

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE DRS35133-ME-26 (2/11)

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

Sponsors: Senator Hartsell.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO ALLOW A TRUSTEE TO APPOINT TRUST PROPERTY TO ANOTHER TRUST FOR THE SAME BENEFICIARY AND TO GRANT CLERKS JURISDICTION TO HEAR MOTIONS TO APPROVE THE APPOINTMENT OF TRUST PROPERTY TO ANOTHER TRUST.

The General Assembly of North Carolina enacts:

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

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

(a) A trustee who has the discretionary power under the terms of an irrevocable trust instrument to distribute principal or income of the trust (the 'first trust') to or for the benefit of one or more beneficiaries of the trust, whether or not there is a current need to distribute principal or income under any standard provided in the trust instrument, may instead, without authorization by the court, exercise the power by appointing all or part of the principal or income subject to the power in favor of a trustee of another trust (the 'second trust') for the current benefit of one or more of the beneficiaries under the same trust instrument or under a different trust instrument which may be created by the trustee.

(b) The terms of the second trust shall be subject to the following:

- (1) The beneficiaries of the second trust may include only beneficiaries of the first trust.
- (2) A beneficiary who has only a future beneficial interest, vested or contingent, in the first trust cannot have the future beneficial interest accelerated to a present interest in the second trust.
- (3) The second trust may not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust.
- (4) If any contribution to the first trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code, then the second trust shall not contain any provision that, if included in the first trust, would have prevented the first trust from qualifying for the deduction or that would have reduced the amount of the deduction.
- (5) If contributions to the first trust have been excluded from the gift tax by the application of Section 2503(b) and Section 2503(c) of the Internal Revenue Code, then the second trust shall provide that the beneficiary's remainder interest in the contributions shall vest and become distributable no later than



- 1 the date upon which the interest would have vested and become distributable
2 under the terms of the first trust.
- 3 (6) If one or more beneficiaries of the first trust has a power of withdrawal over
4 trust property, then either:
- 5 a. The second trust must provide a power of withdrawal in the second
6 trust identical to the power of withdrawal in the first trust; or
7 b. Sufficient trust property must remain in the first trust to satisfy the
8 outstanding power of withdrawal.
- 9 (7) If the power to distribute principal or income in the first trust is subject to an
10 ascertainable standard, then the terms of the second trust shall be subject to
11 all of the following:
- 12 a. The power to distribute principal or income in the second trust must
13 be subject to the same ascertainable standard; and
14 b. The second trust may not confer a power of appointment upon a
15 beneficiary of the first trust; and
16 c. The beneficiaries of the first trust must have the same beneficial
17 interests in the second trust.
- 18 (8) If the power to distribute principal or income in the first trust is not subject
19 to an ascertainable standard, then the second trust may confer a power of
20 appointment upon a beneficiary of the first trust to whom or for the benefit
21 of whom the trustee has the power to distribute principal or income of the
22 first trust. The permissible appointees of the power of appointment conferred
23 upon a beneficiary may include persons who are not beneficiaries of the first
24 or second trust. The power of appointment conferred upon a beneficiary
25 shall be subject to the provisions of G.S. 41-23 covering the time at which
26 the permissible period of the rule against perpetuities and suspension of
27 power of alienation begins and the law that determines the permissible
28 period of the rule against perpetuities and suspension of power of alienation
29 of the first trust.
- 30 (c) A trustee may not exercise the power to appoint principal or income under
31 subsection (a) of this section if the trustee is a beneficiary of the first trust, but the remaining
32 cotrustee or a majority of the remaining cotrustees may act for the trust.
- 33 (d) The exercise of the power to appoint principal or income under subsection (a) of this
34 section:
- 35 (1) Shall be considered the exercise of a power of appointment, other than a
36 power to appoint to the trustee, the trustee's creditors, the trustee's estate, or
37 the creditors of the trustee's estate; and
- 38 (2) Shall be subject to the provisions of G.S. 41-23 covering the time at which
39 the permissible period of the rule against perpetuities and suspension of
40 power of alienation begins and the law that determines the permissible
41 period of the rule against perpetuities and suspension of power of alienation
42 of the first trust; and
- 43 (3) Is not prohibited by a spendthrift provision or by a provision in the trust
44 instrument that prohibits amendment or revocation of the trust.
- 45 (e) To effect the exercise of the power to appoint principal or income under subsection
46 (a) of this section the following shall apply:
- 47 (1) The exercise of the power to appoint shall be made by an instrument in
48 writing, signed and acknowledged by the trustee, setting forth the manner of
49 the exercise of the power, including the terms of the second trust, and the
50 effective date of the exercise of the power. The instrument shall be filed with
51 the records of the first trust.

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

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

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

14 (f) Nothing in this section shall be construed to create or imply a duty of the trustee to
15 exercise the power to distribute principal or income, and no inference of impropriety shall be
16 made as a result of a trustee not exercising the power to appoint principal or income conferred
17 under subsection (a) of this section. Nothing in this section shall be construed to abridge the
18 right of any trustee who has a power to appoint property in further trust that arises under the
19 terms of the first trust or under any other section of this Chapter or under another provision of
20 law or under common law."

21 **SECTION 2.** G.S. 36C-2-203 is amended by adding a new subdivision to read:

22 "**§ 36C-2-203. Subject matter jurisdiction.**

23 (a) The clerks of superior court of this State have original jurisdiction over all
24 proceedings concerning the internal affairs of trusts. Except as provided in subdivision (9) of
25 this subsection, the clerk of superior court's jurisdiction is exclusive. Proceedings concerning
26 the internal affairs of the trust are those concerning the administration and distribution of trusts,
27 the declaration of rights, and the determination of other matters involving trustees and trust
28 beneficiaries, to the extent that those matters are not otherwise provided for in the governing
29 instrument. These include proceedings:

30 ...

31 (8a) To approve the exercise of the trustee's special power to appoint trust
32 principal or income to another trust as provided in G.S. 36C-8-816.1."

33 **SECTION 3.** This act becomes effective October 1, 2009.