



# General Statutes Commission

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## MEMORANDUM

**To:** House Judiciary 1  
**From:** General Statutes Commission  
**Re:** SB 197 (GSC Trusts & Estates Amendments)  
**Date:** June 24, 2021

### General Comments

This bill, recommended by the General Statutes Commission, consists of three parts. Part I removes the location requirement for holographic wills to align North Carolina with all other states recognizing holographic wills, Part II updates the definitions of "terms of a trust" and "trust instrument" in the N.C. Uniform Trust Code ("Trust Code") and revises the article on power holders of trusts, and Part III clarifies the trust exclusion to the rule against perpetuities and makes technical changes in the surrounding language.

Part I on holographic wills consists of amendments suggested by Professor Kevin Bennardo of the University of North Carolina School of Law and technical changes. It was circulated to the N.C. Bar Association, the N.C. Conference of Clerks of Superior Court, and others. Part II on Trust Code definitions and power holders and Part III on the trust exclusion to the rule against perpetuities consists of amendments requested by the Estate Planning & Fiduciary Law Section of the N.C. Bar Association and technical changes. During the drafting process, the General Statutes Commission published all its drafts online. There is no known opposition to any part of this bill.

### Specific Comments

**Part I** of the bill removes the location requirement for holographic wills as follows:

**Section 1(a)** removes the requirement that a witness testify to the location of the will for the will to be probated as a holographic will.

**Section 1(b)** removes the requirement that a will be found in a certain location to be a holographic will. This section does not affect what factors a court may consider in determining whether a testator intended for a document to be a will. This section also modernizes the format of a list and replaces legalese with plain English.

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

**Part II** of the bill updates Trust Code definitions and revises the article on power holders as follows:

**Section 2(a)** updates the Trust Code definitions of "terms of a trust" and "trust instrument" in light of recent amendments to the Uniform Trust Code by the Uniform Law Commission. Specifically, it adds to the definition of "terms of a trust" a list of all the ways a trust's provisions may be

established, determined, or amended and shortens and simplifies the definition of "trust instrument," since it is linked to the "terms of a trust" definition.

**Section 2(b)** modifies a list of exceptions to the general principle that the Trust Code provisions are default, not mandatory, rules. Under current law, (i) the duty to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries and (ii) the effect of an exculpatory term are mandatory rules except as to a power holder for a power held in a nonfiduciary capacity. This section carries forward this concept and adds that the duty to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries is also subject to the article on power holders with respect to a trustee. This section also reorganizes these exceptions for greater clarity.

**Section 2(c)** revises the article on power holders as follows:

In **G.S. 36C-8A-1**, this section revises the definition of "power holder" to add that a power holder is not a person in which a donor creates a power of appointment, a person that has authority to consent to the exercise of a power of appointment, or a beneficiary with a certain type of power over a trust. This section also adds that a power holder may be one or more individuals, one or more other persons qualified to exercise trust powers, or a combination thereof. This section further adds that a person is a power holder whether or not the terms of the trust refer to the person as a power holder and generally whether or not the person is a beneficiary or settlor of the trust. This section also fixes punctuation and relative pronouns.

In **G.S. 36C-8A-2**, this section adds subsections (c) and (d). Subsection (c) provides that a power holder may exercise any further power appropriate to the exercise or nonexercise of a power granted to the power holder. Subsection (d) provides that the power holder's powers are subject to the same provisions of G.S. 36C-8-814 (Discretionary powers; tax savings) regarding discretionary powers and tax savings as apply to a similarly situated trustee. This section also replaces legalese with plain English, makes a stylistic change for greater clarity, and changes "may not" to "shall not" to conform to this State's drafting conventions.

In **G.S. 36C-8A-3**, this section provides all of the following:

- Generally, a power holder is a fiduciary and has the same duty and liability as a similarly situated trustee. This section also sets out a nonexclusive list of provisions applicable to trustees that are also generally applicable to power holders. Current law similarly provides that generally a power holder is a fiduciary and is liable for any loss resulting from a breach of that duty.
- The terms of a trust, however, may provide that a power holder is a nonfiduciary with respect to the exercise or nonexercise of a power, including the power to achieve the settlor's tax objectives, and generally the power to remove and appoint a trustee or power holder shall be deemed to be held in a nonfiduciary capacity. Current law takes a different approach by enumerating certain powers with respect to which a power holder is not a fiduciary.
- A power holder shall provide certain information to a trustee or another power holder, but a power holder does not have a duty to monitor a trustee or another power holder or inform or give advice to a settlor, beneficiary, trustee, or another power holder. This provision is new.

In **G.S. 36C-8A-4**, this section continues to provide that a trustee does not have a duty to monitor a power holder and adds that a trustee does not have a duty to inform or give advice to a settlor, beneficiary, trustee, or power holder concerning an instance in which the trustee might have acted differently from a power holder. This section also adds that a trustee shall provide certain information to a power holder. Additionally, in subsection (a), this section changes "must" to "shall" for improved consistency and fixes punctuation, and in subsection (c), it replaces "person" with the more precise term "power holder," makes stylistic changes for greater clarity, and adds a reference.

This section also adds new **§ 36C-8A-4.1** and **§ 36C-8A-4.2** that provide default rules for an action against a power holder for breach of trust. **§ 36C-8A-4.1** provides that the same limitations of actions apply to a power holder that apply to a similarly situated trustee. **§ 36C-8A-4.2** provides that a power holder may assert the same defenses as a similarly situated trustee and sets out a nonexclusive list of examples.

In **G.S. 36C-8A-8**, this section continues to provide that during a vacancy in the office of the power holder, the trustee shall be vested with the power holder's fiduciary powers and duties. This section also adds that:

- The vacancy need not be filled if one or more power holders remain in office.
- If the terms of a trust provide for a successor power holder, that person shall act as the successor power holder.
- The court may appoint a power holder when necessary.
- Generally, the successor power holder shall succeed to the powers of the original power holder and is subject to the duties and liabilities of the original power holder.

This section also adds a new **§ 36C-8A-12** that provides that a bond shall be required from the power holder only if the terms of the trust require it and sets out which provisions apply if no bond is required and which provisions apply if a bond is required.

**Section 2(d)** authorizes the Revisor of Statutes to print drafters' comments.

**Section 2(e)** provides that this section is effective when it becomes law and applies to trusts created before, on, or after that date.

**Part III** of the bill clarifies the trust exclusion to the statutory rule against perpetuities as follows:

**Section 3(a)** removes a reference to G.S. 41-23 (Perpetuities and suspension of power of alienation for trusts) from the statutory rule against perpetuities. This change correlates to the change in the next section of the bill.

**Section 3(b)** adds to the list of exclusions from the statutory rule against perpetuities a nonvested property interest in or a power of appointment over property or property interests of a trust to which G.S. 41-23 (Perpetuities and suspension of power of alienation for trusts) applies. In current law, generally with respect to trusts, G.S. 41-23 governs the issue of the suspension of the power of alienation, rather than the statutory rule against perpetuities. This bill also modernizes the format of lists, updates an obsolete reference to Article 14 of Chapter 36A of the General Statutes with a reference to the successor provisions in the Trust Code, and fixes punctuation.

**Section 3(c)** provides that this section is effective when it becomes law and applies to trusts created before, on, or after August 19, 2007. This date is the effective date of S.L. 2007-390, which enacted G.S. 41-23 (Perpetuities and suspension of power of alienation for trusts).

**Part IV** of the bill, which consists of **Section 4**, provides that except as otherwise provided, this act is effective when it becomes law.