

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2021

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SENATE BILL 197

Short Title: GSC Trusts & Estates Amendments. (Public)

Sponsors: Senators Edwards and Galey (Primary Sponsors).

Referred to: Rules and Operations of the Senate

March 9, 2021

A BILL TO BE ENTITLED

AN ACT TO (I) REMOVE THE LOCATION REQUIREMENT FOR HOLOGRAPHIC WILLS TO ALIGN NORTH CAROLINA WITH ALL OTHER STATES RECOGNIZING HOLOGRAPHIC WILLS, (II) UPDATE THE DEFINITIONS OF "TERMS OF A TRUST" AND "TRUST INSTRUMENT" AND REVISE THE ARTICLE ON POWER HOLDERS OF TRUSTS, AND (III) CLARIFY THE TRUST EXCLUSION TO THE RULE AGAINST PERPETUITIES AND MAKE TECHNICAL CHANGES IN THE SURROUNDING LANGUAGE, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

PART I. REMOVE LOCATION REQUIREMENT FOR HOLOGRAPHIC WILLS

SECTION 1.(a) G.S. 28A-2A-9 reads as rewritten:

"§ 28A-2A-9. Manner of probate of holographic will.

A holographic will may be probated only ~~in the following manner:~~

- (1) ~~Upon~~ upon the testimony of at least three competent witnesses that they believe that the will is written entirely in the handwriting of the person whose will it purports to be, and that the name of the testator as written in or on, or subscribed to, the will is in the handwriting of the person whose will it purports to ~~be; and~~ be.
- (2) ~~Upon the testimony of one witness who may, but need not be, one of the witnesses referred to in subdivision (1) of this section to a statement of facts showing that the will was found after the testator's death as required by G.S. 31-3.4."~~

SECTION 1.(b) G.S. 31-3.4 reads as rewritten:

"§ 31-3.4. Holographic will.

(a) A holographic will is a will that meets all of the following requirements:

- (1) Written entirely in the handwriting of the testator but when all the words appearing on a paper in the handwriting of the testator are sufficient to constitute a valid holographic will, the fact that other words or printed matter appear thereon not in the handwriting of the testator, and not affecting the meaning of the words in ~~such the~~ handwriting, shall does not affect the validity of the ~~will, and~~ will.
- (2) Subscribed by the testator, or with the testator's name written in or on the will in the testator's own ~~handwriting, and~~ handwriting.
- (3) ~~Found after the testator's death among the testator's valuable papers or effects, or in a safe deposit box or other safe place where it was deposited by the~~



testator or under the testator's authority, or in the possession or custody of some person with whom, or some firm or corporation with which, it was deposited by the testator or under the testator's authority for safekeeping.

(b) No attesting witness to a holographic will is required."

SECTION 1.(c) This section is effective when it becomes law and applies to estates of decedents dying on or after that date.

PART II. AMENDMENTS TO NC UNIFORM TRUST CODE DEFINITIONS AND ARTICLE ON POWER HOLDERS OF TRUSTS

SECTION 2.(a) G.S. 36C-1-103 reads as rewritten:

"§ 36C-1-103. Definitions.

The following definitions apply in this Chapter:

...

(20) Terms of a trust. – The manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or ~~established in a judicial proceeding as established, determined, or amended by any of the following:~~

a. A judicial proceeding.

b. A nonjudicial settlement agreement.

c. A nonjudicial modification with the consent of the settlor and all beneficiaries under G.S. 36C-4-411(a) or other law.

d. A trustee or other person in accordance with law, including a power holder under Article 8A of this Chapter or a trustee under Article 8B of this Chapter.

(21) Trust instrument. – ~~An instrument executed by the settlor that contains terms of the trust, including any amendments to the instrument, and any modifications permitted by court order.~~An instrument that contains the terms of a trust.

...."

SECTION 2.(b) G.S. 36C-1-105 reads as rewritten:

"§ 36C-1-105. Default and mandatory rules.

(a) Except as otherwise provided in the terms of the trust, this Chapter governs the duties and powers of a trustee and a power holder under Article 8A of this Chapter, relations among trustees and those power holders, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this Chapter except:

...

(2) The duty of a trustee or a power holder under Article 8A of this Chapter to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, except as ~~otherwise provided in subsection (e) of this section follows:~~

a. This duty is subject to G.S. 36C-8A-4 with respect to the trustee.

b. This duty does not apply to the extent the power holder is acting in a nonfiduciary capacity as provided in G.S. 36C-8A-3.

