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SENATE BILL DRS45091-MQ-61

Short Title: Estates & Trusts Changes.

(Public)

Sponsors: Senators Galey, Daniel, and Sawrey (Primary Sponsors).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO UPDATE AND REORGANIZE THE GENERAL STATUTES RELATING TO
3 SPOUSAL AND CHILD'S ALLOWANCE IN ESTATES AND TO AMEND THE
4 GENERAL STATUTES TO TREAT WILLS AND REVOCABLE TRUSTS ALIKE IN
5 CONSTRUCTION, INTERPRETATION, AND ADMINISTRATION WHEN A
6 MARRIAGE IS DISSOLVED BY ABSOLUTE DIVORCE OR ANNULMENT AFTER
7 EXECUTION OF THE WILL OR REVOCABLE TRUST, AS RECOMMENDED BY THE
8 NORTH CAROLINA BAR ASSOCIATION.

9 The General Assembly of North Carolina enacts:

10
11 **PART I. CHANGES TO YEARLY ALLOWANCE IN ESTATES**

12 **SECTION 1.1.** The following General Statutes are repealed:

- 13 (1) G.S. 30-16.
14 (2) G.S. 30-21.
15 (3) G.S. 30-23.
16 (4) G.S. 30-25.
17 (5) G.S. 30-28.
18 (6) G.S. 30-29.
19 (7) G.S. 30-31.1.
20 (8) G.S. 30-31.2.

21 **SECTION 1.2.** Article 4 of Chapter 30 of the General Statutes, as amended by
22 Section 1.1 of this act, reads as rewritten:

23 "Article 4.

24 "Year's Allowance.

25 "Part 1. Nature of Allowance.

26 **"§ 30-15. When spouse entitled to allowance.**

27 (a) Every surviving spouse of ~~an intestate or of a testator, decedent,~~ whether or not the
28 surviving spouse has petitioned for an elective share, ~~shall, unless the surviving spouse has~~
29 ~~forfeited the surviving spouse's right thereto, as provided by law, shall~~ be entitled, out of the
30 ~~personal property of the deceased spouse, entitled to receive~~ an allowance ~~of having~~ the value of
31 sixty thousand dollars (\$60,000) for the surviving spouse's support for one year after the death
32 of the deceased ~~spouse-spouse unless the spouse is barred from seeking an allowance under~~
33 G.S. 31A-1 or another applicable law. The spouse's allowance shall be in addition to the spouse's
34 share of the decedent's estate if the decedent died intestate but shall be charged against the
35 spouse's share of the decedent's estate if the decedent died testate.



1 (b) The right of a surviving spouse to file a claim for an allowance must be exercised
2 during the lifetime of the surviving spouse by (i) the surviving spouse, (ii) the surviving spouse's
3 agent under a durable power of attorney, or (iii), with approval of the court, by the guardian of
4 the surviving spouse's estate or general guardian. A claim for an allowance must be made by
5 filing a verified petition with the clerk of court of the county in which venue would be proper
6 under G.S. 28A-3-1. There is no time limitation on bringing a claim for an allowance except that,
7 if a personal representative has been appointed for the decedent's estate, the claim must be made
8 within six months after the issuance of letters testamentary or letters of administration. In
9 addition, if a personal representative has been appointed for the decedent's estate, a copy of the
10 verified petition must be personally delivered or sent by first-class mail by the petitioner to the
11 personal representative.

12 (c) If the surviving spouse dies after the petition is filed but before the claim for an
13 allowance has been fully satisfied, any deficiency judgment existing at the time of the surviving
14 spouse's death shall not expire.

15 (d) The surviving spouse may claim the allowance if, at the death of the decedent, either
16 the decedent or the surviving spouse was a resident of this State. Such spouse's allowance shall
17 be exempt from any lien, lien by judgment or execution, acquired execution against the property
18 of the deceased spouse, and shall, in cases of testacy, be charged against the share of the surviving
19 spouse, decedent or any other claim made against or owed by the decedent's estate. The spouse's
20 allowance takes priority over any child's allowance under G.S. 30-17.

