

Article 8A.

Powers, Duties, and Liability of a Power Holder Other Than a Trustee; Duty and Liability of a Trustee With Respect to Power Holder's Actions.

§ 36C-8A-1. "Power holder" defined.

(a) For purposes of this Article:

- (1) The term "power holder" means a person described in subdivision (2) of this subsection that under the terms of a trust has the power to take certain actions with respect to a trust and that is not any of the following:
 - a. A trustee.
 - b. A settlor with a power to direct or consent pursuant to G.S. 36C-8-808.
 - c. A person in which a donor creates a power of appointment.
 - d. A person that has authority to consent to the exercise of a power of appointment.
 - e. A beneficiary with a power over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of the beneficiary or another beneficiary represented by a beneficiary under G.S. 36C-3-301 through G.S. 36C-3-305 with respect to the exercise or nonexercise of the power.
- (2) A power holder may be any of the following:
 - a. One or more individuals.
 - b. One or more other persons each of which is qualified to exercise trust powers in this State.
 - c. Any combination of the persons described in sub-subdivisions a. and b. of this subdivision.

(b) A person is a power holder whether or not the terms of a trust refer to the person as a power holder and, except as otherwise provided in sub-subdivisions (a)(1)b. and e. of this section, whether or not the person is a beneficiary or settlor of the trust. (2012-18, s. 3.4; 2021-85, s. 2(c).)

§ 36C-8A-2. Powers of a power holder.

(a) The terms of a trust may confer upon a power holder a power to direct or consent to a duty that would normally be required of a trustee, including, but not limited to, a power to direct or consent to the following:

- (1) Investments, including any action relating to investment of all or any one or more of the trust assets that a trustee may take under this Chapter.
- (2) Discretionary distributions of trust assets, including distributions to one or more beneficiaries, distribution of one or more trust assets, and termination of the trust by distribution of all of the trust assets.
- (3) Any other matter regarding trust administration, including the transfer of the principal place of administration of the trust.

(b) The terms of a trust may also confer upon a power holder any other power, including, but not limited to, the power to do the following:

- (1) Modify or amend the trust to do any of the following:
 - a. Achieve favorable tax status under applicable law.
 - b. Take advantage of laws governing restraints on alienation or other State laws restricting the terms of the trust, distribution of trust property, or the administration of the trust.

- (2) Remove and appoint trustees and power holders.
- (3) Increase or decrease the interests of any beneficiary.
- (4) Grant a power of appointment to one or more beneficiaries of the trust or modify the terms of or terminate a power of appointment granted to a beneficiary by the governing instrument, except that a grant or modification of a power of appointment shall not grant a beneficial interest to any of the following:
 - a. Any individual or class of individuals not specifically provided for in the trust instrument.
 - b. The person having the power to grant, modify, or terminate the power of appointment.
 - c. The estate and creditors of the person having the power to grant, modify, or terminate the power of appointment.
- (5) Change the governing law of the trust.

(c) A power holder may exercise any further power appropriate to the exercise or nonexercise of a power granted to the power holder under subsections (a) and (b) of this section.

(d) The powers granted to a power holder under this section are subject to the same provisions of G.S. 36C-8-814 regarding discretionary powers and tax savings that are applicable to a trustee in a like position and under similar circumstances. (2012-18, s. 3.4; 2021-85, s. 2(c).)

§ 36C-8A-3. Duty and liability of power holder.

(a) Except as otherwise provided in subsection (f) of this section, a power holder is a fiduciary with respect to the exercise or nonexercise of a power and has the same duty and liability as the following:

- (1) If the power is not held jointly with the trustee or another power holder, as a sole trustee in a like position and under similar circumstances.
- (2) If the power is held jointly with the trustee or another power holder, as a cotrustee in a like position and under similar circumstances.

(b) Repealed by Session Laws 2021-85, s. 2(c), effective July 8, 2021, and applicable to trusts created before, on, or after that date.

