

1 ENGROSSED SENATE  
2 BILL NO. 980

By: Lamb of the Senate

3 and

4 Duncan of the House

5  
6  
7 [ Oklahoma Discretionary and Special Needs Trust

8 Act - codification -

9 effective date ]

10

11 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

12 SECTION 1. NEW LAW A new section of law to be codified  
13 in the Oklahoma Statutes as Section 175.81 of Title 60, unless there  
14 is created a duplication in numbering, reads as follows:

15 This act shall be known and may be cited as the "Oklahoma  
16 Discretionary and Special Needs Trust Act".

17 SECTION 2. NEW LAW A new section of law to be codified  
18 in the Oklahoma Statutes as Section 175.82 of Title 60, unless there  
19 is created a duplication in numbering, reads as follows:

20 As used in this act:

21 1. "Beneficial interest" means a distribution interest or a  
22 remainder interest, and excludes a power of appointment or a power  
23 reserved by the settlor;

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1           2. "Beneficiary" means a person who has a present or future  
2 beneficial interest in a trust, vested or contingent. However, the  
3 holder of a power of appointment shall not be considered a  
4 beneficiary;

5           3. "Current distribution interest" means a distribution  
6 interest where on the date of qualification the beneficiary is an  
7 eligible distributee or permissible distributee of trust income or  
8 principal;

9           4. "Distribution interest" means a beneficiary's equitable  
10 interest to enforce the distribution terms of the trust subject to  
11 the judicial review standard. A distribution interest is classified  
12 as a mandatory interest, a support interest, a discretionary  
13 interest, or a combination of any such interests. A distribution  
14 interest includes both current distribution interests and future  
15 distribution interests;

16           5. "Exception creditor" means a creditor who is allowed to  
17 reach a support interest as exclusively prescribed by the remedies  
18 in this act;

19           6. "Future distribution interest" means all distribution  
20 interests other than a current distribution interest;

21           7. "Power of appointment" means an inter-vivos or testamentary  
22 power to direct the disposition of trust property, other than a  
23 distribution decision by a trustee to a beneficiary. Powers of  
24 appointment are held by donees, not the settlor. A power of

1 appointment includes any right or power granted by statute to any  
2 person other than the settlor;

3 8. "Remainder interest" means an interest where a trust  
4 beneficiary will receive the property outright in the future; and

5 9. "Reserved power" means a power held by the settlor.

6 SECTION 3. NEW LAW A new section of law to be codified  
7 in the Oklahoma Statutes as Section 175.83 of Title 60, unless there  
8 is created a duplication in numbering, reads as follows:

9 The following provisions apply to all trusts under this act,  
10 regardless of whether a spendthrift provision is included in a  
11 trust:

12 1. A distribution interest may not be judicially sold. A  
13 distribution interest in a trust includes, but is not limited to, a  
14 current interest, life interest or income interest;

15 2. A remainder interest, power of appointment or a reserved  
16 power in a trust may not be judicially sold;

17 3. Trust property is not subject to personal obligations of the  
18 trustee, even if the trustee becomes insolvent or bankrupt;

19 4. A beneficiary of a trust has an equitable interest in the  
20 trust to bring an action against the trustee to enforce the terms of  
21 the trust subject to the judicial review standard; and

22 5. This act provides for the sole and exclusive remedies that  
23 are available to a creditor or other non-beneficiary claiming an  
24 interest in the trust.

1           SECTION 4.           NEW LAW           A new section of law to be codified  
2 in the Oklahoma Statutes as Section 175.84 of Title 60, unless there  
3 is created a duplication in numbering, reads as follows:

4           The following provisions apply to all trusts under this act:

5           1. A creditor may not attach, exercise, or otherwise reach an  
6 interest of a beneficiary or any other person who holds an  
7 unconditional or conditional removal or replacement power over a  
8 trustee. Further, such a power is personal to the beneficiary and  
9 may not be exercised by the beneficiary's creditors, nor may a court  
10 direct any person to exercise such power;

11           2. A creditor may not reach an interest of a beneficiary nor  
12 otherwise compel a distribution because the beneficiary is then  
13 serving as a trustee or a cotrustee;

14           3. If a party challenges a settlor or a beneficiary's influence  
15 over a trust, the following factors, alone or in combination, shall  
16 not be considered dominion and control over a trust:

