

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003

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SENATE DRS75117-LL-70 (3/7)

Short Title: Compensation of Trustees/Other Fiduciaries. (Public)

Sponsors: Senator Hartsell.

Referred to:

A BILL TO BE ENTITLED  
AN ACT TO MODERNIZE THE LAW AFFECTING THE COMPENSATION OF  
TRUSTEES AND OTHER FIDUCIARIES.

The General Assembly of North Carolina enacts:

**SECTION 1.** Article 5 of Chapter 32 of the General Statutes is repealed.

**SECTION 2.** Chapter 32 of the General Statutes is amended to add a new  
Article to read:

"Article 5A.

"Compensation of Trustees and Other Fiduciaries.

**"§ 32-53. Definitions.**

As used in this Article:

(1) "Interested person" includes (i) the grantor of the trust, if living; (ii) all living persons who are currently receiving or eligible to receive distributions of income or principal of the trust; (iii) all living persons who would be entitled to income and/or principal of the trust (without regard to the exercise of any power of appointment) if the trust terminated on that date; and (iv) any special trustee, trust protector, or advisor named in the trust instrument who is entitled to receive similar notices pursuant to the terms of the trust.

(2) "Trust" has the same meaning as contained in G.S. 36A-22.1(5).

**"§ 32-54. Compensation of trustees.**

(a) If the terms of the trust do not specify the trustee's compensation, the trustee is entitled to receive compensation that is reasonable under the circumstances and shall be empowered to pay such compensation from the assets of the trust without prior approval of the clerk of superior court.

(b) Factors to be considered in determining reasonableness of compensation:

- 1           (1)    The degree of difficulty and novelty of the tasks required of the  
2            trustee;
- 3           (2)    The responsibilities and risks involved;
- 4           (3)    The amount and character of the trust assets;
- 5           (4)    The skill, experience, expertise, and facilities of the trustee;
- 6           (5)    The quality of the trustee's performance;
- 7           (6)    Comparable charges for similar services;
- 8           (7)    Time devoted to administering the trust;
- 9           (8)    Time constraints imposed upon the trustee in administering the trust;
- 10          (9)    Nature and costs of services delegated to others by the trustee;
- 11          (10)   Where more than one trustee is serving, the reasonableness of the total  
12          fees paid to all trustees; and
- 13          (11)   Other factors which the trustee or the clerk of superior court deems to  
14          be relevant.

15    **"§ 32-55. Reimbursement for expenses incurred.**

16        In addition to the compensation referred to in G.S. 32-54, the trustee shall be entitled  
17        to reimbursement out of the assets of the trust for expenses properly incurred in the  
18        administration of the trust.

19    **"§ 32-56. Notice of compensation and other payments.**

20        Within a reasonable period of time after the end of each fiscal year of the trust,  
21        regardless of whether an accounting is otherwise required by law or by the trust  
22        instrument, the trustee shall give written notice to all interested persons of any  
23        compensation, expense reimbursement, professional fee, counsel fees allowed under  
24        G.S. 32-60, distribution or payment of any kind made to the trustee in such fiscal year  
25        from the assets of the trust. If any interested person is then under a legal disability, such  
26        notice shall be given to such person's guardian or agent under a durable power of  
27        attorney or to a parent of such person if such person is then a minor; and such notice  
28        shall have the same effect as if given directly to the interested person while not under a  
29        legal disability so long as the person receiving the notice is not also the trustee. An  
30        annual accounting provided by the trustee to all interested persons who are not then  
31        under a legal disability and to the guardian, agent or parent of any interested person who  
32        is then under a legal disability within a reasonable time after the end of the fiscal year of  
33        the trust shall be deemed sufficient notice under this section provided that it sets forth  
34        and clearly identifies all compensation, expense reimbursements, professional fees,  
35        counsel fees allowed under G.S. 32-60, distributions and other payments of any kind to  
36        the trustee during such fiscal year from the assets of the trust.

37    **"§ 32-57. Judicial review of compensation and other payments to trustee.**

38        (a) Unless specifically prohibited by the trust instrument, any interested person,  
39        or the guardian, agent or parent of any interested person who is then under a legal  
40        disability, may initiate a proceeding under Article 3 of Chapter 36A of the General  
41        Statutes for the review of the reasonableness of any compensation or expense  
42        reimbursement paid under this Article. The provisions of Article 3 of Chapter 36A shall  
43        govern that proceeding and any appeal from that proceeding, except that:

- 1           (1) The definition of "interested person" contained in G.S. 32-53(1) shall  
2 control in all matters relating to such review, including the  
3 determination of who may initiate a proceeding under G.S. 36A-23.1  
4 and the determination of when an interested person may be represented  
5 by others under G.S. 36A-26.3(2).
- 6           (2) For purposes of G.S. 36A-26.1, it shall be necessary that all interested  
7 persons not joined as petitioners be joined as respondents, but it shall  
8 not be necessary that all known beneficiaries be joined as respondents  
9 unless they are interested persons.
- 10          (3) In addition to other powers of the clerk of superior court acting under  
11 Article 3 of Chapter 36A, if the clerk of superior court determines  
12 upon review that a trustee has received excessive compensation or  
13 expense reimbursement, the clerk may order such trustee to make  
14 appropriate refunds.

