STATE OF OKLAHOMA

2nd Session of the 56th Legislature (2018)

SENATE BILL 1018 By: Daniels

AS INTRODUCED

An Act relating to trusts; creating the Oklahoma Decanting Act; providing short title; defining terms; establishing requirements for distributions by a trustee with full discretion; authorizing grant of power of appointment; establishing requirements for distributions by a trustee with limited discretion; defining terms; stating powers of special-needs fiduciary under certain circumstances; requiring notice to beneficiaries before certain distributions; establishing requirements for certain notice; providing exceptions to certain notice requirement; specifying required contents of certain notice; requiring written instrument for certain distributions; clarifying certain reference; clarifying status of certain settlor; establishing procedures for court-ordered distributions; providing for distributions from trustees with divided discretion; providing for distribution of subsequently discovered assets; construing provisions; authorizing certain distributions regardless of need; clarifying that provisions create no duty; prohibiting certain distributions; providing exceptions; prohibiting certain distributions resulting in reduced tax benefits; establishing requirements for certain compensation; 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 175.701 of Title 60, unless there is created a duplication in numbering, reads as follows:

SHORT TITLE

This act shall be known and may be cited as the "Oklahoma Decanting Act."

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.702 of Title 60, unless there is created a duplication in numbering, reads as follows:

DEFINITIONS

As used in this act, unless the context or subject matter otherwise requires:

1. "Authorized trustee" means a person, other than the settlor, who has authority under the terms of a first trust to distribute the principal of the trust to or for the benefit of one or more current beneficiaries or a special needs fiduciary under Section 5 of this act;

2. "Charity" means a charitable organization or a charitable trust, as those terms are defined by Section 301.3 of Title 60 of the Oklahoma Statutes or Section 552.2 of Title 18 of the Oklahoma Statutes;

3. "Current beneficiary," with respect to a particular date, means a person who is receiving or is eligible to receive a distribution of income or principal from a trust on that date;

4. "First trust" means an existing irrevocable inter vivos or testamentary trust all or part of the principal of which is distributed in further trust under Sections 3 or 4 of this act;

5. "Full discretion" means a power to distribute principal to or for the benefit of one or more of the beneficiaries of a trust that is not a trust with limited discretion;

6. "Limited discretion" means:

a. a power to distribute principal according to mandatory distribution provisions under which the trustee has no discretion, or

b. a power to distribute principal to or for the benefit of one or more beneficiaries of a trust that is limited by an ascertainable standard, including the health, education, support or maintenance of the beneficiary;

7. "Presumptive remainder beneficiary," with respect to a particular date, means a beneficiary of a trust on that date who, in the absence of notice to the trustee of the exercise of the power of appointment and assuming that any other powers of appointment under the trust are not exercised, would be eligible to receive a distribution from the trust if:

a. the trust terminated on that date, or

b. the interests of all current beneficiaries ended on that date without causing the trust to terminate;

8. "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates and includes income of the trust that, at the time of the exercise of a power of distribution under Sections 3 or 4 of this act, is not currently required to be distributed;

9. "Second trust" means any irrevocable trust to which principal is distributed under Sections 3 or 4 of this act; and

10. "Successor beneficiary" means a beneficiary other than a current or presumptive remainder beneficiary. The term does not include a potential appointee under a power of appointment held by a beneficiary.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.703 of Title 60, unless there is created a duplication in numbering, reads as follows:

DISTRIBUTION TO SECOND TRUST: TRUSTEE WITH FULL DISCRETION

A. An authorized trustee who has the full discretion to distribute the principal of a trust may distribute all or part of the principal of that trust in favor of a trustee of a second trust for the benefit of one more than one, or all of the current beneficiaries of the first trust and for the benefit of one, more than one, or all of the successor or presumptive remainder beneficiaries of the first trust.

B. The authorized trustee may, in connection with the exercise of a power of distribution under this section, grant a power of appointment, including a currently exercisable power of appointment, in the second trust to one or more of the current beneficiaries of the first trust who, at the time the power of appointment is granted, is eligible to receive the principal outright under the terms of the first trust.

C. If the authorized trustee grants a power of appointment to a beneficiary under subsection B of this section, the class of permissible appointees in whose favor the beneficiary may appoint under that power may be broader or different than the current, successor, and presumptive remainder beneficiaries of the first trust.

D. If the beneficiaries of the first trust are described as a class of persons, the beneficiaries of the second trust may include one or more persons who become members of that class after the distribution to the second trust.

E. The authorized trustee shall exercise a power to distribute under this section in good faith, in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.704 of Title 60, unless there is created a duplication in numbering, reads as follows:

DISTRIBUTION TO SECOND TRUST: TRUSTEE WITH LIMITED DISCRETION

A. An authorized trustee who has limited discretion to distribute the principal of a trust may distribute all or part of the principal of that trust in favor of a trustee of a second trust as provided by this section.