17           a. a beneficiary serving as a trustee or a cotrustee as  
18 described in paragraph 2 of this section,

19           b. the settlor or a beneficiary holds an unrestricted  
20 power to remove or replace a trustee,

21           c. the settlor or a beneficiary is a trust administrator,  
22 a general partner of a partnership, a manager of a  
23 limited liability company, an officer of a  
24 corporation, or any other managerial function of any

1 other type of entity, and part or all of the trust  
2 property consists of an interest in said entity,

3 d. a person related by blood or adoption to a settlor or  
4 a beneficiary is appointed as trustee, or

5 e. a settlor's or a beneficiary's accountant, attorney,  
6 financial advisor, business associate, or a friend is  
7 appointed as trustee; and

8 4. The settlor or any beneficiary shall not be deemed to be the  
9 alter ego of a trustee. The following factors, alone or in  
10 combination, shall not be sufficient evidence for a court to  
11 conclude that the settlor controls a trustee or is the alter ego of  
12 a trustee:

13 a. any combination of the factors listed in paragraph 3  
14 of this section,

15 b. occasional occurrences where the settlor or a  
16 beneficiary may have signed checks, made disbursements  
17 or executed other documents related to the trust as a  
18 trustee, when in fact the settlor or a beneficiary was  
19 not a trustee,

20 c. making requests for distributions on behalf of  
21 beneficiaries, or

22 d. making requests to the trustee to hold, purchase, or  
23 sell any trust property.

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1           SECTION 5.           NEW LAW           A new section of law to be codified  
2 in the Oklahoma Statutes as Section 175.85 of Title 60, unless there  
3 is created a duplication in numbering, reads as follows:

4           A. A spendthrift provision is valid if it restrains either the  
5 voluntary or involuntary transfer of a beneficiary's interest. A  
6 spendthrift provision may permit the voluntary transfer of a  
7 beneficiary's interest even if such transfer is subject to the  
8 approval by the trustee if the trustee is not also the transferring  
9 beneficiary. The trustee may honor a transfer even if such transfer  
10 violates a spendthrift provision. The trustee shall not be liable  
11 to either the beneficiary or the assignee whether or not the trustee  
12 honors such a transfer.

13           B. If a trust provides that the interest of a beneficiary is  
14 held subject to a spendthrift provision, or words of similar import,  
15 it shall restrain both the voluntary or involuntary transfer of the  
16 beneficiary's interest.

17           C. Except for an exception creditor of a support interest under  
18 paragraph 4 of Section 8 of this act, when a trust contains a  
19 spendthrift provision, a creditor or assignee of the beneficiary may  
20 not reach an interest in a trust or a distribution by the trustee  
21 until such distribution is received by the beneficiary.

22           D. A creditor shall wait until a distribution is received by a  
23 beneficiary before attachment; provided, however, an exception  
24

1 creditor may attach present and future distributions at the trust  
2 level.

3 E. A spendthrift provision applies to both current distribution  
4 interests and remainder interests.

5 F. A power of appointment in any trust is personal in nature  
6 and cannot be attached or forced to be exercised by a creditor or a  
7 court regardless of the presence of a spendthrift provision. A  
8 power of appointment is not a property interest.

9 G. A reserved power is not protected by a spendthrift  
10 provision. If a reserved power does not constitute a power of  
11 withdrawal for the settlor to withdraw income or principal, the  
12 holder of a reserved power may exercise the power in his or her sole  
13 and absolute discretion unencumbered by any court.

14 H. A spendthrift provision is a material provision of a trust.

15 SECTION 6. NEW LAW A new section of law to be codified  
16 in the Oklahoma Statutes as Section 175.86 of Title 60, unless there  
17 is created a duplication in numbering, reads as follows:

18 A. A distribution interest in a trust shall be classified as a  
19 mandatory interest, a support interest or a discretionary interest.