...

(6) The effect of an exculpatory term under G.S. 36C-10-1008, except as ~~otherwise provided in subsection (e) of this section to the extent the power holder is acting in a nonfiduciary capacity as provided in G.S. 36C-8A-3.~~

...

(c) ~~The provisions of subdivisions (2) and (6) of subsection (b) of this section shall not apply to a power holder described in Article 8A of this Chapter with respect to powers conferred upon the power holder in a nonfiduciary capacity under G.S. 36C-8A-3(a) or under the terms of the trust."~~

1 SECTION 2.(c) Article 8A of Chapter 36C of the General Statutes reads as rewritten:

2 "Article 8A.

3 "Powers, Duties, and Liability of a Power Holder Other Than a Trustee; Duty and Liability of a
4 Trustee With Respect to Power Holder's Actions.

5 **"§ 36C-8A-1. Definition: "Power holder" defined.**

6 (a) For purposes of this ~~Article~~, Article:

7 (1) ~~the~~The term "power holder" means a person ~~who~~ described in subdivision (2)
8 of this subsection that under the terms of a trust has the power to take certain
9 actions with respect to a trust and ~~who~~ that is not ~~a~~ any of the following:

10 a. ~~trustee or a~~ A trustee.

11 b. A settlor with a power to direct or consent pursuant to G.S. 36C-8-808.

12 c. A person in which a donor creates a power of appointment.

13 d. A person that has authority to consent to the exercise of a power of
14 appointment.

15 e. A beneficiary with a power over a trust to the extent the exercise or
16 nonexercise of the power affects the beneficial interest of the
17 beneficiary or another beneficiary represented by a beneficiary under
18 G.S. 36C-3-301 through G.S. 36C-3-305 with respect to the exercise
19 or nonexercise of the power.

20 (2) A power holder may be any of the following:

21 a. One or more individuals.

22 b. One or more other persons each of which is qualified to exercise trust
23 powers in this State.

24 c. Any combination of the persons described in sub-subdivisions a. and
25 b. of this subdivision.

26 (b) A person is a power holder whether or not the terms of a trust refer to the person as a
27 power holder and, except as otherwise provided in sub-subdivisions (a)(1)b. and e. of this section,
28 whether or not the person is a beneficiary or settlor of the trust.

29 **"§ 36C-8A-2. Powers of a power holder.**

30 (a) The terms of a trust may confer upon a power holder a power to direct or consent to
31 a duty that would normally be required of a trustee, including, but not limited to, a power to direct
32 or consent to the following:

33 (1) Investments, including any action relating to investment of all or any one or
34 more of the trust assets that a trustee ~~is authorized to~~ may take under this
35 Chapter.

36 (2) Discretionary distributions of trust assets, including distributions to one or
37 more beneficiaries, distribution of one or more trust assets, and termination of
38 the trust by distribution of all of the trust assets.

39 (3) Any other matter regarding trust administration, including the transfer of the
40 principal place of administration of the trust.

41 (b) The terms of a trust may also confer upon ~~the~~ a power holder any other power,
42 including, but not limited to, the power to do the following:

43 (1) Modify or amend the trust to do any of the following:

44 a. Achieve favorable tax status under applicable law.

45 b. Take advantage of laws governing restraints on alienation or other
46 State laws restricting the terms of the trust, distribution of trust
47 property, or the administration of the trust.

48 (2) Remove and appoint trustees and power holders.

49 (3) Increase or decrease the interests of any beneficiary.

50 (4) Grant a power of appointment to one or more beneficiaries of the trust or
51 modify the terms of or terminate a power of appointment granted to a

1 beneficiary by the governing instrument, except that a grant or modification
2 of a power of appointment ~~may~~shall not grant a beneficial interest to any of
3 the following:

- 4 a. Any individual or class of individuals not specifically provided for in
5 the trust instrument.
- 6 b. The person having the power to grant, modify, or terminate the power
7 of appointment.
- 8 c. The estate and creditors of the person having the power to grant,
9 modify, or terminate the power of appointment.

10 (5) Change the governing law of the trust.

11 (c) A power holder may exercise any further power appropriate to the exercise or
12 nonexercise of a power granted to the power holder under subsections (a) and (b) of this section.

