

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas
94th General Assembly
Regular Session, 2023

A Bill

HOUSE BILL 1394

By: Representatives Maddox, Lundstrum

By: Senator C. Penzo

For An Act To Be Entitled

AN ACT TO AMEND AND UPDATE THE LAW ON SPENDTHRIFT TRUSTS; TO ALLOW FOR THE CREATION OF A DOMESTIC ASSET PROTECTION TRUST; AND FOR OTHER PURPOSES.

Subtitle

TO UPDATE THE LAW ON SPENDTHRIFT TRUSTS;
AND TO ALLOW FOR THE CREATION OF A
DOMESTIC ASSET PROTECTION TRUST.

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

SECTION 1. Arkansas Code Title 28, Chapter 72, is amended to add an additional subchapter to read as follows:

Subchapter 7 – Spendthrift Trusts and Domestic Asset Protection Trusts

28-72-701. Definitions.

As used in this subchapter:

(1) "Adviser" means any person, including without limitation an accountant, attorney, or investment adviser, who gives advice concerning or was involved in the creation of, transfer of property to, or administration of a spendthrift trust or domestic asset protection trust, or who participated in the preparation of accountings, tax returns, or other reports related to a trust;

(2) "Creditor" means a person with a claim;

(3) "Document" means a will, trust, or instrument;

(4) "Domestic asset protection trust" means a self-settled, first-



party spendthrift trust;

(5) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends;

(6) "Settlor" means:

(A) The person who creates a spendthrift trust or domestic asset protection trust as described in the trust instrument; or

(B) Any person who contributes assets to a spendthrift trust or domestic asset protection trust as to the assets that he or she contributed to the spendthrift trust or domestic asset protection trust except to the extent of consideration for the assets contributed by that person; and

(7) "Spendthrift trust" means a trust that, by its terms, imposes a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary.

28-72-702. Applicability – Third-party spendthrift trust and domestic asset protection trust – Requirements.

(a) Unless the document that creates the spendthrift trust or domestic asset protection trust expressly declares otherwise, this subchapter governs the construction, operation, and enforcement of all spendthrift trusts or domestic asset protection trusts in the State of Arkansas, regardless of whether the trust was created in or outside of the State of Arkansas, if:

(1) All or part of the lands, rents, issues, or profits affected are in the State of Arkansas;

(2) All or part of the personal property, interest of money, dividends upon stock, and other profits affected are in the State of Arkansas;

(3) The declared domicile of the creator of a spendthrift trust or domestic asset protection trust affecting personal property is in the State of Arkansas; or

(4) At least one (1) trustee qualified under subsection (b) of this section has powers that include maintaining records and preparing income tax returns for the trust and all or part of the administration of the trust is performed in the State of Arkansas.

(b) If a settlor is a beneficiary of a trust of the settlor's own creation, at least one (1) trustee of the domestic asset protection trust must be:

(1) A natural person who resides and has his or her domicile in the State of Arkansas;

(2) A trust company that:

(A) Is organized under:

(i) Federal law;

(ii) The laws of the State of Arkansas; or

(iii) The laws of another state; and

(B) Maintains an office in the State of Arkansas for the transaction of business; or

(3) A bank that:

(A) Is organized under:

(i) Federal law;

(ii) The laws of the State of Arkansas; or

(iii) The laws of another state;

(B) Maintains an office in the State of Arkansas for the transaction of business; and

(C) Possesses and exercises trust powers.

28-72-703. Creation – Third-party spendthrift trusts and domestic asset protection trusts – Ability of settlor to hold other powers.

(a) A person competent to execute a will or deed may, only by a document that is duly executed, create a spendthrift trust in real, personal, or mixed property for the benefit of:

(1) A person other than the settlor; or

(2) For a domestic asset protection trust, the settlor or both the settlor and another person, if the document:

(A) Is irrevocable;

(B) Does not require that any part of the income or principal of the trust be distributed to the settlor; and

(C) Is not intended to hinder, delay, or defraud known creditors.