15          (b) Notwithstanding the foregoing, if a proceeding for review of the  
16 reasonableness of compensation or expense reimbursement paid to a trustee is not  
17 initiated within one year from the date when notice of such payment is given pursuant to  
18 G.S. 32-56, then it shall be presumed that such compensation or expense reimbursement  
19 was reasonable.

20 **"§ 32-58. Compensation of other fiduciaries.**

21          In the case of a fiduciary other than a trustee under a trust, where the instrument  
22 creating the fiduciary relationship does not contain a provision relating to compensation  
23 and where there is no provision in the General Statutes providing for compensation for  
24 such fiduciary, such fiduciary shall be entitled to reasonable compensation determined  
25 in writing by the clerk of superior court in its discretion and for reimbursement of  
26 expenses properly incurred in the administration of the fiduciary relationship. Upon  
27 written request by the fiduciary, the clerk of superior court may allow the  
28 reimbursement of such expenses and such reasonable compensation after taking into  
29 account the factors set forth in G.S. 32-54(b).

30 **"§ 32-59. Effect of provisions in instrument.**

31          In those instances where the instrument creating the trust or other fiduciary  
32 relationship provides that the compensation of the fiduciary shall be the amount  
33 "provided by law", the "maximum amount provided by law" or other similar language,  
34 or references former G.S. 32-50, such language shall be construed as an intention that  
35 the trustee or other fiduciary shall receive reasonable compensation as allowed under  
36 this Article. In those instances where the instrument creating the trust or other fiduciary  
37 relationship provides that the trustee or other fiduciary shall serve without  
38 compensation, such language shall be construed as being a provision relating to  
39 compensation and the trustee or other fiduciary shall not be entitled to receive  
40 reasonable compensation as allowed under this Article.

41 **"§ 32-60. Counsel fees allowable to attorneys serving as fiduciaries.**

42          The clerk of superior court may exercise discretion to allow counsel fees to an  
43 attorney serving as a fiduciary or trustee (in addition to the compensation allowed to the  
44 attorney as a fiduciary or trustee) where such attorney, on behalf of the trust or fiduciary

1 relationship, renders professional services as an attorney that are different from the  
2 services normally performed by a fiduciary or trustee and of a type which would  
3 reasonably justify the retention of legal counsel by any fiduciary or trustee who is not  
4 licensed to practice law.

5 **"§ 32-61. Applicability.**

6 The provisions of this Article shall apply to all payments made to a fiduciary after  
7 the enactment of this Article, including fiduciary compensation earned or paid after the  
8 enactment of this Article, with respect to trusts and fiduciary relationships created on or  
9 after January 1, 2004, and with respect to all trusts and fiduciary relationships existing  
10 on January 1, 2004."

11 **SECTION 3.** G.S. 32A-11(c) reads as rewritten:

12 "(c) In the event that any power of attorney executed pursuant to the provisions of  
13 this Article does not contain the amount of ~~commissions~~ compensation that the  
14 attorney-in-fact is entitled to receive or the way such ~~commissions are~~ compensation is  
15 to be determined, and the principal should thereafter become incapacitated or mentally  
16 incompetent, ~~the commissions such attorney in fact shall receive subsequent to the~~  
17 ~~principal's incapacity or mental incompetence shall be fixed in the discretion of the~~  
18 ~~clerk of superior court pursuant to the provisions of G.S. 32-50(e).~~ then subsequent to  
19 the principal's incapacity or mental incompetence, the attorney-in-fact shall be entitled  
20 to receive such reasonable compensation as determined by the clerk of superior court  
21 after considering the factors set forth in G.S. 32-54(b)."

22 **SECTION 4.** G.S. 36A-23.1(a) reads as rewritten:

23 "(a) The clerks of superior court of this State have original jurisdiction over all  
24 proceedings initiated by interested persons concerning the internal affairs of trusts  
25 except proceedings to modify or terminate trusts. Except as provided in subdivision (3)  
26 of this subsection, the clerk's jurisdiction is exclusive. Proceedings that may be  
27 maintained under this subsection are those concerning the administration and  
28 distribution of trusts, the declaration of rights, and the determination of other matters  
29 involving trustees and trust beneficiaries, to the extent that those matters are not  
30 otherwise provided for in the governing instrument. These include proceedings:

- 31 (1) To appoint or remove a trustee;
- 32 (2) To review trustees' fees ~~pursuant to G.S. 32-50~~ and expenses pursuant  
33 to Article 5A of Chapter 32 of the General Statutes and to review and  
34 settle interim or final accounts; and
- 35 (3) To ascertain beneficiaries, to determine any question arising in the  
36 administration or distribution of any trust, including questions of  
37 construction of trust instruments, and to determine the existence or  
38 nonexistence of trusts created other than by will and the existence or  
39 nonexistence of any immunity, power, privilege, duty, or right. The  
40 clerk, on the clerk's own motion, may determine that a proceeding to  
41 determine an issue listed in this subdivision shall be originally heard  
42 by a superior court judge."

43 **SECTION 5.** This act becomes effective January 1, 2004, and applies to  
44 payments made to a fiduciary on or after that date.