
- (8) "Property" includes values subject to a beneficiary designation.
- (5) (9) "Right to income" includes a right to payments under an a commercial or private annuity, an annuity trust, a unitrust, or a similar contractual arrangement.
- (6) "Value of property owned by the surviving spouse at the decedent's death" and "value of property to which the surviving spouse succeeds by reason of the decedent's death" include the commuted value of any present or future interest then held by the surviving spouse and the commuted value of amounts payable to the surviving spouse after the decedent's death under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal social security system.
- (10) "Transfer", as it relates to a transfer by or of the decedent, includes:
- (a) An exercise or release of a presently exercisable general power of appointment held by the decedent;
 - (b) A lapse at death of a presently exercisable general power of appointment held by the decedent; and
 - (c) An exercise, release, or lapse of a general power of appointment that the decedent created in the decedent and of a power described in subparagraph b of paragraph 2 of subdivision b of subsection 2 that the decedent conferred on a nonadverse party.
- b. In paragraphs 3 and 4 of subdivision b of subsection 2, a "transfer" includes an exercise or release of a power of appointment; but does not include a lapse of a power of appointment subparagraph a of paragraph 3 of subdivision b of subsection 2, "termination", with respect to a right or interest in property, means that the right or interest terminated by the terms of the governing instrument or that the decedent transferred or relinquished the right or interests; and, with respect to a power over property, means that the power terminated by exercise, release, lapse, in default, or otherwise,

except that, with respect to a power described in subparagraph a of paragraph 1 of subdivision b of subsection 2, "termination" means that the power terminated by exercise or release, but not by lapse nor in default or otherwise.

2. The augmented estate consists of the sum of:
 - a. The value of the decedent's probate estate, reduced by funeral and administration expenses, homestead allowance as defined in section 47-18-01, family allowances ~~and exemptions~~, exempt property, and enforceable claims.
 - b. The value of the decedent's reclaimable estate nonprobate transfers to others, which ~~is~~ are composed of all property, whether movable or immovable, wherever situated, not including in the decedent's probate estate, of any of the following types:
 - (1) Property to the extent the passing of the principal thereof to or for the benefit of any person, other than the decedent's surviving spouse, was subject to of any of the following types that passed outside probate at the decedent's death:
 - (a) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment held by the decedent alone, if the decedent held that power immediately before death or if and to the extent the decedent, while married to the surviving spouse and during the two-year period next preceding the decedent's death, released that power or exercised that power in favor of any person other than the decedent or the decedent's estate, spouse, or surviving spouse created by the decedent during the marriage; the amount included is the value of the property subject to the power, to the extent that the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.
 - (2) (b) Property, to the extent of the decedent's unilaterally severable interest therein The decedent's fractional interest in property, held by the decedent and any other person; except in joint tenancy with the right of survivorship; the amount included is the value of the decedent's fractional interest contributed by the decedent during the marriage, to the extent that that fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse; with right of survivorship; if the decedent held that interest immediately before death or if and to the extent the decedent, while married to the surviving spouse and during the two-year period next preceding the decedent's death, transferred that interest to any person other than the decedent's surviving spouse.

- (2) Proceeds of insurance, including accidental death benefits, on the life of the decedent payable to any person other than the decedent's surviving spouse, if the decedent owned the insurance policy, had the power to change the beneficiary of the insurance policy, or the insurance policy was subject to a presently exercisable general power of appointment held by the decedent alone immediately before death or if and to the extent the decedent, while married to the surviving spouse and during the two-year period next preceding the decedent's death, transferred that policy to any person other than the decedent's surviving spouse.
- (c) The decedent's ownership interest in property or accounts held in POD, TOD, or coownership registration with the right of survivorship; the amount included is the value of the decedent's ownership interest, to the extent that the decedent's ownership interest passed at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.
- (4) (2) Property transferred in any of the following forms by the decedent to any person other than a bona fide purchaser at any time during the decedent's marriage to the surviving spouse, to or for the benefit of any person, other than the decedent's surviving spouse, if the transfer is of any of the following types:
- (a) Any irrevocable transfer to the extent that in which the decedent retained at the time of or during the two-year period next preceding death the right to the possession or enjoyment of, or right to the income from, the property if and to the extent that the decedent's right terminated at or continued beyond the decedent's death; the amount included is the value of the fraction of the property to which the decedent's right related, to the extent that that fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.
- (b) Any transfer to the extent that, at the time of or during the two-year period next preceding the decedent's death, in which the decedent created a power over the income or principal was subject to a power of the transferred property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, for the benefit of the decedent or, the decedent's creditors, the decedent's estate, or the creditors of the decedent's estate; the amount included is the value of the property subject to the power, to the extent that the power was exercisable at the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or to the extent that the property subject to the power passed at the decedent's death, by exercise, release, lapse, in default, or

otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

- (3) Property that passed during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the following types:
- (a) Any property that passed as a result of termination of a right or interest in, or power over, property that would have been included in the augmented estate under subparagraph a, b, or c of paragraph 1 of this subdivision, or under paragraph 2 of this subdivision, if the right, interest, or power had not terminated until the decedent's death; the amount included is the value of the property that would have been included under these subsections, except that the property is valued at the time that the right, interest, or power terminated, and is included only to the extent that the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate, spouse, or surviving spouse.
 - (e) Any transfer of property, to the extent the decedent's contribution to it, as a percentage of the whole, was made during the two-year period next preceding the decedent's death, by which the property is held, at the time of or during the two-year period preceding the decedent's death, by the decedent and another, other than the decedent's surviving spouse, with right of survivorship.
 - ~~(d)~~ (b) Any transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a donee during the two-year period next preceding the decedent's death person other than the decedent's surviving spouse; the amount included is the value of the transferred property to the extent that the aggregate transfers to any one donee in either of the two years ~~exceed~~ exceeded ten thousand dollars.
- c. The value of the decedent's nonprobate transfers to the decedent's surviving spouse, which are composed of all property that passed outside probate at the decedent's death from the decedent to which the surviving spouse ~~succeeds~~ succeeds by reason of the decedent's death (other than by homestead allowance, exempt property, family allowance, testate succession, or intestate succession), including the proceeds of insurance (including accidental death benefits) on the life of the decedent and benefits payable under a retirement plan in which the decedent was a participant, exclusive of:
- (1) The decedent's fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse as surviving joint tenant;

