

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1991

S

1

SENATE BILL 780

Short Title: Restrict Fiduciary Power.

(Public)

Sponsors: Senator Cooper.

Referred to: Judiciary I.

April 24, 1991

A BILL TO BE ENTITLED

AN ACT TO REWRITE THE LAW RESTRICTING THE EXERCISE OF POWER
FOR A FIDUCIARY'S BENEFIT.

The General Assembly of North Carolina enacts:

Section 1. G.S. 32-34 reads as rewritten:

"§ 32-34. Restriction on exercise of power for fiduciary's benefit.

~~(a) Except as provided in subsection (b), a power conferred upon a person in his capacity as fiduciary to make discretionary distributions of principal or income to himself or to make discretionary allocations in his own favor of receipts or expenses as between income and principal cannot be exercised by him. If the power is conferred on two or more fiduciaries, it may be exercised by the fiduciaries who are not so disqualified. If there is no fiduciary qualified to exercise the power, it may be exercised by a special fiduciary appointed by the court. This section shall apply to all trusts now in existence and to all other trusts that shall come into existence after July 1, 1975.~~

~~(b) This section shall not apply to:~~

~~(1) Trusts now in existence in which the fiduciary is also the creator of the trust and is living; or~~

~~(2) Trusts that shall come into existence after July 1, 1975, in which the fiduciary is also the creator of the trust, is living, and the trust instrument shows a clear intent that this section shall not apply.~~

(a) For purposes of this section:

(1) 'General power of appointment' means any power that would cause income to be taxed to the fiduciary in his individual capacity under section 678 of the Internal Revenue Code and any power that would be

1 a general power of appointment, in whole or in part, under section
2 2041(b)(1) or 2514(c) of the Internal Revenue Code.

3 (2) 'Internal Revenue Code' means the 'Code' as defined in G.S 105-2.1.

4 (3) The term 'fiduciary' has the meaning set forth in G.S 32-25.

5 (b) Unless application of this section is clearly negated by specific reference in the
6 will, trust document, or other written instrument appointing a fiduciary, the following
7 provisions apply to any fiduciary, whether acting as a sole fiduciary or as a co-fiduciary.

8 (1) Any power conferred upon a fiduciary in his capacity as a fiduciary,
9 but not in his capacity as a beneficiary, which would, except for this
10 section, constitute in whole or in part, a general power of appointment,
11 may not be exercised by the fiduciary in favor of himself, his estate,
12 his creditors, or the creditors of his estate, but may be exercised in any
13 manner provided in subdivision (2) of this subsection.

14 (2) A power described in subdivision (1) of this subsection may be
15 exercised as follows:

16 a. The fiduciary may exercise the power in favor of a person other
17 than himself, his estate, his creditors, or the creditors of his
18 estate.

19 b. If the power described in subdivision (1) of this subsection is
20 conferred upon two or more fiduciaries, it may be exercised by
21 the fiduciary or fiduciaries who are not disqualified from
22 exercising the power as if they were the only fiduciary or
23 fiduciaries.

24 c. If all of the serving fiduciaries are disqualified from exercising
25 a power, the court that would have jurisdiction to appoint a
26 fiduciary under the instrument, if there were no fiduciary
27 currently serving, shall appoint a special fiduciary whose only
28 power is to exercise the power that cannot be exercised by the
29 other fiduciaries by reason of subdivision (1) of this subsection.

30 (3) Any power conferred upon the fiduciary in his capacity as a fiduciary
31 to allocate receipts and expenses as between income and principal in
32 his own favor must be exercised in accordance with the provisions of
33 Article 2 of Chapter 37 of the General Statutes, the Principal and
34 Income Act of 1973.

35 (c) Subsection (b) of this section does not apply to revocable trusts in which the
36 fiduciary of the trust is also the creator of the trust and is still living.

37 (d) This section applies to all fiduciary relationships in existence on July 1, 1991,
38 and to all other fiduciary relationships that come into existence after that date. The
39 provisions of subsection (b) of this section are declaratory of existing law, and neither
40 modify nor amend existing fiduciary relationships."

41 Sec. 2. This act becomes effective July 1, 1991.