

**PURPOSE AND BENEFITS OF ACT TO ENACT NCGS § 36C-8-816.1  
ENTITLED "TRUSTEE'S SPECIAL POWER TO APPOINT TO OTHER TRUST"  
AND AMEND NCGS 36C-2-203**

**Objective of Bill:** The major objective of the bill is to modernize North Carolina trust law and enhance its competitiveness with the trust laws of other states. Currently, a half-dozen states have enacted statutes that allow a trustee to appoint trust property to another trust, and other states are considering similar legislation.

**Common Law:** Under traditional North Carolina trust law, it is unclear whether a trustee's authority to distribute trust property "to or for the benefit of" a specified person or persons includes the power to distribute property to another trust for the benefit of such person(s). One argument is that the power to distribute "for the benefit of" a person includes the power to distribute to another trust for such person's benefit. Another view is that the power to distribute does not include a power to appoint property to a person in trust. The unresolved question of whether a trustee can distribute property to another trust places an undue burden on the trustee's ability to administer the trust in accordance with the settlor's wishes without exposing itself to uncertain or potential liabilities. The proposed bill would clarify that a trustee's authority to distribute "to or for the benefit of" a person or persons includes the ability to distribute property to a trust for the benefit of such person(s).

**Ability to Distribute to Another Trust:** The benefits of the power to distribute property to another trust have gained heightened appreciation, and many estate planning practitioners include such provisions when drafting trust documents. The proposed bill would reduce complexity by clarifying when a trustee's power to distribute includes the power to distribute to another trust, and, therefore, the potential to achieve a variety of objectives would be available to every trust by default.

**Changed Circumstances:** It is common for trusts to permit discretionary distributions of property to or for the benefit of the beneficiaries. If events have changed since the time that the trust was drafted, such as significant appreciation in trust property or increase in a beneficiary's wealth, a decrease in the number of ultimate beneficiaries, or a beneficiary's lack of maturity, outright distributions may be counterproductive to the settlor's original intent. The ability to distribute to another trust for the benefit of the beneficiaries would provide the trustee with flexibility to achieve the settlor's initial goals, whether to protect assets, provide liquidity to beneficiaries, or maximize ultimate use of the property.

**Administrative Benefits:** Similarly, the proposed bill would allow a trustee to combine trusts for the benefit of similar persons and reduce administration costs. The trustee would be able to fund another trust to purchase specific assets for a beneficiary or meet other trust objectives, and the trustee would be able to correct mistakes in the original trust document. The proposed bill would also allow a trustee to modify provisions that were left out of the original trust document to achieve maximum administrative efficiency or effective investment decisions, as well as modifications to meet subsequent changes in applicable law.

**Subject Matter Jurisdiction**: The proposed bill would also amend the clerk of court's subject matter jurisdiction over trust proceedings to include jurisdiction to approve the exercise of a trustee's special power to appoint trust property to another trust. The proposed amendment would facilitate administrative efficiencies relating to a trustee's ability to distribute property to another trust.

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**§ 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 such 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 such 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, the second trust shall not contain any provision which, if included in the first trust, would have prevented the first trust from qualifying for such a deduction or would have reduced the amount of such deduction;
- (5) In the case of any contributions to the first trust which have been treated as gifts qualifying for the exclusion from gift tax described in Section 2503(b) of the Internal Revenue Code by reason of application of Section 2503(c) of the Internal Revenue Code, the second trust shall provide that the beneficiary's remainder interest shall vest and become distributable no later than the date upon which such interest would have vested and become distributable under the terms of the first trust;
- (6) If one or more beneficiaries of the first trust has a power of withdrawal over trust property, then either:
  - a. the second trust must provide a power of withdrawal in the second trust identical to the power of withdrawal in the first trust; or
  - b. sufficient trust property must remain in the first trust to satisfy the outstanding power of withdrawal;

- (7) If the power to distribute principal or income in the first trust is subject to an ascertainable standard, then the terms of the second trust shall be subject to the following:
- a. the power to distribute principal or income in the second trust must be subject to the same ascertainable standard; and
  - b. the second trust may not confer a power of appointment upon a beneficiary of the first trust; and
  - c. the beneficiaries of the first trust must have the same beneficial interests in the second trust;
- (8) If the power to distribute principal or income in the first trust is not subject to an ascertainable standard, the second trust may confer a power of appointment upon a beneficiary of the first trust to or for the benefit of whom the trustee has the power to distribute principal or income of the first trust. The permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of the first or second trust. The power of appointment conferred upon a beneficiary shall be subject to the provisions of G.S. 41-23 covering the time at which the permissible period of the rule against perpetuities and suspension of power of alienation begins and the law that determines the permissible period of the rule against perpetuities and suspension of power of alienation of the first trust.
- (c) Notwithstanding subsection (a) of this section, a trustee may not exercise the power to appoint principal or income under subsection (a) if the trustee is a beneficiary of the first trust. The remaining cotrustee or a majority of the remaining cotrustees may act for the trust.
- (d) The exercise of the power to appoint principal or income under subsection (a) of this section:
- (1) Shall be considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate or the creditors of the trustee's estate;
  - (2) Shall be subject to the provisions of G.S. 41-23 covering the time at which the permissible period of the rule against perpetuities and suspension of power of alienation begins and the law that determines the permissible period of the rule against perpetuities and suspension of power of alienation of the first trust; and
  - (3) Is not prohibited by a spendthrift provision or by a provision in the trust instrument that prohibits amendment or revocation of the trust.
- (e) To effect the exercise of the power to appoint principal or income under subsection (a) of this section the following shall apply:
- (1) The exercise of the power to appoint shall be made by an instrument in

