

House _____ Amendment NO. _____

Offered By

AMEND House Committee Substitute for Senate Bill No. 569, Page 1, Section 456.006, Line 13,
by inserting after all of said section and line the following:

"456.985. 1. Except as otherwise provided in the terms of an instrument creating or
exercising a power of appointment, sections 456.970 to 456.1135 govern powers of appointment.

2. The terms of an instrument creating or exercising a power of appointment prevail over
any provisions of sections 456.970 to 456.1135 except:

(1) The requisites for the creation of a power of appointment under subsections 1 to 4 of
section 456.990;

(2) The transferability of a power of appointment by a powerholder under subsection 1 of
section 456.995;

~~[(2)] (3)~~ The limitations on the authority of a donor to extend a general power of
appointment beyond the death of a powerholder under subsection 3 of section 456.995;

~~[(3)] (4)~~ The power is exclusionary if the permissible appointees of a power of appointment
are not defined and limited under subsection 3 of section 456.1005;

~~[(4)] (5)~~ The requisites for the exercise of a power of appointment under section 456.1015;

~~[(5)] (6)~~ The effect of an impermissible appointment under section 456.1045;

~~[(6)] (7)~~ A general power of appointment which is presently exercisable may be reached by
the creditors of the powerholder or the powerholder's estate under section 456.1100.

456.1035. 1. A powerholder of a general power of appointment that permits appointment to
the powerholder or the powerholder's estate may make any appointment, including an appointment
in trust or creating a new power of appointment, that the powerholder could make in disposing of
the powerholder's own property.

2. A powerholder of a general power of appointment that permits appointment only to the
creditors of the powerholder or of the powerholder's estate may appoint only to those creditors.

3. The powerholder of a nongeneral power may:

(1) Make an appointment in any form, including an appointment in trust, in favor of a
permissible appointee;

(2) Create a general power or nongeneral power in a permissible appointee; or

(3) Create a nongeneral power in any person to appoint to one or more of the permissible
appointees of the original nongeneral power.

456.1080. As provided by sections 469.010 to ~~[469.210]~~ 469.120, a powerholder may
disclaim all or part of a power of appointment, and a permissible appointee, appointee, or taker in
default of appointment may disclaim all or part of an interest in appointive property."; and

Further amend said bill, Page 2, Section 456.1-103, Lines 16-18, by deleting all of said lines and

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1 inserting in lieu thereof the following:

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3 (7) "Directed trust", any trust, including a split interest trust, in which the trust instrument
4 authorizes a trust protector to instruct or direct the trustee or that charges a trust protector with any
5 responsibilities regarding the trust or that grants the trust protector one or more powers over the
6 trust;"; and

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8 Further amend said bill and section, Page 4, Line 96, by deleting all of said line and inserting in lieu
9 thereof the following:

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11 "[(29)] (30) "Trust protector", any person, group of persons, or entity not serving as a
12 trustee and not the settlor or a beneficiary designated in a trust instrument to instruct or direct the
13 trustee or charged in the trust instrument with any responsibilities regarding the trust or expressly
14 granted in the trust instrument one or more powers over the trust. The term "trust protector"
15 includes, but is not limited to, persons or entities identified in the trust instrument as trust advisors,
16 trust directors, distribution advisors, or investment advisors;

17 (31) "Trustee", includes an original, additional, and successor trustee, and a"; and
18

19 Further amend said bill and page, Section 456.4-414, Line 10, by inserting after all of said section
20 and line the following:

21
22 "456.4-420. 1. If a trust instrument containing a no-contest clause is or has become
23 irrevocable, an interested person may file a petition to the court for an interlocutory determination
24 whether a particular motion, petition, or other claim for relief by the interested person would trigger
25 application of the no-contest clause or would otherwise trigger a forfeiture that is enforceable under
26 applicable law and public policy.

27 2. The petition described in subsection 1 of this section shall be verified under oath. The
28 petition may be filed by an interested person either as a separate judicial proceeding, or brought
29 with other claims for relief in a single judicial proceeding, all in the manner prescribed generally for
30 such proceedings under this chapter. If a petition is joined with other claims for relief, the court
31 shall enter its order or judgment on the petition before proceeding any further with any other claim
32 for relief joined therein. In ruling on such a petition, the court shall consider the text of the clause,
33 the context to the terms of the trust instrument as a whole, and in the context of the verified factual
34 allegations in the petition. No evidence beyond the pleadings and the trust instrument shall be taken
35 except as required to resolve an ambiguity in the no-contest clause.

