

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1999

S

4

SENATE BILL 526  
Judiciary II Committee Substitute Adopted 4/15/99  
Third Edition Engrossed 4/21/99  
House Committee Substitute Favorable 6/14/99

Short Title: Mod. & Term. of Irrevocable Trusts.

(Public)

Sponsors:

Referred to:

March 25, 1999

A BILL TO BE ENTITLED  
AN ACT TO PROVIDE FOR THE MODIFICATION AND TERMINATION OF  
IRREVOCABLE TRUSTS.

The General Assembly of North Carolina enacts:

Section 1. Article 11 of Chapter 36A of the General Statutes is repealed.

Section 2. Chapter 36A of the General Statutes is amended by adding a new

Article to read:

**"ARTICLE 11A.**

**"MODIFICATION AND TERMINATION OF IRREVOCABLE TRUSTS.**

**"§ 36A-125.1. Definitions.**

As used in this section:

(1) 'Beneficiary' means a person who has a present or future interest, vested or contingent, in a trust, including any such person who is not in esse or cannot be determined until the occurrence of a future event.

(2) 'Person' means an individual person, a corporation, an organization, or other legal entity.

1           (3) 'Trust' means an express noncharitable trust. A trust is noncharitable if  
2 it is neither a wholly charitable trust nor a charitable split-interest trust  
3 subject to the provisions of Article 4 or 4A of Chapter 36A of the  
4 General Statutes. The term 'trust' does not include constructive trusts,  
5 resulting trusts, conservatorships, personal representatives, trust  
6 accounts as defined in G.S. 53-146.2, 54-109.57, and 54B-130, trust  
7 funds subject to G.S. 90-210.61, custodial arrangements pursuant to  
8 G.S. 33A-1 through G.S. 33A-24 and G.S. 33B-1 through G.S. 33B-22,  
9 business trusts providing for certificates to be issued to beneficiaries,  
10 common trust funds, voting trusts, security arrangements, liquidation  
11 trusts, and trusts for the primary purpose of paying debts, dividends,  
12 interest, salaries, wages, profits, pensions, or employee benefits of any  
13 kind, or any arrangement under which a person is nominee or escrowee  
14 for another.

15           (4) 'Sole beneficiary' means a beneficiary of a trust for which the settlor  
16 does not manifest an intention to give a beneficial interest to anyone  
17 else.

18           (5) 'Sui juris' means a person who is in esse and not a minor or otherwise  
19 legally incapacitated. With regard to a beneficiary, 'sui juris' also means  
20 that such beneficiary is ascertained and that the trustee knows the  
21 identity of the beneficiary.

22           (6) 'Trustee' means the trustee or trustees acting under an irrevocable trust.

23 **"§ 36A-125.2. Modification or termination where settlor is sole beneficiary.**

24 If a settlor is sui juris and the sole beneficiary of an irrevocable trust, the settlor may  
25 compel the modification or termination of the trust without the approval of the court even  
26 though the purposes for which the trust was created have not been accomplished.

27 **"§ 36A-125.3. Modification or termination by consent of settlor and beneficiaries.**

28           (a) If the settlor and all beneficiaries of an irrevocable trust are sui juris and  
29 consent, they may compel the modification or termination of the trust without the  
30 approval of the court even though the purposes for which the trust was created have not  
31 been accomplished.

32           (b) If any beneficiary does not consent to the modification or termination of the  
33 trust or is not sui juris, the other beneficiaries may institute a proceeding before the  
34 superior court to compel a modification or partial termination of the trust. The court  
35 may, with the consent of the settlor, allow such a modification or partial termination upon  
36 a finding that such action would not substantially impair the interests of the beneficiaries  
37 who do not consent or who are not sui juris.

38 **"§ 36A-125.4. Modification or termination by consent of beneficiaries.**

39           (a) Except as provided in subsection (b) of this section, if all beneficiaries of an  
40 irrevocable trust consent, they may compel modification or termination of the trust in a  
41 proceeding before the superior court.

42           (b) Where the beneficiaries of an irrevocable trust seek to compel a termination of  
43 the trust or modify it in a manner that affects its continuance according to its terms, and if

1 the continuance of the trust is necessary to carry out a material purpose of the trust, the  
2 trust cannot be modified or terminated unless the court in its discretion determines that  
3 the reason for modifying or terminating the trust under the circumstances substantially  
4 outweighs the interest in accomplishing a material purpose of the trust.

5 **"§ 36A-125.5. Provisions relating to consent of beneficiaries.**

6 For purposes of this Article:

7 (1) The consent of a beneficiary who is not sui juris may be given in  
8 proceedings before the court by a guardian ad litem appointed for that  
9 beneficiary if the guardian ad litem finds that it would be appropriate to  
10 do so. The guardian ad litem may base a decision to consent to  
11 modification or termination of a trust upon a finding that living  
12 members of the beneficiary's family would generally benefit from such  
13 action.

14 (2) In determining the class of beneficiaries whose consent is necessary to  
15 modify or terminate a trust, the presumption of fertility is rebuttable.

