

1 STATE OF OKLAHOMA

2 1st Session of the 52nd Legislature (2009)

3 HOUSE BILL 2171

By: McCullough

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5  
6 AS INTRODUCED

7 An Act relating to property; establishing the  
8 Oklahoma Discretionary and Special Needs Trust Act;  
9 providing short title; defining terms; establishing  
10 requirements for certain trusts; establishing  
11 requirements for transfer of certain trusts; stating  
12 consequences of certain provisions; defining certain  
13 interests; stating effects of certain interests;  
14 stating requirements of specified trusts; stating  
15 requirements of specified interests; providing for  
16 termination of certain provisions; providing for  
17 codification; and providing an effective date.

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

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

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

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

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

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

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

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

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

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

1           6. "Future distribution interest" means all distribution  
2 interests other than a current distribution interest;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 3. If a party challenges a settlor or the influence of a  
22 beneficiary over a trust, the following factors, alone or in  
23 combination, shall not be considered dominion and control over a  
24 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 is a trust administrator, 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

1 or executed other documents related to the trust as a  
2 trustee, when in fact the settlor or a beneficiary was  
3 not a trustee,

4 c. making requests for distributions on behalf of  
5 beneficiaries, or

6 d. making requests to the trustee to hold, purchase, or  
7 sell any trust property.

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

11 A. A spendthrift provision is valid if it restrains either the  
12 voluntary or involuntary transfer of a beneficiary's interest. A  
13 spendthrift provision may permit the voluntary transfer of an  
14 interest of a beneficiary even if the transfer is subject to the  
15 approval by the trustee if the trustee is not also the transferring  
16 beneficiary. The trustee may honor a transfer even if the transfer  
17 violates a spendthrift provision. The trustee shall not be liable  
18 to either the beneficiary or the assignee whether or not the trustee  
19 honors the transfer.

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

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

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

10 E. A spendthrift provision applies to both current distribution  
11 interests and remainder interests.

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

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

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

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

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

5 1. A "mandatory interest" means a distribution interest for  
6 which the trustee has no discretion in determining whether the  
7 distribution shall be made, or the amount or timing of the  
8 distribution;

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

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

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

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

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

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

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

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

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

23 The following provisions apply only to support trusts:  
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1           1. The fact that a court would have exercised the distribution  
2 power under a support interest differently than the trustee is not  
3 sufficient reason for interfering with the exercise of the  
4 distribution power by the trustee. However, a court may review the  
5 distribution discretion of a trustee if the trustee acts beyond the  
6 bounds of reasonableness;

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

11           3. The only exception creditor under the Oklahoma Discretionary  
12 and Special Needs Trust Act is a child of a beneficiary who has a  
13 judgment or court order against the beneficiary for support. In  
14 this section, "child" means any person for whom an order or judgment  
15 for child support has been entered in this or another state;

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

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

1 SECTION 9. NEW LAW A new section of law to be codified

2 in the Oklahoma Statutes as Section 175.89 of Title 60, unless there  
3 is created a duplication in numbering, reads as follows:

4 The following provisions apply only to discretionary interests:

5 1. A discretionary interest is neither a property interest nor  
6 an enforceable right to a distribution; it is a mere expectancy;  
7 provided, however, a beneficiary holding a discretionary interest  
8 has an equitable interest to bring an action against the trustee  
9 within the judicial review standard of paragraph 4 of this section.

10 No creditor, regardless of whether the Oklahoma Discretionary and  
11 Special Needs Trust Act provides for any exception creditors, shall  
12 attach, require the trustee to exercise the trustee's discretion to  
13 make a distribution, or cause a court to judicially sell a  
14 discretionary interest;

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

21 3. A creditor, including an exception creditor, of a  
22 beneficiary has no greater rights than a beneficiary, and shall not  
23 compel a distribution that is subject to the discretion of the  
24 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 curtailing the distribution powers of a  
6 trustee as to a trustee making any distribution that would result in  
7 a beneficiary not having an "available resource" is valid, and an  
8 exception creditor may not attach present or future distributions of  
9 a trust. All other restrictions curtailing the distribution power  
10 of a trustee are void as to exception creditors, if any exception  
11 creditors are provided by the Oklahoma Discretionary and Special  
12 Needs Trust Act.

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

16 A. A provision that provides that a current distribution  
17 interest shall become either a discretionary interest or that a  
18 current distribution interest of a beneficiary shall terminate upon  
19 a creditor, including an exception creditor, attaching a current  
20 distribution interest of a beneficiary in a trust is valid.

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

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

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

6 1. During the lifetime of the settlor, the property of a  
7 revocable trust is subject to the claims of the creditors of the  
8 settlor;

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

11 3. After the death of a settlor, and subject to the right of  
12 the settlor to direct the source from which liabilities will be  
13 paid, the property of a trust that was revocable at the death of the  
14 settlor is subject to the claims of the creditors of the settlor,  
15 costs of administration of the estate of the settlor, the expenses  
16 of the funeral and disposal of remains of the settlor, and statutory  
17 allowances to a surviving spouse and children to the extent the  
18 probate estate of the settlor is inadequate to satisfy those claims,  
19 costs, expenses and allowances.

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

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