- (2) The decedent's ownership interest in property or accounts held in coownership registration with the right of survivorship, to the extent the decedent's ownership interest passed to the surviving spouse as surviving coowner;
 - (3) Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent that the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds; the amount included is the value of the proceeds, to the extent that they were payable at the decedent's death; and
 - (4) All other property that would have been included in the augmented estate under paragraph 1 or 2 of subdivision b of this subsection had it passed to or for the benefit of a person other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors, but excluding property passing to the surviving spouse under the federal social security system.
- d. The Except to the extent included in the augmented estate under subdivision a or c, the value of property:
- (1) That was owned by the decedent's surviving spouse at the decedent's death, reduced by enforceable claims against that property or that spouse, plus the value of amounts that including:
 - (a) The surviving spouse's fractional interest in property held in joint tenancy with the right of survivorship;
 - (b) The surviving spouse's ownership interest in property or accounts held in coownership registration with the right of survivorship; and
 - (c) Property that passed to the surviving spouse by reason of the decedent's death, but not including the spouse's right to homestead allowance, family allowance, exempt property, or payments under the federal social security system.
 - (2) That would have been includable included in the surviving spouse's reclaimable estate nonprobate transfers to others, other than the spouse's fractional and ownership interest included under subparagraphs a and b of paragraph 1, had the spouse predeceased been the decedent. But amounts that would have been includable in the surviving spouse's reclaimable estate under paragraph 3 of subdivision b of subsection 2 are not valued as if the spouse were deceased. Property included under this paragraph is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account, except that, for purposes of subparagraphs a and b of paragraph 1, the values of the spouse's fractional and ownership interests are determined

immediately before the decedent's death if the decedent was then a joint tenant or a coowner of the property or accounts. The value of property included under this paragraph is reduced in each category by enforceable claims against the included property and is reduced by enforceable claims against the surviving spouse.

3. Any transfer or exercise or release of a power of appointment The value of any property is excluded from the decedent's reclaimable estate nonprobate transfers to others to the extent the decedent received adequate and full consideration in money or money's worth for the a transfer; exercise, or release of the property or if irrevocably made the property was transferred with the written consent or joinder of, or if the transfer was consented to in writing by, the surviving spouse. Life insurance, accident insurance, pension, profit-sharing, retirement, and other benefit plans payable to persons other than the decedent's surviving spouse or the decedent's estate are also excluded from the decedent's nonprobate transfers.
4. Property is valued as of the decedent's death, but property irrevocably transferred during the two-year period next preceding the decedent's death which is included in the decedent's reclaimable estate under paragraphs 1, 2, and 4 of subdivision b of subsection 2 is valued as of the time of the transfer. If the terms of more than one The value of property includes the commuted value of any present or future interest and the commuted value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal social security system.
5. In case of overlapping application to the same property of the paragraphs or subparagraphs of subdivision b of subsection 2 apply, the property is included in the augmented estate under the paragraph or subparagraph that yields provision yielding the highest value, but under any one, but only one, of the overlapping provisions if they all yield the same value. For the purposes of this section, an "irrevocable transfer of property" includes an irrevocable exercise or release of a power of appointment.
5. a. Although under this section a payment, item of property, or other benefit is included in the decedent's reclaimable estate, a payer or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in good faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payer or other third party received written notice from the surviving spouse or spouse's representative of an intention to file a petition for the elective share or that a petition for the elective share has been filed. A payer or other third party is liable for payments made or other actions taken after the payer or other third party received written notice of an intention to file a petition for the elective share or that a petition for the elective share has been filed.

- b: The written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed must be mailed to the payer's or other third-party's main office or home by registered mail or served upon the payer or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed, a payer or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under subsection 4 of section 30.1-05-05, shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under subsection 1 of section 30.1-05-05, or, if filed, the demand for an elective share is withdrawn under subsection 3 of section 30.1-05-05, the court shall order disbursement to the designated beneficiary. Payments, transfers, or deposits made to or with the court discharge the payer or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.
- e: Upon petition to the court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.
6. a: A person who purchases property from a recipient for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this chapter to return the payment, item of property, or benefit nor liable under this chapter for the amount of that payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit included in the decedent's reclaimable estate is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, as provided in section 30.1-14-07.
- b: If any section or part of any section of this chapter is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent's reclaimable estate, a person who, not for value, receives the payment, item of property, or any other benefit, is obligated to return that payment, item of property, or benefit or is personally liable for the amount of that payment or the value of that item of property or benefit, as provided in section 30.1-05-07, to the person who would have been entitled to it were that section or part of that section not preempted.

30.1-05-03. (2-203) Right of election personal to surviving spouse Sources from which elective share payable.

- 1: The right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is filed in the court under

subsection 1 of section 30.1-05-05. If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by the surviving spouse's conservator, guardian, or agent under the authority of a power of attorney.

2. If the election is exercised on behalf of a surviving spouse who is an incapacitated person, the court must set aside that portion of the elective share and supplemental elective share amounts due from the decedent's probate estate and recipients of the decedent's reclaimable estate under subsections 2 and 3 of section 30.1-05-07 and must appoint a trustee to administer that property for the support of the surviving spouse. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. The trustee must administer the trust in accordance with the following terms and such additional terms as the court determines appropriate:
 - a. Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse's support, without court order but with regard to other support, income, and property of the surviving spouse exclusive of benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need.
 - b. During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust, but if the surviving spouse regains capacity, the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse declaring the termination.
 - c. Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property in the following order: under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the surviving spouse; or to that predeceased spouse's heirs under section 30.1-09.1-11.
1. In a proceeding for an elective share, the following are applied first to satisfy the elective share amount and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others:
 - a. Amounts included in the augmented estate under subdivision a of subsection 2 of section 30.1-05-02 which pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under subdivision c of subsection 2 of section 30.1-05-02; and
 - b. Amounts included in the augmented estate under subdivision d of subsection 2 of section 30.1-05-02.

2. If, after the application of subsection 1, the elective-share amount is not fully satisfied or if the surviving spouse is entitled to a supplemental elective-share amount, amounts included in the decedent's probate estate and in the decedent's nonprobate transfers to others, other than amounts included under subparagraph a or b of paragraph 3 of subdivision b of subsection 2 of section 30.1-05-02, are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent's probate estate and that portion of the decedent's nonprobate transfers to others are so applied that liability for the unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is equitably apportioned among the recipients of the decedent's probate estate and of that portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.
3. If, after the application of subsections 1 and 2, the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent's nonprobate transfers to others is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is equitably apportioned among the recipients of that remaining portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

30.1-05-04. (2-204) Waiver of right to elect and of other rights Personal liability of recipients.

