

1 ENGROSSED HOUSE
2 BILL NO. 2171

By: McCullough of the House

and

Anderson of the Senate

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7 An Act relating to property; establishing the
8 Oklahoma Discretionary and Special Needs Trust Act;
9 providing short title; defining terms; prohibiting
10 judicial sale of certain interests; prohibiting use
11 of trust property to satisfy certain personal
12 obligations; authorizing certain actions; providing
13 remedies for creditors and nonbeneficiaries claiming
14 interest in a trust; prohibiting certain acts;
15 providing that certain factors do not constitute
16 dominion and control over a trust; providing that a
17 settlor or beneficiary is not the alter ego of a
18 trustee; providing for validity and effect of
19 spendthrift provisions; classifying and stating
20 effects of certain interests; providing application
21 of certain provisions to trusts with one or more
22 beneficiaries holding support interests; providing
23 application of certain provisions to trusts with one
24 or more beneficiaries holding discretionary
interests; providing for the distribution powers of a
trustee; stating application of certain rules;
providing for validity of certain provisions;
providing for codification; and providing an
effective date.

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

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

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

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

6 As used in the Oklahoma Discretionary and Special Needs Trust
7 Act:

8 1. "Beneficial interest" means a distribution interest or a
9 remainder interest, and excludes a power of appointment or a power
10 reserved by the settlor;

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

15 3. "Child" means any person for whom an order or judgment for
16 child support has been entered in this state or another state;

17 4. "Current distribution interest" means a distribution
18 interest where on the date of qualification the beneficiary is an
19 eligible distributee or permissible distributee of trust income or
20 principal;

21 5. "Discretionary interest" means any interest for which a
22 trustee has discretion to make or withhold a distribution. A
23 discretionary interest includes permissive language such as "may
24 make distributions" or it may include mandatory language that is

1 inconsistent with the intent of the settlor to create a
2 discretionary trust, such as "The trustee shall make distributions
3 in the sole and absolute discretion of the trustee";

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

11 7. "Exception creditor" means a child of a beneficiary who has
12 a judgment or court order against the beneficiary for support;

13 8. "Future distribution interest" means all distribution
14 interests other than a current distribution interest;

15 9. "Mandatory interest" means a distribution interest for which
16 the trustee has no discretion in determining whether the
17 distribution shall be made, or the amount or timing of the
18 distribution;

19 10. "Power of appointment" means an inter vivos or testamentary
20 power to direct the disposition of trust property, other than a
21 distribution decision by a trustee to a beneficiary. Powers of
22 appointment are held by donees, not the settlor. A power of
23 appointment includes any right or power granted by statute to any
24 person other than the settlor;

1 11. "Remainder interest" means an interest for which a trust
2 beneficiary will receive the property outright in the future;

3 12. "Reserved power" means a power held by the settlor;

4 13. "Special Needs Trust" means a trust created for the partial
5 or exclusive benefit of a disabled or incapacitated person, in order
6 to allow the disabled or incapacitated beneficiary to avoid loss of
7 eligibility for government benefit programs, including, but not
8 limited to, Medicaid, Supplemental Security Income, Social Security
9 Disability Income or other state or federal benefit programs; and

10 14. "Support interest" means any interest which is not a
11 mandatory interest or a discretionary interest. A support interest
12 shall include mandatory language such as "shall make distributions"
13 and be coupled with a standard capable of judicial interpretation,
14 such as an "ascertainable standard" as defined in Internal Revenue
15 Code (IRC) Section 2041.

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

19 The following provisions apply to all trusts created or modified
20 from and after November 1, 2010, regardless of whether a spendthrift
21 provision is included in a trust:

22 1. A distribution interest shall not be judicially sold. A
23 distribution interest in a trust includes, but is not limited to, a
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1 current distribution interest, future distribution interest or
2 income interest;

3 2. A remainder interest, power of appointment or a reserved
4 power in a trust shall not be judicially sold;

5 3. Except as to a settlor who is also a trustee of a revocable
6 trust, trust property is not subject to personal obligations of the
7 trustee, even if the trustee becomes insolvent or bankrupt;

8 4. A beneficiary of a trust has an equitable interest in the
9 trust to bring an action against the trustee to enforce the terms of
10 the trust subject to the judicial review standard set forth in
11 paragraph 4 of Section 9 of this act; and

12 5. Subject to the provisions of the Uniform Fraudulent Transfer
13 Act, the Oklahoma Discretionary and Special Needs Trust Act provides
14 for the sole and exclusive remedies that are available to a creditor
15 or other nonbeneficiary claiming an interest in the trust.

