

STATE OF OKLAHOMA

1st Session of the 58th Legislature (2021)

SENATE BILL 162

By: Howard

AS INTRODUCED

An Act relating to trusts; creating the Oklahoma Decanting Act; providing short title; clarifying applicability of act; 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" and shall apply to any trust administered under the laws of this state including a trust whose governing jurisdiction is transferred to this state.

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 or income 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;

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

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

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

10 6. "Limited discretion" means:

- 11 a. a power to distribute principal or income according to
12 mandatory distribution provisions under which the
13 trustee has no discretion, or
14 b. a power to distribute principal or income to or for
15 the benefit of one or more beneficiaries of a trust
16 that is limited by an ascertainable standard,
17 including the health, education, support or
18 maintenance of the beneficiary;

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

- 1 a. the trust terminated on that date, or
2 b. the interests of all current beneficiaries ended on
3 that date without causing the trust to terminate;

4 8. "Principal" means property held in trust for distribution
5 including accumulated income, that, at the time of the exercise of a
6 power of distribution under Section 3 or 4 of this act, is not
7 currently required to be distributed;

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

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

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

17 DISTRIBUTION TO SECOND TRUST: TRUSTEE WITH FULL DISCRETION

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

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

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

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

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

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

24 DISTRIBUTION TO SECOND TRUST: TRUSTEE WITH LIMITED DISCRETION
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1 A. An authorized trustee who has limited discretion to
2 distribute the principal of a trust may distribute all or part of
3 the principal of that trust in favor of a trustee of a second trust
4 as provided by this section.

5 B. The current beneficiaries of the second trust shall be
6 substantially the same as the current beneficiaries of the first
7 trust, and the successor and presumptive remainder beneficiaries of
8 the second trust shall be substantially the same as the successor
9 and presumptive remainder beneficiaries of the first trust, as
10 determined in the reasonable discretion of the authorized trustee.

11 C. If the beneficiaries of the first trust are described as a
12 class of persons, the beneficiaries of the second trust shall
13 include substantially the same persons who become members of that
14 class after the distribution to the second trust, as determined in
15 the reasonable discretion of the authorized trustee.

16 D. If the first trust grants a power of appointment to a
17 beneficiary of the trust, the second trust shall grant the power of
18 appointment to the beneficiary in the second trust, and the class of
19 permissible appointees under that power shall be the same as the
20 class of permissible appointees under the power granted by the first
21 trust.

22 E. The exercise of a power of distribution under this section
23 shall be made by the authorized trustee in good faith, in accordance
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1 with the terms and purposes of the trust, and in the interests of
2 the beneficiaries.

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

6 TRUST FOR BENEFICIARY WITH DISABILITY

7 A. As used in this act:

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

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

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

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

21 b. if no trustee or fiduciary has discretion under
22 subparagraph a of this section, a trustee or other
23 fiduciary, other than a settlor, that has discretion
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1 to distribute part or all of the income of the first
2 trust to one or more current beneficiaries, or
3 c. if no trustee or fiduciary has discretion under
4 subparagraphs a and b of this section, a trustee or
5 other fiduciary, other than a settlor, that is
6 required to distribute part or all of the income or
7 principal of the first trust to one or more current
8 beneficiaries; and

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

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

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

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

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

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

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

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

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

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

18 NOTICE REQUIRED

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

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

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

10 1. A charity is entitled to notice;

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

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

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

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

1 whom notice is required to be given with respect to that beneficiary
2 under this subsection waives the requirement that notice be given
3 under this section.

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

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

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

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

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

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

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

18 1. Include a statement that:

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

21 b. the beneficiary has the right to object to the
22 exercise of the power, and
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1 c. the beneficiary may petition a court to approve,
2 modify, or deny the exercise of the trustee's power to
3 make a distribution under this act;

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

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

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

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

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

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

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

19 WRITTEN INSTRUMENT REQUIRED

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

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

4 REFERENCE TO TRUST TERMS

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

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

11 SETTLOR OF SECOND TRUST

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

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

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

23 COURT-ORDERED DISTRIBUTION
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1 A. An authorized trustee may petition a court to order a
2 distribution under this act.