21 ...

22 **"§ 30-17. When children entitled to an allowance.**

23 (a) Whenever any parent dies survived by any Every child of a decedent who is under the
24 age of 18 years, years at the time of the decedent's death, including an adopted child or a child
25 with whom the widow may be pregnant at the death of her husband, or a child who is less than
26 22 years of age and is a full-time student in any educational institution, or a child under 21 years
27 of age who has been declared mentally incompetent, or a child under 21 years of age who is
28 totally disabled, or any other person in utero, and every child who is under the age of 18 years
29 residing with the deceased parent at the time of death to at the time of the decedent's death with
30 whom the deceased parent or the surviving parent decedent stood in loco parentis, every such
31 child parentis at the time of death, shall be entitled to receive an allowance having a value of five
32 thousand dollars (\$5,000) for the child's support for the one year next ensuing after the death of
33 the parent decedent. The allowance shall be in addition to the child's share of the deceased
34 parent's decedent's estate regardless of whether the decedent died testate or intestate.

35 (b) The right of a child to file a claim for an allowance must be exercised during the
36 lifetime of the child by the person with priority to file on behalf of the child as provided in
37 subsection (c) of this section. A claim for an allowance must be made by filing a verified petition
38 with the clerk of court of the county in which venue would be proper under G.S. 28A-3-1. There
39 is no time limitation on bringing a claim for an allowance except that, if a personal representative
40 has been appointed for the decedent's estate, the claim must be made within six months after the
41 issuance of letters testamentary or letters of administration. In addition, if a personal
42 representative has been appointed for the decedent's estate, a copy of the verified petition must
43 be personally delivered or sent by first-class mail by the petitioner to the personal representative.

44 (c) The person entitled to file a petition on behalf of the child for a child's allowance shall
45 be in the following order of priority:

46 (1) The general guardian or guardian of the estate of the child, if any.

47 (2) The surviving parent of the child if the child resides with the surviving parent.

48 (3) The person with whom the child resides.

49 If the clerk of court determines that no person entitled to file a petition pursuant to this
50 subsection is a fit or suitable individual, the clerk, upon the clerk's own motion, may appoint

1 another individual if the clerk determines that individual better represents the best interests of the
2 child as the representative.

3 ~~(d) and The child's allowance shall be exempt from any lien by judgment or execution~~
4 ~~against the property of the deceased parent. The personal representative of the deceased parent~~
5 ~~shall, within one year after the parent's death, assign to every such child the allowance herein~~
6 ~~provided for; but if there is no personal representative or if the personal representative fails or~~
7 ~~refuses to act within 10 days after written application by a guardian or next friend on behalf of~~
8 ~~the child, the allowance may be assigned by a magistrate or clerk of court upon~~
9 ~~application decedent or any other claim made against or owed by the decedent's estate except~~
10 ~~that the spouse's allowance under G.S. 30-15 shall take priority over any child's allowance. A~~
11 ~~child's allowance shall only be awarded after the full spouse's allowance under G.S. 30-15 has~~
12 ~~been awarded.~~

13 ~~If the child resides with the surviving spouse of the deceased parent at the time the allowance~~
14 ~~is paid, the allowance shall be paid to the surviving spouse for the benefit of the child. If the child~~
15 ~~resides with its surviving parent who is other than the surviving spouse of the deceased parent,~~
16 ~~the allowance shall be paid to the surviving parent for the use and benefit of the child. The~~
17 ~~payment shall be made regardless of whether the deceased died testate or intestate or whether the~~
18 ~~surviving spouse petitioned for an elective share under Article 1A of Chapter 30 of the General~~
19 ~~Statutes. Provided, however, the allowance shall not be available to a deceased father's child born~~
20 ~~out of wedlock, unless the deceased father has recognized the paternity of the child by deed, will,~~
21 ~~or other paper writing, or unless the deceased father died prior to or within one year after the~~
22 ~~birth of the child and is established to have been the father of the child by DNA testing. If the~~
23 ~~child does not reside with a surviving spouse or a surviving parent when the allowance is paid,~~
24 ~~the allowance shall be paid to the child's general guardian or guardian of the estate, if any, and if~~
25 ~~none, to the clerk of the superior court who shall receive and disburse the allowance for the~~
26 ~~benefit of the child.~~

