

FIRST REGULAR SESSION

SENATE BILL NO. 338

101ST GENERAL ASSEMBLY

INTRODUCED BY SENATOR LUETKEMEYER.

1590S.01H

ADRIANE D. CROUSE, Secretary

AN ACT

To repeal section 456.4-419, RSMo, and to enact in lieu thereof two new sections relating to trusts.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Section 456.4-419, RSMo, is repealed and two
2 new sections enacted in lieu thereof, to be known as sections
3 456.1-114 and 456.4-419, to read as follows:

**456.1-114. 1. For purposes of interpreting a term of
2 familial relationship in a trust, "descendants", "issue",
3 "children", and similar terms of relationship shall be
4 construed as follows:**

5 (1) A child conceived or born of a marriage is
6 presumed to be a child of the persons so married unless a
7 judicial proceeding is commenced before the death of the
8 presumed parent and it is finally determined in such
9 proceeding that the presumed parent is not the parent of the
10 child;

11 (2) A child who is not conceived or born of a marriage
12 is presumed to not be a child of a person who did not give
13 birth to the child unless:

14 (a) A judicial proceeding commenced before the death
15 of such person determined that such person is a parent of
16 the child; or

17 (b) Such person openly recognized the child as his or
18 her child and such person has not refused to voluntarily
19 support the child. A trustee may rely on its discretion

EXPLANATION-Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

20 regarding the sufficiency of recognition or support, and the
21 trustee shall not be liable to any person for its exercise
22 of this discretion unless the trustee acts in bad faith or
23 with reckless indifference to the purposes of the trust or
24 the interest of the beneficiaries.

25 If a parent-child relationship is established pursuant to
26 paragraph (a) or (b) of this subdivision, the rights
27 afforded to the child shall not be retroactive, but instead
28 shall apply from the time the relationship is established;
29 and

30 (3) A child adopted prior to the age of eighteen is
31 the child of an adopting parent and not of the natural
32 parents, except that adoption of a child by the spouse of a
33 natural parent has no effect on the relationship between the
34 child and such natural parent.

35 2. The terms of a trust shall prevail over any
36 provision of this section.

456.4-419. 1. Unless the terms of the trust
2 instrument expressly provide otherwise, a trustee, **other**
3 **than a settlor**, who has discretionary power under the terms
4 of a trust to make a distribution of income or principal,
5 whether or not limited by an ascertainable standard, to or
6 for the benefit of one or more beneficiaries of a trust, the
7 first trust, may instead exercise such discretionary power
8 by [appointing] **distributing** all or part of the income or
9 principal subject to such discretionary power in favor of a
10 trustee of a second trust, the second trust, created under
11 either the same or different trust instrument in the event
12 that the trustee of the first trust decides that the
13 [appointment] **distribution** is necessary or desirable after
14 taking into account the terms and purposes of the first

15 trust, the terms and purposes of the second trust, and the
16 consequences of the distribution. **A trustee may exercise**
17 **the power described in this subsection by distributing**
18 **property from the first trust to one or more second trusts**
19 **or by modifying the trust instrument for the first trust**
20 **which, as modified, becomes one or more second trusts.**

21 2. **With respect to a second trust to which a**
22 **distribution is made pursuant to subsection 1 of this**
23 **section:**

24 (1) **At least one permissible distributee of the first**
25 **trust shall be a permissible distributee of the second trust**
26 **immediately after the distribution;**

27 (2) **If, at the time of the distribution, the settlor**
28 **of the first trust is living and the first trust is not a**
29 **grantor trust under Subpart E of Part I of Subchapter J of**
30 **Chapter 1 of the Internal Revenue Code of 1986, as amended,**
31 **there may not be any permissible distributee of the second**
32 **trust immediately after the distribution who is not a**
33 **permissible distributee of the first trust;**

34 (3) **If, at the time of the distribution, the settlor**
35 **of the first trust is deceased or if, at the time of the**
36 **distribution, the first trust is a grantor trust under**
37 **Subpart E of Part I of Subchapter J of Chapter 1 of the**
38 **Internal Revenue Code of 1986, as amended, for reasons other**
39 **than the trustee having the power granted by this section,**
40 **any beneficiary of the first trust may be included as a**
41 **permissible distributee of the second trust immediately**
42 **after the distribution;**

43 (4) **The second trust may not include any beneficiary**
44 **who is not a beneficiary of the first trust; and**

45 (5) **The trust instrument for the second trust may**
46 **retain, modify, or omit a power of appointment granted in**

47 the first trust, and the trust instrument for the second
48 trust may create a power of appointment if the powerholder
49 is a beneficiary of the second trust. Except to the extent
50 provided otherwise in subsection 4 of this section, a power
51 of appointment in the trust instrument for the second trust
52 may be a general or nongeneral power of appointment and the
53 permissible appointees of the power need not be limited to
54 the beneficiaries of the first trust.

