

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2017

S

1

SENATE BILL 778

Short Title: Amends Probate/Trusts/Wills Choice of Law. (Public)

Sponsors: Senators Barringer, Daniel, and Randleman (Primary Sponsors).

Referred to: Rules and Operations of the Senate

May 31, 2018

A BILL TO BE ENTITLED

AN ACT (I) TO REQUIRE THAT, IN A LIVING PROBATE PROCEEDING, THE ORIGINAL WILL BE INTRODUCED AS EVIDENCE RATHER THAN BEING ATTACHED TO THE INITIAL PETITION, (II) TO PERMIT THE USE OF "MINOR" OR "18+" OR "ADULT" IN PLACE OF THE ACTUAL AGE OF AN HEIR OR DEVISEE IN AN APPLICATION FOR LETTERS OF ADMINISTRATION OR LETTERS TESTAMENTARY, (III) TO ADJUST THIS STATE'S STATUTES DEALING WITH OUT-OF-STATE WILLS RECOGNIZED IN THIS STATE ON THE BASIS OF COMPLIANCE WITH THE LAW OF THE STATE OF EXECUTION IN ORDER TO CONTINUE THE REQUIREMENT THAT THE TESTATOR BE PHYSICALLY PRESENT IN THAT STATE AT THE TIME OF THE WILL'S EXECUTION, (IV) TO PROVIDE FOR NOTICE THAT TENANCY BY THE ENTIRETIES PROPERTY TRANSFERRED TO A TENANCY BY THE ENTIRETIES TRUST REMAINS IMMUNE TO THE CLAIMS OF ONE SPOUSE'S INDIVIDUAL CREDITORS AND TO SPECIFY THAT A PERSON ENTERING INTO A TRANSACTION INVOLVING THE PROPERTY MAY OBTAIN CONFIRMATION FROM THE TRUSTEE THAT THE PROPERTY CONTINUES TO QUALIFY FOR THIS IMMUNITY, AND (V) TO MAKE TECHNICAL CORRECTIONS TO THE AFFECTED STATUTES AND TO THE NORTH CAROLINA UNIFORM POWER OF ATTORNEY ACT, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

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

**"§ 28A-2B-1. Establishment before death that a will or codicil is valid.**

(a) Any petitioner who is a resident of North Carolina and who has executed a will or codicil may file a petition seeking a judicial declaration that the will or codicil is valid.

(b) The petition shall be filed with the clerk of superior court and the matter shall proceed as a contested estate proceeding governed by Article 2 of Chapter 28A of the General Statutes. At the hearing before the clerk of superior court, the petitioner shall produce the original will or codicil and any other evidence necessary to establish that the will or codicil would be admitted to probate if the petitioner were deceased.

If an interested party contests the validity of the will or codicil, that person shall file a written challenge to the will or codicil before the hearing or make an objection to the validity of the will or codicil at the hearing. Upon the filing of a challenge or the raising of an issue contesting the validity of the will or codicil, the clerk shall transfer the cause to the superior court. The matter shall be heard as if it were a caveat proceeding, and the court shall make a determination as to the validity of the will or codicil and enter judgment accordingly.



\* S 7 7 8 - V - 1 \*

1 If no interested party contests the validity of the will or codicil and if the clerk of superior  
2 court determines that the will or codicil would be admitted to probate if the petitioner were  
3 deceased, the clerk of superior court shall enter an order adjudging the will or codicil to be valid.

4 ...."

5 **SECTION 1.(b)** G.S. 28A-2B-3 reads as rewritten:

6 "**§ 28A-2B-3. Contents of petition for will validity.**

7 ...

8 (b) The petitioner shall file ~~the original~~ a copy of the will or codicil with the ~~petition~~  
9 petition and tender the original will or codicil at the hearing as provided in G.S. 28A-2B-1(b). If  
10 an order is entered declaring the will or codicil to be valid, the court shall affix a certificate of  
11 validity to the will or codicil."

