

FIRST REGULAR SESSION

HOUSE BILL NO. 1041

100TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE EVANS.

2107H.011

DANA RADEMAN MILLER, Chief Clerk

AN ACT

To repeal section 456.4-419, RSMo, and to enact in lieu thereof one new section relating to certain distributions from trusts.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Section 456.4-419, RSMo, is repealed and one new section enacted in lieu thereof, to be known as section 456.4-419, to read as follows:

456.4-419. 1. Unless the terms of the trust instrument expressly provide otherwise, a trustee, **other than a settlor**, who has discretionary power under the terms of a trust to make a distribution of income or principal, whether or not limited by an ascertainable standard, to or for the benefit of one or more beneficiaries of a trust, the first trust, may instead exercise such discretionary power by ~~[appointing]~~ **distributing** all or part of the income or principal subject to such discretionary power in favor of a trustee of a second trust, the second trust, created under either the same or different trust instrument in the event that the trustee of the first trust decides that the ~~[appointment]~~ **distribution** is necessary or desirable after taking into account the terms and purposes of the first trust, the terms and purposes of the second trust, and the consequences of the distribution. **A trustee may exercise the power described in this subsection by distributing property from the first trust to one or more second trusts or by modifying the trust instrument for the first trust, which, as modified, becomes one or more second trusts.**

2. **With respect to a second trust to which a distribution is made under subsection 1 of this section:**

(1) **At least one permissible distributee of the first trust shall be a permissible distributee of the second trust immediately after the distribution;**

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

17 (2) If, at the time of the distribution, the settlor of the first trust is living and the
18 first trust is not a grantor trust under 26 U.S.C Sections 671 to 679, there shall not be any
19 permissible distributee of the second trust immediately after the distribution who is not a
20 permissible distributee of the first trust;

21 (3) If, at the time of the distribution, the settlor of the first trust is deceased or if,
22 at the time of the distribution, the first trust is a grantor trust under 26 U.S.C Sections 671
23 to 679 for reasons other than the trustee having the power granted by this section, any
24 beneficiary of the first trust may be included as a permissible distributee of the second
25 trust immediately after the distribution;

26 (4) The second trust shall not include any beneficiary who is not a beneficiary of
27 the first trust;

28 (5) The trust instrument for the second trust may retain, modify, or omit a power
29 of appointment granted in the first trust, and the trust instrument for the second trust may
30 create a power of appointment if the powerholder is a beneficiary of the second trust.
31 Except to the extent provided otherwise in subsection 4 of this section, a power of
32 appointment in the trust instrument for the second trust may be a general or nongeneral
33 power of appointment and the permissible appointees of the power need not be limited to
34 the beneficiaries of the first trust.

35 3. (1) As used in this subsection, the following terms mean:

36 (a) "Beneficiary with a disability", a beneficiary of a first trust who the
37 special-needs fiduciary believes may qualify for governmental benefits based on a
38 disability, regardless of whether the beneficiary currently receives those benefits or is an
39 individual who has been adjudicated disabled or adjudicated incapacitated;

40 (b) "Governmental benefits", financial aid or services from a state, federal, or other
41 public agency;

42 (c) "Special-needs fiduciary", with respect to a trust that has a beneficiary with a
43 disability:

44 a. A trustee or other fiduciary, other than a settlor, who has discretionary power
45 under the terms of a trust to make a distribution of income or principal, regardless of
46 whether limited by an ascertainable standard, to or for the benefit of one or more
47 beneficiaries; or

48 b. If no trustee or fiduciary has discretion under subparagraph a. of this
49 paragraph, a trustee or other fiduciary, other than a settlor, who is required to distribute
50 part or all of the income or principal of the first trust to or for the benefit of one or more
51 beneficiaries;

52 (d) "Special-needs trust", a trust the trustee believes would not be considered a
53 resource for purposes of determining whether a beneficiary with a disability is eligible for
54 governmental benefits.

55 (2) A special-needs fiduciary may exercise the authority granted by subsection 1 of
56 this section if:

57 (a) A second trust is a special-needs trust that benefits the beneficiary with a
58 disability; and

59 (b) The special-needs fiduciary determines that exercise of the authority under
60 subsection 1 of this section will further the purposes of the first trust.

61 (3) The following provisions apply to any exercise of the authority granted by this
62 subsection:

63 (a) Notwithstanding subdivision (4) of subsection 2 of this section, the terms of the
64 second trust may:

65 a. Provide that an interest is held by a pooled trust as defined by federal Medicaid
66 law for the benefit of the beneficiary with a disability under 42 U.S.C. Section
67 1396p(d)(4)(C); or

68 b. Contain payback provisions complying with reimbursement requirements of
69 federal Medicaid law under 42 U.S.C. Section 1396p(d)(4)(A);

70 (b) Except as affected by any change to the interests of the beneficiary with a
71 disability, the second trust or, if there are two or more second trusts, the second trusts in
72 the aggregate shall grant each other beneficiary of the first trust beneficial interests in the
73 second trusts that are substantially similar to the beneficiary's beneficial interests in the
74 first trust, unless such other beneficiary's interest is modified in accordance with the
75 provisions of this section other than the provisions of this subsection.

