

SENATE BILL 492

By Stevens

AN ACT to amend Tennessee Code Annotated, Title 30
and Title 35, relative to trusts.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 35-15-303, is amended by deleting subdivisions (5)–(8) and substituting:

(5) When a trust is a beneficiary of another trust, the beneficiary trust may be represented by its trustee or, if the beneficiary trust has not yet been created, has previously terminated, or is otherwise not then in existence, or the trustee is unwilling or unable to represent the trust, the beneficiary trust may be represented by those persons who are qualified beneficiaries or who would be qualified beneficiaries of the beneficiary trust if the beneficiary trust were then in existence;

(6) A personal representative of a decedent's estate may represent and bind persons interested in the estate;

(7) A person may represent and bind the person's minor or unborn child if a guardian for the descendant has not been appointed. If a disagreement or material conflict of interest arises between persons seeking to represent the same minor child or unborn child, representation is determined as follows:

(A) If only one (1) person is a beneficiary of the trust that is the subject of the representation, that person may represent the minor child or unborn child;

(B) If both persons are beneficiaries of the trust that is the subject of the representation, then the person who is related to the settlor, other than by reason of being married to the other person, may represent the minor child or unborn child;

(C) Subject to subdivision (7)(D), if neither person is a beneficiary of the trust that is the subject of the representation, then the person who is the settlor of the trust that is the subject of the representation may represent the minor child or unborn child; or

(D) If neither person is a beneficiary or settlor of the trust that is the subject of the representation, then the person who is related to the settlor, other than by reason of being married to the other person, may represent the minor child or unborn child;

(8) A person designated by the settlor in the trust instrument or in a writing delivered to the trustee to represent the beneficiaries of the trust may represent and bind the beneficiaries;

(9) A person designated by the beneficiaries of the trust to represent them may represent and bind the beneficiaries; and

(10) An individual who has assumed responsibility for an incapacitated individual other than a minor child, including a parent or spouse of an incapacitated individual, may represent and bind the individual if no conservator or guardian for the individual has been appointed and no agent has authority to act with respect to the matter in question, but an individual who is an employee of an assisted living, hospital, surgery center, nursing home, adult foster care, adult day care, or other custodial care institution where the incapacitated person is residing or receiving services may not act as a representative pursuant to this subdivision (10).

SECTION 2. Tennessee Code Annotated, Section 35-15-303, is amended by adding the following as a new subsection:

() As used in subdivision (5), "beneficiary trust" means a trust that is a beneficiary of another trust.

SECTION 3. Tennessee Code Annotated, Section 35-15-604(c), is amended by adding the language ", or if a distribution is adjudged to have been made in error," after the language "adjudged to be invalid".

SECTION 4. Tennessee Code Annotated, Title 30, Chapter 2, Part 6, is amended by adding the following as a new section:

(a) Except as otherwise provided in subsection (b), the personal representative and all persons whose interests would be affected may enter into a binding nonjudicial settlement agreement with respect to any matter involving estate administration.

(b) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose or intention of the testator and includes terms and conditions that could be properly approved by the court under this section or other applicable law.

(c) Matters that may be resolved by a nonjudicial settlement agreement include:

(1) The interpretation or construction of the terms of the will;

(2) Liability of a personal representative for an action relating to the administration of the estate;

(3) The approval of an investment decision, delegation, policy, plan, or program occurring during estate administration;

(4) Appointment of a trustee of a trust established by the will in the event of a vacancy in the office of the designated trustee;

(5) Change of situs of a trust established by the will;

(6) Change of governing law of a trust established by the will; and

(7) Approval of attorney and personal representative fees.

(d) A nonjudicial settlement agreement entered into pursuant to this section is final and binding on all parties to the agreement, including individuals validly represented as provided by title 35, chapter 15, part 3.

(e) A personal representative or a person bound by a nonjudicial settlement agreement under subsection (d) may request the court to:

(1) Approve a nonjudicial settlement agreement;

(2) Determine whether the representation as provided in subsection (d) was adequate;

(3) Determine whether the agreement violates a material purpose or intention of the testator; or

(4) Determine whether the agreement contains terms and conditions the court could have properly approved.

(f) Entering into or petitioning a court regarding a nonjudicial settlement agreement under this section does not constitute a violation of an in terrorem provision.