(b) A document meets the requirements of subsection (a) of this section even if under the terms of the document the settlor:

(1) May prevent a distribution from the trust;

(2) Holds a special lifetime or testamentary power of appointment that cannot be exercised in favor of the settlor, the settlor's

estate, a creditor of the settlor, or a creditor of the settlor's estate;

(3) Is a beneficiary of a trust that qualifies as a charitable remainder trust pursuant to 26 U.S.C. § 664, as it existed on January 1, 2023, even if the settlor has the right to release the settlor's retained interest in the trust, in whole or in part, in favor of one (1) or more of the remainder beneficiaries of the trust;

(4) Is authorized or entitled to:

(A) Receive a percentage of the value of the trust each year as specified in the trust instrument of the initial value of the trust assets or their value determined from time to time pursuant to the trust instrument, but not exceeding:

(i) The amount that may be defined as income pursuant to 26 U.S.C. § 643(b), as it existed on January 1, 2023; or

(ii) With respect to the benefits from any qualified retirement plan or any eligible deferred compensation plan, the minimum required distribution as defined in 26 U.S.C. § 4974(b), as it existed on January 1, 2023;

(B) Receive income or principal from a grantor-retained annuity trust paying out a qualified annuity interest within the meaning of 26 C.F.R. § 25.2702-3(b), as it existed on January 1, 2023, or a grantor retained unitrust paying out a qualified unitrust interest within the meaning of 26 C.F.R. § 25.2702-3(c); or

(C) Use real property held under a qualified personal residence trust as described in 26 C.F.R. § 25.2702-5(c), as it existed on January 1, 2023; or

(5) Is authorized to:

(A) Receive income or principal from the trust, but only subject to the discretion of another person; or

(B) Use real or personal property owned by the trust.

(c) Except for the power of the settlor to make distributions to himself or herself without the consent of another person, the provisions of this section shall not be construed to prohibit the settlor of a spendthrift trust or domestic asset protection trust from holding other powers under the trust, regardless of whether the settlor is a cotrustee, including without limitation the power to:

(1) Remove and replace a trustee;

- (2) Direct trust investments; and
- (3) Execute other management powers.

(d)(1) No specific language is necessary for the creation of a spendthrift trust or domestic asset protection trust.

(2) It is sufficient if, by the terms of the document, the creator manifests an intention to create a spendthrift trust or domestic asset protection trust.

28-72-704. Powers of settlor.

(a) The settlor of a spendthrift trust or domestic asset protection trust has only the powers and rights that are conferred to the settlor by the trust instrument.

(b) An agreement or understanding, express or implied, between the settlor and the trustee that attempts to grant or permit the retention of greater rights or authority than is stated in the trust instrument is void.

28-72-705. Beneficiaries – Named in writing – Provision for support – Income.

(a) The beneficiary of a spendthrift trust or domestic asset protection trust shall be named or clearly referred to in the document.

(b) No spouse, former spouse, child, or dependent shall be a beneficiary unless the person is named or clearly referred to as a beneficiary in the document.

(c) The provision for the beneficiary shall:

(1) Be for the support, education, maintenance, and benefit of the beneficiary alone;

(2) Be without reference to or limited by:

(A) The beneficiary's needs, station in life, or mode of life; or

(B) The needs of any other person, regardless of whether the person is dependent upon the beneficiary; and

(3) Extend to all of the income from the trust estate devoted for that purpose by the creator of the trust without exception or deduction other than for:

(A) Costs or fees regularly earned, paid, or incurred by the trustee for the administration or protection of the trust estate; or

(B) Taxes paid or incurred by:

(i) The trust estate; or

(ii) The interest of the beneficiary of the trust.

(d) The existence of a spendthrift trust or domestic asset protection trust shall not depend on the beneficiary's:

(1) Character;

(2) Capacity or incapacity; or

(3) Competency or incompetency.