55 3. The following provisions apply to a trust that has
56 a beneficiary with a disability:

57 (1) As used in this subsection, the following terms
58 mean:

59 (a) "Beneficiary with a disability", a beneficiary of
60 a first trust who the special-needs fiduciary believes may
61 qualify for governmental benefits based on disability,
62 whether or not the beneficiary currently receives those
63 benefits or is an individual who has been adjudicated
64 disabled or adjudicated incapacitated;

65 (b) "Governmental benefits", financial aid or services
66 from a state, federal, or other public agency;

67 (c) "Special-needs fiduciary", with respect to a trust
68 that has a beneficiary with a disability:

69 a. A trustee or other fiduciary, other than a settlor,
70 who has discretionary power under the terms of a trust to
71 make a distribution of income or principal, whether or not
72 limited by an ascertainable standard, to or for the benefit
73 of one or more beneficiaries; or

74 b. If no trustee or fiduciary has discretion under
75 subparagraph a of this paragraph, a trustee or other
76 fiduciary, other than a settlor, who is required to
77 distribute part or all of the income or principal of the

78 first trust to or for the benefit of one or more
79 beneficiaries;

80 (d) "Special-needs trust", a trust the trustee
81 believes would not be considered a resource for purposes of
82 determining whether a beneficiary with a disability is
83 eligible for governmental benefits;

84 (2) A special-needs fiduciary may exercise the
85 authority granted by subsection 1 of this section if:

86 (a) A second trust is a special-needs trust that
87 benefits the beneficiary with a disability; and

88 (b) The special-needs fiduciary determines that
89 exercise of the authority pursuant to subsection 1 of this
90 section will further the purposes of the first trust; and

91 (3) The following provisions apply to any exercise of
92 the authority granted by this subsection:

93 (a) Notwithstanding the provisions of subdivision (4)
94 of subsection 2 of this section to the contrary, the terms
95 of the second trust may:

96 a. Provide that an interest is held by a pooled trust
97 as defined by Medicaid law for the benefit of the
98 beneficiary with a disability under 42 U.S.C. Section
99 1396p(d) (4) (C); or

100 b. Contain payback provisions complying with
101 reimbursement requirements of Medicaid law under 42 U.S.C.
102 Section 1396p(d) (4) (A);

103 (b) The provisions of subdivision (3) of subsection 4
104 of this section shall not apply to the interests of the
105 beneficiary with a disability; and

106 (c) Except as affected by any change to the interests
107 of the beneficiary with a disability, the second trust, or
108 if there are two or more second trusts, the second trusts in
109 the aggregate, shall grant each other beneficiary of the

110 **first trust beneficial interests in the second trusts which**
111 **are substantially similar to the beneficiary's beneficial**
112 **interests in the first trust, unless such other**
113 **beneficiary's interest is modified in accordance with the**
114 **provisions of this section other than this subsection.**

115 **4.** The following provisions apply to any exercise of
116 the authority granted by subsection 1 of this section:

117 (1) [The second trust may have as beneficiaries only
118 one or more of those beneficiaries of the first trust to or
119 for whom any discretionary distribution may be made from the
120 first trust and who are proper objects of the exercise of
121 the power, or one or more of those other beneficiaries of
122 the first trust to or for whom a distribution of income or
123 principal may have been made in the future from the first
124 trust at a time or upon the happening of an event specified
125 under the first trust;

126 (2) Unless the exercise of such power is limited by an
127 ascertainable standard, no trustee of the first trust may
128 exercise such authority to make a distribution from the
129 first trust if:

130 (a) Such trustee is a beneficiary of the first trust;
131 or

132 (b) Any beneficiary may remove and replace the trustee
133 of the first trust with a related or subordinate party to
134 such beneficiary within the meaning of Section 672(c) of the
135 Internal Revenue Code;

136 (3) Except if participating in a change that is needed
137 for a distribution to any such beneficiary under an
138 ascertainable standard, no trustee shall exercise such
139 authority to the extent that doing so would have the effect
140 either of:

