

## Chapter 37A.

### Uniform Principal and Income Act.

#### Article 1.

#### Definitions and Fiduciary Duties; Conversion to Unitrust; Judicial Control of Discretionary Power.

##### Part 1. Definitions.

#### § 37A-1-101. Short title.

This Chapter may be cited as the Uniform Principal and Income Act. (2003-232, s. 2.)

#### § 37A-1-102. Definitions.

The following definitions apply in this Chapter:

- (1) "Accounting period" means a calendar year unless another 12-month period is selected by a fiduciary. The term includes a portion of a calendar year or other 12-month period that begins when an income interest begins or ends when an income interest ends.
- (2) "Beneficiary" includes, in the case of a decedent's estate, an heir and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.
- (3) "Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.
- (4) "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in Article 4 of this Chapter.
- (5) "Income beneficiary" means a person to whom net income of a trust is or may be payable.
- (6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.
- (7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.
- (8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this Chapter to or from income during the period.
- (9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.
- (10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.
- (11) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

- (12) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.
- (13) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court. (2003-232, s. 2; 2011-284, s. 47.)

**§ 37A-1-103. Fiduciary duties; general principles.**

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Articles 2 and 3 of this Chapter, a fiduciary:

- (1) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this Chapter;
- (2) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this Chapter;
- (3) Shall administer a trust or estate in accordance with this Chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and
- (4) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this Chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under G.S. 37A-1-104(a), any discretionary power in connection with the conversion or administration of a unitrust under Part 2 of this Article, or a discretionary power of administration regarding a matter within the scope of this Chapter, whether granted by the terms of a trust, a will, or this Chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this Chapter is presumed to be fair and reasonable to all of the beneficiaries.

(c) The exercise of powers of allocation of receipts and expenditures contained or incorporated by reference to G.S. 32-27(29) in wills dated prior to January 1, 2004, shall continue to be valid. (2003-232, s. 2.)

**§ 37A-1-104. Trustee's power to adjust.**

(a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or shall be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in G.S. 37A-1-103(a), that the trustee is unable to comply with G.S. 37A-1-103(b). In lieu of exercising the power to adjust, the trustee may convert the trust to a unitrust as permitted under Part 2 of this Article, in which case the unitrust amount shall become the net income of the trust.

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a) of this section, a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

- (1) The nature, purpose, and expected duration of the trust;
- (2) The intent of the grantor or settlor;

- (3) The identity and circumstances of the beneficiaries;
  - (4) The needs for liquidity, regularity of income, and preservation and appreciation of capital;
  - (5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;
  - (6) The net amount allocated to income under the other sections of this Chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
  - (7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;
  - (8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and
  - (9) The anticipated tax consequences of an adjustment.
- (c) A trustee shall not make an adjustment:
- (1) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;
  - (2) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;
  - (3) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;
  - (4) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;
  - (5) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;
  - (6) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;
  - (7) If the trustee is a beneficiary of the trust;
  - (8) If the trustee is not a beneficiary but the adjustment would benefit the trustee directly or indirectly, except that a trustee may make an adjustment that also benefits a beneficiary even if the terms of the trust provide for trustee compensation as a percentage of the trust's income; or
  - (9) If the trust has been converted to, and is then operating as, a unitrust under Part 2 of this Article.
- (d) If subdivision (5), (6), (7), or (8) of subsection (c) of this section applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the

adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may renounce the entire power conferred by subsection (a) of this section or may renounce only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subdivisions (1) through (6) or subdivision (8) of subsection (c) of this section or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c) of this section. The renunciation may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a) of this section. (2003-232, s. 2; 2007-106, s. 44.)

## Part 2. Conversion to Unitrust.

### § 37A-1-104.1. Definitions.

The following definitions apply to this Part:

- (1) Code. – The Internal Revenue Code of 1986, as amended from time to time, and any statutory enactment successor to the Code; reference to a specific section of the Code in this Part shall be considered a reference also to any successor provision dealing with the subject matter of that section of the Code.
- (2) Repealed by Session Laws 2007-106, s. 45, effective October 1, 2007.
- (3) Disinterested person. – A person who is not a related or subordinate party with respect to the person then acting as trustee of the trust and excludes the settlor of the trust and any interested trustee.
- (4) Repealed by Session Laws 2007-106, s. 45, effective October 1, 2007.
- (5) Income trust. – A trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the trustee, and regardless of whether the trust directs or permits the trustee to distribute principal of the trust to one or more of those persons.
- (6) Interested distributee. – A living beneficiary who is a distributee or permissible distributee of trust income or principal who has the power to remove the existing trustee and designate as successor a person who may be a related or subordinate party with respect to that distributee.
- (7) Interested trustee. – Any of the following:
  - a. An individual trustee who is a qualified beneficiary.
  - b. Any trustee who may be removed and replaced by an interested distributee.
  - c. An individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.
- (7a) Legal disability. – A person under a legal disability is a person who is a minor, an incompetent, or an unborn individual, or whose identity or location is unknown.