1. **The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.**
2. **A surviving spouse's waiver is not enforceable if the surviving spouse proves that:**
 - a. **The waiver, if given effect, would reduce the assets or income available to the surviving spouse to an amount less than those allowed for persons eligible for a program of public assistance;**
 - b. **The surviving spouse did not execute the waiver voluntarily; or**
 - c. **The waiver was unconscionable when it was executed and, before execution of the waiver, the surviving spouse:**
 - (1) **Was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;**
 - (2) **Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided;**
 - (3) **Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.**

3. An issue of unconscionability of a waiver is for decision by the court as a matter of law.
 4. Unless it provides to the contrary, a waiver of "all rights" or equivalent language in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to the person from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.
1. Only original recipients of the decedent's nonprobate transfers to others, and the donees of the recipients of the decedent's nonprobate transfers to others, to the extent the donees have the property or its proceeds, are liable to make a proportional contribution toward satisfaction of the surviving spouse's elective-share or supplemental elective-share amount. A person liable to make contribution may choose to give up the proportional part of the decedent's nonprobate transfers to the person or to pay the value of the amount for which the person is liable.
 2. If any section or part of any section of this chapter is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent's nonprobate transfers to others, a person who, not for value, receives the payment, item of property, or any other benefit, is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of that payment or the value of that item of property or benefit, as provided in section 30.1-05-03, to the person who would have been entitled to it were that section or part of that section not preempted.

30.1-05-05. (2-205) Proceeding for elective share - Time limit.

1. Except as provided in subsection 2, the election must be made by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within nine months after the date of the decedent's death, or within six months after the probate of the decedent's will, whichever limitation later expires. The surviving spouse shall serve a copy of the petition for the elective share on, and shall give written notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests will may be adversely affected by the taking of the elective share. Except as provided in subsection 2, the decedent's reclaimable estate nonprobate transfers to others, described in subdivision b of subsection 2 of section 30.1-05-02, is not included within the augmented estate for the purpose of computing the elective share, if the petition is filed more than nine months after the decedent's death.
2. Within nine months after the decedent's death, the surviving spouse may petition the court for an extension of time for making an election. If, within nine months after the decedent's death, the spouse gives notice of the petition to all persons interested in the decedent's reclaimable estate nonprobate transfers to others, the court for cause shown by the surviving spouse may extend the time for election. If the court grants the

spouse's petition for an extension, the decedent's reclaimable estate nonprobate transfers to others, described in subdivision b of subsection 2 of section 30.1-05-02, is not excluded from the augmented estate for the purpose of computing the elective-share and supplemental elective-share amounts, if the spouse makes an election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within the time allowed by the extension.

3. The surviving spouse may withdraw a demand for an elective share at any time before entry of a final determination by the court.
4. After notice and hearing, the court shall determine the elective-share and supplemental elective-share amounts, and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under ~~section 30.1-05-07~~ sections 30.1-05-03 and 30.1-05-04. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than the person would have been under ~~section 30.1-05-07~~ sections 30.1-05-03 and 30.1-05-04, had relief been secured against all persons subject to contribution.
5. An order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.
6. A copy of the order or judgment of the court shall be forwarded immediately to the tax commissioner by the court.

30.1-05-06. (2-206) Effect of election on statutory benefits Right of election personal to surviving spouse - Incapacitated surviving spouse. If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead allowance, exempt property, and family allowance, if any, are not charged against but are in addition to the elective share and supplemental elective-share amounts.

1. The right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is filed in the court under subsection 1 of section 30.1-05-05. If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by the surviving spouse's conservator, guardian, or agent under the authority of a power of attorney.
2. If the election is exercised on behalf of a surviving spouse who is an incapacitated person, the court shall set aside that portion of the elective-share and supplemental elective-share amounts due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others under subsections 2 and 3 of section 30.1-05-03 and shall appoint a trustee to administer that property for the support of the surviving spouse. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an

incapacitated person. The trustee shall administer the trust in accordance with the following terms and any additional terms as the court determines appropriate:

- a. Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse's support, without court order but with regard to other support, income, and property of the surviving spouse exclusive of benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need.
- b. During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust; but if the surviving spouse regains capacity, the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse declaring the termination.
- c. Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property in the following order: under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the surviving spouse; or to that predeceased spouse's heirs under section 30.1-09.1-11.

30.1-05-07. (2-207) Charging spouse with owned assets and gifts received - Liability of others for balance of elective share Waiver of right to elect and of other rights.

1. In a proceeding for an elective share, the following are applied first to satisfy the elective share amount and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's reclaimable estate:
 - a. Amounts included in the augmented estate which pass or have passed to the surviving spouse by testate or intestate succession;
 - b. Amounts included in the augmented estate under subdivision c of subsection 2 of section 30.1-05-02;
 - c. Amounts included in the augmented estate which would have passed to the spouse but were disclaimed;
 - d. Amounts included in the augmented estate under subdivision d of subsection 2 of section 30.1-05-02 up to the applicable percentage thereof. For the purposes of this subdivision, the "applicable percentage" is twice the elective share percentage set forth in the schedule in subsection 1 of section 30.1-05-01 appropriate to the length of time the spouse and the decedent were married to each other.
2. If, after the application of subsection 1, the elective share amount is not fully satisfied or if the surviving spouse is entitled to a supplemental elective share amount, amounts included in the decedent's probate estate

and that portion of the decedent's reclaimable estate other than amounts irrevocably transferred within two years before the decedent's death are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent's probate estate and that portion of the decedent's reclaimable estate are so applied that liability for the unsatisfied balance of the elective share amount or for the supplemental elective-share amount is equitably apportioned among the recipients of the decedent's probate estate and that portion of the decedent's reclaimable estate in proportion to the value of their interests therein.

3. If, after the application of subsections 1 and 2, the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent's reclaimable estate is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is equitably apportioned among the recipients of that portion of the decedent's reclaimable estate in proportion to the value of their interests therein.
 4. Only original recipients of the reclaimable estate described in subdivision b of subsection 2 of section 30-1-05-02, and the donees of the recipients of the reclaimable estate to the extent the donees have the property or its proceeds, are liable to make a proportional contribution toward satisfaction of the surviving spouse's elective-share or supplemental elective-share amount. A person liable to make contribution may choose to give up the proportional part of the reclaimable estate or to pay the value of the amount for which the person is liable.
1. The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.
 2. A surviving spouse's waiver is not enforceable if the surviving spouse proves that:
 - a. The waiver, if given effect, would reduce the assets or income available to the surviving spouse to an amount less than those allowed for persons eligible for medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need;
 - b. The surviving spouse did not execute the waiver voluntarily; or
 - c. The waiver was unconscionable when it was executed and, before execution of the waiver, the surviving spouse:
 - (1) Was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;
 - (2) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and

- (3) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.
3. An issue of unconscionability of a waiver is for decision by the court as a matter of law.
4. Unless it provides to the contrary, a waiver of "all rights" or equivalent language in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to the person from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

SECTION 4. Section 30.1-05-08 of the North Dakota Century Code is created and enacted as follows:

30.1-05-08. (2-208) Protection of payers and other third parties.