12 **SECTION 2.** G.S. 28A-6-1(a) reads as rewritten:

13 "(a) The application for letters of administration or letters testamentary shall be in the form  
14 of an affidavit sworn to before an officer authorized to administer oaths, signed by the applicant  
15 or the applicant's attorney, which may be supported by other proof under oath in writing, all of  
16 which shall be recorded and filed by the clerk of superior court, and shall allege all the following  
17 facts:

- 18 (1) The name, and to the extent known, the domicile and the date and place of  
19 death of the ~~decedent;~~ decedent.
- 20 (2) The legal residence and mailing address of the ~~applicant;~~ applicant.
- 21 (3) The names, ~~ages~~ ages, and mailing addresses of the decedent's heirs and  
22 devisees, including the names and mailing addresses of the guardians of those  
23 having court-appointed guardians, so far as all of these facts are known or can  
24 with reasonable diligence be ~~ascertained;~~ ascertained. It is sufficient to allege  
25 "minor" for the age of an heir or devisee under the age of eighteen and "18+"  
26 or "adult" for the age of an heir or devisee who is eighteen years of age or  
27 older.
- 28 (4) That the applicant is the person entitled to apply for letters, or that the  
29 applicant applies after persons having prior right to apply are shown to have  
30 renounced under Article 5 of this Chapter, or that the applicant applies subject  
31 to the provisions of G.S. 28A-6-2(1), and that the applicant is not disqualified  
32 under G.S. 28A-4-2.
- 33 (5) The nature and probable value of the decedent's property, both real and  
34 personal, and the location of such property, so far as all of these facts are  
35 known or can with reasonable diligence be ~~ascertained;~~ and ascertained.
- 36 (6) If the decedent was not domiciled in this State at the time of the decedent's  
37 death, a schedule of the decedent's property located in this State, and the name  
38 and mailing address of the decedent's domiciliary personal representative, or  
39 if there is none, whether a proceeding to appoint one is pending."

40 **SECTION 3.(a)** G.S. 31-11.6 reads as rewritten:

41 "**§ 31-11.6. How attested wills may be made self-proved.**

42 ...

43 (d) Any will ~~executed in another state~~ recognized as valid under G.S. 31-46(1) or (2) and  
44 shown by the propounder to have been made self-proved under the laws of ~~that state~~ the  
45 jurisdiction in which the testator was physically present at the time of execution or the place  
46 where the testator was domiciled at the time of execution or at the time of death shall be  
47 considered as self-proved.

48 ...."

49 **SECTION 3.(b)** G.S. 31-46 reads as rewritten:

50 "**§ 31-46. Validity of will; which laws govern.**

1 A will is valid if it meets the requirements of the applicable provisions of law in effect in this  
 2 State either at the time of its execution or at the time of the death of the testator, or if ~~(i) its~~ any  
 3 of the following apply:

4 (1) ~~The will's execution complies~~ complied with the law of the ~~place where it is~~  
 5 ~~executed~~ jurisdiction in which the testator was physically present at the time  
 6 ~~of execution;~~ (ii) its execution.

7 (2) ~~Its execution complies~~ complied with the law of the place where the testator  
 8 ~~is was~~ domiciled at the time of execution or at the time of ~~death;~~ or (iii) it  
 9 death.

10 (3) It is a military testamentary instrument executed in accordance with the  
 11 provisions of 10 U.S.C. § 1044d or any successor or replacement statute."

12 **SECTION 4.(a)** G.S. 39-13.7(a) reads as rewritten:

13 "(a) Any real property held by a husband and wife as a tenancy by the entireties and  
 14 conveyed ~~to (i) to a joint trust or (ii) in equal shares to two separate trusts;~~ trusts shall no  
 15 longer be held by the husband and wife as tenants by the entirety and shall be disposed of by the  
 16 terms of the trust or trusts, but, subject to the provisions of subsection (b) of this section, the real  
 17 property shall have the same immunity from the claims of the separate creditors of the husband  
 18 and wife as would exist if the spouses had continued to hold the property as tenants by the  
 19 entireties."