(c) The provisions regarding the same duty and liability of a power holder as a trustee in a like position and under similar circumstances include all of the following:

- (1) The provisions of Article 8 of this Chapter regarding the duties of a trustee.
- (2) The provisions of G.S. 36C-10-1001 through G.S. 36C-10-1012 regarding liability of trustees and rights of third persons dealing with trustees.
- (3) The provisions of Article 9 of this Chapter regarding the uniform prudent investor rule.
- (4) The provisions of G.S. 36C-7-703 regarding cotrustees.

(d) Subject to subsection (e) of this section, a power holder shall provide information to a trustee or another power holder to the extent the information is reasonably related both to the powers and duties of a power holder and the powers and duties of the trustee or the other power holder. A trustee or other power holder that acts in reliance on information provided by the power holder is not liable for breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee or the other power holder engages in intentional misconduct.

(e) A power holder does not have a duty to monitor a trustee or another power holder or inform or give advice to a settlor, beneficiary, trustee, or another power holder concerning an instance in which the power holder might have acted differently than a trustee or another power

holder. By taking the action described in this subsection, the power holder does not assume the duty excluded under this subsection.

(f) The terms of a trust may provide that a power holder is a nonfiduciary with respect to the exercise or nonexercise of a power, including the power to achieve the settlor's tax objectives under the Internal Revenue Code. Unless the terms of a trust provide otherwise, the power to remove and appoint a trustee or power holder shall be deemed to be held in a nonfiduciary capacity. (2012-18, s. 3.4; 2021-85, s. 2(c).)

§ 36C-8A-4. Duty and liability of trustee.

(a) If the terms of a trust confer upon a power holder the power to direct certain actions of the trustee, the trustee shall act in accordance with the direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with the direction, unless compliance with the direction constitutes intentional misconduct on the part of the trustee.

(b) If the terms of a trust confer upon the power holder the power to consent to certain actions of the trustee, and the power holder does not provide consent within a reasonable time after the trustee has made a timely request for the power holder's consent, the trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the trustee's failure to take any action that required the power holder's consent.

(c) If the terms of a trust confer upon a power holder a power other than the power to direct or to consent to the actions of the trustee described in G.S. 36C-8A-2(a), the trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the exercise or nonexercise of the power.

(d) A trustee does not have a duty to monitor a power holder or inform or give advice to a settlor, beneficiary, trustee, or power holder concerning an instance in which the trustee might have acted differently from a power holder. By taking an action described in this subsection, a trustee does not assume a duty excluded by this subsection.

(e) Subject to subsection (d) of this section, a trustee shall provide information to a power holder to the extent the information is reasonably related both to the powers and duties of the trustee and the powers and duties of the power holder. A power holder that acts in reliance on information provided by a trustee is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the power holder engages in intentional misconduct. (2012-18, s. 3.4; 2021-85, s. 2(c).)

§ 36C-8A-4.1. Limitations of actions against power holder for breach of trust.

In an action against a power holder for breach of trust, the same limitations of actions apply to the power holder that apply under G.S. 36C-10-1005 to an action for breach of trust against a trustee in a like position and under similar circumstances. (2021-85, s. 2(c).)

§ 36C-8A-4.2. Defenses in action against power holder.

In an action against a power holder for breach of trust, the power holder may assert the same defenses that a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee, including the following:

- (1) Reasonable reliance on the terms of a trust pursuant to G.S. 36C-9-901(b) and G.S. 36C-10-1006.
- (2) Reasonable care in ascertaining the happening of an event affecting the administration or distribution of a trust pursuant to G.S. 36C-10-1007.

- (3) Beneficiary's consent, release, or ratification pursuant to G.S. 36C-10-1009. (2021-85, s. 2(c).)

§ 36C-8A-5. Compensation and reimbursement of expenses of power holder.

A power holder as a fiduciary is entitled to compensation and reimbursement of expenses as provided in G.S. 32-59. (2012-18, s. 3.4.)

§ 36C-8A-6. Jurisdiction over power holder.

(a) By accepting appointment to serve as a power holder with respect to a trust having its principal place of business in this State, or by moving the principal place of administration to this State, the power holder submits personally to the jurisdiction of the courts of this State regarding any matter involving action or inaction of the power holder.