20 These definitions apply for all trusts discussed in this act:

21 1. A "mandatory interest" means a distribution interest where  
22 the trustee has no discretion in determining whether the  
23 distribution shall be made, or the amount or timing of such  
24 distribution;

1           2. A "support interest" means any interest which is not a  
2 mandatory interest or a discretionary interest. A support interest  
3 shall include mandatory language such as "shall make distributions"  
4 and be coupled with a standard capable of judicial interpretation,  
5 such as an "ascertainable standard" as defined in Internal Revenue  
6 Code (IRC) Section 2041; and

7           3. A "discretionary interest" means any interest where a  
8 trustee has discretion to make or withhold a distribution. A  
9 discretionary interest includes permissive language such as "may  
10 make distributions" or it may include mandatory language that is  
11 inconsistent with the settlor's intent to create a discretionary  
12 trust, such as, "The trustee shall make distributions in the  
13 trustee's sole and absolute discretion."

14           B. A beneficiary may concurrently hold a mandatory interest,  
15 support interest or discretionary interest. To the extent a trust  
16 contains a combination of a discretionary interest, a support  
17 interest or a mandatory interest, such trust shall be a mandatory  
18 interest only to the extent of the mandatory language and a support  
19 interest only to the extent of such support language. The remaining  
20 trust property shall be held as a discretionary interest.

21           SECTION 7.           NEW LAW           A new section of law to be codified  
22 in the Oklahoma Statutes as Section 175.87 of Title 60, unless there  
23 is created a duplication in numbering, reads as follows:

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1       A. If a trust contains a spendthrift provision, a creditor may  
2 not attach present and future mandatory distributions from the  
3 trust. A creditor shall wait until a distribution is received by a  
4 beneficiary before attachment. However, an exception creditor may  
5 attach present and future distributions for child support.

6       B. If a trust does not contain a spendthrift provision, a  
7 creditor may attach present and future mandatory distributions from  
8 the trust at the trust level.

9       C. A beneficiary holding a mandatory distribution interest may  
10 enforce such interest. A court may review a trustee's distribution  
11 discretion if the trustee acts beyond the bounds of reasonableness.

12       SECTION 8.       NEW LAW       A new section of law to be codified  
13 in the Oklahoma Statutes as Section 175.88 of Title 60, unless there  
14 is created a duplication in numbering, reads as follows:

15       The following provisions apply only to support trusts:

16       1. The mere fact that a court would have exercised the  
17 distribution power under a support interest differently than the  
18 trustee is not sufficient reason for interfering with the exercise  
19 of the distribution power by the trustee. However, a court may  
20 review a trustee's distribution discretion if the trustee acts  
21 beyond the bounds of reasonableness;

22       2. A support interest relies on spendthrift provisions for  
23 protection of a beneficial interest as well as the additional  
24

1 protection provided by protective or restrictive distribution  
2 language under Section 10 of this act;

3 3. The only exception creditor under this act is a  
4 beneficiary's child who has a judgment or court order against the  
5 beneficiary for support. In this section, "child" means any person  
6 for whom an order or judgment for child support has been entered in  
7 this or another state;

8 4. As provided by this act, the sole and exclusive remedy of an  
9 exception creditor is the attachment of the support interest at the  
10 trust level. The court may limit the amount subject to attachment  
11 as appropriate under the circumstances to provide for the needs of  
12 the beneficiary and the beneficiary's family; and

13 5. A beneficiary of a support interest has an enforceable right  
14 to a distribution pursuant to a court review. This does not raise  
15 the beneficiary's interest to the level of a property interest.

16 SECTION 9. NEW LAW A new section of law to be codified  
17 in the Oklahoma Statutes as Section 175.89 of Title 60, unless there  
18 is created a duplication in numbering, reads as follows:

19 The following provisions apply only to discretionary interests:

20 1. A discretionary interest is neither a property interest nor  
21 an enforceable right to a distribution; it is a mere expectancy;  
22 provided, however, a beneficiary holding a discretionary interest  
23 has an equitable interest to bring an action against the trustee  
24 within the judicial review standard of paragraph 4 of Section 9 of

1 this act. No creditor, regardless of whether this act provides for  
2 any exception creditors, may attach, require the trustee to exercise  
3 the trustee's discretion to make a distribution, or cause a court to  
4 judicially sell a discretionary interest;

5 2. Regardless of whether a beneficiary has any outstanding  
6 creditor, a trustee may directly pay any expense on behalf of such  
7 beneficiary and may exhaust the income and principal of the trust  
8 for the benefit of such beneficiary. A trustee shall not be liable  
9 to any creditor or beneficiary for paying the expenses of a  
10 beneficiary;

11 3. A creditor, including an exception creditor, of a  
12 beneficiary has no greater rights than a beneficiary, and may not  
13 compel a distribution that is subject to the trustee's discretion,  
14 nor may a court order a distribution;

15 4. A court may review a trustee's distribution discretion only  
16 if it is proved by clear and convincing evidence that the trustee:

- 17 a. acts dishonestly,
- 18 b. acts with an improper motive, or
- 19 c. fails to act.