27 **"§ 30-18. From what property allowance assigned.**

28 ~~Such An allowance under this Article shall be made in money awarded only out of cash or~~
29 ~~property, other personal property than real property, of the estate of the deceased~~
30 ~~spouse decedent's estate. In the case of a spouse's allowance, the cash or personal property~~
31 ~~awarded shall be distributed to the spouse. In the case of a child's allowance, the cash or personal~~
32 ~~property awarded shall be distributed to the person entitled to file for the allowance on behalf of~~
33 ~~the child pursuant to G.S. 30-17.~~

34 ~~"Part 2. Assigned by Magistrate or Clerk.~~

35 **"§ 30-19. Value of property ascertained. Property awarded to surviving spouse and**
36 **children.**

37 ~~The value determination of the personal property assigned to be awarded to the surviving~~
38 ~~spouse and children and the value thereof shall be ascertained made by a magistrate or the clerk~~
39 ~~of court of the county in which administration was granted or the will probated. venue would be~~
40 ~~proper under G.S. 28A-3-1.~~

41 **"§ 30-20. Procedure for assignment; assignment; order of clerk.**

42 ~~(a) Upon the application of the surviving spouse, a child by the child's guardian or next~~
43 ~~friend, or the personal representative of the deceased, the clerk of superior court of the county in~~
44 ~~which the deceased resided may assign the inquiry to a magistrate of the county. The clerk of~~
45 ~~court, or magistrate upon assignment, court shall first ascertain the person or persons if the~~
46 ~~surviving spouse is entitled to an allowance according to the provisions of this Article, and~~
47 ~~determine the money or other and, if so, enter an order setting forth the personal property of the~~
48 ~~estate, and pay over estate to or assign be awarded to the surviving spouse and to the children, if~~
49 ~~any, so much thereof as they shall be spouse. Once the spouse's allowance has been awarded, the~~
50 ~~clerk of court shall next ascertain if any children of the decedent are entitled to as provided in an~~
51 ~~allowance according to the provisions of this Article. Article, and, if so, enter an order setting~~

1 forth the personal property of the estate to be awarded for the child's allowance. If a personal
2 representative has been appointed for the decedent's estate, the clerk of court shall provide a copy
3 of any order awarding an allowance to the personal representative of the decedent's estate.

4 (b) Any deficiencies shall be made up from any of the personal property of the deceased,
5 and if the personal property of the estate shall be is insufficient to satisfy the allowance,
6 allowances awarded, the clerk of the superior court shall enter judgment against the personal
7 representative decedent's estate for the amount of the deficiency, to be paid deficiency. If a
8 personal representative has been appointed for the decedent's estate, the deficiency shall be
9 satisfied by the personal representative when a sufficiency of such assets shall come into the
10 possession of the personal representative's hands representative.

11 (c) The clerk of court may, on the clerk's own motion, determine that a hearing is
12 necessary to determine whether a year's allowance should be awarded pursuant to the provisions
13 of this Article and, if so, what personal property should be awarded. If the clerk of court makes
14 such a determination, the clerk shall direct the petitioner to commence a contested estate
15 proceeding pursuant to G.S. 30-23 in order to determine the year's allowance.

16 ...