1. Although under section 30.1-05-02 a payment, item of property, or other benefit is included in the decedent's nonprobate transfers to others, a payer or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payer or other third party received written notice from the surviving spouse or spouse's representative of an intention to file a petition for the elective share or that a petition for the elective share has been filed. A payer or other third party is liable only for actions taken two or more business days after the payer or other third party received written notice of an intention to file a petition for the elective share or that a petition for the elective share has been filed. The written notice must indicate the name of the decedent, the date of the decedent's death, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that the spouse intends to file a petition for the elective share or that a petition for the elective share has been filed. Any form of service of notice other than that described in subsection 2 is not sufficient to impose liability on a payer or other third party for actions taken pursuant to the governing instrument.
2. The written notice must be mailed to the payer's or other third-party's main office or home by registered mail or served upon the payer or third party in the same manner as a summons in a civil action. Notice to a sales representative of the payer or other third party does not constitute notice to the payer or other third party. Upon receipt of written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed, a payer or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the

decendent's residence. The availability of an action under this section does not prevent the payer or other third party from taking any other action authorized by law or the governing instrument. If no probate proceedings have been commenced, the payer or other third party shall file with the court a copy of the written notice received by the payer or other third party, with the payment of funds or transfer or deposit of property. The court may not charge a filing fee to the payer or other third party for any such payment, transfer, or deposit with the court, even if no probate proceedings have been commenced before the payment, transfer, or deposit. The court shall hold the funds or items of property and, upon its determination under subsection 4 of section 30.1-05-05, shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under subsection 1 of section 30.1-05-05, or, if filed, the demand for an elective share is withdrawn under subsection 3 of section 30.1-05-05, the court shall order disbursement to the designated beneficiary. A filing fee, if any, may be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court. Payments, transfers, or deposits made to or with the court discharge the payer or other third party from all claims under the governing instrument or applicable law for the value of amounts paid to or items of property transferred to or deposited with the court.

3. Upon petition to the court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

SECTION 5. AMENDMENT. Section 30.1-06-01 of the North Dakota Century Code as created by section 16 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

30.1-06-01. (2-301) Entitlement of spouse - Premarital will.

1. If the testator's surviving spouse married the testator after the testator executed a will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised to a descendant of such a child or passes under section 30.1-09-05 or 30.1-09-06 to such a child or to a descendant of such a child, unless:
 - a. It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;
 - b. The will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or
 - c. The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

2. In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift under section 30.1-09-05 or 30.1-09-06 to a descendant of such a child, abate as provided in section 30.1-20-02.

SECTION 6. AMENDMENT. Subsection 3 of section 30.1-06-02 of the North Dakota Century Code as created by section 16 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

3. ~~Except as provided in subsection 1, if~~ If at the time of execution of the will the testator fails to provide in the will for a living child solely because the testator believes the child to be dead, the child is entitled to share in the estate as if the child were an omitted afterborn; or after-adopted child.

SECTION 7. AMENDMENT. Subsection 2 of section 30.1-07-03 of the North Dakota Century Code as created by section 20 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

2. If the right to an elective share is exercised on behalf of a surviving spouse who is an incapacitated person, the personal representative may add any unexpended portions payable under the homestead allowance, exempt property, and family allowance to the trust established under subsection 2 of section ~~30.1-05-03~~ 30.1-05-06.

SECTION 8. AMENDMENT. Section 30.1-09-05 of the North Dakota Century Code as amended by section 31 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

30.1-09-05. (2-603) Antilapse - Deceased devisee - Class gifts.

~~1.~~ **In this section:**

- a. ~~"Alternative devise" means that a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition precedent, condition subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.~~
- b. ~~"Class member" includes an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had the individual survived the testator.~~
- c. ~~"Devise" includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.~~
- d. ~~"Devisee" includes a class member if the devise is in the form of a class gift, an individual or class member who was deceased at the time the testator executed the will as well as an individual or class~~

member who was then living but who failed to survive the testator, and an appointee under a power of appointment exercised by the testator's will:

- e. "Stepchild" is a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, and not of the testator.
 - f. "Surviving devisee" or "surviving descendant" means a devisee or a descendant who neither predeceased the testator nor is deemed to have predeceased the testator under section 30.1-09.1-02.
 - g. "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.
2. If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:
- a. Except as provided in subdivision d, if a devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. They take by representation the property to which the devisee would have been entitled had the devisee survived the testator.
 - b. Except as provided in subdivision d, if a devise is in the form of a class gift, other than a devise to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", "family", or a class described by language of similar import, a substitute gift is created in the deceased devisee or devisee's surviving descendants. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of deceased devisees. Each surviving devisee takes the share to which the devisee would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take by representation the share to which that deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this subdivision, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants.
 - c. For purposes of section 30.1-09-03, words of survivorship, such as in a devise to an individual "if the individual survives me", or in a devise to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.
 - d. If the will creates an alternative devise with respect to a devise for which a substitute gift is created by subdivision a or b, the substitute gift is superseded by the alternative devise only if an expressly designated devisee of the alternative devise is entitled to take under the will.

- c. Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section; whether or not the descendant is an object of the power.
3. If under subsection 2, substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:
- a. Except as provided in subdivision b, the devised property passes under the primary substitute gift.
- b. If there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift.
- c. In this subsection:
- (1) "Primary devise" means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator.
- (2) "Primary substitute gift" means the substitute gift created with respect to the primary devise.
- (3) "Younger-generation devise" means a devise that is to a descendant of a devisee of the primary devise, is an alternative devise with respect to the primary devise, is a devise for which a substitute gift is created, and would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise.
- (4) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation devise. If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if the devisee predeceased the testator, the issue of the deceased devisee who survive the testator by one hundred twenty hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree, then those of more remote degree take by representation. One who would have been a devisee under a class gift if that person had survived the testator is treated as a devisee for purposes of this section where that person's death occurred before or after the execution of the will.

