

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE BILL 481
Judiciary II Committee Substitute Adopted 4/15/09

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 another trust.**

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

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

- 17 (1) The beneficiaries of the second trust may include only beneficiaries of the
18 first trust.
- 19 (2) A beneficiary who has only a future beneficial interest, vested or contingent,
20 in the first trust cannot have the future beneficial interest accelerated to a
21 present interest in the second trust.
- 22 (3) The second trust may not reduce any fixed income, annuity, or unitrust
23 interest in the assets of the first trust.
- 24 (4) If any contribution to the first trust qualified for a marital or charitable
25 deduction for federal income, gift, or estate tax purposes under the Internal
26 Revenue Code, then the second trust shall not contain any provision that, if
27 included in the first trust, would have prevented the first trust from
28 qualifying for the deduction or that would have reduced the amount of the
29 deduction.
- 30 (5) If contributions to the first trust have been excluded from the gift tax by the
31 application of section 2503(b) and section 2503(c) of the Internal Revenue
32 Code, then the second trust shall provide that the beneficiary's remainder
33 interest in the contributions shall vest and become distributable no later than
34 the date upon which the interest would have vested and become distributable
35 under the terms of the first trust.
- 36 (6) If one or more beneficiaries of the first trust has a power of withdrawal over
37 trust property, then either:



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- 1 a. The second trust must provide a power of withdrawal in the second
2 trust identical to the power of withdrawal in the first trust; or
3 b. Sufficient trust property must remain in the first trust to satisfy the
4 outstanding power of withdrawal.
- 5 (7) If the power to distribute principal or income in the first trust is subject to an
6 ascertainable standard, then the terms of the second trust shall be subject to
7 all of the following:
- 8 a. The power to distribute principal or income in the second trust must
9 be subject to the same ascertainable standard; and
- 10 b. The second trust may not confer a power of appointment upon any
11 person other than a power of appointment conferred upon that person
12 under the original trust; and
- 13 c. The beneficiaries of the first trust must have the same beneficial
14 interests in the second trust.
- 15 (8) If the power to distribute principal or income in the first trust is not subject
16 to an ascertainable standard, then the second trust may confer a power of
17 appointment upon a beneficiary of the first trust to whom or for the benefit
18 of whom the trustee has the power to distribute principal or income of the
19 first trust. The permissible appointees of the power of appointment conferred
20 upon a beneficiary may include persons who are not beneficiaries of the first
21 or second trust. The power of appointment conferred upon a beneficiary
22 shall be subject to the provisions of G.S. 41-23 covering the time at which
23 the permissible period of the rule against perpetuities and suspension of
24 power of alienation begins and the law that determines the permissible
25 period of the rule against perpetuities and suspension of power of alienation
26 of the first trust.
- 27 (c) A trustee may not exercise the power to appoint principal or income under
28 subsection (a) of this section if the trustee is a beneficiary of the first trust, but the remaining
29 cotrustee or a majority of the remaining cotrustees may act for the trust.
- 30 (d) The exercise of the power to appoint principal or income under subsection (a) of this
31 section:
- 32 (1) Shall be considered the exercise of a power of appointment, other than a
33 power to appoint to the trustee, the trustee's creditors, the trustee's estate, or
34 the creditors of the trustee's estate; and
- 35 (2) Shall be subject to the provisions of G.S. 41-23 covering the time at which
36 the permissible period of the rule against perpetuities and suspension of
37 power of alienation begins and the law that determines the permissible
38 period of the rule against perpetuities and suspension of power of alienation
39 of the first trust; and
- 40 (3) Is not prohibited by a spendthrift provision or by a provision in the trust
41 instrument that prohibits amendment or revocation of the trust.
- 42 (e) To effect the exercise of the power to appoint principal or income under subsection
43 (a) of this section the following shall apply:
- 44 (1) The exercise of the power to appoint shall be made by an instrument in
45 writing, signed and acknowledged by the trustee, setting forth the manner of
46 the exercise of the power, including the terms of the second trust, and the
47 effective date of the exercise of the power. The instrument shall be filed with
48 the records of the first trust.
- 49 (2) The trustee shall give written notice to all qualified beneficiaries of the first
50 trust, at least 60 days prior to the effective date of the exercise of the power
51 to appoint, of the trustee's intention to exercise the power. The notice shall

1 include a copy of the instrument described in subdivision (1) of this
2 subsection.

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

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

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

18 (g) A trustee or beneficiary may commence a proceeding to approve or disapprove a
19 proposed exercise of the trustee's special power to appoint to another trust pursuant to
20 subsection (a) of this section."

21 **SECTION 2.** G.S. 36C-2-203(f) is amended by adding a new subdivision to read:
22 **"§ 36C-2-203. Subject matter jurisdiction.**

23 ...

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

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

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

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

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

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

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

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