17 **"§ 30-21.1. Reporting of allowances by personal representative.**

18 If the assets awarded as part of a spouse's allowance or a child's allowance are distributed
19 directly to the spouse or the petitioner for the child and never come into the possession of the
20 personal representative, the assets shall not be reported on the inventory for the decedent's estate
21 or on any subsequent accounting.

22 ...

23 **"§ 30-23.1. Contested proceeding regarding allowance.**

24 (a) If no contested estate proceeding under G.S. 30-20(c) was commenced to determine
25 an award of an allowance under this Article, any person with standing, including the personal
26 representative of the decedent's estate, may bring a proceeding to challenge the award of a spousal
27 allowance or a child's allowance, including, but not limited to, a proceeding to challenge the
28 validity of an award of a year's allowance, a proceeding to challenge the amount of a year's
29 allowance awarded, and a proceeding to challenge the assets awarded as part of a year's
30 allowance. If a contested estate proceeding was commenced under G.S. 30-20(c), then any person
31 with standing, including the personal representative of the decedent's estate, who was not a party
32 to the contested estate proceeding may bring a proceeding in accordance with this section.

33 (b) Any proceeding brought pursuant to this section shall be conducted as an estate
34 proceeding in accordance with the provisions of Article 2 of Chapter 28A of the General Statutes
35 and must be brought within one year of the date the order awarding the year's allowance was
36 entered.

37 ...

38 ~~"Part 3. Assigned in Superior Court. Additional Year's Allowance.~~

39 **"§ 30-27. Surviving spouse or child may apply to superior court for additional allowance.**

40 In addition to any support otherwise assigned to the A surviving spouse or child under this
41 Article, without application to the personal representative, the surviving spouse, or the child
42 through the child's guardian or next friend may, after the date specified in the general notice to
43 creditors as provided for in G.S. 28A-14-1(a), and may file an estate proceeding with the clerk
44 of court seeking an award of additional allowance in excess of the amount allowed to the spouse
45 or child under G.S. 30-15 or G.S. 30-17. Any such proceeding must be filed within one year after
46 of the date of the decedent's death, apply to the superior court of the county in which
47 administration was granted or the will probated to have a year's support assigned at an amount
48 other than prescribed in G.S. 30-15 and G.S. 30-17 except that if a personal representative was
49 appointed for the decedent's estate, any such proceeding must be filed within six months after the
50 issuance of letters testamentary or letters of administration. Any proceeding under this section

1 shall proceed as a contested estate proceeding under Article 2 of Chapter 28A of the General
 2 Statutes.

3 ...

4 **"§ 30-30. Judgment.**

5 The clerk of ~~superior~~ court shall hear the matter and determine whether the ~~petitioner~~
 6 surviving spouse or child is entitled to some or all of the relief sought and, if the clerk determines
 7 that the ~~petitioner spouse or child~~ is so entitled, the clerk shall ~~determine the money or other~~
 8 personal property of enter judgment against the estate and assign to the petitioner a sufficiency
 9 thereof for petitioner's support for one year from the decedent's death. Any deficiency shall be
 10 made up from any of the personal property of the deceased, and if the personal property of the
 11 estate shall be insufficient for such support, the clerk of superior court shall enter judgment
 12 against the for the amount of the deficiency. If a personal representative for has been appointed
 13 for the decedent's estate, the amount of such deficiency, to be paid deficiency shall be satisfied
 14 by the personal representative when a sufficiency of such assets shall come into the possession
 15 of the personal representative's hands. representative. Any judgment so rendered shall have the
 16 same priority over other debts and claims against the estate as an allowance assigned pursuant to
 17 G.S. 30-15 or G.S. 30-17.

