

HOUSE BILL 2317

By Garrett

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

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

SECTION 1. Tennessee Code Annotated, Section 35-6-401, is amended by deleting subdivision (d)(2) and substituting the following:

(2) If the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent (20%) of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt. If the total amount of money and property received in a distribution or series of related distributions is equal to or less than twenty percent (20%) of an entity's gross assets, then it is not deemed a partial liquidation.

SECTION 2. Tennessee Code Annotated, Section 35-15-103(24)(B), is amended by deleting the language "; or" and substituting the language "without causing the trust to terminate; or".

SECTION 3. Tennessee Code Annotated, Section 35-15-108(a), is amended by deleting the language "Without limiting or precluding other means for establishing a sufficient connection with a jurisdiction, the terms of a trust designating that jurisdiction's laws in a state jurisdiction provision are valid and controlling if:" and substituting the following:

Without limiting or precluding other means for establishing a sufficient connection with a jurisdiction, notwithstanding § 35-15-107, the terms of a state jurisdiction provision designating a jurisdiction's trust administration laws are valid and controlling only if:

SECTION 4. Tennessee Code Annotated, Section 35-15-108, is amended by deleting the first sentence in subsection (b) and substituting the following:

Except as otherwise expressly provided in a state jurisdiction provision that is valid and controlling under subsection (a) or by court order addressing the applicable law for trust administration, the laws of this state govern the administration of a trust while the trust is administered in this state.

SECTION 5. Tennessee Code Annotated, Section 35-15-111(c), is amended by adding the following as new subdivisions:

(10) The resignation, appointment, and establishment of the powers and duties of trust protectors or trust advisors; and

(11) The approval of an investment decision, delegation, policy, plan, or program.

SECTION 6. Tennessee Code Annotated, Section 35-15-409(1), is amended by deleting the language "ninety (90) years" and substituting the language "three hundred sixty (360) years".

SECTION 7. Tennessee Code Annotated, Section 35-15-411(c), is amended by deleting the language "as provided under § 35-15-111".

SECTION 8. Tennessee Code Annotated, Section 35-15-510, is amended by deleting subsection (i) and substituting the following:

(i) After a conveyance to a trustee described in subsection (b), the property transferred is deemed to be tenancy by the entirety property held by husband and wife subject to this section.

SECTION 9. Tennessee Code Annotated, Section 35-15-813, is amended by adding the following at the end of subsection (d):

During the time a beneficiary is represented by another pursuant to § 35-15-303, a trustee shall send its report or other information otherwise required to be furnished under this section to the representative of the beneficiary, which has the same effect as sending the report or other information otherwise required to be furnished under this section to the beneficiary being represented.

SECTION 10. Tennessee Code Annotated, Section 35-15-813, is amended by deleting subsection (e) and substituting the following:

(e) Subsections (a) and (b) do not apply to the extent:

(1) That the terms of the trust provide otherwise; or

(2) The settlor of the trust, or a trust protector or trust advisor under part 12 of this chapter, that holds the power to so direct, directs otherwise in a writing delivered to the trustee. Directions made in a writing delivered to the trustee by the settlor, trust advisor, or trust protector as set forth in this subdivision (e)(2)

remain in effect until and unless the settlor, trust advisor, or trust protector revokes the written instructions or is incapacitated. Additionally, the written directions remain in effect only while the trust advisor or trust protector providing the written directions is serving as the current trust advisor or trust protector.

Unless otherwise specifically provided in the written directions, upon the death or incapacity of a settlor who provided the written directions described in this subdivision (e)(2), the directions are revoked. However, upon the death or incapacity of the settlor, a trust advisor or trust protector, if any, may further direct the trustee in writing pursuant to this subdivision (e)(2). Unless otherwise stated in the governing instrument, in the event of a conflict in the written directions, the written directions of the settlor controls. Notwithstanding this subdivision (e)(2), during the time a settlor has designated a representative to represent and bind the interests of a beneficiary or beneficiaries under § 35-15-303, a trustee shall send its report or other information otherwise required to be furnished under this section to the representative designated by the settlor until the settlor revokes the designation or until the designated representative ceases serving. Sending reports or other information otherwise required to be furnished to a designated

representative has the same effect as sending the report or other information otherwise required to be furnished under this section to the beneficiary or beneficiaries being represented. To the extent a settlor, trust advisor, or trust protector directs a trustee not to send its report or other information otherwise required to be furnished under this section to a beneficiary or beneficiaries and does not designate a representative to receive the information, the trustee shall send the information it would otherwise be required to send to the beneficiary or beneficiaries to the settlor who provided the written directions described in this subdivision (e)(2), trust advisor, or trust protector, which has the same effect as sending the report or other information otherwise required to be furnished under this section to the beneficiary or beneficiaries.