13 (d) The powers granted to a power holder under this section are subject to the same
14 provisions of G.S. 36C-8-814 regarding discretionary powers and tax savings that are applicable
15 to a trustee in a like position and under similar circumstances.

16 **"§ 36C-8A-3. Duty and liability of power holder.**

17 ~~(a) A power holder is a fiduciary with respect to the powers conferred upon the power~~
18 ~~holder who, as such, is required to act in good faith and in accordance with the purposes and~~
19 ~~terms of a trust and the interests of the beneficiaries, except a power holder is not a fiduciary with~~
20 ~~respect to the following:~~

- 21 ~~(1) A power to remove and appoint a trustee or power holder.~~
- 22 ~~(2) A power that constitutes a power of appointment held by a beneficiary of a~~
23 ~~trust.~~
- 24 ~~(3) A power the exercise or nonexercise of which may affect only the interests of~~
25 ~~the power holder and no other beneficiary.~~

26 Except as otherwise provided in subsection (f) of this section, a power holder is a fiduciary
27 with respect to the exercise or nonexercise of a power and has the same duty and liability as the
28 following:

- 29 (1) If the power is not held jointly with the trustee or another power holder, as a
30 sole trustee in a like position and under similar circumstances.
- 31 (2) If the power is held jointly with the trustee or another power holder, as a
32 cotrustee in a like position and under similar circumstances.

33 ~~(b) A power holder is liable for any loss that results from breach of fiduciary duty~~
34 ~~occurring as a result of the exercise or nonexercise of the power.~~

35 ~~(c) The following provisions applicable to a trustee shall also be applicable to a power~~
36 ~~holder with respect to powers conferred upon the power holder as a fiduciary: The provisions~~
37 ~~regarding the same duty and liability of a power holder as a trustee in a like position and under~~
38 ~~similar circumstances include all of the following:~~

- 39 ~~(1) The provisions of G.S. 36C-8-814 regarding discretionary powers and tax~~
40 ~~savings. Article 8 of this Chapter regarding the duties of a trustee.~~
- 41 ~~(2) The provisions of G.S. 36C-10-1001 through G.S. 36C-10-1012 regarding~~
42 ~~liability of trustees and rights of third persons dealing with trustees.~~
- 43 ~~(3) The provisions of Article 9 of this Chapter regarding the uniform prudent~~
44 ~~investor rule.~~
- 45 ~~(4) The provisions of G.S. 36C-7-703 regarding cotrustees.~~

46 (d) Subject to subsection (e) of this section, a power holder shall provide information to
47 a trustee or another power holder to the extent the information is reasonably related both to the
48 powers and duties of a power holder and the powers and duties of the trustee or the other power
49 holder. A trustee or other power holder that acts in reliance on information provided by the power
50 holder is not liable for breach of trust to the extent the breach resulted from the reliance, unless
51 by so acting the trustee or the other power holder engages in intentional misconduct.

1 (e) A power holder does not have a duty to monitor a trustee or another power holder or
2 inform or give advice to a settlor, beneficiary, trustee, or another power holder concerning an
3 instance in which the power holder might have acted differently than a trustee or another power
4 holder. By taking the action described in this subsection, the power holder does not assume the
5 duty excluded under this subsection.

6 (f) The terms of a trust may provide that a power holder is a nonfiduciary with respect to
7 the exercise or nonexercise of a power, including the power to achieve the settlor's tax objectives
8 under the Internal Revenue Code. Unless the terms of a trust provide otherwise, the power to
9 remove and appoint a trustee or power holder shall be deemed to be held in a nonfiduciary
10 capacity.

11 **"§ 36C-8A-4. Duty and liability of trustee.**

12 (a) If the terms of a trust confer upon a power holder the power to direct certain actions
13 of the trustee, the trustee ~~must~~ shall act in accordance with the direction and is not liable,
14 individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with
15 the ~~direction~~ direction, unless compliance with the direction constitutes intentional misconduct
16 on the part of the trustee.

17 (b) If the terms of a trust confer upon the power holder the power to consent to certain
18 actions of the trustee, and the power holder does not provide consent within a reasonable time
19 after the trustee has made a timely request for the power holder's consent, the trustee is not liable,
20 individually or as a fiduciary, for any loss resulting directly or indirectly from the trustee's failure
21 to take any action that required the power holder's consent.