20 **SECTION 4.(b)** G.S. 39-13.7 is amended by adding two new subsections to read:

21 "(f) Notice that the real property held in trust receives immunity from the claims of  
 22 separate creditors may be given in a statement in the conveyance of the tenancy by the entireties  
 23 real property to the trust that the real property is held under this section and that, as of the date  
 24 of the conveyance, the requirements of subsection (b) of this section are met.

25 (g) A person entering into a transaction involving real property held in trust under this  
 26 section may request confirmation from the trustee whether the requirements of this section  
 27 providing immunity from the claims of separate creditors are met at the time of the transaction."

28 **SECTION 5.** G.S. 32C-1-116 reads as rewritten:

29 "**§ 32C-1-116. Judicial relief.**

30 (a) The clerks of superior court of this State shall have original jurisdiction of  
 31 proceedings under this Chapter. Except as provided in subdivision (4) of this subsection, the clerk  
 32 of superior court's jurisdiction is exclusive. The following proceedings are included:

33 ...

34 (2) To terminate a power of attorney or to ~~limit, suspend,~~ suspend or terminate  
 35 the authority of an agent where a guardian of the estate or a general guardian  
 36 has been appointed.

37 ...

38 (b) Without otherwise limiting the jurisdiction of the superior court division of the  
 39 General Court of Justice, the clerk of superior court shall not have jurisdiction under this  
 40 subsection over the following actions:

41 (1) To modify or amend a power of attorney instrument.

42 (2) By or against creditors or debtors of an agent or principal.

43 (3) Involving claims for monetary damages, including claims for breach of  
 44 fiduciary duty, fraud, and negligence.

45 (4) To set aside a power of attorney based on undue influence or lack of capacity.

46 (5) For the recovery of property transferred or conveyed by an agent on behalf of  
 47 a principal with intent to hinder, delay, or defraud the principal's creditors.

48 (c) Proceedings brought under the provisions of subsection (a) of this section shall be  
 49 commenced as prescribed for ~~in in,~~ and shall be conducted in accordance with, estate proceedings  
 50 under G.S. 28A-2-6 and may be brought by the following persons:

51 (1) The principal or the agent.

- 1 (2) A general guardian, guardian of the principal's estate, or guardian of the  
 2 principal's person.  
 3 (3) The personal representative of the estate of a deceased principal.  
 4 (4) A person authorized to make health care decisions for the principal.  
 5 (5) Any other interested person, including a person asked to accept a power of  
 6 attorney.

7 ...  
 8 (e) Nothing in this section ~~shall affect~~ affects the right of a person to file an action in the  
 9 Superior Court Division of the General Court of Justice for declaratory relief under Article 26 of  
 10 Chapter 1 of the General Statutes.

11 ...."

12 **SECTION 6.(a)** G.S. 32C-1-109(c) reads as rewritten:

13 "(c) If a power of attorney becomes effective upon the principal's incapacity and the  
 14 principal has not authorized a person to determine whether the principal is incapacitated, or the  
 15 person authorized is unable or unwilling to make the determination, the power of attorney  
 16 becomes effective upon a determination in a writing or other record in one of the following  
 17 manners:

- 18 (1) After a personal examination of the principal, by two individuals who are  
 19 either a physician, a licensed psychologist, or both, that the principal is  
 20 incapacitated within the meaning of ~~G.S. 32C-1-102(5)a.~~ G.S. 32C-1-102(6)a.  
 21 (2) By an attorney-at-law, a judge, or an appropriate governmental official that  
 22 the principal is incapacitated within the meaning of  
 23 ~~G.S. 32C-1-102(5)b.~~ G.S. 32C-1-102(6)b.

24 Notwithstanding the subsequent capacity of the principal to manage property or business  
 25 affairs, a power of attorney which becomes effective under this subsection shall remain effective  
 26 until its termination pursuant to G.S. 32C-1-110(a) or the agent's authority terminates pursuant  
 27 to G.S. 32C-1-110(b)."

