

# **Real Estate Transfers to and from Minors in North Carolina**

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A minor in North Carolina is under special limitations as to their capacity to contract and to deed property. It is not unusual for a practitioner to find that an intestate parent has left real property to a minor child. It is also a common occurrence for a client to want to leave property in a will to a minor child. Moreover, many practitioners have had a client that inexplicably wants to deed the child the property out right. The reasons are varied: usually altruistic and/or dynastic, though sometimes, these reasons involve the preservation of the property from creditors real or imagined. Not-with-standing the Uniform Fraudulent Transfers Act, and the adage "that no good act goes unpunished" there are special considerations that must be addressed. This article will discuss transfers from minors, trusts and the Uniform Transfers to Minors Act.

## **Minor's Interest in Real Property**

The North Carolina Supreme Court in *Shoaf v. Shoaf*, stated that "[t]he rule is settled beyond a reasonable doubt that majority or minority is a status rather than a fixed or vested right and the legislature has the full power to fix and change the age of majority." The Legislature in 1971, enacted N.C.G.S. Sec. 48A-2 Age of Minors, and defined a minor as a person who has not reached the age of 18. The enactment of this statute changed the age limit of minority from 21 to 18.

A deed from a minor in North Carolina is voidable, not void.<sup>i</sup> Moreover, during minority a minor can neither affirm nor disaffirm a deed or contract,<sup>ii</sup> unless such an act is done through a guardian.<sup>iii</sup> The rationale is that if a minor is not competent to deed property, then he does not have the ability to affirm his prior act until he has reached majority.<sup>iv</sup> Upon reaching majority one may affirm a deed or contract by some overt act, or disaffirm a deed or contract by an act or action within three years after reaching majority. If no action is brought to disaffirm the conveyance within three years of reaching majority the grantor is bound.<sup>v</sup>

There are notable exceptions to the common law rule. Generally the contracts of a minor are voidable unless they are for the necessities of life and those specifically authorized by statute.<sup>vi</sup> Necessities are generally held to be food, clothing, shelter and medical attention.<sup>vii</sup> Another exception is when a minor has married, and is then deemed by North Carolina General Statutes to have some capacity to convey real property in certain instances.<sup>viii</sup> One instance is the ability to release or deed the interest the minor may have in his or her spouse's property. The second instance is to convey or mortgage real property, if the minor's spouse is at least 18 years old, and they jointly own the property.

In summary, a deed from a minor is voidable until the minor has reached the age of 21, unless the minor acts under one of the above exceptions, or affirms the deed after he or she reaches 18 years of age.

## **Guardianship**

The real property of a minor can validly be conveyed before majority through a duly appointed guardian. The sale of the minor's interest is conducted under the supervision of the court. Appointment of a guardian and petitioning the clerk for permission to sell a minor's property is not a difficult process. The guardian of the estate is one appointed for the purpose of managing the property, estate, and business affairs of the minor.<sup>ix</sup> The Clerk of Superior Court in the county where the minor resides has jurisdiction to appoint such a guardian.<sup>x</sup> Upon application to the clerk<sup>xi</sup>, (assuming the proposed guardian meets the proper criteria,<sup>xii</sup>) the clerk issues letters of appointment.<sup>xiii</sup>

The powers of a guardian of the estate of a minor are many and varied,<sup>xiv</sup> but unfortunately do not include a general power to sell real estate without a special proceeding.<sup>xv</sup> The special proceeding to sell the minor's real property (or a special proceeding concurrent with the petition to appoint a guardian of the estate of the minor) must be filed, in order to obtain permission to sell the minor's property.<sup>xvi</sup> The guardian has the burden of establishing that the sale is in the best interests of the minor and the sale must also be approved by a superior court judge. The clerk will issue an order allowing the sale<sup>xvii</sup> and the guardian may proceed to convey the property on behalf of the minor. Keep in mind that the guardian has a duty to account<sup>xix</sup> and may be required to post a bond.<sup>xx</sup>

In summary an appointment of guardian and a petition to sell are not a quick fix to transfer property from a minor. It is available as a method to clear title and in many cases may be the only alternative to convey clear title. Practically speaking these procedures can be avoided and the minor protected with prior planning. There are two alternatives where property may be transferred to an entity designed to act as a fiduciary for the minor. One such alternative is a trust and the second is a custodianship under the Uniform Transfer to Minors Act.

### **Trust**

A properly drawn trust agreement can provide great flexibility for managing assets and can be useful in tax and estate planning. Title is held by a designated trustee and, if so empowered, the trustee may mortgage and convey real property for the benefit of the minor without authority or supervision of the court. The authority of a trustee to transfer property may be accomplished by incorporating the statutory powers of fiduciaries found in Chapter 32.

Alternatively, a transfer to a designated trustee without reference to any beneficial interest or governing trust instrument enables the trustee to freely deal with the property. The naked trust can arise when an instrument designates a record owner of real property as trustee, does not identify the beneficial interest, and does not set forth the powers of the trustee with respect to the real property. The designation of the person as trustee, shall not thereafter, be notice to a party dealing with the trustee that there is any limitation in the powers or put them on notice.<sup>xvi</sup> The very lack of discernable beneficial interest or powers of a trustee make this form of conveyance risky and conducive to foul play depending on the choice of trustee.

### **The Uniform Transfer to Minors Act**

Transfer of property to and from a minor can also be accomplished under Chapter 33A, The Uniform Transfer to Minors Act, (hereinafter the "Act"). The Act effective October 1, 1987<sup>xxvii</sup> provides a simple effective way to transfer property to a minor without the use of a trust, while insuring that the property will be under the control of a responsible adult chosen by the grantor until the minor reaches majority.

