

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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SENATE BILL 434
PROPOSED COMMITTEE SUBSTITUTE S434-PCS35234-TG-11

Short Title: Directed Trustee and Trust Protector.

(Public)

Sponsors:

Referred to:

March 29, 2011

1 A BILL TO BE ENTITLED
2 AN ACT GOVERNING THE LIABILITY OF DIRECTED TRUSTEES.
3 The General Assembly of North Carolina enacts:

4 SECTION 1. G.S. 36C-8-808 reads as rewritten:

5 "§ 36C-8-808. Powers to direct of a person who is not a trustee to take certain actions
6 with respect to the trust.

7 (a) While a trust is revocable, the settlor of a revocable trust has, at all times, the power
8 to direct or consent to the actions of the trustee whether or not the power is conferred upon the
9 settlor by the terms of the trust. The duty and liability of the trustee subject to the direction and
10 consent of the settlor is as follows:

11 (1) The trustee may follow a direction of the settlor that is not authorized by or
12 is contrary to the terms of the trust, even if by doing so (i) the trustee
13 exceeds the authority granted to the trustee under the terms of the trust, or
14 (ii) the trustee would otherwise violate a duty the trustee owes under the
15 trust.

16 (2) The trustee is not liable, individually or as a fiduciary, for any loss resulting
17 directly or indirectly from compliance with the direction. If the settlor
18 requires the settlor's consent to certain actions of the trustee, and the settlor
19 does not provide consent within a reasonable time after the trustee has made
20 a timely request for the settlor's consent, the trustee is not liable, individually
21 or as a fiduciary, for any loss resulting directly or indirectly from the
22 trustee's failure to take any action that required the settlor's consent.

23 (b) ~~If the~~ The terms of a trust may confer upon a person other than the who is not a
24 trustee or a settlor of a revocable trust the power to direct take certain actions of the trustee, the
25 trustee must act in accordance with an exercise of the power unless the attempted exercise is
26 manifestly contrary to the terms of the trust, or the trustee knows the attempted exercise would
27 constitute a serious breach of a fiduciary duty that the person holding the power owes to the
28 beneficiaries of the trust. with respect to the trust, including, but not limited to, the power to do
29 the following:

30 (1) Direct or consent to actions regarding the following:

31 a. Investments, including retention, purchase, sale, exchange, or other
32 transaction affecting the ownership of investments with respect to all
33 or any one or more of the trust assets.



- 1 b. Discretionary distributions of trust assets, including distributions to
2 one or more beneficiaries, distribution of one or more trust assets,
3 and termination of the trust by distribution of all of the trust assets.
4 c. Any other matter regarding trust administration, including the
5 transfer of the principal place of administration of the trust.
6 (2) Modify or amend the trust to do the following:
7 a. Achieve favorable tax status under applicable law.
8 b. Take advantage of laws governing restraints on alienation or other
9 State laws restricting the terms of the trust, distribution of trust
10 property, or the administration of the trust.
11 (3) Remove and appoint trustees, advisors, trust committee members, and trust
12 protectors.
13 (4) Increase or decrease the interests of any beneficiary.
14 (5) Grant a power of appointment to one or more beneficiaries of the trust or
15 modify the terms of or terminate a power of appointment granted to a
16 beneficiary by the governing instrument, except that a grant or modification
17 of a power of appointment may not grant a beneficial interest to any of the
18 following:
19 a. Any individual or class of individuals not specifically provided for in
20 the trust instrument.
21 b. The person having the power to grant, modify, or terminate the
22 power of appointment.
23 c. That person's estate or that person's creditors.
24 (6) Change the governing law of the trust.
25 (c) ~~The terms of a trust may confer upon a trustee or other person a power to direct the~~
26 ~~modification or termination of the trust. When the terms of a trust confer upon a person~~
27 ~~described in subsection (b) of this section a power authorized under subsection (b) of this~~
28 ~~section, the duty and liability of the trustee is as follows:~~
29 (1) If the terms of a trust confer upon the person the power to direct certain
30 actions of the trustee, the trustee must act in accordance with the direction
31 and is not liable, individually or as a fiduciary, for any loss resulting directly
32 or indirectly from compliance with the direction unless compliance with the
33 direction constitutes intentional wrongdoing, not mere negligence or gross
34 negligence on the part of the trustee.
35 (2) If the terms of the trust confer upon the person the power to consent to
36 certain actions of the trustee, and the power holder does not provide consent
37 within a reasonable time after the trustee has made a timely request for the
38 power holder's consent, the trustee is not liable, individually or as a
39 fiduciary, for any loss resulting directly or indirectly from the trustee's
40 failure to take any action that required the power holder's consent.
41 (3) If the terms of the trust confer upon the person a power other than the power
42 to direct or consent to actions of the trustee, the trustee is not liable,
43 individually or as a fiduciary, for any loss resulting directly or indirectly
44 from the exercise or nonexercise of the power.
45 (4) The trustee shall have no duty to monitor the conduct of the power holder,
46 provide advice to the power holder, or consult with the power holder. The
47 trustee is not required to give notice to any beneficiary of any action taken or
48 not taken by the power holder whether or not the trustee agrees with the
49 result. Administrative actions taken by the trustee for the purpose of
50 implementing directions of the power holder, including confirming that the
51 directions of the power holder have been carried out, do not constitute