B. The current beneficiaries of the second trust shall be the same as the current beneficiaries of the first trust, and the successor and presumptive remainder beneficiaries of the second trust shall be the same as the successor and presumptive remainder beneficiaries of the first trust.

C. The second trust shall include the same language authorizing the trustee to distribute the income or principal of the trust that was included in the first trust.

D. If the beneficiaries of the first trust are described as a class of persons, the beneficiaries of the second trust shall include all persons who become members of that class after the distribution to the second trust.

E. If the first trust grants a power of appointment to a beneficiary of the trust, the second trust shall grant the power of appointment to the beneficiary in the second trust, and the class of permissible appointees under that power shall be the same as the class of permissible appointees under the power granted by the first trust.

F. The authorized trustee shall exercise a power of distribution under this section in good faith, in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.705 of Title 60, unless there is created a duplication in numbering, reads as follows:

TRUST FOR BENEFICIARY WITH DISABILITY

A. As used in this section:

1. "Beneficiary with a disability" means a beneficiary of a first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated incompetent;

2. "Governmental benefits" means financial aid or services from a state, federal, or other public agency;

3. "Special-needs fiduciary" means, with respect to a trust that has a beneficiary with a disability:

a. a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries,

b. if no trustee or fiduciary has discretion under subparagraph a of this section, a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries, or

c. if no trustee or fiduciary has discretion under subparagraphs a and b of this section, a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries; and

4. "Special-needs trust" means a trust the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

B. A special-needs fiduciary may exercise the decanting power under Section 3 of this act over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

1. A second trust is a special-needs trust that benefits the beneficiary with a disability; and

2. The special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

C. In an exercise of the decanting power under this section, the following rules apply:

1. Notwithstanding Section 3 of this act, the interest in the second trust of a beneficiary with a disability may:

a. be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C., Section 1396p(d)(4)(C), as amended, or

b. contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C., Section 1396p(d)(4)(A), as amended; and

2. Except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, shall comply with Sections 3 or 4 of this act with respect to the interest or interests of each other current beneficiary, presumptive remainder beneficiary, or successor beneficiary.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.706 of Title 60, unless there is created a duplication in numbering, reads as follows:

NOTICE REQUIRED

A. An authorized trustee may exercise a power of distribution under Sections 3 or 4 of this act without the consent of the settlor or beneficiaries of the first trust and without court approval if the trustee provides to all of the current beneficiaries and presumptive remainder beneficiaries written notice of the trustee's decision to exercise the power.

B. For the purpose of determining who is a current beneficiary or presumptive remainder beneficiary entitled to the notice, a beneficiary is determined as of the date the notice is sent. A beneficiary includes a person entitled to receive property under the terms of the first trust.

C. Except as provided by paragraph 5 of subsection E of this section, in addition to the notice required under subsection A of this section, the authorized trustee shall give written notice of the trustee's decision to the attorney general if:

1. A charity is entitled to notice;

2. A charity entitled to notice is no longer in existence;

3. The trustee has the authority to distribute trust assets to one or more charities that are not named in the trust instrument; or

4. The trustee has the authority to make distributions for a charitable purpose described in the trust instrument, but no charity is named as a beneficiary for that purpose.

D. If the beneficiary has a court-appointed guardian or conservator, the notice required to be given by this section shall be given to that guardian or conservator. If the beneficiary is a minor for whom no guardian or conservator has been appointed, the notice required to be given by this section shall be given to a parent of the minor. For purposes of paragraph 3 of subsection E of this section, a beneficiary is considered to have waived the requirement that notice be given under this section if a person to whom notice is required to be given with respect to that beneficiary under this subsection waives the requirement that notice be given under this section.

E. The authorized trustee is not required to provide notice:

1. To a beneficiary who is known to the trustee and cannot be located by the trustee after reasonable diligence;

2. To a beneficiary who is not known to the trustee;

3. To a beneficiary who waives the requirement of the notice under this section;

4. To a beneficiary who is a descendant of a beneficiary to whom the trustee has given notice if the beneficiary and the beneficiary's ancestor have similar interests in the trust and no apparent conflict of interest exists between them; or

5. To the attorney general under subsection C of this section if the attorney general waives that requirement in writing.