SECTION 11. Tennessee Code Annotated, Section 35-15-816, is amended by deleting subdivision (b)(27) and adding the following as a new subsection:

(c) 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 trust under an instrument other than that under which the power to invade is created or under the same instrument 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) The second trust may only have as beneficiaries one (1) or more qualified beneficiaries of 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:

(A)

(i) Under the terms of the original trust or pursuant to law governing the administration of the original trust, either the trustee is a beneficiary or a trust benefitting the trustee is a beneficiary; and

(ii)

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

(b) The trustee's discretion to make distributions to itself 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; or

(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

(B) Under the terms of the original trust or pursuant to law governing the administration of the original trust, 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 limited;

(4) The exercise of the power to invade the principal of the trust under subdivision (c)(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 (c)(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 any trustee who has a power of invasion to appoint property in further trust that arises under any other statute, under common law, or pursuant to the applicable instrument governing the first trust;

(7) The exercise of the power to appoint principal under subdivision (c)(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 (c)(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 (c)(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 (c)(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;

(12) For purposes of this section, "original trust" means the trust from which principal is being distributed, and "second trust" means the trust to which assets are being distributed from the original trust; and

(13) Notwithstanding this section, a trustee may also exercise the power to decant by modifying the first trust without an actual distribution of property, in which case the second trust is the modified first trust. In exercising the power of decant as described in this subdivision (c)(13), a trustee shall notify all beneficiaries of the trust, in writing, at least twenty (20) days prior to the effective date of the trustee's exercise of the power of decant.

SECTION 12. The Tennessee Code Commission is requested to publish the following in the Tennessee Code Annotated as an official comment to Tennessee Code Annotated, Section 35-15-816:

A trustee is always encouraged to consider any generation-skipping transfer tax consequences before exercising its power to decant a trust.

SECTION 13. Tennessee Code Annotated, Section 35-16-102, is amended by deleting subdivision (8) and substituting the following:

(8) "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government;

governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity;

SECTION 14. Tennessee Code Annotated, Section 35-16-102(11), is amended by deleting the language "after the transferor executes a qualified affidavit".

SECTION 15. Tennessee Code Annotated, Section 35-16-104, is amended by adding the following language at the end of subsection (c):

For purposes of this chapter, the transferor's execution of a qualified affidavit creates a rebuttable presumption that the assets disclosed in the affidavit were transferred to the trust on the date of execution of the affidavit. The transferor bears the burden of proving the date of transfer of any asset that is not listed on a qualified affidavit.

SECTION 16. Tennessee Code Annotated, Section 35-15-810, is amended by adding the following as a new subsection:

(f) For all purposes under this chapter, if a trust is apportioned into separate shares for a single beneficiary or related beneficiary group, then the apportioned separate share of the trust must be treated as separate trusts even though the share may be commingled with other separate shares for investment and tax reporting purposes as provided in this section.

SECTION 17. Tennessee Code Annotated, Section 35-15-505, is amended by adding the following as a new subsection:

(h) For purposes of this section, a person is not considered the settlor or deemed settlor of an irrevocable inter vivos trust if the person is a beneficiary with respect to property that was contributed to the trust by the person's spouse, regardless of whether or when the person was a settlor of an irrevocable inter vivos trust for the benefit of the person's spouse. For purposes of this subsection (h), "person's spouse"

means the individual to whom the person was married at the time the irrevocable inter vivos trust was created, regardless of a subsequent dissolution of the marriage.

SECTION 18. Tennessee Code Annotated, Section 35-6-502, is amended by adding the following language at the end of subdivision (a)(1):

however, if in the judgment of the trustee, the charging of a part or all of that portion of the compensation described under § 35-6-501(1) to principal is impracticable because of the lack of sufficient principal cash and readily marketable intangible personal property, or inadvisable because of the nature of the assets, then that part or all of the compensation must be paid out of income. The decision of the trustee to pay a larger portion or all of the compensation out of income is conclusive, and the income of the trust is not entitled to reimbursement from principal at any subsequent time or times;

SECTION 19. Tennessee Code Annotated, Section 35-15-1102, is amended by adding the following language at the end of the section:

However, the execution of a modification, termination, or settlement agreement pursuant to § 35-15-111, § 35-15-411, or § 35-15-412 is considered a "transaction" for purposes of § 47-10-103.

SECTION 20. Tennessee Code Annotated, Section 35-15-509, is amended by adding the following as a new subdivision (3) and redesignating the existing subdivision (3) accordingly:

(3) No creditor or assignee shall reach property transferred pursuant to a power of appointment exercised by a decedent unless the power of appointment was actually exercised in favor of the decedent or the decedent's estate; and

SECTION 21. This act shall take effect upon becoming a law, the public welfare requiring it, and applies to action occurring on or after the effective date of this act.