SECTION 9. AMENDMENT. Section 30.1-09-07 of the North Dakota Century Code as amended by section 33 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

30.1-09-07. (2-605) Increase Change in securities - Accessions - Nonademption.

1. If a testator executes a will that devises intended a specific devise of certain securities and the testator then owned securities that meet the description in the will, the devise includes additional securities owned by the testator at death to the extent the additional securities were acquired by the testator after the will was executed as a result of the testator's ownership of the described securities and are securities of any of the following types rather than the equivalent value thereof, the specific devisee is entitled only to:
 - a. Securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options. As much of the devised securities as is a part of the estate at the time of the testator's death.
 - b. Securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization. Any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options.
 - c. Securities of the same organization acquired as a result of a plan of reinvestment. Securities of another entity owned by the testator as a result of a merger, consolidation, reorganization, or other similar action initiated by the entity.
 - d. Any additional securities of the entity owned by the testator as a result of a plan of reinvestment.
2. Distributions in cash before death with respect to a described specifically devised security not provided for in subsection 1 are not part of the specific devise.

SECTION 10. AMENDMENT. Section 30.1-09-08 of the North Dakota Century Code as amended by section 34 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

30.1-09-08. (2-606) Nonademption of specific devises - Unpaid proceeds of sale, condemnation, or insurance - Sale by conservator or agent.

1. A specific devisee has the right to the specifically devised property in the testator's estate at death and:
 - a. Any balance of the purchase price, together with any security interest, owing from a purchaser to the testator at death by reason of sale of the property.
 - b. Any amount of a condemnation award for the taking of the property unpaid at death.
 - c. Any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property.

- d. Property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation.
- e. ~~Real or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real or tangible personal property.~~
2. If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, or if a condemnation award, insurance proceeds, or recovery for injury to the property are paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery. This subsection does not apply if, after the sale, mortgage, condemnation, casualty, or recovery, it was adjudicated that the testator's incapacity ceased and the testator survived the adjudication by one year.
3. The right of a specific devisee under this subsection 2 is reduced by any right the devisee has under subsection 1.
4. ~~For the purposes of the references in subsection 2 to a conservator, subsection 2 does not apply if after the sale, mortgage, condemnation, casualty, or recovery, it was adjudicated that the testator's incapacity ceased and the testator survived the adjudication by one year.~~
5. ~~For the purposes of the references in subsection 2 to an agent acting within the authority of a durable power of attorney for an incapacitated principal, "incapacitated principal" means a principal who is an incapacitated person; no adjudication of incapacity before death is necessary; and the acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal.~~

SECTION 11. AMENDMENT. Section 30.1-09-10 of the North Dakota Century Code as amended by section 36 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

30.1-09-10. (2-608) Exercise of power of appointment. ~~In the absence of a requirement that a power of appointment be exercised by a reference, or by an express or specific reference, to the power, a A general residuary clause in a will, or a will making general disposition of all of the testator's property, expresses an intention to does not exercise a power of appointment held by the testator only if the power is a general power and the creating instrument does not contain a gift if the power is not exercised or the testator's will manifests an unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power.~~

SECTION 12. AMENDMENT. Section 30.1-09.1-02 of the North Dakota Century Code as created by section 39 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

30.1-09.1-02. (2-702) Requirement of survival by one hundred twenty hours.

1. For the purposes of this title, ~~except for purposes of sections 30.1-31-21 through 30.1-31-30;~~ and except as provided in subsection 4 an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by one hundred twenty hours is deemed to have predeceased the event.
2. Except as provided in subsection 4 ~~and except for a security registered in beneficiary form under sections 30.1-31-21 through 30.1-31-30,~~ for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by one hundred twenty hours is deemed to have predeceased the event.
3. Except as provided in subsection 4, if it is not established by clear and convincing evidence that one of two coowners with right of survivorship survived the other coowner by one hundred twenty hours, one-half of the property passes as if one had survived by one hundred twenty hours and one-half as if the other had survived by one hundred twenty hours and there are more than two coowners and it is not established by clear and convincing evidence that at least one of them survived the others by one hundred twenty hours, the property passes in the proportion that one bears to the whole number of coowners. For purposes of this subsection, the term "coowners with right of survivorship" includes joint tenants, tenants by the entirety, and other coowners of property or accounts held under circumstances that entitles one or more to the whole of the property or account on the death of the other or others.
4. ~~This section does not apply~~ Survival by one hundred twenty hours is not required if:
 - a. The governing instrument contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case;
 - b. The governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specific period or expressly requires the individual to survive the event by a specific period; but survival of the event or the specified period must be established by clear and convincing evidence;
 - c. Imposition of a one-hundred-twenty-hour requirement of survival would cause a nonvested property interest or a power of appointment to fail to qualify for validity under subdivision a of subsection 1, subdivision a of subsection 2, or subdivision a of subsection 3 of section 47-02-27.1, or to become invalid under subdivision b of subsection 1, subdivision b of subsection 2, or subdivision b of subsection 3 of section 47-02-27.1; but survival must be established by clear and convincing evidence; or
 - d. The application of ~~this section~~ a one-hundred-twenty-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition; but survival must be established by clear and convincing evidence.

5. a. A payer or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument who, under this section, is not entitled to the payment or item of property, or for having taken any other action in good faith reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payer or other third party received written notice of a claimed lack of entitlement under this section. A payer or other third party is liable for a payment made or other action taken after the payer or other third party received written notice of a claimed lack of entitlement under this section.
 - b. Written notice of a claimed lack of entitlement under subdivision a must be mailed to the payer's or other third party's main office or home by registered mail or served upon the payer or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this section, a payer or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payer or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.
6. a. A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.
 - b. If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

SECTION 13. AMENDMENT. Subdivision b of subsection 1 of section 30.1-09.1-06 of the North Dakota Century Code as created by section 39 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

- b. "Beneficiary" means the beneficiary of a beneficiary designation under which the beneficiary must survive the decedent and includes a class member if the beneficiary designation is in the form of a class gift and includes an individual or class member who was deceased at the time the beneficiary designation was executed as well as an individual or class member who was then living but who failed to survive the decedent, but excludes a joint tenant of a joint tenancy with the right of survivorship and a party to a joint and survivorship account.

SECTION 14. AMENDMENT. Subdivision b of subsection 2 of section 30.1-09.1-06 of the North Dakota Century Code as created by section 39 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

- b. Except as provided in subdivision d, if the beneficiary designation is in the form of a class gift, other than a beneficiary designation to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", "family", or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary of beneficiaries' surviving descendants. The property to which the beneficiaries would have been entitled had all of them survived the decedent passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the decedent. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the decedent. For the purposes of this subdivision, "deceased beneficiary" means a class member who failed to survive the decedent and left one or more surviving descendants.

