

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE BILL 481
Judiciary II Committee Substitute Adopted 4/15/09
PROPOSED HOUSE COMMITTEE SUBSTITUTE S481-PCS35356-TC-52

Short Title: Trustee's Power to Appoint to Other Trust.

(Public)

Sponsors:

Referred to:

March 10, 2009

1 A BILL TO BE ENTITLED
2 AN ACT TO ALLOW A TRUSTEE TO APPOINT TRUST PROPERTY TO ANOTHER
3 TRUST FOR THE SAME BENEFICIARY.

4 The General Assembly of North Carolina enacts:

5 SECTION 1. Article 8 of Chapter 36C of the General Statutes is amended by
6 adding a new section to read:

7 "§ 36C-8-816.1. Trustee's special power to appoint to a second trust.

8 (a) For purposes of this section, the following definitions apply:

9 (1) Current beneficiary. – A person who is a permissible distributee of trust
10 income or principal.

11 (2) Original trust. – A trust established under an irrevocable trust instrument
12 pursuant to the terms of which a trustee has a discretionary power to
13 distribute principal or income of the trust to or for the benefit of one or more
14 current beneficiaries of the trust.

15 (3) Second trust. – A trust established under an irrevocable trust instrument, the
16 current beneficiaries of which are one or more of the current beneficiaries of
17 the original trust. The second trust may be a trust created under the same
18 trust instrument as the original trust or under a different trust instrument.

19 (b) A trustee of an original trust may, without authorization by the court, exercise the
20 discretionary power to distribute principal or income to or for the benefit of one or more current
21 beneficiaries of the original trust by appointing all or part of the principal or income of the
22 original trust subject to the power in favor of a trustee of a second trust. The trustee of the
23 original trust may exercise this power whether or not there is a current need to distribute
24 principal or income under any standard provided in the terms of the original trust. The trustee's
25 special power to appoint trust principal or income in further trust under this section includes the
26 power to create the second trust.

27 (c) The terms of the second trust shall be subject to all of the following:

28 (1) The beneficiaries of the second trust may include only beneficiaries of the
29 original trust.

30 (2) A beneficiary who has only a future beneficial interest, vested or contingent,
31 in the original trust cannot have the future beneficial interest accelerated to a
32 present interest in the second trust.



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- 1 (3) The terms of the second trust may not reduce any fixed income, annuity, or
2 unitrust interest of a beneficiary in the assets of the original trust.
- 3 (4) If any contribution to the original trust qualified for a marital or charitable
4 deduction for federal income, gift, or estate tax purposes under the Internal
5 Revenue Code, then the second trust shall not contain any provision that, if
6 included in the original trust, would have prevented the original trust from
7 qualifying for the deduction or that would have reduced the amount of the
8 deduction.
- 9 (5) If contributions to the original trust have been excluded from the gift tax by
10 the application of section 2503(b) and section 2503(c) of the Internal
11 Revenue Code, then the second trust shall provide that the beneficiary's
12 remainder interest in the contributions shall vest and become distributable no
13 later than the date upon which the interest would have vested and become
14 distributable under the terms of the original trust.
- 15 (6) If any beneficiary of the original trust has a power of withdrawal over trust
16 property, then either:
- 17 a. The terms of the second trust must provide a power of withdrawal in
18 the second trust identical to the power of withdrawal in the original
19 trust; or
- 20 b. Sufficient trust property must remain in the original trust to satisfy
21 the outstanding power of withdrawal.
- 22 (7) If the power to distribute principal or income in the original trust is subject
23 to an ascertainable standard, then the power to distribute income or principal
24 in the second trust must be subject to the same ascertainable standard as in
25 the original trust and must be exercisable in favor of the same current
26 beneficiaries as in the original trust.
- 27 (8) The second trust may confer a power of appointment upon a beneficiary of
28 the original trust to whom or for the benefit of whom the trustee has the
29 power to distribute principal or income of the original trust. The permissible
30 appointees of the power of appointment conferred upon a beneficiary may
31 include persons who are not beneficiaries of the original or second trust. The
32 power of appointment conferred upon a beneficiary shall be subject to the
33 provisions of G.S. 41-23 covering the time at which the permissible period
34 of the rule against perpetuities and suspension of power of alienation begins
35 and the law that determines the permissible period of the rule against
36 perpetuities and suspension of power of alienation of the original trust.
- 37 (d) A trustee may not exercise the power to appoint principal or income under
38 subsection (b) of this section if the trustee is a beneficiary of the original trust, but the
39 remaining cotrustee or a majority of the remaining cotrustees may act for the trust. If all the
40 trustees are beneficiaries of the original trust, then the court may appoint a special fiduciary
41 with authority to exercise the power to appoint principal or income under subsection (b) of this
42 section.
- 43 (e) The exercise of the power to appoint principal or income under subsection (b) of
44 this section:
- 45 (1) Shall be considered the exercise of a power of appointment, other than a
46 power to appoint to the trustee, the trustee's creditors, the trustee's estate, or
47 the creditors of the trustee's estate; and
- 48 (2) Shall be subject to the provisions of G.S. 41-23 covering the time at which
49 the permissible period of the rule against perpetuities and suspension of
50 power of alienation begins and the law that determines the permissible