28 **SECTION 6.(b)** G.S. 32C-1-116(f) reads as rewritten:

29 "(f) Upon motion by the principal, the clerk of superior court shall dismiss a petition filed  
 30 under subsection (a) of this section, unless the clerk of superior court determines the principal is  
 31 incapacitated within the meaning of ~~G.S. 32C-1-102(5).~~ G.S. 32C-1-102(6)."

32 **SECTION 7.** G.S. 32C-1-110 reads as rewritten:

33 **"§ 32C-1-110. Termination of power of ~~attorney~~ attorney or agent's authority.**

34 ...  
 35 (d) Termination of an agent's authority or of a power of attorney is not effective as to the  
 36 agent or another person that, without actual knowledge of the termination, acts in good faith  
 37 under the power of attorney. An act so performed, unless otherwise invalid or unenforceable,  
 38 binds the principal and the principal's successors in interest.

39 ...  
 40 (f) The execution of a power of attorney does not revoke a power of attorney previously  
 41 executed by the principal unless the subsequent power of attorney provides that the previous  
 42 power of attorney is revoked or that all other powers of attorney are revoked. If the previous  
 43 power of attorney has been registered in an office of the register of deeds in this State, it shall be  
 44 revoked pursuant to subdivision (g)(1) of this section.

45 (g) A principal ~~may revoke~~ revokes a power of attorney in one of the following manners:

- 46 (1) If the power of attorney has been registered in an office of the register of deeds  
 47 in this State, it shall be revoked by registration in that office ~~by~~ of an  
 48 instrument of ~~revocation~~ revocation, including a subsequent power of attorney  
 49 that provides that the previous power of attorney is revoked or all other powers  
 50 of attorney are revoked, executed and acknowledged by the principal while  
 51 the principal is not incapacitated with proof of service on the agent in the

1 manner prescribed for service under Rule 5 of the North Carolina Rules of  
2 Civil Procedure.

3 (2) If the power of attorney has not been registered in an office of the register of  
4 deeds in this State, it ~~may~~shall be revoked by one of the following methods:

5 a. A subsequent written revocatory ~~document~~document, including a  
6 subsequent power of attorney that provides that the previous power of  
7 attorney is revoked or all other powers of attorney are revoked,  
8 executed and acknowledged while not incapacitated.

9 b. Being burnt, torn, canceled, obliterated, or destroyed, with the intent  
10 and for the purpose of revoking it, by the principal or by another  
11 person in the principal's presence and at the principal's direction, while  
12 the principal is not incapacitated.

13 (h) A guardian of the principal's estate or general guardian terminates a power of attorney  
14 that has been registered in an office of the register of deeds in this State by registering in that  
15 office an instrument of revocation executed and acknowledged by such guardian and with proof  
16 of service on the agent in the manner prescribed for service under Rule 5 of the North Carolina  
17 Rules of Civil Procedure."

18 **SECTION 8.** G.S. 32C-1-112 reads as rewritten:

19 "**§ 32C-1-112. Reimbursement and compensation of agent.**

20 (a) If the terms of the power of attorney specify the amount or the way the compensation  
21 is to be determined, the agent is entitled to the compensation as specified.

22 (b) If the terms of the power of attorney do not specify the amount or the way the  
23 compensation is to be determined, and the principal thereafter becomes incapacitated, then  
24 subsequent to the principal's incapacity the agent is entitled to receive reasonable compensation  
25 as determined by the clerk of superior court in accordance with G.S. 32-59.

26 (c) Unless the power of attorney otherwise provides, an agent is entitled upon request to  
27 the clerk of superior court pursuant to G.S. 32-59 to be reimbursed for expenses properly incurred  
28 on behalf of the principal."

29 **SECTION 9.(a)** G.S. 32C-1-114 reads as rewritten:

30 "**§ 32C-1-114. Agent's duties.**

31 ...

32 (b) Except as otherwise provided in the power of attorney, an agent that has accepted  
33 appointment has no affirmative duty to exercise the powers or to continue to exercise the powers  
34 granted to the agent by the power of attorney, but if the agent exercises any of the granted powers,  
35 the agent shall, in the exercise of such powers, do all of the following:

36 (1) Act loyally for the principal's benefit.