28-72-706. Discretion of trustee.

(a) The trustee's discretionary power is absolute, regardless of whether a valid provision for the accumulation of trust income is made or if the provision relates to the trust income from real or personal property, in all cases where the creator of a spendthrift trust or domestic asset protection trust:

(1) Indicates the sum to be applied for or paid to the beneficiary or makes the application or payment of sums for or to the beneficiary at the discretion of the trustee;

(2) Makes the amount of trust income to be applied for or paid to the beneficiary at the discretion of the trustee; or

(3) Gives the trustee the discretion to pay all or any part of the trust income to one (1) or more of the beneficiaries.

(b) A trustee's discretion under subsection (a) of this section shall not be interfered with for any consideration of the needs, station in life, or mode of life of the beneficiary, or for any uncertainty or pretext.

(c) The trustee of a spendthrift trust or domestic asset protection trust is required to disregard and defeat an assignment or other act, voluntary or involuntary, that is attempted contrary to the provisions of this subchapter.

28-72-707. Restraints on alienation – Exclusive jurisdiction of court.

(a)(1) A spendthrift trust or domestic asset protection trust restrains and prohibits the assignment, alienation, acceleration, and anticipation of any interest of the beneficiary under the trust by the voluntary or involuntary act of the beneficiary, by operation of law, or any legal process.

(2) The trust estate, corpus, or capital of a spendthrift trust or domestic asset protection trust shall not be assigned, aliened, diminished, or impaired by any alienation, transfer, or seizure that has the effect of cutting off or diminishing the payments, rents, profits, earnings, or income of the trust estate that would otherwise be currently available for the benefit of the beneficiary.

(b) A mandatory or discretionary payment by the trustee to the beneficiary shall be made only to or for the benefit of the beneficiary and not:

(1) By acceleration or anticipation; or

(2) To an assignee of the beneficiary or upon an order, written or oral, given by the beneficiary, regardless of whether the order is a voluntary contractual act of the beneficiary or is through any legal process, including without limitation:

(A) A judgment;

(B) An execution;

(C) An attachment;

(D) A garnishment;

(E) A bankruptcy; or

(F) A contract, tort, or duty.

(c)(1) The beneficiary shall not have the power or capacity to make any disposition of the trust income:

(A) By his or her order, voluntary or involuntary; or

(B) Upon the order or direction of any court or courts, whether bankruptcy or otherwise.

(2) The interest of the beneficiary shall not be:

(A) Subject to any process of attachment issued against the beneficiary; or

(B) Taken in execution under any form of legal process directed against the beneficiary or against the trustee, trust estate, or any part of the income of the trust estate.

28-72-708. Legal estate of beneficiary in corpus.

(a) A beneficiary of a spendthrift trust or domestic asset protection trust has no legal estate in the capital, principal, or corpus of the trust estate unless under the terms of the trust the beneficiary or a person

deriving title from the beneficiary is entitled to have it conveyed or transferred to him or her immediately or after a term of years or after a life in being.

(b) The income from the corpus is not to be paid to a specific beneficiary or any other beneficiary until any applicable term of years or life passes as described in subsection (a) of this section.

28-72-709. Perpetuities.

(a) A spendthrift trust or domestic asset protection trust may not continue for a period longer than permitted under § 18-3-101 et seq.

(b)(1) The free alienation of the legal estate by the trustee may not be suspended for a period exceeding the limit prescribed in any constitutional or statutory prohibition against perpetuities existing in the State of Arkansas or in the state where the lands affected by the trust are situated.

(2) Notwithstanding subsection (b)(1) of this section, a contingent remainder in fee may be created on a prior remainder in fee to take effect if the person to whom the first remainder is limited dies under twenty-one (21) years of age, or upon any other contingency by which the estate of that person may be determined before he or she attains twenty-one (21) years of age.

28-72-710. Accumulation of income.

