

**EHB 2171**

**THE STATE SENATE**  
**Thursday, March 25, 2010**

**ENGROSSED**

**House Bill No. 2171**

ENGROSSED 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; 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".

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

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

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

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

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

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

19 5. "Discretionary interest" means any interest for which a  
20 trustee has discretion to make or withhold a distribution. A  
21 discretionary interest includes permissive language such as "may  
22 make distributions" or it may include mandatory language that is  
23 inconsistent with the intent of the settlor to create a

1 discretionary trust, such as "The trustee shall make distributions  
2 in the sole and absolute discretion of the trustee";

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

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

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

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

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

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

1 trustee. Further, this power is personal to the beneficiary and may  
2 not be exercised by the creditors of the beneficiary, nor may a  
3 court direct any person to exercise this power;

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

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

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

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

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

17 (1) a trust administrator,

18 (2) a trust protector,

19 (3) a special trustee, or

20 (4) a general partner of a partnership, a manager of  
21 a limited liability company, an officer of a  
22 corporation, or any other managerial function of  
23 any other type of entity, and part or all of the

1 trust property consists of an interest in said  
2 entity,

- 3 d. a person related by blood or adoption to a settlor or
- 4 a beneficiary is appointed as trustee, or
- 5 e. an accountant of a settlor or a beneficiary, 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 in which 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.

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. If  
6 the applicable trust instrument so provides, a spendthrift provision  
7 may permit the voluntary transfer of an interest of a beneficiary  
8 even if the transfer is subject to the approval by the trustee if  
9 the trustee is not also the transferring beneficiary. The trustee  
10 may honor a transfer even if the transfer violates a spendthrift  
11 provision. The trustee shall not be liable to either the  
12 beneficiary or the assignee whether or not the trustee honors the  
13 transfer.

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

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

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

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

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

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

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

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

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

22 B. A beneficiary may concurrently hold a mandatory interest,  
23 support interest or discretionary interest. To the extent a trust

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

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

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

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

18 C. A beneficiary holding a mandatory distribution interest may  
19 enforce the interest. A court may review the distribution  
20 discretion of a trustee if the trustee acts beyond the bounds of  
21 reasonableness.

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

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

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

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

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

19           4. As provided by the Oklahoma Discretionary and Special Needs  
20 Trust Act, the sole and exclusive remedy of an exception creditor is  
21 the attachment of the beneficiary's support interest at the trust  
22 level. The court may limit the amount subject to attachment as

1 appropriate under the circumstances to provide for the needs of the  
2 beneficiary and the family of the beneficiary; and

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

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

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

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

22 2. Regardless of whether a beneficiary has any outstanding  
23 creditor, a trustee may directly pay any expense on behalf of the

1 beneficiary and may exhaust the income and principal of the trust  
2 for the benefit of the beneficiary. A trustee shall not be liable  
3 to any creditor or beneficiary for paying the expenses of a  
4 beneficiary;

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

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

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

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

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

22 6. Absent express language to the contrary, in the event that  
23 the distribution language permits unequal distributions between

1 beneficiaries or distributions to the exclusion of other  
2 beneficiaries, the trustee may distribute all of the accumulated,  
3 accrued, or undistributed income and principal to one beneficiary in  
4 the discretion of the trustee.

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

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

14 B. A restriction limiting the distribution powers of a trustee  
15 as to a trustee, which distribution might result in the loss of a  
16 beneficiary's eligibility for participation in a federal or state  
17 benefits program, including, but not limited to, Medicaid,  
18 Supplemental Security Income, Social Security Disability Income, or  
19 other state or federal benefits program is valid, and no creditor,  
20 including an exception creditor, may attach present or future  
21 distributions from such a trust. All other restrictions curtailing  
22 the distribution power of a trustee are void as to exception

1 creditors, if any exception creditors are provided by the Oklahoma  
2 Discretionary and Special Needs Trust Act.

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

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

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

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

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

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

20 a. during the lifetime of the settlor, the property of a  
21 revocable trust is subject to the claims of the  
22 creditors of the settlor, and

1           b.    a spendthrift provision is ineffective with respect to  
2                    the settlor of a revocable trust while the trust is  
3                    revocable; and

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

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

11    COMMITTEE REPORT BY: COMMITTEE ON JUDICIARY, dated 3-23-10 - DO  
12    PASS.