20 The sole factor not to a make a distribution does not constitute a  
21 failure to act. There is no standard of reasonableness under the  
22 above review standard;

23 5. In addition to any limitations of creditors' rights, if the  
24 trust contains a spendthrift provision, a current interest in a

1 discretionary trust also receives the benefits of any spendthrift  
2 protection; and

3 6. Absent express language to the contrary, in the event that  
4 the distribution language permits unequal distributions between  
5 beneficiaries or distributions to the exclusion of other  
6 beneficiaries, the trustee may distribute all of the accumulated,  
7 accrued, or undistributed income and principal to one beneficiary in  
8 the trustee's discretion.

9 SECTION 10. NEW LAW A new section of law to be codified  
10 in the Oklahoma Statutes as Section 175.90 of Title 60, unless there  
11 is created a duplication in numbering, reads as follows:

12 A. A trustee may only make distributions for the purposes  
13 designated by the settlor. A creditor, including an exception  
14 creditor, has no greater rights than a beneficiary. In this  
15 respect, a creditor, including an exception creditor, cannot attach  
16 present or future distributions if such creditor's claim does not  
17 come within the distribution standard.

18 B. A restriction curtailing a trustee's distribution powers as  
19 to a trustee making any distribution that would result in a  
20 beneficiary not having an "available resource" is valid, and an  
21 exception creditor may not attach present or future distributions of  
22 a trust. All other restrictions curtailing a trustee's distribution  
23 power are void as to exception creditors, if any exception creditors  
24 are provided by this act.

1           SECTION 11.           NEW LAW           A new section of law to be codified  
2 in the Oklahoma Statutes as Section 175.91 of Title 60, unless there  
3 is created a duplication in numbering, reads as follows:

4           A. A provision that provides that a current distribution  
5 interest shall become either a discretionary interest or that a  
6 beneficiary's current distribution interest shall terminate upon a  
7 creditor, including an exception creditor, attaching a beneficiary's  
8 current distribution interest in a trust is valid.

9           B. A provision that provides a remainder interest shall  
10 terminate or change into a dynasty interest upon attachment by a  
11 creditor, including an exception creditor, is valid.

12           SECTION 12.           NEW LAW           A new section of law to be codified  
13 in the Oklahoma Statutes as Section 175.92 of Title 60, unless there  
14 is created a duplication in numbering, reads as follows:

15           A. Whether or not the terms of a trust contain a spendthrift  
16 provision, the following rules apply:

17           1. During the lifetime of the settlor, the property of a  
18 revocable trust is subject to the claims of the settlor's creditors;

19           2. A spendthrift provision is ineffective with respect to a  
20 revocable trust while such trust is revocable; and

21           3. After the death of a settlor, and subject to the settlor's  
22 right to direct the source from which liabilities will be paid, the  
23 property of a trust that was revocable at settlor's death is subject  
24 to the claims of the settlor's creditors, costs of administration of

1 the settlor's estate, the expenses of the settlor's funeral and  
2 disposal of remains, and statutory allowances to a surviving spouse  
3 and children to the extent the settlor's probate estate is  
4 inadequate to satisfy those claims, costs, expenses and allowances.

5 B. A creditor or assignee of the settlor may reach the maximum  
6 amount that can be distributed to or for settlor's benefit. If a  
7 trust has more than one settlor, the amount the creditor or assignee  
8 of a particular settlor may reach may not exceed the settlor's  
9 interest in the portion of the trust attributable to that settlor's  
10 contribution.

11 SECTION 13. This act shall become effective November 1, 2007.

12 Passed the Senate the 14th day of March, 2007.

13  
14 \_\_\_\_\_  
15 Presiding Officer of the Senate

16 Passed the House of Representatives the \_\_\_\_ day of \_\_\_\_\_,  
17 2007.

18  
19 \_\_\_\_\_  
20 Presiding Officer of the House  
21 of Representatives