- (7b) Qualified beneficiary. – A qualified beneficiary as defined in G.S. 36C-1-103(15).
- (8) Related or subordinate party. – A related or subordinate party as defined in section 672(c) of the Code.
- (8a) Representative. – A person who may represent and bind another as provided in Article 3 of Chapter 36C of the General Statutes, the provisions of which shall apply for purposes of this Article.
- (8b) Settlor. – An individual, including a testator, who creates a trust.
- (9) Total return unitrust. – An income trust that has been converted under and meets the provisions of this Part.
- (9a) Treasury regulations. – The regulations, rulings, procedures, notices, or other administrative pronouncements issued by the Internal Revenue Service, as amended from time to time.
- (10) Trustee. – Any person acting as trustee of the trust, except as otherwise expressly provided in this Part, whether acting in that person's discretion or on the direction of one or more persons acting in a fiduciary capacity.
- (11) Unitrust amount. – An amount computed as a percentage of the fair market value of the trust. (2003-232, s. 2; 2005-244, ss. 1, 2; 2007-106, s. 45.)

**§ 37A-1-104.2. Conversion in trustee's discretion without court approval.**

(a) Any trustee, other than an interested trustee, or, where two or more persons are acting as trustees, a majority of the trustees who are not interested trustees (in either case hereafter "trustee"), may, in the trustee's sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if all of the following apply:

- (1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.
- (2) The trustee gives written notice of its intention to take the action, including copies of the written policy and this Part, to (i) the settlor of the trust, if living, and (ii) all persons who are the qualified beneficiaries of the trust at the time the notice is given. If a qualified beneficiary is under a legal disability, notice shall be given to the representative of the qualified beneficiary if a representative is available without court order.
- (3) There is at least (i) one qualified beneficiary described in G.S. 36C-1-103(15)a. or b. who is not under a legal disability or a representative of a qualified beneficiary so described and (ii) one qualified beneficiary described in G.S. 36C-1-103(15)c. who is not under a legal disability or a representative of a qualified beneficiary so described.  
and

- (4) No person receiving notice of the trustee's intention to take the proposed action objects to the action within 60 days after notice has been given. The objection shall be by written instrument delivered to the trustee.

(b) If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two or more persons are acting as trustee and are interested trustees, a majority of the interested trustees may, in its sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if all of the following apply:

- (1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income as determined under this Chapter, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income as determined under this Chapter rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.
- (2) The trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee (i) the percentage to be used to calculate the unitrust amount, (ii) the method to be used in determining the fair market value of the trust, and (iii) which assets, if any, are to be excluded in determining the unitrust amount.
- (3) The trustee gives written notice of its intention to take the action, including copies of the written policy and this Part, and the determinations of the disinterested person to (i) the settlor of the trust, if living, and (ii) all persons who are the qualified beneficiaries of the trust at the time of the giving of the notice. If a qualified beneficiary is under a legal disability, notice shall be given to the representative of the qualified beneficiary if a representative is available without court order.
- (4) There is at least one (i) qualified beneficiary described in G.S. 36C-1-103(15)a. or b. or a representative of a beneficiary so described and (ii) one qualified beneficiary described in G.S. 36C-1-103(15)c. or a representative of a qualified beneficiary so described.
- (5) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to the action or to the determination of the disinterested person within 60 days after notice has been given. The objection must be by written instrument delivered to the trustee.

(c) A trustee may act under subsection (a) or (b) of this section with respect to a trust for which both income and principal have been set aside permanently for charitable purposes under the governing instrument and for which a federal estate or gift tax deduction has been taken, provided that all of the following apply:

- (1) Instead of sending written notice to the persons described in subdivisions (2) and (3) of subsection (a) of this section or subdivisions (3) and (4) of subsection (b) of this section, as the case may be, the trustee shall send written notice to each charitable organization expressly designated to receive the income of the trust under the governing instrument and, if no charitable organization is

expressly designated to receive all of the income of the trust under the governing instrument, to the Attorney General of this State.

- (2) Subdivision (4) of subsection (a) of this section or subdivision (5) of subsection (b) of this section, as the case may be, shall not apply to this action.
- (3) In each taxable year, the trustee shall distribute the greater of the unitrust amount or the amount required by section 4942 of the Code.

(d) The provisions of G.S. 36C-1-109 regarding notices and the sending of documents to persons under Chapter 36C of the General Statutes shall apply for purposes of notices and the sending of documents under this section. (2003-232, s. 2; 2005-244, s. 3; 2007-106, s. 46.)