1 monitoring of the power holder nor do they constitute participation in
2 decisions within the scope of the power holder's authority.

3 (d) ~~A person, other than a beneficiary, person described in subsection (b) of this section~~
4 ~~who holds a power to direct authorized under subsection (b) of this section is presumptively a~~
5 ~~fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust~~
6 ~~and the interests of the beneficiaries. beneficiaries, except that if a beneficiary is a person with~~
7 ~~a power authorized under subsection (b) of this section, the beneficiary is not a fiduciary with~~
8 ~~respect to the following:~~

9 (1) A power to remove and appoint a trustee.

10 (2) The power that constitutes a power of appointment.

11 (3) A power the exercise or nonexercise of which may affect only the interests
12 of the beneficiary holding the power and no other beneficiary.

13 The holder of a power to direct authorized under subsection (b) of this section is liable for
14 any loss that results from breach of a fiduciary ~~duty.~~ duty occurring as a result of the exercise
15 or nonexercise of the power."

16 **SECTION 2.** G.S. 36C-7-703 is amended by adding a new subsection to read:

17 "(e1) If the terms of a trust confer upon a cotrustee, to the exclusion of another cotrustee,
18 the power to take certain actions with respect to the trust, including the power to direct or
19 prevent certain actions of the trustees, the following apply:

20 (1) The duty and liability of the excluded trustee is as follows:

21 a. If the terms of a trust confer upon the cotrustee the power to direct
22 certain actions of the excluded trustee, the excluded trustee must act
23 in accordance with the direction and is not liable, individually or as a
24 fiduciary, for any loss resulting directly or indirectly from
25 compliance with the direction unless compliance with the direction
26 constitutes intentional wrongdoing, not mere negligence or gross
27 negligence on the part of the directed cotrustee.

28 b. If the terms of the trust confer upon the cotrustee any other power,
29 the excluded trustee is not liable, individually or as a fiduciary, for
30 any loss resulting directly or indirectly from the action taken by the
31 cotrustee.

32 c. The excluded trustee shall have no duty to monitor the conduct of the
33 cotrustee, provide advice to the cotrustee, or consult with or request
34 directions from the cotrustee. The excluded trustee is not required to
35 give notice to any beneficiary of any action taken or not taken by the
36 cotrustee whether or not the excluded trustee agrees with the result.
37 Administrative actions taken by the excluded trustee for the purpose
38 of implementing directions of the cotrustee, including confirming
39 that the directions of the cotrustee have been carried out, do not
40 constitute monitoring of the cotrustee nor do they constitute
41 participation in decisions within the scope of the cotrustee's
42 authority.

