

HCS SCS SB 886 -- TRUSTS

SPONSOR: Luetkemeyer (Evans)

COMMITTEE ACTION: Voted "Do Pass with HCS" by the Standing Committee on Judiciary by a vote of 9 to 0. Voted "Do Pass" by the Standing Committee on Rules- Administrative Oversight by a vote of 8 to 0.

The following is a summary of the House Committee Substitute for SB 886.

This bill modifies provisions relating to trusts, including the application of the rule against perpetuities to beneficiaries of certain trusts, interpretation of familial relationships described in trusts, distributions of income or principal from one trust to another trust, discretionary trusts, and settlors' beneficial interests in certain trusts.

APPLICATION OF THE RULE AGAINST PERPETUITIES (Section 456.026, RSMo)

If there is only one beneficiary who is entitled or eligible to receive distributions of income or principal from the trust and such beneficiary holds a general power of appointment over the trust with no other person having a power to appoint any part of the trust to anyone other than the beneficiary, then the beneficiary has a vested interest in the trust for purposes of determining whether a trust is subject to the rule against perpetuities.

FAMILIAL RELATIONSHIPS (Section 456.1-114)

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 recognizes 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. Furthermore, 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.

Finally, the rights afforded to the child shall not be retroactive but shall apply from the time the relationship is established. The terms of a trust shall prevail over this provision of the bill.

TRUST DECANTING (Section 456.4-419)

As specified in 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 an 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 shall 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 that apply to the property of the first trust. This provision shall not preclude the creation of a general power of appointment in the second trust instrument.

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.

DISCRETIONARY TRUSTS AND SETTLORS' BENEFICIAL INTEREST (Section 456.5-504 and 456.5-505)

This bill provides that no creditor or other person making a claim against a beneficiary shall be entitled to any information relating to the trust's assets or other trust records if distributions to the beneficiary are solely within the discretion of the trustee. Furthermore, this provision shall apply during the term of the trust, regardless of whether the beneficiary is also a potential remainder beneficiary of the trust.

Currently, a settlor's creditors may not reach the settlor's beneficial interest in an irrevocable trust with a spendthrift provision, regardless of any testamentary power of appointment retained by the settlor that is exercisable by the settlor in favor of certain appointees. This bill modifies the provision to state that a settlor's creditors may not reach the settlor's beneficial

interest in such a trust, regardless of any testamentary power of appointment that is exercisable by the settlor, by a will or other written instrument, in favor of certain appointees or regardless of the settlor's power to veto distributions from the trust.

A settlor of the following trusts shall not be treated as the settlor of any other trust created pursuant to the exercise of a power of appointment if the settlor is the beneficiary of the trust created:

(1) An irrevocable inter vivos trust for the benefit of the settlor's spouse that qualifies for certain marital deductions from the federal gift tax;

(2) An irrevocable inter vivos trust for the benefit of the settlor's spouse, or the spouse and other beneficiaries, where the spouse is the beneficiary who exercises the power of appointment to create the additional trust; and

(3) An irrevocable inter vivos trust where any beneficiary exercises a general power of appointment to create the additional trust.

The following is a summary of the public testimony from the committee hearing. The testimony was based on the Senate Perfected version of the bill.

PROPOSERS: Supporters say that this makes consistent the rules for out of wedlock children who are included in a class gift for a trust to ensure they are treated consistently under probate laws as they are under other laws. Decanting trusts can be turned over into other trusts. They can be distributed to a second trust to take advantage of new tax laws. There are records that can be kept closed under certain circumstances. These have been based on model trust laws. This bill prevents future problems for Missourians. Public DNA testing allows people to find out that some people who they thought were their natural parents are not so this affects some trusts and estates. Decanting is how a trust can pour over assets into a second trust. There is a uniform decanting law. This bill codifies Missouri common law relating to the rule against perpetuities.

Testifying for the bill were Senator Luetkemeyer; and Daniel P. Wheeler, The Missouri Bar.

OPPOSERS: Those who oppose the bill submitted their testimony in writing, which can be found online.

Testifying against 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.