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SENATE BILL 526
Judiciary II Committee Substitute Adopted 4/15/99
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Short Title: Mod. & Term. of Irrevocable Trusts.

(Public)

Sponsors:

Referred to:

March 25, 1999

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

4 The General Assembly of North Carolina enacts:

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 Article 11 of Chapter 36A of the General Statutes is repealed.

6 Section 2. Chapter 36A of the General Statutes is amended by adding a new
7 Article to read:

8 **"ARTICLE 11A.**

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

10 **"§ 36A-125.1. Definitions.**

11 As used in this section:

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

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

17 (3) 'Irrevocable trust' means an express noncharitable irrevocable trust. A
18 trust is noncharitable if it is neither a wholly charitable trust nor a

1 charitable split-interest trust subject to the provisions of Article 4 or 4A
2 of Chapter 36A of the General Statutes.

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

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

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

11 **"§ 36A-125.2. Modification or termination where settlor is sole beneficiary.**

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

15 **"§ 36A-125.3. Modification or termination by consent of settlor and beneficiaries.**

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

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

26 **"§ 36A-125.4. Modification or termination by consent of beneficiaries.**

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

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

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

37 For purposes of this Article:

38 (1) The consent of a beneficiary who is not sui juris may be given in
39 proceedings before the court by a guardian ad litem appointed for that
40 beneficiary if the guardian ad litem finds that it would be appropriate to
41 do so. The guardian ad litem may base a decision to consent to
42 modification or termination of a trust upon a finding that living

1 members of the beneficiary's family would generally benefit from such
2 action.

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

5 (3) If the trust provides for the disposition of property to a class of persons
6 described only as 'heirs' or 'next of kin' of any person or uses other
7 words that describe the class of all persons who would take under the
8 rules of intestacy, the court may limit the class of beneficiaries whose
9 consent is needed to compel the modification or termination of the trust
10 to the beneficiaries who are reasonably likely to take under the
11 circumstances.

12 **"§ 36A-125.6. Modification or termination of a small trust.**

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

18 (b) Notwithstanding the provisions of subsection (a) of this section, if at any time
19 the trustee of an irrevocable trust determines in good faith that the fair market value of
20 the assets held in trust is fifty thousand dollars (\$50,000) or less, and the continuance of
21 the trust pursuant to its terms in relation to the cost of its administration would defeat or
22 substantially impair the accomplishment of the purposes of the trust, the trustee, without
23 approval of the court, may in its discretion terminate the trust and distribute the trust
24 property, including principal and undistributed income, to any one or more of the
25 beneficiaries to whom the income could be paid, or if there is no beneficiary to whom the
26 income could be paid, to any one or more of the beneficiaries in a manner which
27 conforms as nearly as possible to the intention of the settlor as determined by the trustee
28 from the trust instrument. The trustee may enter into an agreement or make such other
29 provisions that the trustee deems necessary or appropriate to protect the interests of the
30 beneficiaries and to carry out the intent and purpose of the trust.

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

35 The provisions of this subsection shall not apply where the instrument creating the
36 trust, by specific reference to this section, or to former G.S. 36A-125, provides that it
37 shall not apply.

38 **"§ 36A-125.7. Modification or termination because of changed circumstances.**

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

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

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

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

7 "**§ 36A-125.8. Inalienability of the beneficiary's interest.**

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

14 "**§ 36A-125.9. Tax Consequences.**

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

19 "**§ 36A-125.10. Distribution to minors or incompetents.**

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

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

27 "**§ 36A-125.11. Procedure.**

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

31 "**§ 36A-125.12. Exclusiveness of remedy.**

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

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