(g) A nonjudicial settlement agreement must not be utilized in a manner that would cause the disqualification or loss of the federal estate tax marital deduction under § 2056(a) or § 2523(a) of the Internal Revenue Code (26 U.S.C. § 2506(a) or § 2523(a)), charitable deduction under § 170(a), § 642(c), § 2055(a), or § 2522(a) of the Internal Revenue Code (26 U.S.C. § 170(a), 642(c), § 2055(a), or § 2522(a)), favorable generation-skipping transfer treatment under § 2642(c) of the Internal Revenue Code (26 U.S.C. § 2642(c)), or another specific tax benefit under the Internal Revenue Code.

SECTION 5. Tennessee Code Annotated, Section 35-15-103(12), is amended by adding the language "an exercise of the authority described in Section 7," after the language "an agreement of the qualified beneficiaries,".

SECTION 6. Tennessee Code Annotated, Section 35-15-710, is amended by deleting the section and substituting:

If the terms of the trust, an agreement of the qualified beneficiaries, an exercise of the authority described in Section 7, or a court order requires a trustee, trust advisor,

or trust protector to follow the direction of a trust advisor, trust protector, or trustee, and the trustee, trust advisor, or trust protector acts in accordance with such direction, then the trustee, trust advisor, or trust protector so directed must be treated as an excluded fiduciary.

SECTION 7. Tennessee Code Annotated, Title 35, Chapter 15, Part 7, is amended by adding the following as a new section:

(a) The power to appoint a successor trustee under a trust instrument includes the power to appoint multiple successor trustees. A presently exercisable power to remove and replace a trustee under a trust instrument includes the power to appoint additional trustees to serve with the current trustee. The power to appoint multiple successor trustees and the power to appoint additional trustees includes the power to allocate various trustee powers, including the power to direct or prevent certain actions of the trustees, exclusively to one (1) or more of the trustees serving from time to time.

(b) All of the provisions of a trust instrument generally applicable to the trustees, including the provisions regarding trustee qualifications, resignation, removal, standard of care, indemnification, compensation, and the scope and nature of the restrictions, limitations, and immunities applicable when exercising powers and authority, apply to trustees appointed under this section. Such provisions include, but are not limited to:

(1) Provisions waiving certain duties when exercising certain investment powers apply equally to trustees appointed under this section;

(2) Provisions permitting the removal and replacement of a trustee subject to various limitations and conditions apply equally to trustees appointed under this section; and

(3) Provisions proscribing the settlor and beneficiaries and persons or entities related or subordinate to the settlor and any beneficiary from being

eligible to serve as a trustee apply equally to proscribe all of those persons from serving as trustees appointed under this section.

(c) Notwithstanding subsection (b), if an appointment under this section confers upon a co-trustee, to the exclusion of another co-trustee, the power to take certain actions with respect to the trust, including the power to direct or prevent certain actions of the trustees, then the respective duties and liabilities of the trustee who is an excluded fiduciary as well as of the co-trustee holding the power are as set forth under § 35-15-1204 and § 35-15-1205.

(d) Any powers granted in subsection (a) to appoint additional trustees, which are exercised in such a manner as to modify the duties of an existing trustee, do not become effective until thirty (30) days after the receipt by the existing trustee of a written notice from the person authorized to appoint additional trustees detailing the changes. The thirty-day notice requirement may be waived by the existing trustee.

(e) Except as otherwise expressly provided by the terms of a trust instrument, this section is available to any trust that is administered in this state or otherwise governed by the laws of this state.

SECTION 8. Tennessee Code Annotated, Section 35-15-411(c), is amended by deleting "modified" wherever it appears and substituting "modified or terminated" and by deleting "modification" wherever it appears and substituting "modification or termination".

SECTION 9. Tennessee Code Annotated, Section 35-15-510, is amended by deleting subsection (i) and substituting:

(i) After a conveyance to a trustee described in subsection (b), the property transferred is no longer held by the spouses as tenants by the entirety, but is held by the trustee, in trust, and the spouses and the spouse's creditors have the rights as set forth in this section with regard to the property.

SECTION 10. Tennessee Code Annotated, Title 35, Chapter 15, Part 10, is amended by adding the following as a new section:

35-15-1015. Limitation on personal liability of beneficiaries.

A beneficiary of a trust is not personally liable for the liabilities of third persons incurred in or arising from the administration of the trust or which are otherwise imposed upon the holder of the title to the property, including liabilities arising from contracts made by the trustee or torts committed by the trustee in the course of the administration of the trust.

SECTION 11. Tennessee Code Annotated, Section 35-15-802(a), is amended by adding the language "as the beneficiaries' interests are defined under the terms of the trust" at the end of the sentence.

SECTION 12. Tennessee Code Annotated, Section 35-17-102(5), is amended by deleting "at dissolution or" and substituting "at dissolution or immediately after".

