

Explanatory Statement and Memorandum for 36C-4-401.

Currently, the courts in North Carolina often create trusts for minors or disabled adults in matters before the court, such as personal injury or medical malpractice cases, pursuant to the court's inherent authority over the case. This inherent authority has always been exercised without an express statute. The official uniform comments to N.C.G.S. §36C-1-102 Scope of the Uniform Trust Code states that "Express trusts also may be created by means of court judgment or decree. Examples include trusts created to hold the proceeds of personal injury recoveries and trust created to hold the assets of a protected person in a conservatorship proceeding."

While most judges understand the court has this inherent authority, there is some hesitation, and even resistance, among some judges on the grounds that he or she is not sure the court has such authority. This has produced inconsistent actions across the state. This proposed legislation is designed to clear up any misconceptions regarding the court's authority and to expressly provide that a court does have the right to create a trust by court order, judgment or decree. It is hoped that this will provide for more consistency in the courts throughout North Carolina.

The legislation as proposed also makes specific reference to 42 U.S.C. §1396p(d)(4). That federal statute provides that a trust can be created by a court for a disabled individual. This provision is included to assist our courts in understanding that 42 U.S.C. §1396p(d)(4) is applicable in North Carolina and is a right of our disabled citizens.

It is our understanding that the Association has not previously taken a position on the issue raised by this proposal. The impact of this proposed legislation is minimal as the courts already have the inherent authority to create trusts. This legislation is meant to clarify current common law and the courts inherent authority. There are no known constitutional problems.

AN ACT TO CLARIFY THE FACT THAT COURTS IN NORTH CAROLINA HAVE THE AUTHORITY TO CREATE TRUSTS BY JUDICIAL ORDER OR JUDGMENT IN CASES PROPERLY BEFORE THAT COURT; AND TO SPECIFICALLY PROVIDE THAT NORTH CAROLINA COURTS HAVE THE RIGHT TO CREATE TRUSTS PURSUANT TO 42 U.S.C. §1396P(d)(4)(A).

New Text Underlined.

The General Assembly of North Carolina enacts:

**36C-4-401. Methods of creating trust** reads as rewritten:

A trust may be created by any of the following methods:

(1) Transfer of property by a settlor to a person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death including either of the following:

- a. The devise or bequest to the trustee of the trust as provided in G.S. 31-47.
- b. The designation of the trust as beneficiary of life insurance or other death benefits as provided in G.S. 36C-4-401.1.

(2) Declaration by the owner of property that the owner holds identifiable property as trustee unless the transfer of title of that property is otherwise required by law.

(3) Exercise of a power of appointment in favor of a trustee.

(4) A court by judgment, order or decree, including the establishment of a trust pursuant to 42 United States Code § 1396p(d)(4).

This act is effective when it becomes law.

This proposed legislation was drafted by:

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Groups outside the Association likely to be interested in the proposal:

While it is hard to know which groups will be interested in this proposal which is intended to clarify the law, I am sure that one group will be The North Carolina Administrative Office of the Courts.