### **§ 37A-1-104.3. Conversion with court approval.**

(a) If any trustee desires to (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust but does not have the ability to or elects not to do it under G.S. 37A-1-104.2, the trustee may petition the court for an order as the trustee considers appropriate. In the event, however, there is only one trustee of the trust and the trustee is an interested trustee or in the event there are two or more trustees of the trust and a majority of them are interested trustees, the court, in its own discretion or on the petition of the trustee or trustees or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present information to the court as shall be necessary to enable the court to make its determinations under this Part.

(b) A qualified beneficiary or a representative of a qualified beneficiary may request the trustee to (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust. If the trustee does not take the action requested, the qualified beneficiary or a representative of the qualified beneficiary may petition the court to order the trustee to take the action.

(c) All proceedings under this section shall be conducted as provided in Article 2 of Chapter 36C of the General Statutes. (2003-232, s. 2; 2007-106, s. 47.)

### **§ 37A-1-104.4. Determination of unitrust amount.**

(a) The fair market value of the trust shall be determined at least annually, using a valuation date selected by the trustee in its discretion. The trustee, in its discretion, may use an average of the fair market value on the same valuation date for the current fiscal year and not more than three preceding fiscal years, if the use of this average appears desirable to reduce the impact of fluctuations in market value on the unitrust amount. Assets for which a fair market value cannot be readily ascertained shall be valued using valuation methods as are considered reasonable and appropriate by the trustee. Assets, such as a residence or tangible personal property, used by the trust beneficiary may be excluded from the fair market value for computing the unitrust amount.

(b) The percentage to be used in determining the unitrust amount shall be a reasonable current return from the trust, in any event not less than three percent (3%) nor more than five percent (5%), taking into account the intentions of the settlor of the trust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust, and projected inflation and its impact on the trust.

(c) Repealed by Session Laws 2005-244, s. 4, effective July 30, 2005. See notes for applicability language.

- (d) Following the conversion of an income trust to a total return unitrust, the trustee:
- (1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;
  - (2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;
  - (3) May, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as the discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)-3(b) of the Treasury Regulations, as amended from time to time; and
  - (4) Shall then consider the unitrust amount as coming from the principal of the trust. (2003-232, s. 2; 2005-244, s. 4; 2007-106, ss. 48, 49.)

**§ 37A-1-104.5. Matters in trustee's discretion.**

In administering a total return unitrust, the trustee may, in its sole discretion but subject to the provisions of the governing instrument, determine:

- (1) The effective date of the conversion;
- (2) The timing of distributions, including provisions for prorating a distribution for a short year in which a beneficiary's right to payments commences or ceases;
- (3) Whether distributions are to be made in cash or in kind or partly in cash and partly in kind;
- (4) If the trust is reconverted to an income trust, the effective date of the reconversion; and
- (5) Any other administrative issues as may be necessary or appropriate to carry out the purposes of this Part. (2003-232, s. 2.)

**§ 37A-1-104.6. No effect on principal distributions.**

Conversion to a total return unitrust under this Part shall not affect any other provision of the governing instrument, if any, regarding distributions of principal. For purposes of this Part, the distribution of a unitrust amount is considered a distribution of income and not of principal. (2003-232, s. 2.)

**§ 37A-1-104.7:** Repealed by Session Laws 2007-106, s. 49.1, effective October 1, 2007.

**§ 37A-1-104.8. No liability on part of trustee or disinterested person acting in good faith.**

No trustee or disinterested person who in good faith takes or fails to take any action under this Part shall be liable to any person affected by the action or inaction, regardless of whether the person received written notice as provided in this Part and regardless of whether the person was under a legal disability at the time of the delivery of the notice. The exclusive remedy for any person affected by an action or inaction shall be to obtain an order of the court directing the trustee (i) to convert an income trust to a total return unitrust, (ii) to reconvert from a total return unitrust to an income trust, or (iii) to change the percentage used to calculate the unitrust amount. (2003-232, s. 2.)

**§ 37A-1-104.9. Applicability.**

This Part shall apply to all trusts in existence on, or created after January 1, 2004, unless (i) the governing instrument contains a provision clearly expressing the settlor's intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust, (ii) the trust is a trust described in section 170(f)(2)(B), section 664(d), section 2702(a)(3), or section 2702(b) of the Code, (iii) the trust is a trust under which any amount is, or has been in the past, set aside permanently for charitable purposes unless the income from the trust also is devoted permanently to charitable purposes, or (iv) the governing instrument expressly prohibits use of this Part by specific reference to this Part, or expressly states the settlor's intent that net income not be calculated as a unitrust amount. A provision in the governing instrument that "the provisions of Part 2 of Article 1 of Chapter 37A of the General Statutes or any corresponding provision of future law, shall not be used in the administration of this trust." or "the trustee shall not determine the distributions to the income beneficiary as a unitrust amount." or similar words reflecting that intent is sufficient to preclude the use of this Part. (2003-232, s. 2; 2005-244, s. 5; 2007-106, s. 50.)