F. The notice required under subsection A of this section shall:

1. Include a statement that:

a. the authorized trustee intends to exercise the power of distribution,

b. the beneficiary has the right to object to the exercise of the power, and

c. the beneficiary may petition a court to approve, modify, or deny the exercise of the trustee's power to make a distribution under this act;

2. Describe the manner in which the trustee intends to exercise the power;

3. Specify the date the trustee proposes to distribute the first trust to the second trust;

4. Include the name and mailing address of the trustee;

5. Include copies of the agreements of the first trust and the proposed second trust;

6. Be given not later than the ninetieth day before the proposed date of distribution to the second trust; and

7. Be sent by registered or certified mail, return receipt requested, or delivered in person, unless the notice is waived in writing by the person to whom notice is required to be given.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.707 of Title 60, unless there is created a duplication in numbering, reads as follows:

WRITTEN INSTRUMENT REQUIRED

A distribution under Sections 3 or 4 of this act shall be made by a written instrument that is signed and acknowledged by the authorized trustee and filed with the records of the first trust and the second trust.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.708 of Title 60, unless there is created a duplication in numbering, reads as follows:

REFERENCE TO TRUST TERMS

A reference to the governing instrument or terms of the governing instrument of a trust includes the terms of a second trust to which that trust's principal was distributed under this act.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.709 of Title 60, unless there is created a duplication in numbering, reads as follows:

SETTLOR OF SECOND TRUST

A. Except as provided by subsection B of this section, the settlor of a first trust is considered to be the settlor of a second trust established under this act.

B. If a settlor of a first trust is not also the settlor of a second trust into which principal of that first trust is distributed, the settlor of the first trust is considered the settlor of the portion of the second trust distributed to the second trust from that first trust under this act.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.710 of Title 60, unless there is created a duplication in numbering, reads as follows:

COURT-ORDERED DISTRIBUTION

A. An authorized trustee may petition a court to order a distribution under this act.

B. If the authorized trustee receives a written objection to a distribution under this Act from a beneficiary before the proposed effective date of the distribution specified in the notice provided to the beneficiary under Section 6 of this act, the trustee or the beneficiary may petition a court to approve, modify, or deny the exercise of the trustee's power to make a distribution under this act.

C. If the authorized trustee receives a written objection to the distribution from the attorney general not later than the thirtieth day after the date the notice required by Section 6 of this act was received by the attorney general, the trustee shall not make a distribution under Sections 3 or 4 of this act without petitioning a court to approve or modify the exercise of the trustee's power to make a distribution under this act.

D. In a judicial proceeding under this section, the authorized trustee may present the trustee's reasons for supporting or opposing a proposed distribution, including whether the trustee believes the distribution would enable the trustee to better carry out the purposes of the trust.

E. The authorized trustee has the burden of proving that the proposed distribution furthers the purposes of the trust, is in accordance with the terms of the trust, and is in the interests of the beneficiaries.

F. This section does not limit a beneficiary's right to bring an action against a trustee for a breach of trust.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.711 of Title 60, unless there is created a duplication in numbering, reads as follows:

DIVIDED DISCRETION

If an authorized trustee has full discretion to distribute the principal of a trust and another trustee has limited discretion to distribute principal under the trust instrument, the authorized trustee having full discretion may exercise the power to distribute the trust's principal under Section 3 of this act.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.712 of Title 60, unless there is created a duplication in numbering, reads as follows:

LATER DISCOVERED ASSETS

To the extent the authorized trustee does not provide otherwise:

A. The distribution of all of the principal of a first trust to a second trust includes subsequently discovered assets otherwise belonging to the first trust and principal paid to or acquired by the first trust after the distribution of the first trust's principal to the second trust.

B. The distribution of part of the principal of a first trust to a second trust does not include subsequently discovered assets belonging to the first trust or principal paid to or acquired by the first trust after the distribution of principal from the first trust to the second trust, and those assets or that principal remain the assets or principal of the first trust.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.713 of Title 60, unless there is created a duplication in numbering, reads as follows:

OTHER AUTHORITY TO DISTRIBUTE IN FURTHER TRUST NOT LIMITED

This act shall not be construed to limit the power of an authorized trustee to distribute property in further trust under the terms of the governing instrument of a trust, other law, or a court order.

SECTION 14. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.714 of Title 60, unless there is created a duplication in numbering, reads as follows:

NEED FOR DISTRIBUTION NOT REQUIRED.

An authorized trustee may exercise the power to distribute principal to a second trust under Sections 3 or 4 of this act regardless of whether there is a current need to distribute principal under the terms of the first trust.

SECTION 15. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.715 of Title 60, unless there is created a duplication in numbering, reads as follows:

DUTIES NOT CREATED

A. This act does not create or imply a duty for an authorized trustee to exercise a power to distribute principal, and impropriety shall not be inferred as a result of the trustee not exercising a power conferred by Sections 3 or 4 of this act.

B. An authorized trustee does not have a duty to inform beneficiaries about the availability of the authority provided by this act or a duty to review the trust to determine whether any action should be taken under this act.