76 (4) Subdivision (3) of subsection 4 of this section shall not apply to the interests of
77 the beneficiary with a disability.

78 4. The following provisions apply to any exercise of the authority granted by subsection
79 1 of this section:

80 (1) ~~[The second trust may have as beneficiaries only one or more of those beneficiaries~~
81 ~~of the first trust to or for whom any discretionary distribution may be made from the first trust~~
82 ~~and who are proper objects of the exercise of the power, or one or more of those other~~
83 ~~beneficiaries of the first trust to or for whom a distribution of income or principal may have been~~
84 ~~made in the future from the first trust at a time or upon the happening of an event specified under~~
85 ~~the first trust;~~

86 ~~—(2) Unless the exercise of such power is limited by an ascertainable standard, no trustee~~
87 ~~of the first trust may exercise such authority to make a distribution from the first trust if:~~

118 ——— (a) Such trustee is a beneficiary of the first trust; or
119 ——— (b) Any beneficiary may remove and replace the trustee of the first trust with a related
120 or subordinate party to such beneficiary within the meaning of Section 672(c) of the Internal
121 Revenue Code;
122 ——— (3) Except if participating in a change that is needed for a distribution to any such
123 beneficiary under an ascertainable standard, no trustee shall exercise such authority to the extent
that doing so would have the effect either of:
124 ——— (a) Increasing the distributions that can be made in the future from the second trust to
125 the trustee of the first trust or to a beneficiary who can remove and replace the trustee of the first
126 trust with a related or subordinate party to such beneficiary within the meaning of Section 672(c)
127 of the Internal Revenue Code; or
128 ——— (b) Removing restrictions on discretionary distributions imposed by the instrument under
129 which the first trust was created;
130 ——— (4) In the case of any trust contributions which have been treated as gifts qualifying for
131 the exclusion from gift tax described in Section 2503(b) of the Internal Revenue Code, by reason
132 of the application of Section 2503(c), the governing instrument for the second trust shall provide
133 that the beneficiary's remainder interest shall vest no later than the date upon which such interest
134 would have vested under the terms of the governing instrument for the first trust;
135 ——— (5) The exercise of such authority may not reduce any income interest of any income
136 beneficiary of any of the following trusts:
137 ——— (a) A trust for which a marital deduction has been taken for federal tax purposes under
138 Section 2056 or 2523 of the Internal Revenue Code or for state tax purposes under any
139 comparable provision of applicable state law;
140 ——— (b) A charitable remainder trust under Section 664 of the Internal Revenue Code;
141 ——— (c) A grantor retained annuity trust under Section 2702 of the Internal Revenue Code;
142 or
143 ——— (d) A trust which has been qualified as a Subchapter S trust under Section 1361(d) of the
144 Internal Revenue Code or an electing small business trust under Section 1361(e) of the Internal
145 Revenue Code;
146 ——— (6) The exercise of such authority does not apply to trust property subject to a presently
147 exercisable power of withdrawal held by a trust beneficiary to whom, or for the benefit of whom,
148 the trustee has authority to make distributions, unless after the exercise of such authority, such
149 beneficiary's power of withdrawal is unchanged with respect to the trust property; and
150 ——— (7) A spendthrift clause or a provision in the trust instrument that prohibits amendment
151 or revocation of the trust shall not preclude the trustee from exercising the authority granted by
152 subsection 1 of this section] **If the exercise of authority is limited by an ascertainable**

standard and the trustee exercising such authority is a permissible distributee of the first trust under such standard:

(a) The discretionary power under the trust instrument for the second trust to distribute income or principal to such trustee as a permissible distributee shall be subject to the same ascertainable standard as, or a more restrictive ascertainable standard than, such standard in the trust instrument for the first trust; and

(b) The trust instrument for the second trust shall not:

- a. Modify a power of appointment granted to such trustee in the first trust; or
- b. Grant a power of appointment to such trustee that did not exist in the first trust;

(2) An exercise of the authority is subject to the following limitations:

(a) If the first trust contains property that qualified or would have qualified but for provisions of this section other than this subdivision for a marital deduction for purposes of the gift or estate tax under the Internal Revenue Code of 1986, as amended, the trust instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the second trust, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code of 1986, as amended, under which the transfer qualified;

(b) If the first trust contains property that qualified or would have qualified but for provisions of this section other than this subdivision for a charitable deduction for purposes of the income, gift, or estate tax under the Internal Revenue Code of 1986, as amended, the trust instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the second trust, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code of 1986, as amended, under which the transfer qualified;