A transfer to a minor under the Act is a relatively simple process. A custodian must be nominated,<sup>xxviii</sup> and the transferor irrevocably transfers to the custodian, . . ." as custodian for \_\_\_\_\_ (name of minor) under the North Carolina Uniform Transfers to minors Act." The custodian is under a strict fiduciary duty,<sup>xxx</sup> but the Act limits the custodian's liability to third parties.<sup>xxxi</sup> The Act directs the custodian to consider only the needs of the minor when making distributions from custodianship.<sup>xxxii</sup>

Generally a transfer may also be made under the Act from a trust or a will,<sup>xxxiii</sup> by a fiduciary of the donor or minor,<sup>xxxiv</sup> an obligor of the minor,<sup>xxxv</sup> or under a contract for future payments in which the donor has named the custodianship as beneficiary.<sup>xxxvi</sup>

Transfer from a custodian is also a simple process. A third person, in good faith, without court order, may act on the instructions of or otherwise deal with any person purporting to make a transfer in the capacity of a custodian, without determining the validity of the custodianship or the propriety or validity of the transfer.<sup>xxxvii</sup> The custodianship is terminated when the minor reaches the age of 21, or sooner if designated.<sup>xxxviii</sup> When the custodianship is terminated, it is necessary for the custodian to deed the real estate to the emancipated individual to clarify the records and properly vest title.

The Act, though certainly a panacea to the real estate practitioner, must be balanced by other considerations. A trust, depending on the circumstances of the donor and the minor, may be more appropriate for multiple beneficiaries, tax considerations, spendthrift provisions and other long term planning. The act should not be overlooked as it is an efficient, effective form of transfer to a minor that provides a standard of fiduciary care and ease of transfer and/or mortgage of real property. The Act when used properly can solve many problems associated with a transfer to a minor before they arise, which is the best solution when dealing with these type of transfers.

## **Summary**

Transfers to and from minors are fraught with potential pitfalls and a practitioner forewarned is forearmed. A deed from a minor is generally voidable until the minor reaches 21, and title is effectively rendered unmarketable unless it falls within an exception. A transfer to a minor is best accomplished by means of a custodianship or a trust. If one desires to transfer property from a minor who holds property in his or her own name it can only be done by a guardian after receiving permission from the clerk of superior court.

<sup>i</sup> Weeks v. Wilkins, 139 N.C. 215, 51 S.E. 909 (1905).

<sup>ii</sup> McCormick V. Leggett, 53 N.C. 425 (1862).

<sup>iii</sup> Article 6, Chapter 35A, N.C. Gen. Stat.

- <sup>iv</sup> Carolina Interstate Bldg. & Loan Ass'n v. Black, 119 N.C. 323, 25 S.E. 975 (1895). See also: Jackson v. Beard, 162 N.C. 105, 78 S.E. 6 (1913); Ward v. Anderson, 111 N.C. 115, 15 S.E. 933 (1892).
- <sup>v</sup> Bagget v. Jackson, 160 N.C. 26, 76 S.E. 86 (1912).
- <sup>vi</sup> Gastonia v. Rogers, 276 N.C. 279, 172 S.E. 2d 19 (1970).
- <sup>vii</sup> Id.
- <sup>viii</sup> NCGS § 39-13.2
- <sup>ix</sup> Id. § 1202 (9)
- <sup>x</sup> Id. § 35A-1203
- <sup>xi</sup> Id. § 35A-1221
- <sup>xii</sup> Id. § 35A-1224
- <sup>xiii</sup> Id. § 35A-1226
- <sup>xiv</sup> Id. § 35A-1251
- <sup>xv</sup> Id. § 35A-1251
- <sup>xvi</sup> Id. § 35A-1301
- <sup>xvii</sup> Id.
- <sup>xviii</sup> Id. § 35A-1253
- <sup>xix</sup> Article 10, Chapter 35A, N.C. Gen. Stat.
- <sup>xx</sup> Id. § 35A-1230
- <sup>xxi</sup> See, Sherrod v. Any Child or Children, 312 N.C. 74, 320 S.E. 2d 669 (1984)
- <sup>xxii</sup> Trust Co., v. Raspberry, 226 N.C. 586, 39 S.E. 2d 601 (1946)
- <sup>xxiii</sup> Shannonhouse v. Wolfe, 191 N.C. 769, 133 S.E. 93 (1926)
- <sup>xxiv</sup> N.C. Gen. Stat. §§ 32-26, 32-27
- <sup>xxv</sup> Shannonhouse v. Wolfe, 191 N.C. 769, 133 S.E. 93 (1926)
- <sup>xxvi</sup> N.C. Gen. Stat. §§ 43-63 and 43-64
- <sup>xxvii</sup> Act of July 6, 1987, ch. 563, 1987 N.C. Sess. Laws 973 (codified at N.C. Gen. Stat. §§ 33A-1 to -24 (1987))
- <sup>xxviii</sup> N.C. Gen. Stat. § 33A-3
- <sup>xxix</sup> Id. § 33A(a)(5)
- <sup>xxx</sup> Id. § 33A-12
- <sup>xxxi</sup> Id. § 33A-17
- <sup>xxxii</sup> Id. § 33A-14
- <sup>xxxiii</sup> Id. § 33A-5
- <sup>xxxiv</sup> Id. § 33A-6
- <sup>xxxv</sup> Id. § 33A-7
- <sup>xxxvi</sup> Id. § 33A-3
- <sup>xxxvii</sup> Id. § 33A-16
- <sup>xxxviii</sup> Id. § 33A-20