(b) This section does not preclude other methods of obtaining jurisdiction over a power holder. (2012-18, s. 3.4.)

§ 36C-8A-7. Accepting or declining the appointment as power holder.

(a) A person designated as a power holder accepts the appointment to serve as a power holder:

- (1) By substantially complying with a method of acceptance provided in the terms of a trust; or
- (2) If the terms of a trust do not provide a method or the method provided in the terms of a trust is not expressly made exclusive, by exercising powers or performing duties as a power holder or otherwise indicating acceptance of the appointment to serve as a power holder.

(b) A person designated as a power holder may reject the appointment to serve as a power holder. A trustee may give written notice to a power holder requesting acceptance of the appointment as power holder. A power holder who does not accept such appointment within 120 days after receipt of such notice is considered to have rejected the appointment to serve as a power holder. (2012-18, s. 3.4.)

§ 36C-8A-8. Vacancy in the office of the power holder.

(a) If a vacancy occurs in the office of the power holder because the power holder fails or ceases to act for any reason, all of the following apply:

- (1) If one or more power holders remain in office, a vacancy in the office of the power holder need not be filled.
- (2) If the terms of the trust provide for a successor to the power holder, the person designated by the terms of the trust or appointed under the terms of the trust shall act as the successor power holder.
- (3) During the time when a vacancy occurs, the trustee shall be vested with any fiduciary power or duty conferred upon the power holder by the terms of the trust that are described in G.S. 36C-8A-2(a).
- (4) The court may appoint a power holder whenever the court considers the appointment necessary for the administration of the trust.

(b) A successor power holder shall succeed to all the powers and is subject to the duties and liabilities that were imposed upon the original power holder, unless a contrary intent appears from the governing instrument. (2012-18, s. 3.4; 2021-85, s. 2(c).)

§ 36C-8A-9. More than one power holder.

When there is more than one power holder authorized to act, and they are unable to reach a unanimous decision, they may act by majority decision. Unanimity is required when only two are authorized to act. (2012-18, s. 3.4.)

§ 36C-8A-10. Resignation of power holder.

(a) A power holder may resign upon either of the following conditions:

- (1) Upon at least 30 days' notice in writing to the qualified beneficiaries, the settlor, if living, and all trustees.
- (2) With the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property. (2012-18, s. 3.4.)

§ 36C-8A-11. Removal of power holder.

(a) For the reasons set forth in subsection (b) of this section, the settlor of an irrevocable trust, a trustee of an irrevocable trust, or a beneficiary of an irrevocable trust may request the court to remove a power holder, or a power holder may be removed by the court on its own initiative.

(b) The court may remove a power holder under any of the following circumstances:

- (1) The power holder has committed a serious breach of trust.
- (2) Lack of cooperation with the trustee substantially impairs the administration of the trust.
- (3) Because of unfitness, unwillingness, or a persistent failure of the power holder to exercise effectively the duties and powers conferred upon the power holder the court determines that removal of the power holder best serves the interests of the beneficiaries.
- (4) There has been a substantial change of circumstances, the court finds that removal of the power holder best serves the interests of all of the beneficiaries and is consistent with a material purpose of the trust, and a suitable successor power holder is available.

(c) Pending a final decision on a request to remove a power holder, or in lieu of or in addition to removing a power holder, the court may order appropriate relief under G.S. 36C-10-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries. (2012-18, s. 3.4.)

§ 36C-8A-12. Power holder's bond.

(a) A bond shall be required for the performance of the power holder's duty only if the terms of a trust require the power holder to provide a bond.

(b) If no bond is required, the provisions of G.S. 36C-7-702(a)(3) and (4) applicable to a trustee apply to the power holder, but in no event shall a bond be required of a power holder if the terms of a trust require otherwise.

(c) If a bond is required, the provisions of G.S. 36C-7-702(b) and (c) applicable to a trustee apply to the power holder. (2021-85, s. 2(c).)