

THE HOUSE OF REPRESENTATIVES  
Wednesday, February 25, 2009

House Bill No. 2171

HOUSE BILL NO. 2171 - By: MCCULLOUGH of the House and ANDERSON of the Senate.

An Act relating to property; establishing the Oklahoma Discretionary and Special Needs Trust Act; providing short title; defining terms; establishing requirements for certain trusts; establishing requirements for transfer of certain trusts; stating consequences of certain provisions; defining certain interests; stating effects of certain interests; stating requirements of specified trusts; stating requirements of specified interests; providing for termination of certain provisions; providing for codification; and providing an effective date.

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

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

4           This act shall be known and may be cited as the “Oklahoma Discretionary and  
5 Special Needs Trust Act”.

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

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

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

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

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

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

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

14           6. "Future distribution interest" means all distribution interests other than a  
15 current distribution interest;

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

21           8. "Remainder interest" means an interest for which a trust beneficiary will receive  
22 the property outright in the future; and

1           9. “Reserved power” means a power held by the settlor.

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

5           The following provisions apply to all trusts created pursuant to the Oklahoma  
6 Discretionary and Special Needs Trust Act, regardless of whether a spendthrift provision  
7 is included in a trust:

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

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

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

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

17          5. The Oklahoma Discretionary and Special Needs Trust Act provides for the sole  
18 and exclusive remedies that are available to a creditor or other nonbeneficiary claiming  
19 an interest in the trust.

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

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

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

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

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

- 13 a. a beneficiary serving as a trustee or a cotrustee as described in  
14 paragraph 2 of this section,
- 15 b. the settlor or a beneficiary holds an unrestricted power to remove or  
16 replace a trustee,
- 17 c. the settlor or a beneficiary is a trust administrator, a general partner  
18 of a partnership, a manager of a limited liability company, an officer of  
19 a corporation, or any other managerial function of any other type of  
20 entity, and part or all of the trust property consists of an interest in  
21 said entity,



1 a transfer even if the transfer violates a spendthrift provision. The trustee shall not be  
2 liable to either the beneficiary or the assignee whether or not the trustee honors the  
3 transfer.

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

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

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

14 E. A spendthrift provision applies to both current distribution interests and  
15 remainder interests.

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

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

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

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

5 A. A distribution interest in a trust shall be classified as a mandatory interest, a  
6 support interest or a discretionary interest. These definitions apply for all trusts  
7 provided for in the Oklahoma Discretionary and Special Needs Trust Act:

8 1. A “mandatory interest” means a distribution interest for which the trustee has  
9 no discretion in determining whether the distribution shall be made, or the amount or  
10 timing of the distribution;

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

16 3. A “discretionary interest” means any interest for which a trustee has discretion  
17 to make or withhold a distribution. A discretionary interest includes permissive  
18 language such as “may make distributions” or it may include mandatory language that is  
19 inconsistent with the intent of the settlor to create a discretionary trust, such as, “The  
20 trustee shall make distributions in the sole and absolute discretion of the trustee.”

21 B. A beneficiary may concurrently hold a mandatory interest, support interest or  
22 discretionary interest. To the extent a trust contains a combination of a discretionary

1 interest, a support interest or a mandatory interest, the trust shall be a mandatory  
2 interest only to the extent of the mandatory language and a support interest only to the  
3 extent of the support language. The remaining trust property shall be held as a  
4 discretionary interest.

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

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

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

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

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

20 The following provisions apply only to support trusts:

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

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

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

7 3. The only exception creditor under the Oklahoma Discretionary and Special  
8 Needs Trust Act is a child of a beneficiary who has a judgment or court order against the  
9 beneficiary for support. In this section, “child” means any person for whom an order or  
10 judgment for child support has been entered in this or another state;

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

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

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

22 The following provisions apply only to discretionary interests:

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

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

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

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

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

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

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

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

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

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

17           B. A restriction curtailing the distribution powers of a trustee as to a trustee  
18 making any distribution that would result in a beneficiary not having an “available  
19 resource” is valid, and an exception creditor may not attach present or future  
20 distributions of a trust. All other restrictions curtailing the distribution power of a  
21 trustee are void as to exception creditors, if any exception creditors are provided by the  
22 Oklahoma Discretionary and Special Needs Trust Act.

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

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

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

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

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

15 1. During the lifetime of the settlor, the property of a revocable trust is subject to  
16 the claims of the creditors of the settlor;

17 2. A spendthrift provision is ineffective with respect to a revocable trust while the  
18 trust is revocable; and

19 3. After the death of a settlor, and subject to the right of the settlor to direct the  
20 source from which liabilities will be paid, the property of a trust that was revocable at  
21 the death of the settlor is subject to the claims of the creditors of the settlor, costs of  
22 administration of the estate of the settlor, the expenses of the funeral and disposal of

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

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

9 SECTION 13. This act shall become effective November 1, 2009.

10 COMMITTEE REPORT BY: COMMITTEE ON JUDICIARY, dated 02-24-09 - DO PASS,  
11 As Coauthored.