

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1999

SESSION LAW 1999-266
SENATE BILL 526

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 Article 11 of Chapter 36A of the General Statutes is repealed.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

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

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

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

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

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

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

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

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

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

(b) Where the beneficiaries of an irrevocable trust seek to compel a termination of the trust or modify it in a manner that affects its continuance according to its terms, and if the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court in its discretion determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust.

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

For purposes of this Article:

- (1) The consent of a beneficiary who is not sui juris may be given in proceedings before the court by a guardian ad litem appointed for that beneficiary if the guardian ad litem finds that it would be appropriate to do so. The guardian ad litem may base a decision to consent to modification or termination of a trust upon a finding that living members of the beneficiary's family would generally benefit from such action.
- (2) In determining the class of beneficiaries whose consent is necessary to modify or terminate a trust, the presumption of fertility is rebuttable.
- (3) If the trust provides for the disposition of property to a class of persons described only as 'heirs' or 'next of kin' of any person or uses other

words that describe the class of all persons who would take under the rules of intestacy, the court may limit the class of beneficiaries whose consent is needed to compel the modification or termination of the trust to the beneficiaries who are reasonably likely to take under the circumstances.

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

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

(b) Notwithstanding the provisions of subsection (a) of this section, if at any time the trustee of an irrevocable trust determines in good faith that the fair market value of the assets held in trust is fifty thousand dollars (\$50,000) or less, and the continuance of the trust pursuant to its terms in relation to the cost of its administration would defeat or substantially impair the accomplishment of the purposes of the trust, the trustee, without approval of the court, may in its discretion terminate the trust and distribute the trust property. The trust property, including principal and undistributed income, shall be paid, in a manner that conforms as nearly as possible to the intention of the settlor as determined by the trustee from the trust instrument, to any one or more of the beneficiaries to whom the income could be paid, or if there is no beneficiary to whom the income could be paid, to any one or more of the beneficiaries. The trustee may enter into an agreement or make such other provisions that the trustee deems necessary or appropriate to protect the interests of the beneficiaries and to carry out the intent and purpose of the trust. The provisions of this subsection shall not apply where the instrument creating the trust, by specific reference to this section, or to former G.S. 36A-125, provides that it shall not apply.

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

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

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

- (1) If the purpose of the trust has been fulfilled or has become illegal or impossible of fulfillment; or
- (2) If, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust.

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

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

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

"§ 36A-125.9. Tax consequences.

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

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

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

- (1) To the guardian of the estate or general guardian of such beneficiary;
- (2) In accordance with the North Carolina Uniform Transfer to Minors Act, Chapter 33A of the General Statutes; or
- (3) In accordance with the North Carolina Custodial Trust Act, Chapter 33B of the General Statutes.

"§ 36A-125.11. Procedure.

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

"§ 36A-125.12. Exclusiveness of remedy.

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

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

In the General Assembly read three times and ratified this the 30th day of June, 1999.

s/ Marc Basnight
President Pro Tempore of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ James B. Hunt, Jr.
Governor

Approved 1:12 p.m. this 9th day of July, 1999