1 period of the rule against perpetuities and suspension of power of alienation
2 of the original trust; and
3 (3) Is not prohibited by a spendthrift provision or by a provision in the original
4 trust instrument that prohibits amendment or revocation of the trust.

5 (f) To effect the exercise of the power to appoint principal or income under subsection
6 (b) of this section, all of the following shall apply:

7 (1) The exercise of the power to appoint shall be made by an instrument in
8 writing, signed and acknowledged by the trustee, setting forth the manner of
9 the exercise of the power, including the terms of the second trust, and the
10 effective date of the exercise of the power. The instrument shall be filed with
11 the records of the original trust.

12 (2) The trustee shall give written notice to all qualified beneficiaries of the
13 original trust, at least 60 days prior to the effective date of the exercise of the
14 power to appoint, of the trustee's intention to exercise the power. The notice
15 shall include a copy of the instrument described in subdivision (1) of this
16 subsection.

17 (3) If all qualified beneficiaries waive the notice period by a signed written
18 instrument delivered to the trustee, the trustee's power to appoint principal or
19 income shall be exercisable after notice is waived by all qualified
20 beneficiaries, notwithstanding the effective date of the exercise of the power.

21 (4) The trustee's notice under this subsection shall not limit the right of any
22 beneficiary to object to the exercise of the trustee's power to appoint and
23 bring an action for breach of trust seeking appropriate relief as provided by
24 G.S. 36C-10-1001.

25 (g) Nothing in this section shall be construed to create or imply a duty of the trustee to
26 exercise the power to distribute principal or income, and no inference of impropriety shall be
27 made as a result of a trustee not exercising the power to appoint principal or income conferred
28 under subsection (b) of this section. Nothing in this section shall be construed to abridge the
29 right of any trustee who has a power to appoint property in further trust that arises under the
30 terms of the original trust or under any other section of this Chapter or under another provision
31 of law or under common law.

32 (h) A trustee or beneficiary may commence a proceeding to approve or disapprove a
33 proposed exercise of the trustee's special power to appoint to a second trust pursuant to
34 subsection (b) of this section."

35 **SECTION 2.** G.S. 36C-2-203(f) reads as rewritten:

36 **"§ 36C-2-203. Subject matter jurisdiction.**

37 ...

38 (f) Without otherwise limiting the jurisdiction of the superior court division of the
39 General Court of Justice, proceedings concerning the internal affairs of trusts shall not include,
40 and, therefore, the clerk of superior court shall not have jurisdiction under subsection (a) of this
41 section of the following:

42 (1) Actions to reform, terminate, or modify a trust as provided by
43 G.S. 36C-4-410 through G.S. 36C-4-416;

44 (2) Actions by or against creditors or debtors of a trust;

45 (3) Actions involving claims for monetary damages, including claims for breach
46 of fiduciary duty, fraud, and negligence;

47 (4) Actions to enforce a charitable trust under G.S. 36C-4-405.1; ~~and~~

48 (5) Actions to amend or reform a charitable trust under
49 ~~G.S. 36C-4A-1~~G.S. 36C-4A-1; and

50 (6) Actions involving the exercise of the trustee's special power to appoint to a
51 second trust pursuant to G.S. 36C-8-816.1."

1 **SECTION 3.** This act becomes effective October 1, 2009, and applies to (i) all
2 trusts created, and to all conveyances, devises, beneficiary designations, or other transfers
3 occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or
4 transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings
5 concerning trusts or transfers to or by trusts commenced before that date unless the court finds
6 that application of a particular provision of this act would substantially interfere with the
7 effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case
8 the law as it existed on September 30, 2009, shall apply.