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

19 The following provisions apply to all trusts created pursuant to
20 the Oklahoma Discretionary and Special Needs Trust Act:

21 1. A creditor shall not attach, exercise, or otherwise reach an
22 interest of a beneficiary or any other person who holds an
23 unconditional or conditional removal or replacement power over a
24 trustee. Further, this power is personal to the beneficiary and may

1 not be exercised by the creditors of the beneficiary, nor may a
2 court direct any person to exercise this power;

3 2. A creditor shall not reach an interest of a beneficiary nor
4 otherwise compel a distribution because the beneficiary is then
5 serving as a trustee or a cotrustee;

6 3. If a party challenges a settlor or the influence of a
7 beneficiary over a trust, the following factors, alone or in
8 combination, shall not be considered dominion and control over a
9 trust:

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

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

14 c. the settlor or a beneficiary, as provided in the
15 applicable trust instrument, is:

16 (1) a trust administrator,

17 (2) a trust protector,

18 (3) a special trustee, or

19 (4) a general partner of a partnership, a manager of
20 a limited liability company, an officer of a
21 corporation, or any other managerial function of
22 any other type of entity, and part or all of the
23 trust property consists of an interest in said
24 entity,

- d. a person related by blood or adoption to a settlor or a beneficiary is appointed as trustee, or
- e. an accountant of a settlor or a beneficiary, attorney, financial advisor, business associate, or a friend is appointed as trustee; and

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

- a. any combination of the factors listed in paragraph 3 of this section,
- b. occasional occurrences in which the settlor or a beneficiary may have signed checks, made disbursements or executed other documents related to the trust as a trustee, when in fact the settlor or a beneficiary was not a trustee,
- c. making requests for distributions on behalf of beneficiaries, or
- d. making requests to the trustee to hold, purchase, or sell any trust property.

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

1 A. A spendthrift provision is valid if it restrains either the
2 voluntary or involuntary transfer of a beneficiary's interest. If
3 the applicable trust instrument so provides, a spendthrift provision
4 may permit the voluntary transfer of an interest of a beneficiary
5 even if the transfer is subject to the approval by the trustee if
6 the trustee is not also the transferring beneficiary. The trustee
7 may honor a transfer even if the transfer violates a spendthrift
8 provision. The trustee shall not be liable to either the
9 beneficiary or the assignee whether or not the trustee honors the
10 transfer.

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

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

20 D. A creditor shall wait until a distribution is received by a
21 beneficiary before attachment; provided, however, an exception
22 creditor may attach current and future distributions at the trust
23 level.

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1 E. A spendthrift provision applies to both current distribution
2 interests, future distribution interests, and remainder interests.

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

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

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

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

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

18 B. A beneficiary may concurrently hold a mandatory interest,
19 support interest or discretionary interest. To the extent a trust
20 contains a combination of a discretionary interest, a support
21 interest or a mandatory interest, the trust shall be a mandatory
22 interest only to the extent of the mandatory language and a support
23 interest only to the extent of the support language. The remaining
24 trust property shall be held as a discretionary interest.

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

4 A. If a trust created on or after November 1, 2010, contains a
5 spendthrift provision, a creditor shall not attach present and
6 future mandatory distributions from the trust. A creditor shall
7 wait until a distribution is received by a beneficiary before
8 attachment. However, an exception creditor may attach present and
9 future mandatory distributions for child support.

10 B. If a trust does not contain a spendthrift provision, a
11 creditor may attach present and future mandatory distributions from
12 the trust at the trust level.

13 C. A beneficiary holding a mandatory distribution interest may
14 enforce the interest. A court may review the distribution
15 discretion of a trustee if the trustee acts beyond the bounds of
16 reasonableness.

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

20 The following provisions apply only to trusts with one or more
21 beneficiaries holding support interests:

22 1. The fact that a court would have exercised the distribution
23 power under a support interest differently than the trustee is not
24 sufficient reason for interfering with the exercise of the

1 distribution power by the trustee. However, a court may review the
2 distribution discretion of a trustee if the trustee acts beyond the
3 bounds of reasonableness;

4 2. A support interest relies on spendthrift provisions for
5 protection of a beneficial interest as well as the additional
6 protection provided by protective or restrictive distribution
7 language under Section 10 of this act;

8 3. The only exception creditor under the Oklahoma Discretionary
9 and Special Needs Trust Act is a child of a beneficiary who has a
10 judgment or court order against the beneficiary for support;

11 4. As provided by the Oklahoma Discretionary and Special Needs
12 Trust Act, the sole and exclusive remedy of an exception creditor is
13 the attachment of the beneficiary's support interest at the trust
14 level. The court may limit the amount subject to attachment as
15 appropriate under the circumstances to provide for the needs of the
16 beneficiary and the family of the beneficiary; and

17 5. A beneficiary holding a support interest has an enforceable
18 right to a distribution pursuant to a court review. This does not
19 raise the interest of the beneficiary to the level of a property
20 interest.