36 3. An order or judgment determining a petition described in subsection 1 of this section
37 shall have the effect set forth in subsections 4 and 5 of this section, and shall be subject to appeal as
38 with other final judgments. If the order disposes of fewer than all claims for relief in a judicial
39 proceeding, that order is subject to interlocutory appeal in accordance with the applicable rules for
40 taking such an appeal. If an interlocutory appeal is taken, the court may stay the pending judicial
41 proceeding until final disposition of said appeal on such terms and conditions as the court deems
42 reasonable and proper under the circumstances. A final ruling on the applicability of a no-contest
43 clause shall not preclude any later filing and adjudication of other claims related to the trust.

44 4. An order or judgment, in whole or in part, on a petition described in subsection 1 of this
45 section shall result in the no-contest clause being enforceable to the extent of the court's ruling, and
46 shall govern application of the no-contest clause to the extent that the interested person then
47 proceeds forward with the claims described therein. In the event such an interlocutory order or
48 judgment is vacated, reversed, or otherwise modified on appeal, no interested person shall be

1 prejudiced by any reliance, through action, inaction, or otherwise, on the order or judgment prior to
2 final disposition of the appeal.

3 5. An order or judgment shall have effect only as to the specific trust terms and factual basis
4 recited in the petition. If claims are later filed that are materially different than those upon which
5 the order or judgment is based, then to the extent such new claims are raised, the party in whose
6 favor the order or judgment was entered shall have no protection from enforcement of the no-
7 contest clause otherwise afforded by the order and judgment entered under this section.

8 6. For purposes of this section, a "no-contest clause" shall mean a provision in a trust
9 instrument purporting to rescind a donative transfer to, or a fiduciary appointment of, any person, or
10 that otherwise effects a forfeiture of some or all of an interested person's beneficial interest in a trust
11 estate as a result of some action taken by the beneficiary. This definition shall not be construed in
12 any way as determining whether a no-contest clause is enforceable under applicable law and public
13 policy in a particular factual situation. As used in this section, the term "no-contest clause" shall
14 also mean an "in terrorem clause".

15 7. A no-contest clause is not enforceable against an interested person in, but not limited to,
16 the following circumstances:

17 (1) Filing a motion, petition, or other claim for relief objecting to the jurisdiction or venue
18 of the court over a proceeding concerning a trust, or over any person joined, or attempted to be
19 joined, in such a proceeding;

20 (2) Filing a motion, petition, or other claim for relief concerning an accounting, report, or
21 notice that has or should have been made by a trustee, provided the interested person otherwise has
22 standing to do so under applicable law, including, but not limited to, section 456.6-603;

23 (3) Filing a motion, petition, or other claim for relief under chapter 475 concerning the
24 appointment of a guardian or conservator for the settlor;

25 (4) Filing a motion, petition, or other claim for relief under chapter 404 concerning the
26 settlor;

27 (5) Disclosure to any person of information concerning a trust instrument or that is relevant
28 to a proceeding before the court concerning the trust instrument or property of the trust estate,
29 unless such disclosure is otherwise prohibited by law;

30 (6) Filing a motion, pleading, or other claim for relief seeking approval of a nonjudicial
31 settlement agreement concerning a trust instrument, as set forth in section 456.1-111;

32 (7) Filing a motion, pleading, or other claim for relief concerning a breach of trust by a
33 trustee including, but not limited to, a claim under section 456.10-1001. For purposes of this
34 subdivision, "breach of trust" means a trustee's violation of the terms of a trust instrument, a
35 violation of the trustee's general fiduciary obligations, or a trustee's violation of a duty that equity
36 imposes on a trustee;

37 (8) Filing a motion, pleading, or other claim for relief concerning removal of a trustee
38 including, but not limited to, a claim for removal under section 456.7-706; and

39 (9) To the extent a petition under subsection 1 of this section is limited to the procedure and
40 purpose described therein.

41 8. In any proceeding brought under this section, the court may award costs, expenses, and
42 attorneys' fees to any party, as provided in section 456.10-1004."; and

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44 Further amend said bill, Pages 5-8, Section 456.8-808, Lines 1-116, by deleting all of said lines and
45 inserting in lieu thereof the following:

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47 "456.8-808. 1. While a trust is revocable, the trustee may follow a direction of the settlor
48 that is contrary to the terms of the trust.