141 (a) Increasing the distributions that can be made in
142 the future from the second trust to the trustee of the first
143 trust or to a beneficiary who can remove and replace the
144 trustee of the first trust with a related or subordinate
145 party to such beneficiary within the meaning of Section
146 672(c) of the Internal Revenue Code; or

147 (b) Removing restrictions on discretionary
148 distributions imposed by the instrument under which the
149 first trust was created;

150 (4) In the case of any trust contributions which have
151 been treated as gifts qualifying for the exclusion from gift
152 tax described in Section 2503(b) of the Internal Revenue
153 Code, by reason of the application of Section 2503(c), the
154 governing instrument for the second trust shall provide that
155 the beneficiary's remainder interest shall vest no later
156 than the date upon which such interest would have vested
157 under the terms of the governing instrument for the first
158 trust;

159 (5) The exercise of such authority may not reduce any
160 income interest of any income beneficiary of any of the
161 following trusts:

162 (a) A trust for which a marital deduction has been
163 taken for federal tax purposes under Section 2056 or 2523 of
164 the Internal Revenue Code or for state tax purposes under
165 any comparable provision of applicable state law;

166 (b) A charitable remainder trust under Section 664 of
167 the Internal Revenue Code;

168 (c) A grantor retained annuity trust under Section
169 2702 of the Internal Revenue Code; or

170 (d) A trust which has been qualified as a Subchapter S
171 trust under Section 1361(d) of the Internal Revenue Code or
172 an electing small business trust under Section 1361(e) of

173 the Internal Revenue Code] If the exercise of the authority
174 granted by subsection 1 of this section is limited by an
175 ascertainable standard and the trustee exercising such
176 authority is a permissible distributee of the first trust
177 under such standard, then:

178 (a) The discretionary power under the trust instrument
179 for the second trust to distribute income or principal to
180 such trustee as a permissible distributee shall be subject
181 to the same ascertainable standard as, or a more restrictive
182 ascertainable standard than, such standard in the trust
183 instrument for the first trust; and

184 (b) The trust instrument for the second trust shall
185 not:

186 a. Modify a power of appointment granted to such
187 trustee in the first trust; or

188 b. Grant a power of appointment to such trustee that
189 did not exist in the first trust;

190 (2) An exercise of the authority granted by subsection
191 1 of this section is subject to the following limitations:

192 (a) If the first trust contains property that
193 qualified, or would have qualified but for provisions of
194 this section other than this subdivision, for a marital
195 deduction for purposes of the gift or estate tax under the
196 Internal Revenue Code of 1986, as amended, the trust
197 instrument for the second trust shall not include or omit
198 any term that, if included in or omitted from the trust
199 instrument for the second trust, would have prevented the
200 transfer from qualifying for the deduction, or would have
201 reduced the amount of the deduction, under the same
202 provisions of the Internal Revenue Code under which the
203 transfer qualified;

204 (b) If the first trust contains property that
205 qualified, or would have qualified but for provisions of
206 this section other than this subdivision, for a charitable
207 deduction for purposes of the income, gift, or estate tax
208 under the Internal Revenue Code of 1986, as amended, the
209 trust instrument for the second trust shall not include or
210 omit any term that, if included in or omitted from the trust
211 instrument for the second trust, would have prevented the
212 transfer from qualifying for the deduction, or would have
213 reduced the amount of the deduction, under the same
214 provisions of the Internal Revenue Code under which the
215 transfer qualified;

216 (c) If the first trust contains property that
217 qualified, or would have qualified but for provisions of
218 this section other than this subdivision, for the exclusion
219 from the gift tax described in Section 2503(b) of the
220 Internal Revenue Code of 1986, as amended, the trust
221 instrument for the second trust shall not include or omit a
222 term that, if included in or omitted from the trust
223 instrument for the second trust, would have prevented the
224 transfer from qualifying under Section 2503(b) of the
225 Internal Revenue Code. If the first trust contains property
226 that qualified, or would have qualified but for provisions
227 of this section other than this subdivision, for the
228 exclusion from the gift tax described in Section 2503(b) of
229 the Internal Revenue Code, by application of Section 2503(c)
230 of the Internal Revenue Code, the trust instrument for the
231 second trust shall not include or omit a term that, if
232 included or omitted from the trust instrument for the second
233 trust, would have prevented the transfer from meeting the
234 requirements of Section 2503(c) of the Internal Revenue Code;

