

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2009

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SENATE BILL 481

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

Sponsors: Senator Hartsell.

Referred to: Judiciary II.

March 10, 2009

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 the date upon which the interest would have vested and become distributable under the terms of the first trust.



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

1 to appoint, of the trustee's intention to exercise the power. The notice shall  
2 include a copy of the instrument described in subdivision (1) of this  
3 subsection.

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

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

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

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

20 "**§ 36C-2-203. Subject matter jurisdiction.**

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

28 ...

29 (8a) To approve the exercise of the trustee's special power to appoint trust  
30 principal or income to another trust as provided in G.S. 36C-8-816.1."

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