



# SENATE BILL 50: Estate Planning Law Changes.

2021-2022 General Assembly

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| <b>Committee:</b> Senate Rules and Operations of the Senate | <b>Date:</b> February 23, 2021     |
| <b>Introduced by:</b> Sens. Daniel, Galey                   | <b>Prepared by:</b> Bill Patterson |
| <b>Analysis of:</b> Second Edition                          | Staff Attorney                     |

## **OVERVIEW: Senate Bill 50 would:**

- *Permit the settlor of a revocable trust to seek a judicial determination that the trust is valid.*
- *Permit the clerk of superior court to authorize transactions benefiting a minor or other incompetent without appointing a guardian.*
- *Update venue and procedural rules governing estate proceedings and trust proceedings.*
- *Update the North Carolina Uniform Powers of Appointment Act to broaden the list of permissible appointees for holders of a nongeneral power of appointment.*

## **CURRENT LAW AND BILL ANALYSIS:**

### **Part I: Living Probate for Trusts**

Under current law a North Carolina resident who has executed a will or codicil can file a petition seeking a judicial declaration that the will or codicil is valid, pursuant to Article 2B of Chapter 28A of the General Statutes. There is currently no similar procedure by which the settlor of a revocable trust can seek a judicial declaration that the trust is valid.

**Section 1.1** of Senate Bill 50 would enact new Article 4C in Chapter 36C of the General Statutes to permit the settlor of a revocable trust who is a resident of North Carolina to seek a judicial declaration of the validity of the trust, by filing a verified petition in superior court in the settlor's county of residence. The petition could also contain a request for a judicial declaration of the validity of the petitioner's will or codicil.

The petition would have to state:

- The petitioner's county of residence.
- That the petitioner had the capacity to create a revocable trust at the time it was created.
- That the trust was created in accordance with State law and with the intent to create a revocable trust.
- That the petitioner executed the trust in the exercise of free will and free from undue influence and duress.
- The identity of the petitioner and all persons believed to have an interest in the proceeding, including the appropriate representatives for any interested parties who are minors.

All interested persons identified in the petition would have to be served with a copy of the summons and petition. Any judgment declaring the trust to be valid would be binding on the parties to the proceeding and would bar them from challenging the trust's validity once it becomes irrevocable.

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The court file of the proceeding would be sealed by order of the court upon motion of any party to the proceeding. Without a showing of good cause, the contents of the sealed file would not be released to anyone other than the petitioner, the petitioner's attorney, or a court of competent jurisdiction hearing or reviewing the matter. After the petitioner's death a sealed file would be unsealed upon request of any interested person for the purpose of other estate proceedings.

**Sections 1.2, 1.3, and 1.4** of the bill would make conforming statutory changes in Chapter 36C.

## **Part II: Changes to Appointment of Guardians**

Under Chapter 35A of the General Statutes governing the appointment of a guardian, there is currently no alternative to a full guardianship proceeding in cases where the needs of the minor or other incompetent person could be met with a single protective arrangement or other transaction.

**Section 2.2** of the bill would amend Article 2 of Chapter 35A to authorize the clerk of superior court, without appointing a guardian, to authorize, direct, or ratify:

- Any protective arrangement or transaction necessary or desirable to meet the foreseeable needs of a minor or incompetent person.
- Any contract, trust, or other transaction relating to the property or business affairs of the minor or other incompetent person that is determined to be in their best interest.

Before approving a transaction, the clerk would be required to consider the interests of creditors and dependents of the minor or incompetent person and whether there is a need for the continuing protection of a guardian. The clerk would have discretion to appoint a limited guardian to assist in completing the authorized transaction, to be discharged by order after report to the clerk of all matters done pursuant to the appointment.

**Section 2.1** of the bill would make a conforming statutory change.

## **Part III: Changes to Trusts and Estates Proceedings**

G.S. 36C-1-105(b)(10) provides that rules of venue in trust proceedings cannot be modified by the terms of the trust. **Section 3.1** of the bill would delete a conflicting provision in G.S. 36C-2-204(1) that would permit the trust terms to override the venue rules.

**Section 3.1** would also amend G.S. 36C-2-204 to provide that:

- An objection to venue in trust proceedings before the clerk must be made as part of any timely response to the complaint or petition, or if no response is filed, the objection would be due within 20 days after service of the complaint or petition.
- An objection to venue in trust proceedings before the Superior Court Division is governed by the Rules of Civil Procedure.
- The validity of a trust proceeding is not affected by an error in venue.

**Sections 3.2 and 3.3** of the bill would add the following to the Rules of Civil Procedure that apply to trust and estate proceedings:

- Rule 52(b) governing motions to amend court findings of fact.
- Rule 58 governing entry of judgment.
- Rule 59 governing new trials and amendment of judgments.

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**Section 3.3** would also lengthen the response time in trust proceedings from 10 to 20 days after service of the petition, making the response time the same in both estate and trust proceedings.

**Sections 3.4 and 3.5** of the bill would clarify the time for and effect of an appeal to superior court in estate and trust proceedings.

## **Part IV. Changes to Powers of Appointment**

The North Carolina Uniform Powers of Appointment Act (NCUPAA), enacted in 2015 as Chapter 31D of the General Statutes, was modeled after the Uniform Powers of Appointment Act (UPAA) drafted by the Uniform Laws Commission (ULC).

In 2018, the ULC amended Section 305 of the UPAA to broaden the appointments that may be made by the power holder of a nongeneral power of appointment.

**Section 4.2** of the bill would amend G.S. 31D-3-305 to update the NCUPAA in accordance with the 2018 change to Section 305 of the UPAA. With this change the holder of a nongeneral power of appointment would be permitted to create a new nongeneral power of appointment in a permissible appointee to appoint to one or more persons, provided that the permissible appointees of the new nongeneral power include at least one of the permissible appointees of the original nongeneral power.

**Section 4.1** of the bill would make a conforming statutory change.

## **Part V. Severability**

**Section 5.1** of the bill is a severability clause that provides that if any provision of this act or its application is held invalid, it would not affect other provisions of this act that can be given effect without the invalid provision.

**EFFECTIVE DATE:** Parts I, II, and III of the act would become effective October 1, 2021, and would apply to proceedings initiated on or after that date. The remainder of the act would become effective when it becomes law. Section 4.1 would apply to powers of appointment created on after the effective date of the act. Section 4.2 would apply to the exercise, on or after the effective date of the act, of a power of appointment created before, on, or after that date.