SECTION 13. Tennessee Code Annotated, Section 35-17-105(a), is amended by deleting the subsection and substituting:

(a) Whether or not both, one (1) or neither is domiciled in this state, spouses may transmute any or all of their property to community property by transferring property to a community property trust.

SECTION 14. Tennessee Code Annotated, Section 35-16-102(10), is amended by deleting the subdivision.

SECTION 15. Tennessee Code Annotated, Section 35-16-103, is amended by deleting the section.

SECTION 16. Tennessee Code Annotated, Section 35-16-104(c), is amended by deleting the last two sentences of the subsection and substituting:

The transferor's execution of a sworn instrument creates a rebuttable presumption that the assets disclosed in the instrument were transferred to the trust on the date of execution of the instrument. The transferor bears the burden of proving by a preponderance of the evidence the date of transfer of any asset that is not listed on a sworn instrument.

SECTION 17. Tennessee Code Annotated, Title 35, Chapter 15, Part 6, is amended by adding the following as a new section:

35-15-606. Settlor's powers – powers to remove and appoint trustees.

(a) Unless the terms of a trust expressly provide otherwise, the settlor of a revocable trust may remove a trustee or trustees and appoint a successor trustee or trustees by giving at least thirty (30) days written notice to the removed trustee or trustees and the successor trustee or trustees.

(b) If there are two (2) or more settlors of the same revocable trust, then the removal and appointment of trustees must be made by unanimous decision of all settlors.

SECTION 18. Tennessee Code Annotated, Section 35-15-817, is amended by deleting the section and substituting:

35-15-817. Distribution upon termination, partial termination, or fiduciary removal or resignation – discharge of fiduciary liability.

(a) Upon the occurrence of an event terminating or partially terminating a trust, or upon the trustee's removal or resignation, the trustee shall proceed to distribute the trust property to the persons entitled to it within a reasonable period of time, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, attorney fees, and taxes.

(b) A trustee may send a notice pursuant to this section seeking to be relieved from liability upon such trustee's removal or resignation, or upon the full or partial termination of the trust.

(c) A notice sent by a trustee under this section must include:

(1) A statement of the fair market value of the trust's assets and the trust's liabilities, known to the trustee, as of a date specified in the notice, which date must not be more than thirty (30) days prior to the date the notice is sent;

(2)

(A) A statement of the following during the time period determined under subsections (c)(2)(B)–(D):

(i) The trust's receipts, including the source and the amount of each receipt;

(ii) The amount and recipient of each trust disbursement, including:

(a) Distributions to or for the benefit of one (1) or more beneficiaries, and

(b) All fees, expenses, and taxes paid; and

(iii) A reasonable estimate of the remaining fees and costs to be paid by the trust prior to the removal, resignation, or termination of the trustee sending the notice, as applicable;

(B) A statement required under subsection (c)(2)(A) must cover the time period that begins with the most recent of:

(i) The date of acceptance of the trusteeship by the trustee sending the notice;

(ii) The ending date of the period for which an accounting was last approved by the court pursuant to § 35-15-205; and

(iii) If a notice was previously sent in compliance with this section by the trustee sending the notice, then the date upon which the time period under subsection (f) terminated and no person timely objected in a writing delivered to the trustee, or, to the extent an objection was timely made in a writing and delivered to the trustee, then the date on which the objections were resolved by nonjudicial settlement agreement under § 35-15-111;

(C) The ending date of the time period covered by a statement required under subsection (c)(2)(A) must not be more than thirty (30) days prior to the date the notice is sent; and

(D) The time period covered by a statement required under subsection (c)(2)(A) must not exceed three (3) years;

(3) The beginning and ending dates of the time period covered by the statement required under subsection (c)(2)(A);

(4) A proposal for distribution;

(5) Notice that the trust is terminating in whole or in part, or that the trustee has resigned or has been removed;

(6) Notice that claims against a trustee under §§ 35-15-604 and 35-15-1005, as applicable, are barred if no objections specifically referencing the notice are received in writing by the trustee within forty-five (45) days after receipt of the notice by the person designated in subsections (d) and (e);

(7) If the trustee sending the notice is an individual trustee, the name, telephone number, and mailing or electronic mail address of the trustee sending the notice; and

(8) If the trustee sending the notice is a corporate trustee, the name, telephone number, and mailing or electronic mail address of a representative of the corporate trustee who may be contacted for additional information.

(d) A notice sent by a trustee under this section must be sent to:

(1) The grantor, if living;

(2) Each qualified beneficiary or such qualified beneficiary's representative under part 3 of this chapter to the extent there is no material conflict of interest; and

(3) All other then-serving trustees trust advisors, and trust protectors known to the trustee sending the notice.