16 (3) If the trust provides for the disposition of property to a class of persons  
17 described only as 'heirs' or 'next of kin' of any person or uses other  
18 words that describe the class of all persons who would take under the  
19 rules of intestacy, the court may limit the class of beneficiaries whose  
20 consent is needed to compel the modification or termination of the trust  
21 to the beneficiaries who are reasonably likely to take under the  
22 circumstances.

23 **"§ 36A-125.6. Modification or termination of a small trust.**

24 (a) In a proceeding before the superior court, the court in its discretion may  
25 modify or terminate an irrevocable trust if the court determines that the fair market value  
26 of the assets held in trust is so low that the continuance of the trust pursuant to its terms  
27 in relation to the cost of its administration would defeat or substantially impair the  
28 accomplishment of the purposes of the trust.

29 (b) Notwithstanding the provisions of subsection (a) of this section, if at any time  
30 the trustee of an irrevocable trust determines in good faith that the fair market value of  
31 the assets held in trust is fifty thousand dollars (\$50,000) or less, and the continuance of  
32 the trust pursuant to its terms in relation to the cost of its administration would defeat or  
33 substantially impair the accomplishment of the purposes of the trust, the trustee, without  
34 approval of the court, may in its discretion terminate the trust and distribute the trust  
35 property. The trust property, including principal and undistributed income, shall be paid,  
36 in a manner that conforms as nearly as possible to the intention of the settlor as  
37 determined by the trustee from the trust instrument, to any one or more of the  
38 beneficiaries to whom the income could be paid, or if there is no beneficiary to whom the  
39 income could be paid, to any one or more of the beneficiaries. The trustee may enter into  
40 an agreement or make such other provisions that the trustee deems necessary or  
41 appropriate to protect the interests of the beneficiaries and to carry out the intent and  
42 purpose of the trust. The provisions of this subsection shall not apply where the

1 instrument creating the trust, by specific reference to this section, or to former G.S. 36A-  
2 125, provides that it shall not apply.

3 (c) The trustee shall not be liable for such termination and distribution,  
4 notwithstanding the existence or potential existence of other beneficiaries who are not sui  
5 juris. Any beneficiary receiving a distribution from a trust terminated under this section  
6 shall incur no liability and shall not be required to account to anyone for such  
7 distribution.

8 **"§ 36A-125.7. Modification or termination because of changed circumstances.**

9 (a) In a proceeding before the superior court, the court in its discretion may  
10 modify or terminate an irrevocable trust:

11 (1) If the purpose of the trust has been fulfilled or has become illegal or  
12 impossible of fulfillment; or

13 (2) If, owing to circumstances not known to the settlor and not anticipated  
14 by the settlor, the continuation of the trust under its terms would defeat  
15 or substantially impair the accomplishment of the purposes of the trust.

16 (b) In exercising its discretion under subsection (a) of this section, the court may  
17 order the trustee to do acts that are not authorized or are prohibited by the trust instrument  
18 if necessary to carry out the purposes of the trust.

19 **"§ 36A-125.8. Inalienability of the beneficiary's interest.**

20 The court, in exercising its discretion to modify or terminate an irrevocable trust  
21 pursuant to the provisions of G.S. 36A-125.4, 36A-125.6(a), and 36A-125.7, and the  
22 trustee, in exercising its discretion to terminate a trust pursuant to G.S. 36A-125.6(b),  
23 shall consider provisions making the interest of a beneficiary inalienable, including those  
24 described in G.S. 36A-115(b), but the court or trustee is not precluded from the exercise  
25 of that discretion solely because of such provisions.

26 **"§ 36A-125.9. Tax consequences.**

27 The court, in exercising its discretion to modify or terminate an irrevocable trust  
28 under the provisions of this Article, and the trustee, in exercising its discretion to  
29 terminate a trust pursuant to G.S. 36A-125.6(b), shall consider the tax consequences of  
30 such modification or termination, if any, to the trust and the beneficiaries of the trust.

31 **"§ 36A-125.10. Distribution to minors or incompetents.**

32 If any trust property becomes distributable to a minor or incompetent under this  
33 Article it may be distributed:

34 (1) To the guardian of the estate or general guardian of such beneficiary;

35 (2) In accordance with the North Carolina Uniform Transfer to Minors Act,  
36 Chapter 33A of the General Statutes; or

37 (3) In accordance with the North Carolina Custodial Trust Act, Chapter 33B  
38 of the General Statutes.

39 **"§ 36A-125.11. Procedure.**

40 A proceeding under this Article may be brought under the Uniform Declaratory  
41 Judgment Act, Article 26 of Chapter 1 of the General Statutes, the provisions of which  
42 shall apply to that proceeding to the extent not inconsistent with this Article.

43 **"§ 36A-125.12. Exclusiveness of remedy.**

1        This Article does not include or abridge any other rights or proceedings existing under  
2 any other statute or otherwise provided by law to modify, terminate, reform, or rescind an  
3 irrevocable trust."

4            Section 3. This act becomes effective January 1, 2000, and applies to all trusts  
5 created before or after that date, except that G.S. 36A-125.6(b) shall not apply to trusts  
6 created before October 1, 1991, if the trust instrument contains spendthrift or similar  
7 protective provisions, including provisions described in G.S. 36A-115(b)(3).