Part 2A. Express Total Return Unitrusts.

**§ 37A-1-104.21. Definitions.**

(a) An "express total return unitrust" means a trust that has a governing instrument requiring the distribution at least annually of a unitrust amount equal to a fixed percentage of not less than three percent (3%) nor more than five percent (5%) per year of the net fair market value of the trust's assets, valued at least annually.

(b) "Code" means the Internal Revenue Code as described in G.S. 37A-1-104.1(1).

(c) "Treasury regulations" means the treasury regulations described in G.S. 37A-1-104.1(9a). (2005-244, s. 6.)

**§ 37A-1-104.22. Determination of unitrust amount.**

(a) The unitrust amount to be distributed by the express total return unitrust may be determined in the governing instrument by reference to the net fair market value of the trust's assets determined annually or averaged on a multiple year basis.

(b) The terms of the governing instrument of an express total return unitrust may provide that:

- (1) Assets for which a fair market value cannot be readily ascertained shall be valued using valuation methods that the trustee considers reasonable and appropriate.
- (2) Assets, such as a residence property or tangible personal property, used by the trust beneficiary entitled to the unitrust amount may be excluded from the net fair market value for computing the unitrust amount. (2005-244, s. 6.)

**§ 37A-1-104.23. Effect of distribution of unitrust amount.**

The distribution from an express total return unitrust of the fixed percentage of not less than three percent (3%) nor more than five percent (5%) reasonably apportions between the income beneficiaries and remaindermen the total return of an express total return unitrust. (2005-244, s. 6.)

**§ 37A-1-104.24. Change or conversion of unitrust amount.**

(a) The terms of the governing instrument of an express total return unitrust may provide the method similar to the method provided under G.S. 37A-1-104.2(a) for changing the unitrust percentage or for converting from a unitrust to an income trust or for a reconversion of an income trust to a unitrust, or for all of these actions.

(b) If the terms of the governing instrument of an express total return unitrust do not specifically or by reference to G.S. 37A-1-104.2 grant a power to the trustee to change the unitrust percentage or change to an income trust, the trustee shall not have that power. (2005-244, s. 6.)

**§ 37A-1-104.25. Determination of character of unitrust amount.**

Unless the terms of the governing instrument of the express total return unitrust specifically provide otherwise, the trustee:

- (1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;
- (2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;
- (3) May, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as this discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)-3(b) of the treasury regulations; and
- (4) Shall then consider the unitrust amount as coming from the principal of the trust. (2005-244, s. 6.)

**§ 37A-1-104.26. Unitrust amount in excess of a five percent payout.**

A trust that provides for a fixed percentage payout in excess of five percent (5%) per year is considered an express total return unitrust that pays out a fixed percentage of five percent (5%) per year and pays out principal to the extent that the fixed percentage payout exceeds five percent (5%) per year. (2005-244, s. 6.)

Part 3. Judicial Control of Discretionary Power.

**§ 37A-1-105. Judicial control of discretionary power.**

(a) The court shall not order a fiduciary to change a decision to exercise or not to exercise a discretionary power conferred by this Chapter unless it determines that the decision was an abuse of the fiduciary's discretion. A fiduciary's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(b) The decisions to which subsection (a) of this section applies include:

- (1) A decision under G.S. 37A-1-104(a) as to whether and to what extent an amount should be transferred from principal to income or from income to principal.
- (2) A decision regarding the factors that are relevant to the trust and its beneficiaries, the extent to which the factors are relevant, and the weight, if any, to be given to those factors in deciding whether and to what extent to exercise the discretionary power conferred by G.S. 37A-1-104(a).

(c) If the court determines that a fiduciary has abused the fiduciary's discretion, the court may place the income and remainder beneficiaries in the positions they would have occupied if the discretion had not been abused, according to the following rules:

- (1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court shall order the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position.
- (2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall place the beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the fiduciary to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or ordering that beneficiary to return some or all of the distribution to the trust.
- (3) To the extent that the court is unable, after applying subdivisions (1) and (2) of this subsection, to place the beneficiaries, the trust, or both in the positions they would have occupied if the discretion had not been abused, the court may order the fiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

(d) Upon petition by the fiduciary, the court having jurisdiction over a trust or estate shall determine whether a proposed exercise or nonexercise by the fiduciary of a discretionary power conferred by this Chapter will result in an abuse of the fiduciary's discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion. (2003-232, s. 2.)