

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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SENATE BILL 434

Short Title: Directed Trustee and Trust Protector.

(Public)

Sponsors: Senator Hartsell.

Referred to: Judiciary I.

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 trustee may follow a direction of the settlor that is not
10 authorized by or is contrary to the terms of the trust, even if by doing so (i) the trustee exceeds
11 the authority granted to the trustee under the terms of the trust, or (ii) the trustee would
12 otherwise violate a duty the trustee owes under the trust. The trustee is not liable, individually
13 or as a fiduciary, for any loss resulting directly or indirectly from compliance with the
14 direction. If the settlor requires the settlor's consent to certain actions of the trustee, and the
15 settlor does not provide consent within a reasonable time after the trustee has made a timely
16 request for the settlor's consent, the trustee is not liable, individually or as a fiduciary, for any
17 loss resulting directly or indirectly from the trustee's failure to take any action that required the
18 settlor's consent.

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

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

- 26 a. Investments, including retention, purchase, sale, exchange, or other
27 transaction affecting the ownership of investments with respect to all
28 or any one or more of the trust assets.
29 b. Discretionary distributions of trust assets, including distributions to
30 one or more beneficiaries, distribution of one or more trust assets,
31 and termination of the trust by distribution of all of the trust assets.
32 c. Any other matter regarding trust administration, including the
33 transfer of the principal place of administration of the trust.

34 (2) Modify or amend the trust to do the following:

- 35 a. Achieve favorable tax status under applicable law.



- 1 b. Take advantage of laws governing restraints on alienation or other
2 State laws restricting the terms of the trust, distribution of trust
3 property, or the administration of the trust.
- 4 (3) Remove and appoint trustees, advisors, trust committee members, and trust
5 protectors.
- 6 (4) Increase or decrease the interests of any beneficiary.
- 7 (5) Grant a power of appointment to one or more beneficiaries of the trust or
8 modify the terms of or terminate a power of appointment granted to a
9 beneficiary by the governing instrument, except that a grant or modification
10 of a power of appointment may not grant a beneficial interest to any of the
11 following:
- 12 a. Any individual or class of individuals not specifically provided for in
13 the trust instrument.
- 14 b. The person having the power to grant, modify, or terminate the
15 power of appointment.
- 16 c. That person's estate or that person's creditors.
- 17 (6) Change the governing law of the trust.
- 18 (c) ~~The terms of a trust may confer upon a trustee or other person a power to direct the~~
19 ~~modification or termination of the trust. When the terms of a trust confer upon a person~~
20 ~~described in subsection (b) of this section a power authorized in subsection (b) of this section,~~
21 ~~the duty and liability of the trustee is as follows:~~
- 22 (1) If the terms of a trust confer upon the person the power to direct certain
23 actions of the trustee, the trustee must act in accordance with the direction
24 and is not liable, individually or as a fiduciary, for any loss resulting directly
25 or indirectly from compliance with the direction unless compliance with the
26 direction constitutes intentional wrongdoing, not mere negligence or gross
27 negligence on the part of the trustee.
- 28 (2) If the terms of the trust confer upon the person the power to consent to
29 certain actions of the trustee, and the power holder does not provide consent
30 within a reasonable time after the trustee has made a timely request for the
31 power holder's consent, the trustee is not liable, individually or as a
32 fiduciary, for any loss resulting directly or indirectly from the trustee's
33 failure to take any action that required the power holder's consent.
- 34 (3) If the terms of the trust confer upon the person a power other than the power
35 to direct or consent to actions of the trustee, the trustee is not liable,
36 individually or as a fiduciary, for any loss resulting directly or indirectly
37 from the exercise or nonexercise of the power.
- 38 (4) The trustee shall have no duty to monitor the conduct of the power holder,
39 provide advice to the power holder, or consult with the power holder. The
40 trustee is not required to give notice to any beneficiary of any action taken or
41 not taken by the power holder whether or not the trustee agrees with the
42 result. Administrative actions taken by the trustee for the purpose of
43 implementing directions of the power holder, including confirming that the
44 directions of the power holder have been carried out, do not constitute
45 monitoring of the power holder nor do they constitute participation in
46 decisions within the scope of the power holder's authority.
- 47 (d) ~~A person, other than a beneficiary, person described in subsection (b) of this section,~~
48 ~~who holds a power to direct authorize under subsection (b) of this section is presumptively a~~
49 ~~fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust~~
50 ~~and the interests of the beneficiaries. beneficiaries, except that if a beneficiary is a person with~~