2. A trust instrument may provide for ~~[the appointment of a trust protector. For purposes of this section, a "trust protector", whether referred to in the trust instrument by that name or by some other name, is a person, other than the settlor, a trustee, or a beneficiary, who is expressly granted in the trust instrument one or more powers over the trust]~~ one or more persons, not then serving as a trustee and not the settlor or a beneficiary, to be given any powers over the trust as expressly granted in the trust instrument. Any such person may be identified and appointed as a trust protector or similar term. Whenever a trust instrument names, appoints, authorizes, or otherwise designates a trust protector, the trust shall be deemed a directed trust.

3. A trust protector appointed in the trust instrument shall have only the powers granted to the trust protector by the express terms of the trust instrument, and a trust protector is only authorized to act within the scope of the authority expressly granted in the trust instrument. Without limiting the authority of the settlor to grant powers to a trust protector, the express powers that may be granted include, but are not limited to, the following:

- (1) Remove and appoint a trustee or a trust protector or name a successor trustee or trust protector;
 - (2) Modify or amend the trust instrument to:
 - (a) Achieve favorable tax status or respond to changes in the Internal Revenue Code or state law, or the rulings and regulations under such code or law;
 - (b) Reflect legal changes that affect trust administration;
 - (c) Correct errors or ambiguities that might otherwise require court construction; or
 - (d) Correct a drafting error that defeats a grantor's intent;
 - (3) Increase, decrease, modify, or restrict the interests of the beneficiary or beneficiaries of the trust;
 - (4) Terminate the trust in favor of the beneficiary or beneficiaries of the trust;
 - (5) Change the applicable law governing the trust and the trust situs; or
 - (6) Such other powers as are expressly granted to the trust protector in the trust instrument.
4. Notwithstanding any provision in the trust instrument to the contrary, a trust protector shall have no power to modify a trust to:

- (1) Remove a requirement from a trust created to meet the requirements of 42 U.S.C. Section 1396p(d)(4) to pay back a governmental entity for benefits provided to the permissible beneficiary of the trust at the death of that beneficiary; or
- (2) Reduce or eliminate an income interest of the income beneficiary of any of the following types of trusts:
 - (a) A trust for which a marital deduction has been taken for federal tax purposes under Section 2056 or 2523 of the Internal Revenue Code or for state tax purposes under any comparable provision of applicable state law, during the life of the settlor's spouse;
 - (b) A charitable remainder trust under Section 664 of the Internal Revenue Code, during the life of the noncharitable beneficiary;
 - (c) A grantor retained annuity trust under Section 2702 of the Internal Revenue Code, during any period in which the settlor is a beneficiary; or
 - (d) A trust for which an election as a qualified Sub-Chapter S Trust under Section 1361(d) of the Internal Revenue Code is currently in place.

5. Except to the extent otherwise provided in a trust instrument specifically referring to this subsection, the trust protector shall not exercise a power in a way that would result in a taxable gift for federal gift tax purposes or cause the inclusion of any assets of the trust in the trust protector's gross estate for federal estate tax purposes.

6. Except to the extent otherwise provided in the trust instrument and in subsection 7 of this section, and notwithstanding any provision of sections 456.1-101 to 456.11-1106 to the contrary:

(1) A trust protector shall act in a fiduciary capacity in carrying out the powers granted to the trust protector in the trust instrument, and shall have such duties to the beneficiaries, the settlor, or the trust as set forth in the trust instrument, provided that the trust instrument may provide that the trust protector shall act in a nonfiduciary capacity. A trust protector is not a trustee, and is not liable or accountable as a trustee when performing or declining to perform the express powers given to the trust protector in the trust instrument. A trust protector is not liable for the acts or omissions of any fiduciary or beneficiary under the trust instrument;

(2) A trust protector is exonerated from any and all liability for the trust protector's acts or omissions, or arising from any exercise or nonexercise of the powers expressly conferred on the trust protector in the trust instrument, unless it is established by a preponderance of the evidence that the acts or omissions of the trust protector were done or omitted in breach of the trust protector's duty, in bad faith or with reckless indifference;

(3) A trust protector is authorized to exercise the express powers granted in the trust instrument at any time and from time to time after the trust protector acquires knowledge of their appointment as trust protector and of the powers granted. The trust protector may take any action, judicial or otherwise, necessary to carry out the duties given to the trust protector in the trust instrument;

(4) A trust protector is entitled to receive, from the assets of the trust for which the trust protector is acting, reasonable compensation, and reimbursement of the reasonable costs and expenses incurred, in determining whether to carry out, and in carrying out, the express powers given to the trust protector in the trust instrument;

(5) A trust protector is entitled to receive, from the assets of the trust for which the trust protector is acting, reimbursement of the reasonable costs and expenses, including attorney's fees, of defending any claim made against the trust protector arising from the acts or omissions of the trust protector acting in that capacity unless it is established by clear and convincing evidence that the trust protector was acting in bad faith or with reckless indifference; and

(6) The express powers granted in the trust instrument shall not be exercised by the trust protector for the trust protector's own personal benefit.