SECTION 16. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.716 of Title 60, unless there is created a duplication in numbering, reads as follows:

CERTAIN DISTRIBUTIONS PROHIBITED

A. Except as provided by subsection B of this section, an authorized trustee shall not exercise a power to distribute principal of a trust otherwise provided by Sections 3 or 4 of this act if the distribution is expressly prohibited by the terms of the governing instrument of the trust.

B. A general prohibition of the amendment or revocation of a trust or a provision that constitutes a spendthrift clause shall not preclude the exercise of a power to distribute principal of a trust under Sections 3 or 4 of this act.

SECTION 17. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.717 of Title 60, unless there is created a duplication in numbering, reads as follows:

EXCEPTIONS TO POWER OF DISTRIBUTION

An authorized trustee shall not exercise a power to distribute principal of a trust under Sections 3 or 4 of this act to:

1. Reduce, limit, or modify a beneficiary's current, vested right to:

a. receive a mandatory distribution of income or principal,

b. receive a mandatory annuity or unitrust interest,

c. withdraw a percentage of the value of the trust, or

d. withdraw a specified dollar amount from the trust;

2. Materially limit a trustee's fiduciary duty:

a. under the terms of the trust, or

b. in a manner that would be prohibited by the Oklahoma Trust Act, Section 175.1 et seq. of Title 60 of the Oklahoma Statutes, the Oklahoma Prudent Investor Act, Section 175.60 et seq. of Title 60 of the Oklahoma Statutes, the Oklahoma Principal and Income Act, Section 175.101 et seq. of Title 60 of the Oklahoma Statutes, or the Oklahoma Charitable Fiduciary Act, Section 301.1 et seq. of Title 60 of the Oklahoma Statutes;

3. Decrease or indemnify against a trustee's liability or exonerate a trustee from liability;

4. Add a provision exonerating a trustee for failure to exercise reasonable care, diligence, and prudence;

5. Eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the distribution power under Sections 3 or 4 of this act; or

6. Reduce, limit, or modify in the second trust a perpetuities provision included in the first trust, unless expressly permitted by the terms of the first trust.

SECTION 18. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.718 of Title 60, unless there is created a duplication in numbering, reads as follows:

TAX-RELATED LIMITATIONS

A. The authorized trustee shall not distribute the principal of a trust under Sections 3 or 4 of this act in a manner that would prevent a contribution to that trust from qualifying for or that would reduce the exclusion, deduction, or other federal tax benefit that was originally claimed for that contribution, including:

1. The annual exclusion under Section 2503(b) of the Internal Revenue Code of 1986, as amended;

2. A marital deduction under Section 2056(a) or 2523(a) of the Internal Revenue Code of 1986, as amended;

3. The charitable deduction under Sections 170(a), 642(c), 2055(a), or 2522(a) of the Internal Revenue Code of 1986, as amended;

4. Direct skip treatment under Section 2642(c) of the Internal Revenue Code of 1986, as amended; or

5. Any other tax benefit for income, gift, estate, or generation-skipping transfer tax purposes under the Internal Revenue Code of 1986, as amended.

B. Notwithstanding subsection A of this section, an authorized trustee may distribute the principal of a first trust to a second trust regardless of whether the settlor is treated as the owner of either or both trusts under the Internal Revenue Code, 26 U.S.C., Sections 671 through 679, as amended.

C. If S corporation stock is held in trust, an authorized trustee shall not distribute all or part of that stock under Sections 3 or 4 of this act to a second trust that is not a permitted shareholder under the Internal Revenue Code, 26 U.S.C., Section 1361(c)(2), as amended.

D. If an interest in property that is subject to the minimum distribution rules of the Internal Revenue Code, 26 U.S.C., Section 401(a)(9), as amended, is held in trust, an authorized trustee shall not distribute the trust's interest in the property to a second trust under Sections 3 or 4 of this act if the distribution would shorten the minimum distribution period applicable to the property.

SECTION 19. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.719 of Title 60, unless there is created a duplication in numbering, reads as follows:

COMPENSATION OF TRUSTEE

A. Except as provided by subsection B of this section and unless a court, on application of the authorized trustee, directs otherwise, the trustee shall not exercise a power under Sections 3 or 4 of this act solely to change trust provisions regarding the determination of the compensation of any trustee.

B. An authorized trustee, in connection with the exercise of a power under Sections 3 or 4 of this act for another valid and reasonable purpose, may bring the trustee's compensation into conformance with reasonable limits authorized by state law.

C. The compensation payable to an authorized trustee of the first trust may continue to be paid to the trustee of the second trust during the term of the second trust and may be determined in the same manner as the compensation would have been determined in the first trust.

D. An authorized trustee shall not receive a commission or other compensation for the distribution of a particular asset from a first trust to a second trust under Sections 3 or 4 of this act.

SECTION 20. This act shall become effective November 1, 2018.

56-2-2552 TEK 1/17/2018 8:41:24 AM