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

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

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

22 E. The authorized trustee has the burden of proving that the
23 proposed distribution furthers the purposes of the trust, is not
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1 expressly prohibited by the terms of the trust, and is in the
2 interests generally of the beneficiaries.

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

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

8 DIVIDED DISCRETION

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

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

17 LATER DISCOVERED ASSETS

18 To the extent the authorized trustee does not provide otherwise:

19 1. The distribution of all of the principal of a first trust to
20 a second trust includes subsequently discovered assets otherwise
21 belonging to the first trust and principal paid to or acquired by
22 the first trust after the distribution of the first trust's
23 principal to the second trust; and
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1 2. The distribution of part of the principal of a first trust
2 to a second trust does not include subsequently discovered assets
3 belonging to the first trust or principal paid to or acquired by the
4 first trust after the distribution of principal from the first trust
5 to the second trust, and those assets or that principal remain the
6 assets or principal of the first trust.

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

10 OTHER AUTHORITY TO DISTRIBUTE IN FURTHER TRUST NOT LIMITED

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

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

18 NEED FOR DISTRIBUTION NOT REQUIRED

19 An authorized trustee may exercise the power to distribute
20 principal to a second trust under Section 3 or 4 of this act
21 regardless of whether there is a current need to distribute
22 principal under the terms of the first trust.
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1 SECTION 15. NEW LAW A new section of law to be codified
2 in the Oklahoma Statutes as Section 175.715 of Title 60, unless
3 there is created a duplication in numbering, reads as follows:

4 DUTIES NOT CREATED

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

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

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

16 CERTAIN DISTRIBUTIONS PROHIBITED

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

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

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

6 EXCEPTIONS TO POWER OF DISTRIBUTION

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

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

- 11 a. receive a mandatory distribution of income or
- 12 principal,
- 13 b. receive a mandatory annuity or unitrust interest,
- 14 c. withdraw a percentage of the value of the trust, or
- 15 d. withdraw a specified dollar amount from the trust;

16 2. Materially limit a trustee's fiduciary duty:

- 17 a. under the terms of the trust, or
- 18 b. in a manner that would be prohibited by the Oklahoma
- 19 Trust Act, Section 175.1 et seq. of Title 60 of the
- 20 Oklahoma Statutes, the Oklahoma Prudent Investor Act,
- 21 Section 175.60 et seq. of Title 60 of the Oklahoma
- 22 Statutes, the Oklahoma Principal and Income Act,
- 23 Section 175.101 et seq. of Title 60 of the Oklahoma
- 24 Statutes, or the Oklahoma Charitable Fiduciary Act,

1 Section 301.1 et seq. of Title 60 of the Oklahoma
2 Statutes;

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

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

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

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

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

16 TAX-RELATED LIMITATIONS

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

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

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

3 3. The charitable deduction under Section 170(a), 642(c),
4 2055(a), or 2522(a) of the Internal Revenue Code of 1986, as
5 amended;

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

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

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

16 C. If S corporation stock is held in trust, an authorized
17 trustee shall not distribute all or part of that stock under Section
18 3 or 4 of this act to a second trust that is not a permitted
19 shareholder under the Internal Revenue Code, 26 U.S.C., Section
20 1361(c) (2), as amended.

21 D. If an interest in property that is subject to the minimum
22 distribution rules of the Internal Revenue Code, 26 U.S.C., Section
23 401(a) (9), as amended, is held in trust, an authorized trustee shall
24 not distribute the trust's interest in the property to a second

1 trust under Section 3 or 4 of this act if the distribution would
2 shorten the minimum distribution period applicable to the property.

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

6 COMPENSATION OF TRUSTEE

7 A. Except as provided by subsection B of this section and
8 unless a court, on application of the authorized trustee, directs
9 otherwise, the trustee shall not exercise a power under Section 3 or
10 4 of this act solely to change trust provisions regarding the
11 determination of the compensation of any trustee.

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

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

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

24 SECTION 20. This act shall become effective November 1, 2021.

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