

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2021

S

3

SENATE BILL 50
Judiciary Committee Substitute Adopted 2/23/21
House Committee Substitute Favorable 3/9/21

Short Title: Estate Planning Law Changes.

(Public)

Sponsors:

Referred to:

February 4, 2021

A BILL TO BE ENTITLED
AN ACT TO MAKE VARIOUS CHANGES TO THE GENERAL STATUTES REGARDING
ESTATES AND TRUSTS, AS RECOMMENDED BY THE ESTATE PLANNING &
FIDUCIARY LAW SECTION OF THE NORTH CAROLINA BAR ASSOCIATION.

The General Assembly of North Carolina enacts:

PART I. LIVING PROBATE FOR TRUSTS

SECTION 1.1. Chapter 36C of the General Statutes is amended by adding a new
Article to read:

"Article 4C.

"Judicial Establishment of Validity of a Revocable Trust.

"§ 36C-4C-401. Proceedings for validity of a revocable trust.

A settlor may commence a judicial proceeding to establish the validity of a revocable trust pursuant to this Article.

"§ 36C-4C-402. Establishing validity of a revocable trust before death.

(a) During the settlor's lifetime, any settlor of a revocable trust who is a resident of North Carolina may commence a judicial proceeding seeking a judicial declaration that the trust is valid.

(b) The petition shall be filed with the Superior Court Division of the General Court of Justice. At the hearing, the petitioner shall produce the evidence necessary to establish that the revocable trust, including any existing amendments thereto, is valid and enforceable under its terms, subject only to a subsequent amendment or revocation of the revocable trust. Civil summonses shall be issued to those interested persons identified in the settlor's petition, and such parties shall be served with a copy of the summons and petition as provided in Rule 4 of the Rules of Civil Procedure.

(c) The petition filed to determine the validity of a revocable trust may also join as an additional claim a request for a judicial declaration that the petitioner's will or codicil is valid as provided in Article 2B of Chapter 28A of the General Statutes and, notwithstanding G.S. 28A-2B-1(b), the joined action shall be heard in the Superior Court Division of the General Court of Justice as provided in this Article.

(d) Failure to use the procedure authorized by this Article shall not have any evidentiary or procedural effect on any future proceedings, including trust proceedings, civil actions, and estate proceedings.

(e) For purposes of this Article only, a "petitioner" is a person who requests a judicial declaration that confirms the validity of that person's revocable trust.

"§ 36C-4C-403. Venue.



The venue for a petition under this Article shall be as provided in G.S. 36C-2-204.

"§ 36C-4C-404. Contents of petition for revocable trust validity.

(a) Petition. – A petition requesting an order declaring that a petitioner's revocable trust is valid shall be verified and shall contain the following information:

(1) A statement that the petitioner is a resident of North Carolina and specifying the county of the petitioner's residence.

(2) Allegations that the revocable trust was prepared and executed in accordance with North Carolina law and a statement that the revocable trust was created with intent to create the revocable trust.

(3) A statement that the petitioner had capacity to create a revocable trust at the time the trust was created.

(4) A statement that the petitioner was free from undue influence and duress and executed the revocable trust in the exercise of the petitioner's free will.

(5) A statement identifying the petitioner, and all persons believed by the petitioner to have an interest in the proceeding, including, for any interested parties who are minors, information regarding the minor's appropriate representative.

(b) The petitioner shall attach a copy of the revocable trust and any amendments then in effect to the petition. If an order is entered declaring the revocable trust to be valid, the petitioner shall tender the original revocable trust and any amendments then in effect at the hearing, and the court shall affix a certificate of validity to such revocable trust and amendments, if any.

"§ 36C-4C-405. Declaration by court; bar to contesting validity of trust.

(a) If the court enters a judgment declaring a revocable trust to be valid, such judgment shall be binding upon all parties to the proceeding, including any persons represented in the proceeding, pursuant to the provisions of Article 3 of Chapter 36C of the General Statutes, and no party bound by the judgment shall have any further right to, and shall be barred from filing, a challenge to the validity of the revocable trust once that trust becomes irrevocable.