37 ...

38 ~~(7) Account to the principal or a person designated by the principal in the power~~  
39 ~~of attorney.~~

40 ...

41 (h) Except as otherwise provided in the power of attorney, an agent is not required to  
42 disclose receipts, disbursements, or transactions conducted on behalf of the principal unless  
43 ordered by a court or requested by the ~~principal, principal or a person designated by the principal~~  
44 in the power of attorney, a guardian of the estate, general guardian, or, upon the death of the  
45 principal, by the personal representative or successor in interest of the principal's estate."

46 **SECTION 9.(b)** G.S. 32C-3-301 reads as rewritten:

47 "**§ 32C-3-301. Statutory form power of attorney.**

48 As a nonexclusive method to grant a power of attorney, a document substantially in the  
49 following form may be used to create a statutory form power of attorney that has the meaning  
50 and effect prescribed by this Chapter:

51 "NORTH CAROLINA

STATUTORY SHORT FORM POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE DEFINED IN CHAPTER 32C OF THE NORTH CAROLINA GENERAL STATUTES, WHICH EXPRESSLY PERMITS THE USE OF ANY OTHER OR DIFFERENT FORM OF POWER OF ATTORNEY DESIRED BY THE PARTIES CONCERNED.

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the North Carolina Uniform Power of Attorney Act.

This power of attorney does not authorize the agent to make health care decisions for you.

...

"IMPORTANT INFORMATION FOR AGENT

Agent's Duties

...

Unless the Additional Provisions and Exclusions in this power of attorney state otherwise, you must also:

- (1) Act loyally for the principal's benefit;
- ...
- (5) Cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects, or if you do not know the principal's expectations, to act in the principal's best ~~interest;~~interest; ~~and~~ and
- (6) Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best ~~interest; and~~interest.
- ~~(7) Account to the principal (or a person designated by the principal (if any)) in the Additional Provisions and Exclusions.~~

...."

**SECTION 10.** G.S. 32C-4-403 reads as rewritten:

**"§ 32C-4-403. Effect on existing powers of attorney.**

- (a) Except as otherwise provided in this Chapter, the following apply on January 1, 2018.
  - (1) This Chapter applies to a power of attorney created before, on, or after January 1, 2018, unless there is clear indication of a contrary intent in the terms of a power of attorney or unless application of a particular provision of this Chapter would substantially impair rights of a party.
  - (2) This Chapter applies to a judicial proceeding concerning a power of attorney commenced on or after January 1, 2018.
  - (3) This Chapter applies to a judicial proceeding concerning a power of attorney commenced before January 1, 2018, unless the court finds that application of

1 a provision of this Chapter would substantially interfere with the effective  
2 conduct of the judicial proceeding or prejudice the rights of a party, in which  
3 case that the particular provision of this Chapter does not apply and the  
4 superseded law applies.

- 5 (4) A rule of construction or presumption provided by this ~~Chapter~~ Chapter,  
6 including the rule of G.S. 32C-1-104 regarding durability of a power of  
7 attorney, applies to powers of attorney executed before January 1, 2018,  
8 unless there is a clear indication of a contrary intent in the terms of a power of  
9 attorney or unless the application of the rule of construction or presumption  
10 would substantially impair rights of a party created under North Carolina law  
11 in effect prior to January 1, 2018, in which case the rule of construction or  
12 presumption does not apply and the superseded rule of construction or  
13 presumption applies.

14 (b) If a right is acquired, extinguished, or banned upon the expiration of a prescribed  
15 period that commenced under law of this State other than this Chapter before January 1, 2018,  
16 that statute continues to apply to the right even if it has been repealed or superseded.

17 (c) References to prior statutes ~~and in~~ powers of attorney, whether executed on or after  
18 the adoption of this Chapter shall be deemed to refer to the corresponding provisions this Chapter  
19 unless application of the rule of construction would substantially impair substantial rights of a  
20 party.