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

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1 The following provisions apply only to trusts with one or more
2 beneficiaries holding discretionary interests:

3 1. A discretionary interest is neither a property interest nor
4 an enforceable right to a distribution; it is a mere expectancy;
5 provided, however, a beneficiary holding a discretionary interest
6 has an equitable interest to bring an action against the trustee
7 within the judicial review standard of paragraph 4 of this section.
8 No creditor, regardless of whether the Oklahoma Discretionary and
9 Special Needs Trust Act provides for any exception creditors, shall
10 attach, require the trustee to exercise the trustee's discretion to
11 make a distribution, or cause a court to judicially sell a
12 discretionary interest;

13 2. Regardless of whether a beneficiary has any outstanding
14 creditor, a trustee may directly pay any expense on behalf of the
15 beneficiary and may exhaust the income and principal of the trust
16 for the benefit of the beneficiary. A trustee shall not be liable
17 to any creditor or beneficiary for paying the expenses of a
18 beneficiary;

19 3. A creditor, including an exception creditor, of a
20 beneficiary has no greater rights in a discretionary interest than a
21 beneficiary, and shall not compel a distribution that is subject to
22 the discretion of the trustee, nor may a court order a distribution;

1 4. A court may review a distribution discretion of a trustee
2 only if it is proved by clear and convincing evidence that the
3 trustee:

- 4 a. acts dishonestly,
- 5 b. acts with an improper motive, or
- 6 c. fails to act.

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

10 5. In addition to any limitations of rights of creditors, if
11 the trust contains a spendthrift provision, a current interest in a
12 discretionary trust also receives the benefits of any spendthrift
13 protection; and

14 6. Absent express language to the contrary, in the event that
15 the distribution language permits unequal distributions between
16 beneficiaries or distributions to the exclusion of other
17 beneficiaries, the trustee may distribute all of the accumulated,
18 accrued, or undistributed income and principal to one beneficiary in
19 the discretion of the trustee.

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

23 A. A trustee may only make distributions for the purposes
24 designated by the settlor. A creditor, including an exception

1 creditor, has no greater rights than a beneficiary. In this
2 respect, a creditor, including an exception creditor, cannot attach
3 present or future distributions if the claim of the creditor does
4 not come within the distribution standard.

5 B. A restriction limiting the distribution powers of a trustee
6 as to a trustee, which distribution might result in the loss of a
7 beneficiary's eligibility for participation in a federal or state
8 benefits program, including, but not limited to, Medicaid,
9 Supplemental Security Income, Social Security Disability Income, or
10 other state or federal benefits program is valid, and no creditor,
11 including an exception creditor, may attach present or future
12 distributions from such a trust. All other restrictions curtailing
13 the distribution power of a trustee are void as to exception
14 creditors, if any exception creditors are provided by the Oklahoma
15 Discretionary and Special Needs Trust Act.

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

19 A. A provision which provides that a current distribution
20 interest shall either become a discretionary interest or shall
21 terminate upon the attachment by a creditor, including an exception
22 creditor, is valid.

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

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

7 Subject to the provisions of the Family Wealth Preservation
8 Trust Act:

9 1. Whether or not the terms of a trust contain a spendthrift
10 provision, the following rules apply:

11 a. during the lifetime of the settlor, the property of a
12 revocable trust is subject to the claims of the
13 creditors of the settlor, and

14 b. a spendthrift provision is ineffective with respect to
15 the settlor of a revocable trust while the trust is
16 revocable; and

17 2. A creditor or assignee of the settlor may reach the maximum
18 amount that can be distributed to or for the benefit of the settlor.
19 If a trust has more than one settlor, the amount the creditor or
20 assignee of a particular settlor may reach may not exceed the
21 interest of the settlor in the portion of the trust attributable to
22 the contribution of that settlor.

23 SECTION 13. This act shall become effective November 1, 2010.

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1 Passed the House of Representatives the 16th day of February,
2 2010.

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5 Presiding Officer of the House of
6 Representatives

7 Passed the Senate the ____ day of _____, 2010.

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10 Presiding Officer of the Senate

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