43 (2) Except as otherwise provided in sub-subdivision a. of subdivision (1) of this
44 subsection, the cotrustee holding the power to take certain actions with
45 respect to the trust shall be liable to the beneficiaries with respect to the
46 exercise of the power as if the excluded trustee was not in office and shall
47 have the exclusive obligation to account to and defend any action brought by
48 the beneficiaries with respect to the exercise of the power."

49 **SECTION 3.** G.S. 32-72(d) reads as rewritten:

50 "(d) ~~Whenever an instrument reserves to the settlor or vests in any person, including an~~
51 ~~advisory or investment committee or one or more co-fiduciaries, the authority to direct the~~

1 ~~making or retention of any investment to the exclusion of the fiduciary or to the exclusion of~~
2 ~~one or more of several co-fiduciaries, the excluded fiduciary or co-fiduciary who has no~~
3 ~~discretion in selecting the person authorized to make or retain investments is not liable to the~~
4 ~~beneficiaries or to the trust for the decisions or actions of the settlor or other person authorized~~
5 ~~to direct the making or retention of investments. As used in this subsection, the term "person"~~
6 ~~includes an individual, a corporation, or any legal or commercial entity authorized to hold~~
7 ~~property or do business in the State. The following provisions apply to an instrument creating a~~
8 ~~fiduciary relationship other than a trust instrument to which Chapter 36C of the General~~
9 ~~Statutes applies and to a fiduciary other than a trustee:~~

10 (1) The terms of the instrument may confer upon a person the power to direct or
11 consent to certain actions of the fiduciary with respect to the following:

12 a. Investments, including retention, purchase, sale, exchange, or other
13 transaction affecting the ownership of investments with respect to all
14 or any one or more assets.

15 b. Any other administrative matter.

16 (2) When the terms of the instrument confer upon a person the power to direct
17 or consent to certain actions of the fiduciary, the duty and liability of the
18 fiduciary are as follows:

19 a. If the terms of the instrument confer upon the person the power to
20 direct certain actions of the fiduciary, the fiduciary must act in
21 accordance with the direction and is not liable, individually or as a
22 fiduciary, for any loss resulting directly or indirectly from
23 compliance with the direction unless compliance with the direction
24 constitutes intentional wrongdoing, not mere negligence or gross
25 negligence on the part of the fiduciary.

26 b. If the terms of the instrument confer upon a person the power to
27 consent to certain actions of the fiduciary, and the power holder does
28 not provide consent within a reasonable time after the fiduciary has
29 made a timely request for the power holder's consent, the fiduciary is
30 not liable, individually or as a fiduciary, for any loss resulting
31 directly or indirectly from the fiduciary's failure to take any action
32 that required the power holder's consent.

33 c. The fiduciary shall have no duty to monitor the conduct of the power
34 holder, provide advice to the power holder, or consult with the power
35 holder. The fiduciary is not required to give notice to any beneficiary
36 of any action taken or not taken by the power holder whether or not
37 the fiduciary agrees with the result. Administrative actions taken by
38 the fiduciary for the purpose of implementing directions of the power
39 holder, including confirming that the directions of the power holder
40 have been carried out, do not constitute monitoring of the power
41 holder or other participation in decisions within the scope of the
42 power holder's authority.

43 (3) A person who holds a power to direct or consent is a fiduciary who, as such,
44 is required to act in good faith with regard to the purposes of the estate, or
45 other relationship between the fiduciary and beneficiaries, and the interests
46 of the beneficiaries, except that if a beneficiary is a person with a power to
47 direct or consent, the beneficiary is not a fiduciary with respect to the
48 following:

49 a. A power that constitutes a power of appointment.

1 b. A power the exercise or nonexercise of which affects only the
2 interests of the beneficiary holding the power and no other
3 beneficiary.

4 The holder of the power to direct or consent is liable for any loss that results
5 from breach of a fiduciary duty occurring as a result of the exercise or
6 nonexercise of the power."

7 **SECTION 4.** This act becomes effective October 1, 2011, and applies to trusts and
8 other instruments created before, on, or after that date.