writing, signed and acknowledged by the trustee, setting forth the manner of the exercise of the power, including the terms of the second trust, and the effective date of the exercise of the power. The instrument shall be filed with the records of the first trust.

- (2) The trustee shall give written notice to all qualified beneficiaries of the first trust, at least 60 days prior to the effective date of the exercise of the power to appoint, of the trustee's intention to exercise the power. The notice shall include a copy of the instrument described in subdivision (1) of this subsection.
  - (3) If all qualified beneficiaries waive the notice period by a signed written instrument delivered to the trustee, the trustee's power to appoint principal or income shall be exercisable after notice is waived by all qualified beneficiaries, notwithstanding the effective date of the exercise of the power.
  - (4) The trustee's notice under this subsection shall not limit the right of any beneficiary to object to the exercise of the trustee's power to appoint and bring an action for breach of trust seeking appropriate relief as provided by G.S. 36C-10-1001.
- (f) Nothing in this section shall be construed (i) to create or imply a duty of the trustee to exercise the power to distribute principal or income, and no inference of impropriety shall be made as a result of a trustee not exercising the power to appoint principal or income conferred under subsection (a) of this section, and (ii) to abridge the right of any trustee who has a power to appoint property in further trust that arises under the terms of the first trust or under any other section of this Chapter or under another provision of law or under common law.

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

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

- (1) To appoint or remove a trustee, including the appointment and removal of a trustee pursuant to G.S. 36C-4-414(b).
- (2) To approve the resignation of a trustee.
- (3) To review trustees' fees under Article 6 of Chapter 32 of the General Statutes and review and settle interim or final accounts.
- (4) To (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust as provided in G.S. 37A-1-104.3.
- (5) To transfer a trust's principal place of administration.
- (6) To require a trustee to provide bond and determine the amount of the bond, excuse a requirement of bond, reduce the amount of bond, release the surety, or permit the substitution of another bond with the same or different sureties.
- (7) To make orders with respect to a trust for the care of animals as provided in G.S. 36C-4-408.
- (8) To make orders with respect to a noncharitable trust without an ascertainable beneficiary as provided in G.S. 36C-4-409.
- (8a) To approve the exercise of the trustee's special power to appoint trust principal or income to another trust as provided in G.S. 36C-8-816.1.
- (9) To ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments, and to determine the existence or nonexistence of trusts created other than by will and the existence or nonexistence of any immunity, power, privilege, duty, or right. Any party may file a notice of transfer of a proceeding pursuant to this subdivision to the superior court division of the General Court of Justice as provided in G.S. 36C-2-205(g1). In the absence of a transfer to Superior Court, Article 26 of Chapter 1 of the General Statutes shall apply to a trust proceeding pending before the clerk of superior court to the extent consistent with this Article.

(b) Nothing in this section shall be construed (i) to confer upon the clerk of superior court any authority to regulate or supervise the actions of a trustee except to the extent that the trustee's actions are inconsistent with the governing instrument or of State law; or (ii) to confer upon any party any additional right, remedy, or cause of action not otherwise conferred by law.

(c) Nothing in this section affects the right of a person to file an action in the superior court division of the General Court of Justice for declaratory relief under Article 26 of Chapter 1 of the General Statutes.

(d) The clerk of superior court shall not, over the objection of a party, entertain proceedings under this section involving a trust having its principal place of administration in another state, except:

- (1) When all appropriate parties could not be bound by litigation in the courts of the state in which the trust had its principal place of administration; or
- (2) When the interests of justice otherwise would be seriously impaired.

The clerk of superior court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust has its principal place of administration, or the clerk of superior court may grant a continuance or enter any other appropriate order.

(e) Any party to a proceeding before the clerk of superior court may appeal from the decision of the clerk to a superior court judge as provided for estate matters in G.S. 1-301.3.

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

- (1) Actions to reform, terminate, or modify a trust as provided by G.S. 36C-4-410 through G.S. 36C-4-416;
- (2) Actions by or against creditors or debtors of a trust;
- (3) Actions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud, and negligence;
- (4) Actions to enforce a charitable trust under G.S. 36C-4-405.1; and
- (5) Actions to amend or reform a charitable trust under G.S. 36C-4A-1. (1911, c. 39, s. 4; C.S. s. 4027; 1977, c. 502, s. 2; 1999-216, s. 8; 2001-413, s. 1; 2005-192, s. 2; 2007-106, ss. 6, 7.)