SECTION 15. AMENDMENT. Section 30.1-09.1-07 of the North Dakota Century Code as created by section 39 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

30.1-09.1-07. (2-707) Survivorship with respect to future interests under the terms of a trust - Substitute takers.

1. In this section:
 - a. "Alternative future interest" means to an expressly created future interest that can take effect in possession or enjoyment instead of another future interest on the happening of one or more events, including survival of an event or failure to survive an event, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause in a will does not create an alternative future interest with respect to a future interest created in a nonresiduary devise in the will, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause.
 - b. "Beneficiary" means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

- c. "Class member" includes an individual who fails to survive the distribution date but who would have taken under a future interest in the form of a class gift had the individual survived the distribution date.
 - d. "Distribution date", with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day.
 - e. "Future interest" includes an alternative future interest and a future interest in the form of a class gift.
 - f. "Future interest under the terms of a trust" means a future interest that was created by a transfer creating a trust or to an existing trust or by an exercise of a power of appointment to an existing trust, directing the continuance of an existing trust, designating a beneficiary of an existing trust, or creating a trust.
 - g. "Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under section 30.1-09.1-02.
2. A future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:
- a. Except as provided in subdivision d, if the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date.
 - b. Except as provided in subdivision d, if the future interest is in the form of a class gift, other than a future interest to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", or "family", or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary ~~or beneficiaries' surviving descendants~~. The property to which the beneficiaries would have been entitled had all of them survived the distribution date passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the distribution date. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date. For the purposes of this paragraph, "deceased beneficiary" means a class member who failed to survive the distribution date and left one or more surviving descendants.

- c. For purposes of section 30.1-09.1-01, words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this ~~section~~ section. Words of survivorship include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed in condition-precedent, condition-subsequent, or any other form.
 - d. If a governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by subdivision a or b, the substitute gift is superseded by the alternative future interest only if an expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment.
3. If, under subsection 2, substitute gifts are created and not superseded with respect to more than one future interest and the future interests are alternative future interests, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:
- a. Except as provided in subdivision b, the property passes under the primary substitute gift.
 - b. If there is a younger-generation future interest, the property passes under the younger-generation substitute gift and not under the primary substitute gift.
 - c. In this subsection:
 - (1) "Primary future interest" means the future interest that would have taken effect had all the deceased beneficiaries of the alternative future interest who left surviving descendants survived the distribution date.
 - (2) "Primary substitute gift" means the substitute gift created with respect to the primary future interest.
 - (3) "Younger-generation future interest" means a future interest that is to a descendant of a beneficiary of the primary future interest, is an alternative future interest with respect to the primary future interest, is a future interest for which a substitute gift is created, and would have taken effect had all the deceased beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary of beneficiaries of the primary future interest.
 - (4) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation future interest.
4. If Except as provided in subsection 5, if, after the application of subsections 2 and 3, there is no surviving taker, the property passes in the following order:
- a. If the trust was created in a nonresiduary devise in the transferor's will or in a codicil to the transferor's will, the property passes under

the residuary clause in the transferor's will; for purposes of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

- b. If no taker is produced by the application of subdivision a, the property passes to the transferor's heirs under section 30.1-09.1-11.

5. If, after the application of subsections 2 and 3, there is no surviving taker and if the future interest was created by the exercise of a power of appointment:

- a. The property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust; and
- b. If no taker is produced by the application of subdivision a, the property passes as provided in subsection 4. For purposes of subsection 4, "transferor" means the donor if the power was a nongeneral power and means the donee if the power was a general power.

SECTION 16. AMENDMENT. Section 30.1-09.1-09 of the North Dakota Century Code as created by section 39 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

30.1-09.1-09. (2-709) Representation - Per capita at each generation - Representation - Per stirpes.

1. In this section:
 - a. "Deceased child" or "deceased descendant" means a child or a descendant who either predeceased the distribution date or is deemed to have predeceased the distribution date under section 30.1-09.1-02.
 - b. "Distribution date", with respect to an interest, means the time when the interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day.
 - c. "Surviving ancestor", "surviving child", or "surviving descendant" means an ancestor, a child, or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under section 30.1-09.1-02.
2. If an applicable statute or a governing instrument calls for property to be distributed "~~by representation~~" or "per capita at each generation", the property is divided into as many equal shares as there are surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants and deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the distribution date.

3. If an applicable statute or a governing instrument calls for property to be distributed "by representation" or "per stirpes", the property is divided into as many equal shares as there are surviving children of the designated ancestor and deceased children who left surviving descendants. Each surviving child is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.
4. For the purposes of subsections 2 and 3, an individual who is deceased and left no surviving descendant is disregarded, and an individual who leaves a surviving ancestor who is a descendant of the designated ancestor is not entitled to a share.

SECTION 17. AMENDMENT. Section 30.1-09.1-11 of the North Dakota Century Code as created by section 39 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

30.1-09.1-11. (2-711) Future interests in heirs and like. If an applicable statute or a governing instrument calls for a present or future distribution to or creates a present or future interest in a designated individual's "heirs", "heirs at law", "next of kin", "relatives", or "family", or language of similar import, the property passes to those persons, including the state ~~under section 30.1-04-05~~, and in such shares as would succeed to the designated individual's intestate estate under the intestate succession law of the designated individual's domicile if the designated individual died when the disposition is to take effect in possession or enjoyment. If the designated individual's surviving spouse is living but is remarried at the time the disposition is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.

