

HB 758 -- TRUST INTERPRETATION AND DECANTING

SPONSOR: Hardwick

COMMITTEE ACTION: Voted "Do Pass" by the Standing Committee on Judiciary by a vote of 10 to 0. Voted "Do Pass" by the Standing Committee on Rules- Administrative Oversight by a vote of 11 to 0 with 1 voting present.

This bill establishes a provision regarding interpretation of familial relationships described in trusts and modifies a provision regarding distributions of income or principal from one trust to another trust.

FAMILIAL RELATIONSHIPS (Section 456.1-114 RSMo)

For the purposes of interpreting a term of familial relationship in a trust, a child conceived or born during a marriage is presumed to be a child of the married persons unless a judicial proceeding is commenced before the death of the presumed parent and it is determined that the presumed parent is not the parent of the child.

Additionally, this bill provides that a child who is not conceived or born in a marriage is presumed to not be a child of a person who did not give birth to such child unless a judicial proceeding determines such parentage or the person openly recognized the child as his or her child and such person has not refused to voluntarily support the child. A trustee shall not be liable to any person for exercising discretion in regards to the sufficiency of recognition and support of a child unless the trustee acted in bad faith or with a reckless indifference to the purposes of the trust or the interests of the beneficiaries. The rights afforded to the child shall not be retroactive but shall apply from the time the relationship is established.

Under this bill, a child adopted prior to 18 years of age is a child of the adopting parent and not of the natural parents, except that adoption by a spouse of a natural parent shall have no effect on the relationship between the child and the natural parent. Additionally, the terms of a trust shall prevail over this provision of the bill.

TRUST DECANTING (Section 456.4-419)

Under this bill, a trustee, other than a settlor, who has discretionary power to make a distribution may exercise such power by distributing all or part of the income or principal to a trustee of a second trust. The power may be exercised by distributing property from the first trust to one or more second trusts or by

modifying the first trust instrument to become one or more second trusts.

This bill provides requirements regarding permissible distributees of second trusts, including that at least one permissible distributee of the first trust shall be a permissible distributee of the second trust immediately after the distribution and that only a beneficiary of the first trust may be a beneficiary of the second trust. In addition, this bill modifies the use of powers of appointment in the second trust. The second trust instrument may retain, modify, or omit a power of appointment granted by the first trust and the second trust instrument may create a general or nongeneral power of appointment if the powerholder is a beneficiary of the second trust. Furthermore, this bill provides that a special-needs fiduciary may exercise the authority to make a distribution to a second trust if the second trust is a special-needs trust that has a beneficiary with a disability and if the fiduciary determines that the exercise of authority will further the purposes of the trust.

The bill repeals the current provisions regarding a second trust's beneficiaries, the limitations on a trustee's authority to make distributions from the first trust in certain circumstances, trust contributions treated as gifts, and the exercise of the discretionary power to reduce the income interest of any income beneficiary in certain trusts. The bill provides that if the exercise of the distribution authority is limited by an ascertainable standard, under which the trustee exercising such authority is a permissible distributee of the first trust, then the discretionary power shall be subject to at least the same standard as the first trust and the trust instrument for the second trust shall not modify powers of appointment nor grant a power of appointment to a trustee who did not exist in the first trust.

A second trust shall not include or omit terms that would prevent the first trust property from qualifying as a marital deduction, as a charitable deduction, for exclusion from the gift tax, as a qualified subchapter-S trust, or for a zero inclusion ratio for purposes of the generation skipping transfer tax under the Internal Revenue Code. Additionally, if the first trust property includes shares of a S-corporation's stock and the first trust is a permitted shareholder, then the trustee of the first trust may exercise the authority with respect to the S-corporation stock if the second trust is a permitted shareholder.

Currently, a notification must be made at least 60 days prior to making a discretionary distribution to the permissible distributees of the second trust or if none then to the qualified beneficiaries of the second trust. This bill requires that the notification be

made to the permissible distributees of the first trust and to the permissible distributees of the second trust.

The second trust may have a duration that is the same as the first trust. However, the property of the second trust that is attributable to the first trust is subject to the rules governing maximum perpetuity, accumulation, or suspension of the power of alienation which apply to the property of the first trust. The creation of a general power of appointment in the second trust instrument shall not be precluded by this provision.

In the event that part of the second trust instrument does not comply with this bill, the exercise of the discretionary power is effective and the provisions of the second trust instrument that are not permitted in or are required to be in the trust instrument are deemed void or included to the extent necessary to comply.

This bill is similar to SB 338 (2021) and HB 2533 (2020).

PROPOSERS: Supporters say that this bill makes provisions in trust law that apply to kids who were adopted or born out of wedlock. There are other things the settlor of a trust can do regarding beneficiaries and does not penalize the trustee using discretion in certain situations. It also addresses adverse tax consequences. The Supreme Court has pointed out that there is no definition of who is a child if a child is adopted or born out of wedlock, but those definitions exist in the probate code so this is putting it in the trust code. The bill does not address adult adoptions. Decanting is not new in Missouri but there is a uniform decanting law now, and the Missouri Bar believes that some of those uniform provisions should be adopted but not all.

Testifying for the bill were Representative Hardwick; Daniel Wheeler, and the Missouri Bar Association.

OPPOSERS: There was no opposition voiced to the committee.

OTHERS: Others testifying on the bill submitted written testimony, which can be found online.

Testifying on the bill was Arnie C. Dienoff.

Written testimony has been submitted for this bill. The full written testimony can be found under Testimony on the bill page on the House website.