235 (d) If the property of the first trust includes shares
236 of stock in an S corporation, as defined in Section 1361 of
237 the Internal Revenue Code of 1986, as amended, and the first
238 trust is, or but for provisions of this section other than
239 this subdivision would be, a permitted shareholder under any
240 provision of Section 1361 of the Internal Revenue Code, the
241 trustee of the first trust may exercise such authority with
242 respect to part or all of the S corporation stock only if
243 the second trust receiving the stock is a permitted
244 shareholder under Section 1361(c)(2) of the Internal Revenue
245 Code. If the property of the first trust includes shares of
246 stock in an S corporation and the first trust is, or but for
247 provisions of this section other than this subdivision would
248 be, a qualified subchapter-S trust within the meaning of
249 Section 1361(d) of the Internal Revenue Code, the trust
250 instrument for the second trust shall not include or omit a
251 term that prevents the second trust from qualifying as a
252 qualified subchapter-S trust; and

253 (e) If the first trust contains property that
254 qualified, or would have qualified but for provisions of
255 this section other than this subdivision, for a zero
256 inclusion ratio for purpose of the generation-skipping
257 transfer tax under Section 2642(c) of the Internal Revenue
258 Code of 1986, as amended, the trust instrument for the
259 second trust shall not include or omit a term that, if
260 included in or omitted from the first trust, would have
261 prevented the transfer to the first trust from qualifying
262 for a zero inclusion ratio under Section 2642(c) of the
263 Internal Revenue Code;

264 [(6)] (3) The exercise of such authority does not
265 apply to trust property subject to a presently exercisable
266 power of withdrawal held by a trust beneficiary to whom, or

267 for the benefit of whom, the trustee has authority to make
268 distributions, unless after the exercise of such authority,
269 such beneficiary's power of withdrawal is unchanged with
270 respect to the trust property; and

271 [(7)] (4) A spendthrift clause or a provision in the
272 trust instrument that prohibits amendment or revocation of
273 the trust shall not preclude the trustee from exercising the
274 authority granted by subsection 1 of this section.

275 [3.] 5. At least sixty days prior to making a
276 discretionary distribution under subsection 1 of this
277 section, the trustee of the first trust shall notify **the**
278 **permissible distributees of the first trust and** the
279 permissible distributees of the second trust[, or the
280 qualified beneficiaries of the second trust if there are no
281 permissible distributees of the second trust,] of the
282 distribution. A beneficiary may waive the right to the
283 notice required by this subsection and, with respect to
284 future distributions, may withdraw a waiver previously given.

285 [4.] 6. In exercising the authority granted by
286 subsection 1 of this section, the trustee shall remain
287 subject to all fiduciary duties otherwise imposed under the
288 trust instrument and Missouri law.

289 [5.] 7. This section does not impose on a trustee a
290 duty to exercise the authority granted by subsection 1 of
291 this section in favor of another trust or to consider
292 exercising such authority in favor of another trust.

293 **8. A second trust may have a duration that is the same**
294 **as or different from the duration of the first trust.**
295 **However, to the extent that property of the second trust is**
296 **attributable to property of the first trust, the property of**
297 **the second trust is subject to any rules governing maximum**
298 **perpetuity, accumulation, or suspension of the power of**

299 alienation which apply to property of the first trust. The
300 provisions of this subsection shall not preclude the
301 creation of a general power of appointment in the trust
302 instrument for a second trust as authorized by subdivision
303 (5) of subsection 2 of this section.

304 9. In the event the trust instrument for the second
305 trust in part does not comply with this section but would
306 otherwise be effective under this section, the exercise of
307 the power is effective and the following rules apply with
308 respect to the principal of the second trust attributable to
309 the exercise of the power:

310 (1) A provision in the trust instrument for the second
311 trust which is not permitted under this section is void to
312 the extent necessary to comply with this section; and

313 (2) A provision required by this section to be in the
314 trust instrument for the second trust which is not contained
315 in the trust instrument is deemed to be included in the
316 trust instrument to the extent necessary to comply with this
317 section.

318 [6.] 10. This section is intended to codify and, from
319 and after enactment, to provide certain limitations to the
320 common law of this state, and this section applies to any
321 trust governed by the laws of this state, including a trust
322 whose principal place of administration is transferred to
323 this state before or after the enactment of this section.

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