(b) If the court declares a revocable trust to be valid, upon the motion of the petitioner or the court, the court may order that the trust cannot be revoked and that no subsequent revocable trust or amendment to the validated trust will be valid unless the revocation or the subsequent amendment to the validated trust is declared valid in a proceeding under this Article. If the court enters such an order, any subsequent revocation of the trust not declared valid in a proceeding under this Article shall be void, and any subsequent trust or amendment to the validated trust not declared valid in a proceeding under this Article shall be void.

(c) If a revocable trust judicially declared valid is revoked or modified by a subsequent revocable trust or amendment, nothing in this section shall bar an interested person from contesting the validity of that subsequent trust or amendment, unless that subsequent trust or amendment is also declared valid in a proceeding under this Article in which the interested person was a party. If a trust or amendment to a trust judicially declared valid is revoked by a method other than the execution of a subsequent trust, nothing in this section shall bar an interested person from contesting the validity of that revocation, unless that revocation is also declared valid in a proceeding under this Article in which the interested person was a party.

"§ 36C-4C-406. Confidentiality.

(a) Following the entry of a judgment, a party to the proceeding may move that the contents of the file be sealed and kept confidential, and upon such motion, the court shall seal the contents of the file from public inspection. The contents of the file shall not be released except by order of the court to any person other than the following:

(1) The petitioner named in the petition.

(2) The attorney for the petitioner.

(3) A court of competent jurisdiction hearing or reviewing the matter.

(b) For good cause shown, the court may order the records that are confidential under this section to be made available to a person who is not listed in this section. Following the petitioner's death, a sealed file shall be unsealed upon the request of any interested person for the purpose of other estate proceedings."

SECTION 1.2. G.S. 36C-2-204 reads as rewritten:

"§ 36C-2-204. Venue.

In any trust proceeding, whether brought before the clerk of superior court or the superior court division of the General Court of Justice, the following rules apply notwithstanding any other applicable Rule of Civil Procedure or provision of Chapter 1 of the General Statutes:

(1) If the trustee is required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is the place where the accountings are filed.

(2) If the trustee is not required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is either of the following:

a. In the case of an inter vivos trust, in any county of this State in which the trust has its principal place of administration or where any beneficiary resides.

b. In the case of a testamentary trust, in any county of this State in which the trust has its principal place of administration, where any beneficiary resides, or in which the testator's estate was administered.

(2a) In the case of a petition to establish the validity of a revocable trust before death pursuant to Article 4C of this Chapter, venue shall be in the county of this State in which the petitioner whose revocable trust is the subject of the petition resides.

...."

SECTION 1.3. G.S. 36C-10-1004 reads as rewritten:

"§ 36C-10-1004. Attorneys' fees and costs.

In a judicial proceeding involving the administration of a trust, the court may award costs and expenses, including reasonable attorneys' fees, as provided in the General ~~Statutes~~Statutes, except that, in the case of a proceeding to establish the validity of a trust under Article 4C of this Chapter, the court shall allow for attorneys' fees for the attorneys of a party contesting the proceeding only if the court finds the party had reasonable grounds for contesting the proceeding."

SECTION 1.4. G.S. 36C-2-203 reads as rewritten:

"§ 36C-2-203. Subject matter jurisdiction.

...
(f) Without otherwise limiting the jurisdiction of the superior court division of the General Court of Justice, proceedings concerning the internal affairs of trusts shall not include, and, therefore, the clerk of superior court shall not have jurisdiction under subsection (a) of this section of any of the following:

...
(8) Actions to establish the validity of a revocable trust before death pursuant to Article 4C of this Chapter."

SECTION 1.5. This Part becomes effective October 1, 2021, and applies to proceedings initiated on or after that date.

PART II. CHANGES TO APPOINTMENT OF GUARDIANS

SECTION 2.1. G.S. 35A-1120 reads as rewritten:

"§ 35A-1120. Appointment of guardian.

