

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003**

**SESSION LAW 2004-139
SENATE BILL 470**

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 Article 5 of Chapter 32 of the General Statutes is repealed.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 by adding a new Article to read:

"Article 5A.

"Compensation of Trustees and Other Fiduciaries.

"§ 32-53. Definitions.

The following definitions apply in this Article:

- (1) "Beneficiary" means (i) all living persons who are currently receiving or who are eligible to receive distributions of income or principal of the trust and (ii) all living persons who would be entitled to income and/or principal of the trust if the trust were to terminate at the time of the giving of the notice referred to in G.S. 32-55 (without regard to the exercise of any power of appointment).
- (2) "Representative" means, with respect to a beneficiary who is under a legal disability, the beneficiary's agent under a durable power of attorney, general guardian, guardian of the estate, or guardian of the person of a beneficiary, and the parent of a minor beneficiary.
- (3) "Trust" is as defined 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 from the assets of the trust compensation that is reasonable under the circumstances.

(b) All of the following factors shall be considered in determining reasonableness of compensation:

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

"§ 32-55. Notice.

(a) The trustee shall give written notice to all beneficiaries of each proposed payment of compensation if the annual amount of compensation exceeds four-tenths of

one percent (4/10 of 1%) of the principal value of the assets of the trust on the last day of the trust accounting year. The notice shall contain a statement that the beneficiaries have 20 days from when notice is given to file a proceeding for review of the reasonableness of the compensation with the clerk of superior court in accordance with Article 3 of Chapter 36A of the General Statutes.

(b) In lieu of giving written notice of each proposed payment of compensation under subsection (a) of this section, the trustee may give written notice to all beneficiaries of the amount of compensation to be paid to the trustee on a periodic basis or of the method of computation of the compensation. The trustee shall not be required to give additional notice to the beneficiaries unless the amount to be paid to the trustee on a periodic basis or the method of computation of the compensation changes.

(c) If a beneficiary is under a legal disability, notice shall be deemed to be given to the beneficiary only if notice is given to the representative of the beneficiary. If the trustee is the representative of the beneficiary, no notice shall be deemed to have been given to the beneficiary.

(d) The written notice required under this section shall be deemed to be given as follows: (i) when personally delivered by hand to the person, (ii) when transmitted by facsimile or e-mail with confirmation of transmission, (iii) when placed in the hands of a nationally recognized courier service for delivery, (iv) when received by the person if sent by registered or certified United States mail, return receipt requested, (v) three days after depositing the same in a regularly maintained receptacle for the deposit of United States mail if sent by regular United States mail. Notices delivered by any other means shall be deemed to be delivered, given, and received for all purposes as of the date of the actual receipt.

"§ 32-56. Payment of compensation without court order.

(a) The trustee is authorized to pay the compensation provided for in G.S. 32-54 without prior approval of the clerk of superior court only if:

- (1) The annual amount of compensation does not exceed four-tenths of one percent (4/10 of 1%) of the principal value of the assets of the trust on the last day of the trust accounting year; or
- (2) No beneficiary has initiated a proceeding under G.S. 32-57 for review of the reasonableness of the compensation within 20 days after notice has been given by the trustee in accordance with G.S. 32-55.

"§ 32-57. Judicial review; payment of compensation and other payments with court order.

(a) The trustee or any beneficiary may initiate a proceeding under Article 3 of Chapter 36A of the General Statutes for review of the reasonableness of any compensation or expense reimbursement and for the approval or denial of the payment of compensation or expense reimbursement. A beneficiary may initiate a proceeding even though the 20-day period referred to in G.S. 32-56(a)(2) has expired.

(b) In connection with reviewing the reasonableness of any compensation or expense reimbursement, the clerk of superior court may order the trustee to make appropriate refunds if the clerk determines upon review that a trustee has received excessive compensation or expense reimbursement.

"§ 32-58. Reimbursement for expenses incurred.

In addition to the compensation referred to in G.S. 32-54, the trustee shall be entitled to reimbursement out of the assets of the trust for expenses properly incurred in the administration of the trust and shall be empowered to pay the expenses from the assets of the trust without prior approval of the clerk of superior court.

"§ 32-59. Compensation of other fiduciaries.

Unless otherwise provided by the General Statutes or by the instrument creating the fiduciary relationship, fiduciaries other than trustees under a trust shall be entitled, upon written request to the clerk of superior court, to reasonable compensation in an amount to be determined by the clerk after taking into consideration the factors set forth in

G.S. 32-54(b) and to reimbursement for expenses properly incurred in the administration of the fiduciary relationship.

"§ 32-60. Effect of provisions in instrument.

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

"§ 32-61. Counsel fees allowable to attorneys serving as fiduciaries.

The clerk of superior court may exercise discretion to allow counsel fees to an attorney serving as a fiduciary or trustee (in addition to the compensation allowed to the attorney as a fiduciary or trustee) where the attorney, on behalf of the trust or fiduciary relationship, renders professional services as an attorney that are different from the services normally performed by a fiduciary or trustee and of a type which would reasonably justify the retention of legal counsel by a fiduciary or trustee who is not licensed to practice law.

"§ 32-62. Applicability.

Regardless of when the trust or fiduciary relationship is created, the provisions of this Article shall apply to all payments made to a fiduciary after January 1, 2005, including payments for compensation earned prior to January 1, 2005."

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

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

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

"(a) The clerks of superior court of this State have original jurisdiction over all proceedings initiated by interested persons concerning the internal affairs of trusts except proceedings to modify or terminate trusts. Except as provided in subdivision (3) of this subsection, the clerk's jurisdiction is exclusive. Proceedings that may be maintained under this subsection 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;
- (2) To review trustees' fees ~~pursuant to G.S. 32-50~~ and expenses pursuant to Article 5A of Chapter 32 of the General Statutes and to review and settle interim or final accounts; and
- (3) 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. The clerk, on the clerk's own motion, may determine that a proceeding to

determine an issue listed in this subdivision shall be originally heard by a superior court judge."

SECTION 5. G.S. 36A-63(d) reads as rewritten:

"(d) In addition to any other compensation to which it may be entitled under G.S. 28A-23-3, ~~32-50~~, 34-12, 35A-1269, or under any other authority, a corporation acting in a fiduciary capacity shall be allowed to charge a fee for the temporary investment of funds held awaiting investment or distribution, which fee may be calculated upon the amount of such funds actually invested and upon the income produced thereby. The fee authorized by this subsection shall not exceed twelve percent (12%) of the income produced by such investment. A corporation acting in a fiduciary capacity has complied with its duty to disclose fees and practices in connection with the investment of fiduciary funds awaiting investment or distribution if the corporation's periodic statements set forth the method of computing such fees."

SECTION 6. This act becomes effective January 1, 2005, and applies to payments made to a fiduciary on or after that date.

In the General Assembly read three times and ratified this the 14th day of July, 2004.

s/ Beverly E. Perdue
President of the Senate

s/ Richard T. Morgan
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 12:22 p.m. this 29th day of July, 2004