7. If a trust protector is granted a power in the trust instrument to direct, consent to, or disapprove a trustee's actual or proposed investment decision, distribution decision, or other decision of the trustee required to be performed under applicable trust law in carrying out the duties of the trustee in administering the trust, then only with respect to such power, excluding the powers identified in subsection 3 of this section, the trust protector shall have the same duties and liabilities as if serving as a trustee under the trust instrument unless the trust instrument expressly provides otherwise. In carrying out any written directions given to the trustee by the trust protector concerning actual or proposed investment decisions, the trustee shall not be subject to the provisions of sections 469.900 to 469.913. For purposes of this subsection, "investment decisions" means, with respect to any investment, decisions to retain, purchase, sell, exchange, tender, or otherwise engage in transactions affecting the ownership of investments or rights therein and, with respect to nonpublicly traded investments, the valuation thereof.

8. Any trustee of a directed trust shall not be accountable under the law or equity for any act or omission of a trust protector and shall stand absolved from liability for executing the decisions or instructions from a trust protector or for monitoring the actions or inactions of a trust protector. A trustee shall take reasonable steps to facilitate the activity of a trust protector in a directed trust. A trustee shall carry out the written directions given to the trustee by a trust protector acting within the scope of the powers expressly granted to the trust protector in the trust instrument. Except ~~in cases of bad faith or reckless indifference on the part of the trustee, or~~ as otherwise provided in the trust instrument, the trustee shall not be liable for any loss resulting directly or indirectly from any act

1 taken or omitted as a result of the written direction of the trust protector or the failure of the trust
2 protector to provide consent. Except as otherwise provided in the trust instrument, the trustee shall
3 have no duty to monitor the conduct of the trust protector, provide advice to or consult with the trust
4 protector, or communicate with or warn or apprise any beneficiary concerning instances in which
5 the trustee would or might have exercised the trustee's own discretion in a manner different from the
6 manner directed by the trust protector. Except as otherwise provided in the trust instrument, any
7 actions taken by the trustee at the trust protector's direction shall be deemed to be administrative
8 actions taken by the trustee solely to allow the trustee to carry out the instructions of the trust
9 protector and shall not be deemed to constitute an act by the trustee to monitor the trust protector or
10 otherwise participate in actions within the scope of the trust protector's authority.

11 9. Except to the extent otherwise expressly provided in the trust instrument, the trust
12 protector shall be entitled to receive information regarding the administration of the trust as follows:

13 (1) Upon the request of the trust protector, unless unreasonable under the circumstances, the
14 trustee shall promptly provide to the trust protector any and all information related to the trust that
15 may relate to the exercise or nonexercise of a power expressly granted to the trust protector in the
16 trust instrument. The trustee has no obligation to provide any information to the trust protector
17 except to the extent a trust protector requests information under this section;

18 (2) The request of the trust protector for information under this section shall be with respect
19 to a single trust that is sufficiently identified to enable the trustee to locate the records of the trust;
20 and

21 (3) If the trustee is bound by any confidentiality restrictions with respect to an asset of a
22 trust, a trust protector who requests information under this section about such asset shall agree to be
23 bound by the confidentiality restrictions that bind the trustee before receiving such information from
24 the trustee.

25 10. A trust protector may resign by giving thirty days' written notice to the trustee and any
26 successor trust protector. A successor trust protector, if any, shall have all the powers expressly
27 granted in the trust instrument to the resigning trust protector unless such powers are expressly
28 modified for the successor trust protector.

29 11. A trust protector of a trust having its principal place of administration in this state
30 submits personally to the jurisdiction of the courts of this state during any period that the principal
31 place of administration of the trust is located in this state and the trust protector is serving in such
32 capacity. The trust instrument may also provide that a trust protector is subject to the personal
33 jurisdiction of the courts of this state as a condition of appointment."; and

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35 Further amend said bill by amending the title, enacting clause, and intersectional references
36 accordingly.