22 (c) If the terms of a trust confer upon ~~the person a~~ a power holder a power other than the
23 power to direct or to consent to the actions of the trustee, ~~trustee described in G.S. 36C-8A-2(a),~~
24 the trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly
25 from the exercise or nonexercise of the power.

26 (d) ~~The trustee has no duty to monitor the conduct of the power holder, provide advice to~~
27 ~~the power holder, or consult with the power holder. The trustee is not required to give notice to~~
28 ~~any beneficiary of any action taken or not taken by the power holder whether or not the trustee~~
29 ~~agrees with the result. Administrative actions taken by the trustee for the purpose of~~
30 ~~implementing directions of the power holder, including confirming that the directions of the~~
31 ~~power holder have been carried out, do not constitute monitoring of the power holder nor do they~~
32 ~~constitute participation in decisions within the scope of the power holder's authority. A trustee~~
33 does not have a duty to monitor a power holder or inform or give advice to a settlor, beneficiary,
34 trustee, or power holder concerning an instance in which the trustee might have acted differently
35 from a power holder. By taking an action described in this subsection, a trustee does not assume
36 a duty excluded by this subsection.

37 (e) Subject to subsection (d) of this section, a trustee shall provide information to a power
38 holder to the extent the information is reasonably related both to the powers and duties of the
39 trustee and the powers and duties of the power holder. A power holder that acts in reliance on
40 information provided by a trustee is not liable for a breach of trust to the extent the breach resulted
41 from the reliance, unless by so acting the power holder engages in intentional misconduct.

42 **"§ 36C-8A-4.1. Limitations of actions against power holder for breach of trust.**

43 In an action against a power holder for breach of trust, the same limitations of actions apply
44 to the power holder that apply under G.S. 36C-10-1005 to an action for breach of trust against a
45 trustee in a like position and under similar circumstances.

46 **"§ 36C-8A-4.2. Defenses in action against power holder.**

47 In an action against a power holder for breach of trust, the power holder may assert the same
48 defenses that a trustee in a like position and under similar circumstances could assert in an action
49 for breach of trust against the trustee, including the following:

- 50 (1) Reasonable reliance on the terms of a trust pursuant to G.S. 36C-9-901(b) and
51 G.S. 36C-10-1006.

- 1 (2) Reasonable care in ascertaining the happening of an event affecting the
 2 administration or distribution of a trust pursuant to G.S. 36C-10-1007.
 3 (3) Beneficiary's consent, release, or ratification pursuant to G.S. 36C-10-1009.

4 ...
 5 **"§ 36C-8A-8. Powers of trustee in the absence of a power holder. Vacancy in the office of**
 6 **the power holder.**

7 (a) If a vacancy occurs in the office of the power holder because the power holder fails
 8 or ceases to act for any reason, all of the following apply:

- 9 (1) If one or more power holders remain in office, a vacancy in the office of the
 10 power holder need not be filled.
 11 (2) If the terms of the trust provide for a successor to the power holder, the person
 12 designated by the terms of the trust or appointed under the terms of the trust
 13 shall act as the successor power holder.
 14 (3) ~~The~~ During the time when a vacancy occurs, the trustee shall be vested with
 15 any fiduciary power or duty conferred upon a the power holder by the terms
 16 of a the trust that are described in G.S. 36C-8A-2(a) during the time when no
 17 power holder is available to exercise such power or perform such duty because
 18 of absence, illness, or other cause. G.S. 36C-8A-2(a).
 19 (4) The court may appoint a power holder whenever the court considers the
 20 appointment necessary for the administration of the trust.

21 (b) A successor power holder shall succeed to all the powers and is subject to the duties
 22 and liabilities that were imposed upon the original power holder, unless a contrary intent appears
 23 from the governing instrument.

24 ...

25 **"§ 36C-8A-12. Power holder's bond.**

26 (a) A bond shall be required for the performance of the power holder's duty only if the
 27 terms of a trust require the power holder to provide a bond.

28 (b) If no bond is required, the provisions of G.S. 36C-7-702(a)(3) and (4) applicable to a
 29 trustee apply to the power holder, but in no event shall a bond be required of a power holder if
 30 the terms of a trust require otherwise.

31 (c) If a bond is required, the provisions of G.S. 36C-7-702(b) and (c) applicable to a
 32 trustee apply to the power holder."