SECTION 18. AMENDMENT. Subsection 4 of section 30.1-10-01 as created by section 40 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

4. The effects of disclaimer are:
 - a. If property or an interest therein devolves to a disclaimant under a testamentary instrument, under a power of appointment exercised by a testamentary instrument, or under the laws of intestacy, and the decedent has not provided for another disposition of that interest, should it be disclaimed, or of disclaimed or failed interests in general, the disclaimed interest devolves as if the disclaimant had predeceased the decedent, but if by law or under the testamentary instrument the descendants of the disclaimant would ~~take the disclaimant's share in the disclaimed interest~~ by representation or otherwise were the disclaimant to predecease the decedent, then the disclaimed interest passes by representation, or passes as directed by the governing instrument, to the descendants of the disclaimant who survive the decedent. A future interest that takes effect in possession or enjoyment after the termination of the estate or interest disclaimed takes effect as if the disclaimant had predeceased the decedent. A disclaimer relates back for all purposes to the date of death of the decedent.
 - b. If property or an interest therein devolves to a disclaimant under a nontestamentary instrument or contract and the instrument or

contract does not provide for another disposition of that interest, should it be disclaimed, or of disclaimed or failed interests in general, the disclaimed ~~interest~~ interest devolves as if the disclaimant has predeceased the effective date of the instrument or contract, but if by law or under the nontestamentary instrument or contract the descendants of the disclaimant would ~~take the disclaimant's share in~~ the disclaimed interest by representation or otherwise were the disclaimant to predecease the effective date of the instrument, then the disclaimed interest passes by representation, or passes as directed by the governing instrument, to the descendants of the disclaimant who survive the effective date of the instrument. A disclaimer relates back for all purposes to that date. A future interest that takes effect in possession or enjoyment at or after the termination of the disclaimed interest takes effect as if the disclaimant had died before the effective date of the instrument or contract that transferred the disclaimed interest.

- c. The disclaimer or the written waiver of the right to disclaim is binding upon the disclaimant or person waiving and all persons claiming through or under either of them.

SECTION 19. AMENDMENT. Subsections 5, 8, and 9 of section 30.1-10-03 of the North Dakota Century Code as created by section 40 of chapter 334 of the 1993 Session Laws are amended and reenacted as follows:

5. Provisions of a governing instrument ~~which are not revoked by this section~~ are given effect as if the killer disclaimed all revoked provisions ~~revoked by this section~~ or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent.
8. a. A payer or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by an intentional and felonious killing, or for having taken any other action in good faith reliance on the validity of the governing instrument, upon request and satisfactory proof of the decedent's death, before the payer or other third party received written notice of a claimed forfeiture or revocation under this section. A payer or other third party does not have a duty or obligation to make any determination as to whether the decedent was a victim of a felonious killing or to seek any evidence with respect to a felonious killing even if the circumstances of the decedent's death are suspicious or questionable as to the beneficiary's participation in any such felonious killing. A payer or other third party is only liable for a payment made or other action actions taken two or more business days after the actual receipt by the payer or other third party received of written notice of a claimed forfeiture or revocation under this section. The payer or other third party may be liable for actions taken pursuant to the governing instrument only if the form of service is that described in subdivision b.
- b. The written notice must indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that a claim of forfeiture or revocation is being made under this section. Written

notice of a claimed forfeiture or revocation under this subsection must be mailed to the payer's or third party's main office or home by registered mail or served upon the payer or other third party in the same manner as a summons in a civil action. Notice to a sales representative of the payer or other third party does not constitute notice to the payer or other third party. Upon receipt of written notice of a claimed forfeiture or revocation under this section, a payer or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. In addition to the actions available under this section, the payer or other third party may take any action authorized by law or the governing instrument. If no probate proceedings have been commenced, the payer or other third party shall file with the court a copy of the written notice received by the payer or other third party, with the payment of funds or transfer or deposit of property. The court may not charge a filing fee to the payer or other third party for the payment to the court of amounts owed or transferred to or deposit with the court of any item of property, even if no probate proceedings have been commenced before the payment, transfer, or deposit. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. A filing fee, if any, may be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court. Payments, transfers, or deposits made to or with the court discharge the payer or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

9. a. A person bona fide purchaser who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.
- b. If this section or any part of this section is preempted by federal law, other than the federal Employee Retirement Income Security Act of 1974, as amended, with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

SECTION 20. AMENDMENT. Subsections 4, 7, and 8 of section 30.1-10-04 of the North Dakota Century Code as created by section 40 of chapter 334 of the 1993 Session Laws are amended and reenacted as follows:

4. Provisions of a governing instrument ~~that are not revoked by this section~~ are given effect as if the former spouse and relatives of the former spouse disclaimed ~~the revoked all provisions revoked by this section~~ or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

7. a. A payer or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in ~~good faith~~ reliance on the validity of the governing instrument, before the payer or other third party received written notice of the divorce, annulment, or remarriage. A payer or other third party does not have a duty or obligation to inquire as to the continued marital relationship between the decedent and a beneficiary or to seek any evidence with respect to a marital relationship. A payer or other third party is only liable for a payment made or other action actions taken two or more business days after the actual receipt by the payer or other third party received of written notice of a claim forfeiture or revocation under this section. The payer or other third party may be liable for actions taken pursuant to the governing instrument only if the form of service is that described in subdivision b.

- b. The written notice must indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that a divorce, annulment, or remarriage of the decedent and the designated beneficiary occurred. Written notice of the divorce, annulment, or remarriage under this subdivision must be mailed to the payer's or other third party's main office or home by registered mail or served upon the payer or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, or remarriage, a payer or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. In addition to the actions available under this section, the payer or other third party may take any action authorized by law or the governing instrument. If no probate proceedings have been commenced, the payer or other third party shall file with the court a copy of the written notice received by the payer or other third party, with the payment of funds or transfer or deposit of property. The court may not charge a filing fee to the payer or other third party for the payment to the court of amounts owed or transferred to or deposit with the court of any item of property, even if no probate proceedings have been commenced before the payment, transfer, or deposit. The court shall hold the funds or item of property and, upon its determination

under this section, shall order disbursement or transfer in accordance with the determination. A filing fee, if any, may be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court. Payments, transfers, or deposits made to or with the court discharge the payer or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

8. a. A person bona fide purchaser who purchases property from a former spouse, relative of a former spouse, or any other person ~~for value and without notice~~, or who receives from a former spouse, relative of a former spouse, or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor liable under this section for the amount of the payment or the value of the item of property or benefit. But a former spouse, relative of a former spouse, or other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.
- b. If this section or any part of this section is preempted by federal law, other than the federal Employee Retirement Income Security Act of 1974, as amended, with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

SECTION 21. AMENDMENT. Section 30.1-12-02 of the North Dakota Century Code is amended and reenacted as follows:

30.1-12-02. (3-102) Necessity of order of probate for will. Except as provided in section 30.1-23-01, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate or an adjudication of probate by the court; ~~except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if:~~

- 1: ~~No court proceeding concerning the succession or administration of the estate has occurred; and~~
- 2: ~~Either the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will; or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.~~

SECTION 22. AMENDMENT. Section 30.1-12-08 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

30.1-12-08. (3-108) Probate, testacy, and appointment proceedings - Ultimate time limit. No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, except:

1. If a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment, or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceedings.
2. Appropriate probate, appointment, or testacy proceedings may be maintained in relation to the estate of an absent, disappeared, or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person.
3. A proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of twelve months from the informal probate or three years from the decedent's death.
4. If no personal representative of a decedent's estate has been appointed in any proceeding within three years after the decedent's death, a proceeding for formal probate of a will or for adjudication of intestacy, with a request for an appointment of a personal representative, may be commenced at any time three years or more after the decedent's death for the sole purpose of establishing inheritance or succession of property in which the decedent possessed an interest at the time of death and for appointment of a personal representative to convey title to that property to the decedent's heirs or devisees. A description of the property must be included within the petition to the court. In addition to the parties specified in section 30.1-15-03, notice of a proceeding under this subsection must also be given to any person in possession of the property and to any person claiming an ownership interest in the property of whom the petitioner has actual or constructive notice. An informal appointment or a formal testacy or appointment proceeding may be commenced thereafter if no proceeding concerning the succession or estate administration has occurred within the three-year period after the decedent's death, but the personal representative has no right to possess estate assets as provided in section 30.1-18-09 beyond that necessary to confirm title to the assets in the successors to the estate and claims other than expenses of administration may not be presented against the estate.
5. A formal testacy proceeding may be commenced at any time after three years from the decedent's death for the purpose of establishing an instrument to direct or control the ownership of property passing or distributable after the decedent's death from one other than the decedent

when the property is to be appointed by the terms of the decedent's will or is to pass or be distributed as a part of the decedent's estate or its transfer is otherwise to be controlled by the terms of the decedent's will.

These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate. In cases under subsection 1 or 2, the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this title which relate to the date of death.

SECTION 23. AMENDMENT. Section 30.1-15-12 of the North Dakota Century Code is amended and reenacted as follows:

30.1-15-12. (3-412) Formal testacy proceedings - Effect of order - Vacation. Subject to appeal and subject to vacation as provided herein and in section 30.1-15-13, a formal testacy order under sections 30.1-15-09 through 30.1-15-11, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

1. The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will ~~were~~:
 - a. Were unaware of its existence at the time of the earlier proceeding; or ~~were~~
 - b. Were unaware of the earlier proceeding and were given no notice thereof, except by publication.
2. If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted from the determination and it is also shown that the persons ~~were~~:
 - a. Were unaware of their relationship to the decedent; ~~were~~;
 - b. Were unaware of ~~his~~ the decedent's death; or ~~were~~
 - c. Were given no notice of any proceeding concerning ~~his~~ the decedent's estate, except by publication.
3. A petition for vacation under either subsection 1 or 2 must be filed prior to the earlier of the following time limits:
 - a. If a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, six months after the filing of the closing statement.
 - b. Whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by section 30.1-12-08 when it is no longer possible to initiate an original proceeding to probate a will of the decedent.

- c. Twelve months after the entry of the order sought to be vacated.
4. The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs.
5. The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at his last known address and the court finds that a search under subsection 2 of section 30.1-15-03 was made.

If the alleged decedent is not dead, even if notice was sent and search was made, he may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any of the estate or its proceeds from distributees which is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all of the circumstances.

SECTION 24. AMENDMENT. Section 30.1-22-01 of the North Dakota Century Code is amended and reenacted as follows:

30.1-22-01. (3-1101) Effect of approval of agreements involving trusts, inalienable interests, or interest of third persons. A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any probated will governing instrument, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto including those unborn, unascertained, or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it.

SECTION 25. AMENDMENT. Section 30.1-22-02 of the North Dakota Century Code is amended and reenacted as follows:

30.1-22-02. (3-1102) Procedure for securing court approval of compromise. The procedure for securing court approval of a compromise is as follows:

1. The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents or guardians acting for any minor children having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.
2. Any interested person, including the personal representative, if any, or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.
3. After notice to all interested persons or their representatives, including the personal representative of ~~the~~ any estate and all affected trustees, the court, if it finds that the contest or controversy is in good faith and that

the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries under its supervision to execute the agreement. Minor children represented only by their parents or guardians may be bound only if their parents or guardians join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

SECTION 26. REPEAL. Section 30.1-04-06 of the North Dakota Century Code, as amended by section 8 of chapter 334 of the 1993 Session Laws, is repealed.

SECTION 27. AMENDMENT. Section 51 of chapter 334 of the 1993 Session Laws is amended and reenacted as follows:

SECTION 51. EFFECTIVE DATE. This Act becomes effective on ~~August 1, 1995~~ January 1, 1996.

SECTION 28. EFFECTIVE DATE. Sections 1 through 26 of this Act become effective on January 1, 1996.

Approved March 10, 1995

Filed March 13, 1995

CHAPTER 323**SENATE BILL NO. 2337**

(Senators Holmberg, Traynor)

**FOREIGN PERSONAL REPRESENTATIVE
APPOINTMENT**

AN ACT to amend and reenact section 30.1-24-05 of the North Dakota Century Code, relating to orders concerning the appointment of a foreign personal representative.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 30.1-24-05 of the North Dakota Century Code is amended and reenacted as follows:

30.1-24-05. (4-204) Proof of authority - Bond. If no local administration or application or petition therefor is pending in this state, a domiciliary foreign personal representative may file with a court in this state, in a county in which property belonging to the decedent is located, authenticated copies of his appointment and of any official bond he has given, and the court shall enter an order establishing the filing of the copies.

Approved March 1, 1995

Filed March 1, 1995

CHAPTER 324**SENATE BILL NO. 2240**

(Senators Traynor, Nething, W. Stenehjerm)
(Representatives Kretschmar, Mahoney, Nicholas)

GIFTS UNDER POWER OF ATTORNEY

AN ACT to create and enact a new section to chapter 30.1-30 of the North Dakota Century Code, relating to the making of gifts under a power of attorney.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 30.1-30 of the North Dakota Century Code is created and enacted as follows:

Gifts under power of attorney. If any power of attorney, durable or otherwise, or other writing authorizes an attorney in fact or other agent to perform any act that the principal might or could do or evidences the principal's intent to give the attorney in fact or agent full power to handle the principal's affairs or deal with the principal's property, the attorney in fact or agent may make gifts. The gifts may be in any amount of any of the principal's property to any individual or to an organization described in sections 170(c) and 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both. Notwithstanding this section, a principal, by express words in the power of attorney or other writing, may authorize, or limit the authority of, any attorney in fact or other agent to make gifts of the principal's property. This section applies to a power of attorney executed before August 1, 1995, as well as a power of attorney executed after July 31, 1995.

Approved March 10, 1995

Filed March 13, 1995