SECOND REGULAR SESSION

SENATE BILL NO. 886

101ST GENERAL ASSEMBLY

INTRODUCED BY SENATOR LUETKEMEYER.

3707S.01I 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Section A. Section 456.4-419, RSMo, is repealed and two new sections enacted in lieu thereof, to be known as sections 456.1-114 and 456.4-419, to read as follows:

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

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

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

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

(b) Such person openly recognized the child as his or her child and such person has not refused to voluntarily 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.

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

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

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

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

456.4-419. 1. Unless the terms of the trust instrument expressly provide otherwise, a trustee, **other than a settlor**, who has discretionary power under the terms of a trust to make a distribution of income or principal, whether or not limited by an ascertainable standard, to or for the benefit of one or more beneficiaries of a trust, the first trust, may instead exercise such discretionary power by **[**appointing**]** **distributing** all or part of the income or principal subject to such discretionary power in favor of a trustee of a second trust, the second trust, created under either the same or different trust instrument in the event that the trustee of the first trust decides that the **[**appointment**]** **distribution** is necessary or desirable after taking into account the terms and purposes of the first trust, the terms and purposes of the second trust, and the consequences of the distribution. **A trustee may exercise the power described in this subsection by distributing property from the first trust to one or more second trusts or by modifying the trust instrument for the first trust which, as modified, becomes one or more second trusts.**

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

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

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

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

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

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

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

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

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

(a) "Beneficiary with a disability", 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 disabled or adjudicated incapacitated;

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

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

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

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

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

(d) "Special-needs trust", 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;

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

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

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

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

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

a. Provide that an interest is held by 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); or

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

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

(c) 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 grant each other beneficiary of the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) A trust which has been qualified as a Subchapter S trust under Section 1361(d) of the Internal Revenue Code or an electing small business trust under Section 1361(e) of the Internal Revenue Code] **If the exercise of the authority granted by subsection 1 of this section is limited by an ascertainable standard and the trustee exercising such authority is a permissible distributee of the first trust under such standard, then:**

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

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

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

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

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

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

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

(c) If the first trust contains property that qualified, or would have qualified but for provisions of this section other than this subdivision, for the exclusion from the gift tax described in Section 2503(b) of the Internal Revenue Code of 1986, as amended, the trust instrument for the second trust shall not include or omit a term that, if included in or omitted from the trust instrument for the second trust, would have prevented the transfer from qualifying under Section 2503(b) of the Internal Revenue Code. If the first trust contains property that qualified, or would have qualified but for provisions of this section other than this subdivision, for the exclusion from the gift tax described in Section 2503(b) of the Internal Revenue Code, by application of Section 2503(c) of the Internal Revenue Code, the trust instrument for the second trust shall not include or omit a term that, if included or omitted from the trust instrument for the second trust, would have prevented the transfer from meeting the requirements of Section 2503(c) of the Internal Revenue Code;

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

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

[(6)**] (3)** The exercise of such authority does not apply to trust property subject to a presently exercisable power of withdrawal held by a trust beneficiary to whom, or for the benefit of whom, the trustee has authority to make distributions, unless after the exercise of such authority, such beneficiary's power of withdrawal is unchanged with respect to the trust property; and

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

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

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

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

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

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

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

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

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

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

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