(e) The trustee may also provide the notice to a person not described in subsection (d) whom the trustee reasonably believes may also have an interest in the trust.

(f) The right of any person described in subsection (d), or to whom the trustee sent a notice pursuant to subsection (e), to object to the notice under this section terminates if the person does not notify the trustee in writing of an objection within forty-five (45) days after the person received the notice.

(g) If the trustee sending the notice complies with this section, and if a person described in subsection (d), or to whom the trustee sent a notice pursuant to subsection (e), does not object within the time period prescribed in subsection (f), then the trustee shall within a reasonable period of time following the expiration of such period, distribute the trust's assets as provided in the proposal for distribution included in the notice.

(h) If the trustee sending the notice complies with this section, and if a person described in subsection (d) or a person to whom the trustee has distributed a notice pursuant to subsection (e) does not object within the time period prescribed in subsection (f), then the trustee sending the notice is relieved from any liability for the most recent continuous period that the trustee served as trustee of the trust, and the persons who received notice under this section are time barred from:

(1) Commencing a judicial proceeding to contest the validity of the trust, except as otherwise provided in § 35-15-604;

(2) Commencing a judicial proceeding for a claim of breach of trust against the trustee to the same extent and with the same preclusive effect as if the court had entered a final order approving the trustee's account under § 35-15-205; and

(3) Commencing a judicial proceeding for a claim of breach of fiduciary duty against a co-trustee, trust advisor, or trust protector for failure to object to the trustee's notice under this section.

(i) A trustee may rely upon the written statement of a person indicating no objection to the notice as a failure to object within the time period prescribed in subsection (f), regardless of whether the time period has terminated.

(j) If the trustee receives a written objection within the period prescribed in subsection (f) from a person to whom the trustee sent a notice, then the trustee may resolve the objection by nonjudicial settlement agreement under § 35-15-111 or seek judicial relief under § 35-15-205.

(k) For the purpose of determining the date a notice was received, if the confirmation of the date of receipt is unavailable, then the notice is presumed to have been received ten (10) business days after the date of mailing.

(l) This section does not preclude a trustee from proceeding under § 35-15-205 to have the trustee's accounts reviewed and settled by the court.

(m) If the person entitled to the trust property under subsection (a) is the trustee of another trust, or the successor trustee of the same trust, and there is a vacancy in the office of that trustee, then the otherwise applicable provisions of this chapter apply, including §§ 35-15-704 and 35-15-707. A vacancy in the office of a trustee, as described in this subsection (m), does not change the notice and time periods required by this section.

SECTION 19. Tennessee Code Annotated, Section 35-15-816, is amended by deleting subsection (c).

SECTION 20. Tennessee Code Annotated, Title 35, Chapter 15, Part 8, is amended by adding the following as a new section:

35-15-818. Trustee's power to appoint in trust.

(a) Unless the terms of the instrument expressly provide otherwise:

(1) A trustee who has authority, under the terms of a testamentary instrument or irrevocable inter vivos trust agreement, to invade the principal of a trust to make distributions to, or for the benefit of, one (1) or more proper objects of the exercise of the power, may instead exercise that authority by appointing all or part of the principal of the trust in favor of a trustee of a second trust if the exercise of that authority:

(A) Does not reduce any income interest of any income beneficiary of the following trusts:

(i) A trust for which a marital deduction has been taken for federal tax purposes under § 2056 or § 2523 of the Internal

Revenue Code (26 U.S.C. § 2056 or § 2523) or for state tax purposes under any comparable provision of applicable state law;

(ii) A charitable remainder trust under § 664 of the Internal Revenue Code; or

(iii) A grantor retained annuity or unitrust trust under § 2702 of the Internal Revenue Code (26 U.S.C. § 2702); and

(B) Is in favor of the proper objects of the exercise of the power;

(2)

(A) The second trust must only have as beneficiaries one (1) or more of the beneficiaries of the first trust. For distributions made during the grantor's lifetime, the second trust must not accelerate the beneficial interest of a future beneficiary. For distributions made after the grantor's death, the second trust may accelerate the beneficial interest of a future beneficiary;

(B) For purposes of this subdivision (a)(2):

(i) "Accelerate the beneficial interest" means making a beneficiary eligible to receive distributions of income or principal at a date earlier than the date upon which the beneficiary would otherwise be eligible to receive distributions from the first trust; and