33 **SECTION 2.(d)** The Revisor of Statutes shall cause to be printed, as annotations to
 34 the published General Statutes, all explanatory comments of the drafters of this section as the
 35 Revisor may deem appropriate.

36 **SECTION 2.(e)** This section is effective when it becomes law and applies to trusts
 37 created before, on, or after that date.

38
 39 **PART III. CLARIFY TRUST EXCLUSION TO RULE AGAINST PERPETUITIES**

40 **SECTION 3.(a)** G.S. 41-15 reads as rewritten:

41 **"§ 41-15. Statutory rule against perpetuities.**

42 (a) ~~Except as otherwise provided in G.S. 41-23, a~~ A nonvested property interest is invalid
 43 unless:

- 44 (1) When the interest is created, it is certain to vest or terminate no later than 21
 45 years after the death of an individual then alive; or
 46 (2) The interest either vests or terminates within 90 years after its creation.

47 "

48 **SECTION 3.(b)** G.S. 41-18 reads as rewritten:

49 **"§ 41-18. Exclusions from statutory rule against perpetuities.**

50 G.S. 41-15 does not apply ~~to~~ to any of the following:

- 1 (1) A nonvested property interest or a power of appointment arising out of a
2 nondonative transfer, except a nonvested property interest or a power of
3 appointment arising out of ~~of~~ any of the following:
- 4 a. A premarital or postmarital ~~agreement~~; agreement.
 - 5 b. A separation or divorce ~~settlement~~; settlement.
 - 6 c. A spouse's ~~election~~; election.
 - 7 d. A similar arrangement arising out of a prospective, existing, or
8 previous marital relationship between the ~~parties~~; parties.
 - 9 e. A contract to make or not to revoke a will or ~~trust~~; trust.
 - 10 f. A contract to exercise or not to exercise a power of
11 ~~appointment~~; appointment.
 - 12 g. A transfer in satisfaction of a duty of ~~support~~; or support.
 - 13 h. A reciprocal ~~transfer~~; transfer.
- 14 (2) A fiduciary's power relating to the administration or management of assets,
15 including the power of a fiduciary to sell, lease, or mortgage property, and the
16 power of a fiduciary to determine principal and ~~income~~; income.
- 17 (3) A power to appoint a ~~fiduciary~~; fiduciary.
- 18 (4) A discretionary power of a trustee to distribute principal before termination of
19 a trust to a beneficiary having an indefeasibly vested interest in the income
20 and ~~principal~~; principal.
- 21 (5) A nonvested property interest held by a charity, government, or governmental
22 agency or subdivision, if the nonvested property interest is preceded by an
23 interest held by another charity, government, or governmental agency or
24 ~~subdivision~~; subdivision.
- 25 (6) A nonvested property interest in or a power of appointment with respect to a
26 trust or other property arrangement forming part of a pension, profit-sharing,
27 stock bonus, health, disability, death benefit, income deferral, or other current
28 or deferred benefit plan for one or more employees, independent contractors,
29 or their beneficiaries or spouses, to which contributions are made for the
30 purpose of distributing to or for the benefit of the participants or their
31 beneficiaries or spouses the property, income, or principal in the trust or other
32 property arrangement, except a nonvested property interest or a power of
33 appointment that is created by an election of a participant or a beneficiary or
34 ~~spouse~~; spouse.
- 35 (7) A property interest, power of appointment, or arrangement that was not
36 subject to the common-law rule against perpetuities or is excluded by another
37 statute of this ~~State~~; State.
- 38 (8) A property interest or arrangement subjected to a time limit under ~~Article 14~~
39 ~~of Chapter 36A, "Honorary Trusts; Trusts for Pets; Trusts for Cemetery Lots";~~
40 ~~or G.S. 36C-4-408 or G.S. 36C-4-409.~~
- 41 (9) A property interest or arrangement subjected to a time limit under Article 3 of
42 this Chapter, "Time Limits on Options in Gross and Certain Other Interests in
43 ~~Land~~". Land."
- 44 (10) A nonvested property interest in or a power of appointment over property or
45 property interests of a trust to which G.S. 41-23 applies."

46 **SECTION 3.(c)** This section is effective when it becomes law and applies to trusts
47 created before, on, or after August 19, 2007.

49 **PART IV. EFFECTIVE DATE**

50 **SECTION 4.** Except as otherwise provided, this act is effective when it becomes
51 law.