18 **"§ 30-31. Amount of allowance.**

19 ~~The~~ In determining the amount of additional allowance to award pursuant to G.S. 30-27, the
 20 clerk of ~~superior~~ court may assign to the petitioner ~~a value an amount~~ sufficient for the support
 21 of ~~the petitioner according to the estate and condition of the decedent~~ and without regard to the
 22 dollar limitations set forth in this Chapter; Article, provided that the following criteria are met:

- 23 (1) ~~but the value~~ The amount allowed ~~shall be is~~ fixed with due consideration for
 24 other persons entitled to allowances ~~for year's support~~ from the decedent's
 25 estate; estate under this Article and the financial condition of the decedent's
 26 estate.
- 27 (2) ~~and the~~ The total value of all allowances ~~shall does~~ not in any case exceed ~~the~~
 28 one half one-half of the average decedent's annual net income of after-tax
 29 income, averaged over the deceased for three calendar years next preceding
 30 the deceased's calendar year of the decedent's death. As used in this
 31 subdivision, the term "annual after-tax income" means income remaining after
 32 all applicable deductions against the income, including deductions for federal
 33 and State income taxes attributable to the income, are taken.
- 34 (3) Attorneys' fees and costs awarded to the petitioner under G.S. 6-21 ~~shall be~~
 35 are paid as an administrative expense of the estate.

36"

37 **SECTION 1.3.** G.S. 28A-15-10 reads as rewritten:

38 **"§ 28A-15-10. Assets of decedent's estate for limited purposes.**

39 (a) When needed to satisfy claims against a decedent's estate, assets may be acquired by
 40 a personal representative or collector from the following sources:

- 41 (1) Tentative trusts created by the decedent in savings accounts for other persons.
 42 (2) Gifts causa mortis made by the decedent.
 43 (3) Joint deposit accounts with right of survivorship created by decedent pursuant
 44 to the provisions of G.S. 41-2.1 or otherwise; and joint tenancies with right of
 45 survivorship created by decedent in corporate stocks or other investment
 46 securities.
 47 (4) An interest in a security passing to a beneficiary pursuant to the provisions of
 48 Article 4 of Chapter 41 of the General Statutes.

49 Such assets shall be acquired solely for the purpose of satisfying such claims, however, and shall
 50 not be available for distribution to heirs or devisees.

1 (b) Where there are not sufficient personal and real assets of the decedent to satisfy all
2 the debts and other claims against the decedent's estate, the personal representative shall have the
3 right to sue for and recover any and all personal property or real property, or interest therein,
4 which the decedent may in any manner have transferred or conveyed with intent to hinder, delay,
5 or defraud the decedent's creditors, and any personal property or real property, or interest therein,
6 so recovered shall constitute assets of the estate in the hands of the personal representative for
7 the payment of debts and other claims against the estate of the decedent. But if the alienee has
8 sold the personal property or real property, or interest therein, so fraudulently acquired by the
9 alienee from the decedent to a bona fide purchaser for value without notice of the fraud, then
10 such personal property or real property, or interest therein, may not be recovered from such bona
11 fide purchaser but the fraudulent alienee shall be liable to the personal representative for the value
12 of the personal property or real property, or interest therein, so acquired and disposed of to a bona
13 fide purchaser. If the whole recovery from the fraudulent alienee shall not be necessary for the
14 payment of the debts and other claims against the estate of the decedent, the surplus shall be
15 returned to such fraudulent alienee or the fraudulent alienee's assigns.

16 (b1) Any asset acquired by a personal representative or collector under this section shall
17 first be used to pay the allowances allowed to a spouse and children under Article 4 of Chapter
18 30 of the General Statutes. After the allowances are fully satisfied, an asset may be used to satisfy
19 other claims against a decedent's estate.

20 (c) Where there has been a recovery in an action for wrongful death, the same shall not
21 be applied to the payment of debts and other claims against the estate of decedent or devisees,
22 except as to the payment of reasonable burial and funeral expenses and reasonable hospital and
23 medical expenses incident to the injury resulting in death and as limited and provided in ~~G.S.~~
24 ~~28-18-2.~~ G.S. 28A-18-2."