1 a power authorized under subsection (b) of this section, the beneficiary is not a fiduciary with
2 respect to the following:

- 3 (1) A power to remove and appoint a trustee.
- 4 (2) The power that constitutes a power of appointment.
- 5 (3) A power the exercise or nonexercise of which may affect only the interests
6 of the beneficiary holding the power and no other beneficiary.

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

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

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

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

- 15 a. If the terms of a trust confer upon the cotrustee the power to direct
16 certain actions of the excluded trustee, the excluded trustee must act
17 in accordance with the direction and is not liable, individually or as a
18 fiduciary, for any loss resulting directly or indirectly from
19 compliance with the direction unless compliance with the direction
20 constitutes intentional wrongdoing, not mere negligence or gross
21 negligence on the part of the directed cotrustee.
- 22 b. If the terms of the trust confer upon the cotrustee any other power,
23 the excluded trustee is not liable, individually or as a fiduciary, for
24 any loss resulting directly or indirectly from the action taken by the
25 cotrustee.
- 26 c. The excluded trustee shall have no duty to monitor the conduct of the
27 cotrustee, provide advice to the cotrustee, or consult with or request
28 directions from the cotrustee. The excluded trustee is not required to
29 give notice to any beneficiary of any action taken or not taken by the
30 cotrustee whether or not the excluded trustee agrees with the result.
31 Administrative actions taken by the excluded trustee for the purpose
32 of implementing directions of the cotrustee, including confirming
33 that the directions of the cotrustee have been carried out, do not
34 constitute monitoring of the cotrustee nor do they constitute
35 participation in decisions within the scope of the cotrustee's
36 authority.

37 (2) Subject to the provisions of sub-subdivision a. of subdivision (1) of this
38 subsection, the cotrustee holding the power to take certain actions with
39 respect to the trust shall be liable to the beneficiaries with respect to the
40 exercise of the power as if the excluded trustee was not in office and shall
41 have the exclusive obligation to account to and defend any action brought by
42 the beneficiaries with respect to the exercise of the power."

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

44 ~~"(d) Whenever an instrument reserves to the settlor or vests in any person, including an~~
45 ~~advisory or investment committee or one or more co-fiduciaries, the authority to direct the~~
46 ~~making or retention of any investment to the exclusion of the fiduciary or to the exclusion of~~
47 ~~one or more of several co-fiduciaries, the excluded fiduciary or co-fiduciary who has no~~
48 ~~discretion in selecting the person authorized to make or retain investments is not liable to the~~
49 ~~beneficiaries or to the trust for the decisions or actions of the settlor or other person authorized~~
50 ~~to direct the making or retention of investments. As used in this subsection, the term "person"~~
51 ~~includes an individual, a corporation, or any legal or commercial entity authorized to hold~~

1 ~~property or do business in the State.~~ The following provisions apply to an instrument creating a
2 fiduciary relationship other than a trust instrument to which Chapter 36C of the General
3 Statutes applies and to a fiduciary other than a trustee:

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

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

9 b. Any other administrative matter.

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

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

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

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

37 (3) A person who holds a power to direct or consent is a fiduciary who, as such,
38 is required to act in good faith with regard to the purposes of the estate, or
39 other relationship between the fiduciary and beneficiaries, and the interests
40 of the beneficiaries, except that if a beneficiary is a person with a power to
41 direct or consent, the beneficiary is not a fiduciary with respect to the
42 following:

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

44 b. A power the exercise or nonexercise of which affects only the
45 interests of the beneficiary holding the power and no other
46 beneficiary.

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

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