(c) If the first trust contains property that qualified or would have qualified but for provisions of this section other than this subdivision for the exclusion from the gift tax described in Section 2503(b) of the Internal Revenue Code of 1986, as amended, the trust instrument for the second trust shall not include or omit a term that, if included in or omitted from the trust instrument for the second trust, would have prevented the transfer from qualifying under Section 2503(b) of the Internal Revenue Code of 1986, as amended. If the first trust contains property that qualified or would have qualified but for provisions of this section other than this subdivision for the exclusion from the gift tax described in 2503(b) of the Internal Revenue Code of 1986, as amended, by application of Section 2503(c) of the Internal Revenue Code of 1986, as amended, the trust instrument for the

second trust shall not include or omit a term that, if included or omitted from the trust instrument for the second trust, would have prevented the transfer from meeting the requirements of Section 2503(c) of the Internal Revenue Code of 1986, as amended;

(d) If the property of the first trust includes shares of stock in an S corporation, as defined in Section 1361 of the Internal Revenue Code of 1986, as amended, and the first trust is or but for provisions of this section other than this subdivision would be a permitted shareholder under any provision of Section 1361 of the Internal Revenue Code of 1986, as amended, the trustee of the first trust may exercise such authority with respect to part or all of the S corporation stock only if the second trust receiving the stock is a permitted shareholder under Section 1361(c)(2) of the Internal Revenue Code of 1986, as amended. If the property of the first trust includes shares of stock in an S corporation and the first trust is or but for provisions of this section other than this subdivision would be a qualified subchapter S trust within the meaning of Section 1361(d) of the Internal Revenue Code of 1986, as amended, the trust instrument for the second trust shall not include or omit a term that prevents the second trust from qualifying as a qualified subchapter S trust; and

(e) If the first trust contains property that qualified or would have qualified but for provisions of this section other than this subdivision for a zero inclusion ratio for purpose of the generation-skipping transfer tax under Section 2642(c) of the Internal Revenue Code of 1986, as amended, the trust instrument for the second trust shall not include or omit a term that, if included in or omitted from the first trust, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under Section 2642(c) of the Internal Revenue Code of 1986, as amended;

(3) The exercise of authority shall not apply to trust property subject to a presently exercisable power of withdrawal held by a trust beneficiary to whom, or for the benefit of whom, the trustee has authority to make distributions, unless after the exercise of such authority, such beneficiary's power of withdrawal is unchanged with respect to the trust property; and

(4) A spendthrift clause or a provision in the trust instrument that prohibits amendment or revocation of the trust shall not preclude the trustee from exercising the authority granted by subsection 1 of this section.

[3-] 5. At least sixty days prior to making a discretionary distribution under subsection 1 of this section, the trustee of the first trust shall notify the permissible distributees of the first trust and the permissible distributees of the second trust, or the qualified beneficiaries of the second trust if there are no permissible distributees of the second trust, of the distribution. A

195 beneficiary may waive the right to the notice required by this subsection and, with respect to
196 future distributions, may withdraw a waiver previously given.

197 ~~[4-]~~ 6. In exercising the authority granted by subsection 1 of this section, the trustee shall
198 remain subject to all fiduciary duties otherwise imposed under the trust instrument and Missouri
199 law.

200 ~~[5-]~~ 7. This section does not impose on a trustee a duty to exercise the authority granted
201 by subsection 1 of this section in favor of another trust or to consider exercising such authority
202 in favor of another trust.

203 **8. A second trust may have a duration that is the same as or different from the**
204 **duration of the first trust. However, to the extent that property of the second trust is**
205 **attributable to property of the first trust, the property of the second trust is subject to any**
206 **rules governing maximum perpetuity, accumulation, or suspension of the power of**
207 **alienation that apply to property of the first trust. This subsection shall not preclude the**
208 **creation of a general power of appointment in the trust instrument for a second trust as**
209 **authorized by this section.**

210 **9. In the event the trust instrument for the second trust in part does not comply**
211 **with this section but would otherwise be effective under this section, the exercise of the**
212 **power is effective and the following rules apply with respect to the principal of the second**
213 **trust attributable to the exercise of the power:**

214 **(1) A provision in the trust instrument for the second trust that is not permitted**
215 **under this section is void to the extent necessary to comply with this section; and**

216 **(2) A provision required by this section to be in the trust instrument for the second**
217 **trust which is not contained in the trust instrument is deemed to be included in the trust**
218 **instrument to the extent necessary to comply with this section.**

219 ~~[6-]~~ 10. This section is intended to codify and, from and after enactment, to provide
220 certain limitations to the common law of this state, and this section applies to any trust governed
221 by the laws of this state, including a trust whose principal place of administration is transferred
222 to this state before or after the enactment of this section.

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