25 **SECTION 1.4.** Sections 1.2 and 1.3 of this Part are effective when they become law
26 and apply to decedents dying on or after that date. The remainder of this Part is effective when it
27 becomes law.

28 29 **PART II. CHANGES TO TREATMENT OF FORMER SPOUSES IN ESTATES AND** 30 **TRUSTS**

31 **SECTION 2.1.** G.S. 31-5.4 reads as rewritten:

32 "**§ 31-5.4. Revocation by divorce or annulment; revival.**

33 (a) ~~Dissolution of~~ Unless a contrary intent is expressly indicated in the will, if the
34 testator's marriage is dissolved by absolute divorce or annulment after ~~making the execution of a~~
35 will does not revoke the will of any testator but, unless otherwise specifically provided in the
36 will, it revokes all provisions in the will in favor of ~~then~~ the testator's former spouse or ~~purported~~
37 former spouse, shall be deemed to have predeceased the testator for all purposes related to the
38 construction, interpretation, or administration of that will. This section shall apply to all
39 provisions of the testator's will, including, but not by way of limitation, any provision conferring
40 a general or special power of appointment on the former spouse or ~~purported former spouse~~ and
41 any appointment of the former spouse or ~~purported former spouse~~ as executor, trustee,
42 conservator, or ~~guardian~~ guardian, or any other fiduciary or nonfiduciary position.

43 (b) This section shall not apply to a will if the following occur:

44 (1) The testator executes a subsequent valid testamentary document that makes
45 express reference to the will, such as by date of the will, and which modifies
46 the will.

47 (2) ~~If provisions are revoked solely by this section, they are revived by the~~
48 testator's remarriage to ~~The testator remarries~~ the former spouse prior to the
49 testator's death, unless the remarriage is subsequently dissolved by absolute
50 divorce or annulment.

1 (c) ~~or~~ As used in this section, the term "former spouse" includes a purported former
2 spouse."

3 **SECTION 2.2.** G.S. 36C-6-606 reads as rewritten:

4 "**§ 36C-6-606. Revocation of provisions in revocable trust by divorce or annulment; revival.**

5 (a) ~~Dissolution of~~ Unless a contrary intent is expressly indicated in the revocable trust, if
6 the settlor's marriage is dissolved by absolute divorce or annulment after ~~executing the execution~~
7 of a revocable trust revokes all provisions in the trust in favor of trust, then the settlor's former
8 spouse, spouse shall be deemed to have predeceased the settlor for all purposes related to the
9 construction, interpretation, or administration of that revocable trust. This section shall apply to
10 all provisions of the settlor's revocable trust, including, but not by way of limitation, any
11 provision conferring a general or special power of appointment on the former spouse and any
12 appointment of the former spouse as trustee. Property prevented from passing to the former
13 spouse because of revocation by divorce or absolute annulment passes as if the former spouse
14 failed to survive the settlor, and other provisions conferring some power or office on the former
15 spouse are interpreted as if the former spouse failed to survive the settlor. executor, trustee,
16 conservator, guardian, or any other fiduciary or nonfiduciary position.

17 (b) This section shall not apply to a revocable trust if any of the following occur:

18 (1) The settlor executes a subsequent valid amendment to the revocable trust, such
19 as by date of the revocable trust, and which modifies the revocable trust.

20 (2) ~~If provisions are revoked solely by this section, they are revived by the settlor's~~
21 ~~remarriage to~~ The settlor remarries the former spouse, spouse prior to the
22 settlor's death, unless the remarriage is subsequently dissolved by absolute
23 divorce or annulment.

24 (c) ~~The reference to~~ As used in this section, the term "former spouse" in this section
25 includes a purported former spouse."

26 **SECTION 2.3.** This Part is effective when it becomes law and applies to wills
27 probated on or after that date.

28 **PART III. EFFECTIVE DATE**

29 **SECTION 3.1.** Except as otherwise provided, this act is effective when it becomes
30 law.
31