1 ~~If~~ Except as otherwise provided in this Article, if the respondent is adjudicated incompetent,
2 or proper application is made for appointment of the guardian of a minor under Article 6 of this
3 Chapter, a guardian or guardians shall be appointed in the manner provided for in Subchapter II
4 of this Chapter."

5 **SECTION 2.2.** Article 2 of Chapter 35A of the General Statutes is amended by
6 adding a new section to read:

7 **"§ 35A-1121. Transactions authorized without appointing guardian.**

8 (a) If it is established in a proper proceeding that a basis exists for the appointment of a
9 guardian of a minor or an incompetent person, the clerk of superior court, without appointing a
10 guardian, may order a protective arrangement or other transaction as follows:

11 (1) Authorize, direct, or ratify any transaction necessary or desirable to achieve
12 any security, service, or care arrangement meeting the foreseeable needs of
13 the minor or incompetent person, and authorize a special fiduciary to execute
14 any such transaction on behalf of the minor or incompetent person, including
15 any of the following:

16 a. The payment, delivery, deposit, or retention of funds or property.

17 b. The sale, mortgage, lease, or other transfer of property.

18 c. The entry into an annuity contract, a contract for life care, a deposit
19 contract, or a contract for training and education.

20 d. The establishment, funding, or addition to a suitable trust, including,
21 but not limited to, a trust for the benefit of the minor or incompetent
22 person pursuant to 42 U.S.C. § 1396p(d)(4).

23 e. The establishment, funding, or administration of an ABLE account, as
24 defined in section 529A of the Internal Revenue Code.

25 (2) Authorize, direct, or ratify any contract, trust, or other transaction relating to
26 the minor or incompetent person's property and business affairs, and authorize
27 a special fiduciary to execute any such contract, trust, or other transaction on
28 behalf of the minor or incompetent person, if the clerk of superior court
29 determines that the transaction is in the best interest of the minor or
30 incompetent person.

31 (b) Before approving a protective arrangement or other transaction under this section, the
32 clerk of superior court shall consider the interests of creditors and dependents of the minor or
33 incompetent person and, in view of the disability, whether the minor or incompetent person needs
34 the continuing protection of a guardian. The clerk of superior court may appoint a temporary
35 guardian to assist in the accomplishment of any protective arrangement or other transaction
36 authorized under this section who shall have the authority conferred by the order and serve until
37 discharged by order after report to the clerk of superior court of all matters done pursuant to the
38 order of appointment.

39 (c) The sale, mortgage, exchange, lease, or gift of any property by a special fiduciary or
40 temporary guardian appointed as provided in this section shall be subject to the same procedural
41 and reporting requirements that would otherwise apply to the sale, mortgage, exchange, lease, or
42 gift of such property by a guardian of the estate or general guardian, pursuant to this Chapter."

43 **SECTION 2.3.** This Part becomes effective October 1, 2021, and applies to
44 proceedings initiated on or after that date.

45
46 **PART III. CHANGES TO TRUST AND ESTATE PROCEEDINGS**

47 **SECTION 3.1.** G.S. 36C-2-204 reads as rewritten:

48 **"§ 36C-2-204. Venue.**

49 In any trust proceeding, whether brought before the clerk of superior court or the superior
50 ~~court division~~ Superior Court Division of the General Court of Justice, the following rules apply

notwithstanding any other applicable Rule of Civil Procedure or provision of Chapter 1 of the General Statutes: apply:

- (1) If the trustee is required to account to the clerk of superior court, ~~then unless the terms of the governing instrument provide otherwise,~~ venue for proceedings under G.S. 36C-2-203 involving trusts is the place where the accountings are filed.
- (2) If the trustee is not required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is either of the following:
 - a. In the case of an inter vivos trust, in any county of this State in which the trust has its principal place of administration or where any beneficiary resides.
 - b. In the case of a testamentary trust, in any county of this State in which the trust has its principal place of administration, where any beneficiary resides, or in which the testator's estate was administered.
- (3) Repealed by Session Laws 2007-106, s. 8, effective October 1, 2007.
- (4) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in any county of this State in which a beneficiary resides, in any county in which trust property is located, in the county of this State specified in the trust instrument, if any county is so specified, or in the case of a testamentary trust, in the county in which the decedent's estate was or is being administered.
- (5) An objection to improper venue in a trust proceeding shall be subject to the following:
 - a. For a trust proceeding before the clerk of superior court, objection must be made as part of a timely served response to the complaint or petition or, if no response is filed, within 20 days after service of the complaint or petition, including any extensions of time pursuant to G.S. 36C-2-205(d).
 - b. For a trust proceeding before the Superior Court Division of the General Court of Justice, objection shall be governed by the Rules of Civil Procedure.
- (6) The validity of a trust proceeding shall not be affected by any error in venue."

SECTION 3.2. G.S. 28A-2-6 reads as rewritten:

"§ 28A-2-6. Commencement of estate proceedings, pleadings, consolidation, and joinder.

...
(e) Rules of Civil Procedure. – Unless the clerk of superior court otherwise directs, Rules 4, 5, 6(a), 6(d), 6(e), 18, 19, 20, 21, 24, 45, 52(b), 56, 58, 59, and 65 of G.S. 1A-1, the Rules of Civil Procedure, shall apply to estate proceedings. Upon motion of a party or the clerk of superior court, the clerk may further direct that any or all of the remaining Rules of Civil Procedure shall apply, including, without limitation, discovery rules; however, nothing in Rule 17 requires the appointment of a guardian ad litem for a party represented except as provided in G.S. 28A-2-7. In applying these Rules to an estate proceeding pending before the clerk of superior court, the term "judge" shall mean "clerk of superior court."

...."

SECTION 3.3. G.S. 36C-2-205 reads as rewritten:

"§ 36C-2-205. Commencement of proceedings, pleadings, consolidation, and joinder.

(a) Contested Proceedings. – Trust proceedings before the clerk of superior court brought against adverse parties shall be commenced as is prescribed for civil actions. Upon the filing of the petition or complaint, the clerk of superior court shall docket the cause as an estate matter. All parties not joined as petitioners shall be joined as respondents. The clerk of superior court

shall issue the summons for the respondents. The clerk of superior court may order that additional persons be joined as respondents and shall issue the summons for the additional persons. The summons shall notify the respondents to appear and answer the petition within ~~10-20~~ days after its service upon the respondents. The summons shall comply with the requirements set forth in G.S. 1-394 for a special proceeding summons except that the clerk of superior court shall indicate on the summons by appropriate words that the summons is issued in an estate matter and not in a special proceeding or in a civil action and shall be served upon the respondents in accordance with Rule 4 of the Rules of Civil Procedure. After the time for responding to the petition or complaint has expired, any party or the clerk of superior court may give notice to all parties of a hearing.

...

(e) Rules of Civil Procedure. – Unless the clerk of superior court otherwise directs, G.S. 1A-1, Rules 4, 5, 6(a), 6(d), 6(e), 18, 19, 20, 21, 24, 45, 52(b), 56, 58, 59, and 65 of the Rules of Civil Procedure shall apply to trust proceedings. Upon motion of a party or the clerk of superior court, the clerk may further direct that any or all of the remaining Rules of Civil Procedure, shall apply, including, without limitation, discovery rules; however, nothing in Rule 17 requires the appointment of a guardian ad litem for a party represented except as provided under G.S. 36C-2-206. In applying these Rules to a trust proceeding pending before the clerk of superior court, the term "judge" shall be construed as "clerk of superior court."

...."

SECTION 3.4. G.S. 28A-9-4 reads as rewritten:

"§ 28A-9-4. Appeal; stay effected.

