

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003

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SENATE BILL 470

Short Title: Compensation of Trustees/Other Fiduciaries.

(Public)

Sponsors: Senator Hartsell.

Referred to: Judiciary II.

March 20, 2003

1 A BILL TO BE ENTITLED  
2 AN ACT TO MODERNIZE THE LAW AFFECTING THE COMPENSATION OF  
3 TRUSTEES AND OTHER FIDUCIARIES.

4 The General Assembly of North Carolina enacts:

5 SECTION 1. Article 5 of Chapter 32 of the General Statutes is repealed.

6 SECTION 2. Chapter 32 of the General Statutes is amended to add a new  
7 Article to read:

8 "Article 5A.

9 "Compensation of Trustees and Other Fiduciaries.

10 "**§ 32-53. Definitions.**

11 As used in this Article:

12 (1) "Interested person" includes (i) the grantor of the trust, if living; (ii) all  
13 living persons who are currently receiving or eligible to receive  
14 distributions of income or principal of the trust; (iii) all living persons  
15 who would be entitled to income and/or principal of the trust (without  
16 regard to the exercise of any power of appointment) if the trust  
17 terminated on that date; and (iv) any special trustee, trust protector, or  
18 advisor named in the trust instrument who is entitled to receive similar  
19 notices pursuant to the terms of the trust.

20 (2) "Trust" has the same meaning as contained in G.S. 36A-22.1(5).

21 "**§ 32-54. Compensation of trustees.**

22 (a) If the terms of the trust do not specify the trustee's compensation, the trustee  
23 is entitled to receive compensation that is reasonable under the circumstances and shall  
24 be empowered to pay such compensation from the assets of the trust without prior  
25 approval of the clerk of superior court.

26 (b) Factors to be considered in determining reasonableness of compensation:

27 (1) The degree of difficulty and novelty of the tasks required of the  
28 trustee;

29 (2) The responsibilities and risks involved;

- 1           (3)    The amount and character of the trust assets;
- 2           (4)    The skill, experience, expertise, and facilities of the trustee;
- 3           (5)    The quality of the trustee's performance;
- 4           (6)    Comparable charges for similar services;
- 5           (7)    Time devoted to administering the trust;
- 6           (8)    Time constraints imposed upon the trustee in administering the trust;
- 7           (9)    Nature and costs of services delegated to others by the trustee;
- 8           (10) Where more than one trustee is serving, the reasonableness of the total
- 9               fees paid to all trustees; and
- 10          (11) Other factors which the trustee or the clerk of superior court deems to
- 11               be relevant.

12 **"§ 32-55. Reimbursement for expenses incurred.**

13       In addition to the compensation referred to in G.S. 32-54, the trustee shall be entitled

14 to reimbursement out of the assets of the trust for expenses properly incurred in the

15 administration of the trust.

16 **"§ 32-56. Notice of compensation and other payments.**

17       Within a reasonable period of time after the end of each fiscal year of the trust,

18 regardless of whether an accounting is otherwise required by law or by the trust

19 instrument, the trustee shall give written notice to all interested persons of any

20 compensation, expense reimbursement, professional fee, counsel fees allowed under

21 G.S. 32-60, distribution or payment of any kind made to the trustee in such fiscal year

22 from the assets of the trust. If any interested person is then under a legal disability, such

23 notice shall be given to such person's guardian or agent under a durable power of

24 attorney or to a parent of such person if such person is then a minor; and such notice

25 shall have the same effect as if given directly to the interested person while not under a

26 legal disability so long as the person receiving the notice is not also the trustee. An

27 annual accounting provided by the trustee to all interested persons who are not then

28 under a legal disability and to the guardian, agent or parent of any interested person who

29 is then under a legal disability within a reasonable time after the end of the fiscal year of

30 the trust shall be deemed sufficient notice under this section provided that it sets forth

31 and clearly identifies all compensation, expense reimbursements, professional fees,

32 counsel fees allowed under G.S. 32-60, distributions and other payments of any kind to

33 the trustee during such fiscal year from the assets of the trust.

34 **"§ 32-57. Judicial review of compensation and other payments to trustee.**

35       (a) Unless specifically prohibited by the trust instrument, any interested person,

36 or the guardian, agent or parent of any interested person who is then under a legal

37 disability, may initiate a proceeding under Article 3 of Chapter 36A of the General

38 Statutes for the review of the reasonableness of any compensation or expense

39 reimbursement paid under this Article. The provisions of Article 3 of Chapter 36A shall

40 govern that proceeding and any appeal from that proceeding, except that:

- 41           (1)    The definition of "interested person" contained in G.S. 32-53(1) shall
- 42               control in all matters relating to such review, including the
- 43               determination of who may initiate a proceeding under G.S 36A-23.1

1                   and the determination of when an interested person may be represented  
2                   by others under G.S. 36A-26.3(2).

3           (2)       For purposes of G.S. 36A-26.1, it shall be necessary that all interested  
4                   persons not joined as petitioners be joined as respondents, but it shall  
5                   not be necessary that all known beneficiaries be joined as respondents  
6                   unless they are interested persons.

7           (3)       In addition to other powers of the clerk of superior court acting under  
8                   Article 3 of Chapter 36A, if the clerk of superior court determines  
9                   upon review that a trustee has received excessive compensation or  
10                  expense reimbursement, the clerk may order such trustee to make  
11                  appropriate refunds.