(ii) "Future beneficiary" means a beneficiary who is not currently eligible to receive any distributions of income or principal from the first trust, but is eligible to receive a distribution of income or principal from the first trust at a future time or upon the happening of an event specified under the first trust;

(3) A trustee who is a beneficiary of the original trust shall not exercise the authority to appoint property of the original trust to a second trust if under the terms of the original trust or pursuant to law governing the administration of the original trust:

(A) The trustee does not have discretion to make distributions to itself;

(B) The trustee's discretion to make distributions to itself is limited by an ascertainable standard, and under the terms of the second trust, the trustee's discretion to make distributions to itself is not limited by the same ascertainable standard;

(C) The trustee's discretion to make distributions to itself can only be exercised with the consent of a co-trustee or a person holding an adverse interest and under the terms of the second trust the trustee's discretion to make distributions to itself is not limited by an ascertainable standard and may be exercised without consent; or

(D) The trustee of the original trust does not have discretion to make distributions that will discharge the trustee's legal support obligations but under the second trust the trustee's discretion is not so limited;

(4) The exercise of the power to invade the principal of the trust under subdivision (a)(1) must be by an instrument in writing, signed by the trustee, and filed with the records of the trust;

(5) The exercise of the power to invade principal of the trust under subdivision (a)(1) must not extend the permissible period of the rule against perpetuities that applies to the trust;

(6) This section does not abridge the right of a trustee who has a power of invasion to appoint property in further trust that arises under another statute, common law, or pursuant to the applicable instrument governing the first trust;

(7) The exercise of the power to appoint principal under subdivision (a)(1) must be considered an exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate;

(8) The second trust:

(A) May confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal of the original trust;

(B) The permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of the original or second trust; and

(C) The power of appointment conferred upon a beneficiary must preclude any exercise that would extend the permissible period of the rule against perpetuities that applies to the trust;

(9) If any contribution to the original trust qualified for the annual exclusion under § 2503(b) of the Internal Revenue Code (26 U.S.C. § 2503(b)), the marital deduction under § 2056(a) or § 2523(a) of the Internal Revenue Code (26 U.S.C. § 2506(a) or § 2523(a)), or the charitable deduction under § 170(a), § 642(c), § 2055(a), or § 2522(a) of the Internal Revenue Code (26 U.S.C. § 170(a), § 642(c), § 2055(a), or § 2522(a)), is a direct skip qualifying for treatment under § 2642(c) of the Internal Revenue Code (26 U.S.C. § 2642(c)), or qualified for any other specific tax benefit that would be lost by the existence of the

authorized trustee's authority under subdivision (a)(1) for income, gift, estate, or generation-skipping transfer tax purposes under the Internal Revenue Code, then the authorized trustee does not have the power to distribute the principal of a trust pursuant to subdivision (a)(1) in a manner that would prevent the contribution to the original trust from qualifying for or would reduce the exclusion, deduction, or other tax benefit that was originally claimed with respect to that contribution;

(10) During any period when the original trust owns stock in a subchapter S corporation, as defined in § 1361(a)(1) of the Internal Revenue Code (26 U.S.C. § 1361(a)(1)), an authorized trustee shall not exercise a power authorized by subdivision (a)(1) to distribute part or all of the stock of the S corporation to a second trust that is not a permitted shareholder under § 1361(c)(2) of the Internal Revenue Code (26 U.S.C. § 1361(c)(2));

(11) This section applies to any trust that is administered in this state;
and

(12) For purposes of this section:

(A) "Original trust" means the trust from which principal is being distributed; and

(B) "Second trust" means an original trust after modification or restatement under this section, or a trust to which a distribution of property from an original trust is or may be made under this section; provided, that the exercise of the power to appoint principal under this subsection (a) to a second trust by restatement or modification of the original trust does not require the retitling of property titled to the original trust or a change in a payable on death or beneficiary designation to the

original trust, even if the second trust is created by a fiduciary or other person as the nominal settlor.

SECTION 21. The Tennessee Code Commission is requested to publish in Tennessee Code Annotated the revisions required to conform to the current state of the law office comments for Chapter 2 of Title 30 and Chapters 15, 16, and 17 of Title 35 that are filed with the executive secretary of the Tennessee Code Commission by June 16, 2023, unless a later date is provided by said secretary, by duly authorized representatives of the Trust Committee of the Tennessee Bankers Association.

SECTION 22. The headings in this act are for reference purposes only and do not constitute a part of the law enacted by this act. However, the Tennessee Code Commission is requested to include the headings in any compilation or publication containing this act.

SECTION 23. This act takes effect upon becoming a law, the public welfare requiring it.