Any interested person may appeal from the order of the clerk of superior court granting or denying revocation as ~~a special~~ an estate proceeding pursuant to ~~G.S. 28A-2-9(b)~~ G.S. 1-301.3. The clerk of superior court may issue a stay of an order revoking the letters upon the appellant posting an appropriate bond set by the clerk until the cause is heard and determined upon appeal."

SECTION 3.5. G.S. 1-301.3 reads as rewritten:

"§ 1-301.3. Appeal of trust and estate matters determined by clerk.

...

(c) Appeal to Superior Court. – A party aggrieved by an order or judgment of the clerk may appeal to the superior court by filing a written notice of the appeal with the clerk within 10 days of ~~entry of the order or judgment after service of the order on that party.~~ If a timely motion is made by any party for relief under Rule 52(b) or 59 of the Rules of Civil Procedure, the 10-day period for taking appeal is tolled as to all parties. Upon entry of an order disposing of the motion, the 10-day period then runs as to each party from its service upon that party. The notice of appeal shall contain a short and plain statement of the basis for the appeal. Unless otherwise provided by law, a judge of the superior court or the clerk may issue a stay of the order or judgment upon the appellant's posting an appropriate bond set by the judge or clerk issuing the stay. While the appeal is pending, the clerk retains authority to enter orders affecting the administration of the estate, subject to any order entered by a judge of the superior court limiting that authority.

(d) Duty of Judge on Appeal. – Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:

- (1) Whether the findings of fact are supported by the evidence.
- (2) Whether the conclusions of law are supported by the findings of facts.
- (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

It is not necessary for a party to object to the admission or exclusion of evidence before the clerk in order to preserve the right to assign error on appeal to its admission or exclusion. If the judge finds prejudicial error in the admission or exclusion of evidence, the judge, in the judge's discretion, shall either remand the matter to the clerk for a subsequent hearing or resolve the matter on the basis of the record. If the record is insufficient, the judge may receive additional

evidence on the factual issue in question. The judge may continue the case if necessary to allow the parties time to prepare for a hearing to receive additional evidence. If the judge retains jurisdiction and either excludes evidence that was considered by the clerk or considers new evidence that was not considered by the clerk, then the judge shall review issues of fact and law de novo based on the record from the hearing below, as modified by the court, and any new evidence heard by the court.

...."

SECTION 3.6. This Part becomes effective October 1, 2021, and applies to proceedings initiated on or after that date.

PART IV. CHANGES TO POWERS OF APPOINTMENT

SECTION 4.1. G.S. 31D-2-201 reads as rewritten:

"§ 31D-2-201. Creation of power of appointment.

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

SECTION 4.2. G.S. 31D-3-305 reads as rewritten:

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

- (a) If a power holder of a general power of appointment permits appointment to the power holder or the power holder's estate, the power holder may make any appointment, including an appointment in trust or an appointment that creates a new power of appointment that the power holder could make in disposing of the power holder's own property.
- (b) If a power holder of a general power of appointment permits appointment only to the creditors of the power holder or the creditors of the power holder's estate, or both, the power holder may appoint only to those creditors.
- (c) Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power holder of a nongeneral power may:
 - (1) Make an appointment in any form, including an appointment in trust, in favor of a permissible appointee.
 - (2) Create a general power in a permissible appointee.
 - ~~(d)(3) The terms of the instrument may permit the power holder of a nongeneral power to create~~ Create a nongeneral power in any person to appoint to one or more of the permissible appointees of the original nongeneral power.
 - (4) Create a nongeneral power in a permissible appointee to appoint to one or more persons if the permissible appointees of the new nongeneral power include one or more permissible appointees of the original nongeneral power."

PART V. SEVERABILITY

SECTION 5.1. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end, the provisions of this act are severable.

PART VI. EFFECTIVE DATE

SECTION 6.1. Except as otherwise indicated, this act is effective when it becomes law. Section 4.1 applies to powers of appointment created on or after the effective date of this act. Section 4.2 applies to the exercise, on or after the effective date of this act, of powers of appointment created before, on, or after that date.