12       (b)       Notwithstanding the foregoing, if a proceeding for review of the  
13       reasonableness of compensation or expense reimbursement paid to a trustee is not  
14       initiated within one year from the date when notice of such payment is given pursuant to  
15       G.S. 32-56, then it shall be presumed that such compensation or expense reimbursement  
16       was reasonable.

17       **"§ 32-58. Compensation of other fiduciaries.**

18       In the case of a fiduciary other than a trustee under a trust, where the instrument  
19       creating the fiduciary relationship does not contain a provision relating to compensation  
20       and where there is no provision in the General Statutes providing for compensation for  
21       such fiduciary, such fiduciary shall be entitled to reasonable compensation determined  
22       in writing by the clerk of superior court in its discretion and for reimbursement of  
23       expenses properly incurred in the administration of the fiduciary relationship. Upon  
24       written request by the fiduciary, the clerk of superior court may allow the  
25       reimbursement of such expenses and such reasonable compensation after taking into  
26       account the factors set forth in G.S. 32-54(b).

27       **"§ 32-59. Effect of provisions in instrument.**

28       In those instances where the instrument creating the trust or other fiduciary  
29       relationship provides that the compensation of the fiduciary shall be the amount  
30       "provided by law", the "maximum amount provided by law" or other similar language,  
31       or references former G.S. 32-50, such language shall be construed as an intention that  
32       the trustee or other fiduciary shall receive reasonable compensation as allowed under  
33       this Article. In those instances where the instrument creating the trust or other fiduciary  
34       relationship provides that the trustee or other fiduciary shall serve without  
35       compensation, such language shall be construed as being a provision relating to  
36       compensation and the trustee or other fiduciary shall not be entitled to receive  
37       reasonable compensation as allowed under this Article.

38       **"§ 32-60. Counsel fees allowable to attorneys serving as fiduciaries.**

39       The clerk of superior court may exercise discretion to allow counsel fees to an  
40       attorney serving as a fiduciary or trustee (in addition to the compensation allowed to the  
41       attorney as a fiduciary or trustee) where such attorney, on behalf of the trust or fiduciary  
42       relationship, renders professional services as an attorney that are different from the  
43       services normally performed by a fiduciary or trustee and of a type which would

1 reasonably justify the retention of legal counsel by any fiduciary or trustee who is not  
2 licensed to practice law.

3 **"§ 32-61. Applicability.**

4 The provisions of this Article shall apply to all payments made to a fiduciary after  
5 the enactment of this Article, including fiduciary compensation earned or paid after the  
6 enactment of this Article, with respect to trusts and fiduciary relationships created on or  
7 after January 1, 2004, and with respect to all trusts and fiduciary relationships existing  
8 on January 1, 2004."

9 **SECTION 3.** G.S. 32A-11(c) reads as rewritten:

10 "(c) In the event that any power of attorney executed pursuant to the provisions of  
11 this Article does not contain the amount of ~~commissions~~ compensation that the  
12 attorney-in-fact is entitled to receive or the way such ~~commissions are~~ compensation is  
13 to be determined, and the principal should thereafter become incapacitated or mentally  
14 incompetent, ~~the commissions such attorney in fact shall receive subsequent to the~~  
15 ~~principal's incapacity or mental incompetence shall be fixed in the discretion of the~~  
16 ~~clerk of superior court pursuant to the provisions of G.S. 32-50(e).~~ then subsequent to  
17 the principal's incapacity or mental incompetence, the attorney-in-fact shall be entitled  
18 to receive such reasonable compensation as determined by the clerk of superior court  
19 after considering the factors set forth in G.S. 32-54(b)."

20 **SECTION 4.** G.S. 36A-23.1(a) reads as rewritten:

21 "(a) The clerks of superior court of this State have original jurisdiction over all  
22 proceedings initiated by interested persons concerning the internal affairs of trusts  
23 except proceedings to modify or terminate trusts. Except as provided in subdivision (3)  
24 of this subsection, the clerk's jurisdiction is exclusive. Proceedings that may be  
25 maintained under this subsection are those concerning the administration and  
26 distribution of trusts, the declaration of rights, and the determination of other matters  
27 involving trustees and trust beneficiaries, to the extent that those matters are not  
28 otherwise provided for in the governing instrument. These include proceedings:

- 29 (1) To appoint or remove a trustee;  
30 (2) To review trustees' fees ~~pursuant to G.S. 32-50~~ and expenses pursuant  
31 to Article 5A of Chapter 32 of the General Statutes and to review and  
32 settle interim or final accounts; and  
33 (3) To ascertain beneficiaries, to determine any question arising in the  
34 administration or distribution of any trust, including questions of  
35 construction of trust instruments, and to determine the existence or  
36 nonexistence of trusts created other than by will and the existence or  
37 nonexistence of any immunity, power, privilege, duty, or right. The  
38 clerk, on the clerk's own motion, may determine that a proceeding to  
39 determine an issue listed in this subdivision shall be originally heard  
40 by a superior court judge."

41 **SECTION 5.** This act becomes effective January 1, 2004, and applies to  
42 payments made to a fiduciary on or after that date.