

ENROLLED HOUSE  
BILL NO. 2171

By: McCullough of the House

and

Anderson, Stanislawski and  
Johnson (Constance) of the  
Senate

An Act relating to property; establishing the Oklahoma Discretionary and Special Needs Trust Act; providing short title; defining terms; prohibiting judicial sale of certain interests; prohibiting use of trust property to satisfy certain personal obligations; authorizing certain actions; providing remedies for creditors and nonbeneficiaries claiming interest in a trust; prohibiting certain acts; providing that certain factors do not constitute dominion and control over a trust; providing that a settlor or beneficiary is not the alter ego of a trustee; providing for validity and effect of spendthrift provisions; classifying and stating effects of certain interests; providing application of certain provisions to trusts with one or more beneficiaries holding support interests; providing application of certain provisions to trusts with one 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:

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

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

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

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

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

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

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

5. "Discretionary interest" means any interest for which a trustee has discretion to make or withhold a distribution. A discretionary interest includes permissive language such as "may make distributions" or it may include mandatory language that is inconsistent with the intent of the settlor to create a discretionary trust, such as "The trustee shall make distributions in the sole and absolute discretion of the trustee";

6. "Distribution interest" means a beneficiary's equitable interest to enforce the distribution terms of the trust subject to the judicial review standard. A distribution interest is classified as a mandatory interest, a support interest, a discretionary interest, or a combination of any such interests. A distribution

interest includes both current distribution interests and future distribution interests;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. A creditor shall not attach, exercise, or otherwise reach an interest of a beneficiary or any other person who holds an unconditional or conditional removal or replacement power over a trustee. Further, this power is personal to the beneficiary and may not be exercised by the creditors of the beneficiary, nor may a court direct any person to exercise this power;

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

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

- a. a beneficiary serving as a trustee or a cotrustee as described in paragraph 2 of this section,
- b. the settlor or a beneficiary holds an unrestricted power to remove or replace a trustee,
- c. the settlor or a beneficiary, as provided in the applicable trust instrument, is:
  - (1) a trust administrator,
  - (2) a trust protector,
  - (3) a special trustee, or
  - (4) a general partner of a partnership, a manager of a limited liability company, an officer of a corporation, or any other managerial function of any other type of entity, and part or all of the trust property consists of an interest in said 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:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. A beneficiary holding a mandatory distribution interest may enforce the interest. A court may review the distribution

discretion of a trustee if the trustee acts beyond the bounds of reasonableness.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

6. Absent express language to the contrary, in the event that the distribution language permits unequal distributions between beneficiaries or distributions to the exclusion of other

beneficiaries, the trustee may distribute all of the accumulated, accrued, or undistributed income and principal to one beneficiary in the discretion of the trustee.

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

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

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

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

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

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

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

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

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

- a. during the lifetime of the settlor, the property of a revocable trust is subject to the claims of the creditors of the settlor, and
- b. a spendthrift provision is ineffective with respect to the settlor of a revocable trust while the trust is revocable; and

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

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

Passed the House of Representatives the 12th day of May, 2010.

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Presiding Officer of the House of  
Representatives

Passed the Senate the 20th day of May, 2010.

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Presiding Officer of the Senate