21 (d) Notwithstanding the provisions of this Chapter, the powers conferred by former  
22 G.S. 32A-2 shall apply to a Statutory Short Form Power of Attorney that was created in  
23 accordance with former G.S. 32A-1 prior to January 1, 2018."

24 **SECTION 11.(a)** G.S. 90-21.13(c) reads as rewritten:

25 "(c) The following persons, in the order indicated, are authorized to consent to medical  
26 treatment on behalf of a patient who is comatose or otherwise lacks capacity to make or  
27 communicate health care decisions:

- 28 (1) A guardian of the patient's person, or a general guardian with powers over the  
29 patient's person, appointed by a court of competent jurisdiction pursuant to  
30 Article 5 of Chapter 35A of the General Statutes; provided that, if the patient  
31 has a health care agent appointed pursuant to a valid health care power of  
32 attorney, the health care agent shall have the right to exercise the authority to  
33 the extent granted in the health care power of attorney and to the extent  
34 provided in G.S. 32A-19(a) unless the Clerk has suspended the authority of  
35 that health care agent in accordance with G.S. 35A-1208(a).
- 36 (2) A health care agent appointed pursuant to a valid health care power of  
37 attorney, to the extent of the authority granted.
- 38 (3) An agent, with powers to make health care decisions for the patient, appointed  
39 by the ~~patient pursuant to Chapter 32C of the General Statutes,~~ patient, to the  
40 extent of the authority granted.
- 41 (4) The patient's spouse.
- 42 (5) A majority of the patient's reasonably available parents and children who are  
43 at least 18 years of age.
- 44 (6) A majority of the patient's reasonably available siblings who are at least 18  
45 years of age.
- 46 (7) An individual who has an established relationship with the patient, who is  
47 acting in good faith on behalf of the patient, and who can reliably convey the  
48 patient's wishes."

49 **SECTION 11.(b)** G.S. 90-322(b) reads as rewritten:

50 "(b) If a person's condition has been determined to meet the conditions set forth in  
51 subsection (a) of this section and no instrument has been executed as provided in G.S. 90-321,

1 then life-prolonging measures may be withheld or discontinued upon the direction and under the  
2 supervision of the attending physician with the concurrence of the following persons, in the order  
3 indicated:

- 4 (1) A guardian of the patient's person, or a general guardian with powers over the  
5 patient's person, appointed by a court of competent jurisdiction pursuant to  
6 Article 5 of Chapter 35A of the General Statutes; provided that, if the patient  
7 has a health care agent appointed pursuant to a valid health care power of  
8 attorney, the health care agent shall have the right to exercise the authority to  
9 the extent granted in the health care power of attorney and to the extent  
10 provided in G.S. 32A-19(b) unless the Clerk has suspended the authority of  
11 that health care agent in accordance with G.S. 35A-1208(a).
- 12 (2) A health care agent appointed pursuant to a valid health care power of  
13 attorney, to the extent of the authority granted.
- 14 (3) An agent, with powers to make health care decisions for the patient, appointed  
15 by the patient pursuant to Chapter 32C of the General Statutes, patient, to the  
16 extent of the authority granted.
- 17 (4) The patient's spouse.
- 18 (5) A majority of the patient's reasonably available parents and children who are  
19 at least 18 years of age.
- 20 (6) A majority of the patient's reasonably available siblings who are at least 18  
21 years of age.
- 22 (7) An individual who has an established relationship with the patient, who is  
23 acting in good faith on behalf of the patient, and who can reliably convey the  
24 patient's wishes.

25 If none of the above is reasonably available then at the discretion of the attending physician  
26 the life-prolonging measures may be withheld or discontinued upon the direction and under the  
27 supervision of the attending physician."

28 **SECTION 12.** The Revisor of Statutes shall cause to be printed, as annotations to  
29 the published General Statutes, all explanatory comments of the drafters of Sections 5, 6, 7, 8, 9,  
30 and 10, as the Revisor may deem appropriate.

31 **SECTION 13.** This act is effective when it becomes law.