(a) The accumulation of income of trust property may be directed in the document creating a spendthrift trust or domestic asset protection trust for the benefit of one or more beneficiaries to commence within the time permitted for the vesting of a future interest, but shall not extend beyond the period limiting the time within which the absolute power of alienation of property may be suspended.

(b)(1) If the direction of the accumulation of income of trust property is for a longer term than is permitted by law, it is void only as to the excess time, regardless of whether the direction is separable from the other clauses in the trust.

(2) In the case of invalidity of the direction of the accumulation of income of trust property, the income may be paid and distributed to the next succeeding beneficiary in interest.

28-72-711. Alternate provisions – Discretion of settlor.

A settlor of a spendthrift trust or domestic asset protection trust may by a document creating a spendthrift trust or domestic asset protection trust make separate, different, or alternate provisions other than what is set forth in §§ 28-72-701 - 28-72-710, so long as the settlor uses express, specific language establishing that intent.

28-72-712. Transfer of property to trust – Actions against advisers, settlors, and trustees – Limitations.

(a) A person may not bring an action with respect to a transfer of property to a spendthrift trust or domestic asset protection trust if the person:

(1) Is a creditor when the transfer is made, unless the action is commenced within:

(A) Two (2) years after the transfer is made; or

(B) Six (6) months after the person discovers or reasonably should have discovered the transfer, whichever is later; or

(2) Becomes a creditor after the transfer is made, unless the action is commenced within two (2) years after the transfer is made.

(b) A person is deemed to have discovered a transfer under subsection (a) of this section at the time a public record is made of the transfer, including without limitation at the time of:

(1) The conveyance of real property that is recorded in the office of the county recorder of the county in which the property is located; or

(2) The filing of a financing statement under the Uniform Commercial Code, § 4-1-101 et seq.

(c)(1) A creditor shall not be awarded a judgment in an action with respect to a transfer of property to a spendthrift trust or domestic asset protection trust unless the creditor proves by clear and convincing evidence that the transfer of property:

(A) Was a fraudulent transfer under the Uniform Voidable Transactions Act, § 4-59-201 et seq.; or

(B) Violates a legal obligation owed to the creditor under a contract or a valid court order that is legally enforceable by that

creditor.

(2) In the absence of clear and convincing evidence, the property transferred is not subject to the claims of the creditor.

(3) Clear and convincing evidence:

(A) That is established by a creditor showing that a transfer of property was fraudulent or wrongful does not constitute clear and convincing evidence as to any other creditor; and

(B) Of a fraudulent or wrongful transfer of property as to a creditor shall not invalidate any other transfer of property.

(d)(1) If property transferred to a spendthrift trust or domestic asset protection trust is conveyed to the settlor or to a beneficiary for the purpose of obtaining a loan secured by a mortgage or deed of trust on the property and is later reconveyed to the trust, for the purpose of bringing an action under subsection (a) of this section, the transfer is disregarded and the reconveyance relates back to the date the property was originally transferred to the trust.

(2) The mortgage or deed of trust on the property shall be enforceable against the trust.

(e) A person shall not be awarded a judgment in an action against an adviser to the settlor or trustee of a spendthrift trust or domestic asset protection trust unless the person proves by clear and convincing evidence that the adviser:

(1) Acted knowingly and in bad faith in violation of the laws of the State of Arkansas; and

(2) Directly caused the damages suffered by the person.

(f)(1) A person other than a beneficiary or settlor shall not be awarded a judgment in an action against a trustee of a spendthrift trust or domestic asset protection trust unless the person proves by clear and convincing evidence that the trustee:

(A) Acted knowingly and in bad faith in violation of the laws of the State of Arkansas; and

(B) Directly caused the damages suffered by the person.

(2) As used in subsection (f) of this section, "trustee" includes a cotrustee and a predecessor trustee.

(g) If more than one transfer is made to a spendthrift trust or domestic asset protection trust:

(1) The subsequent transfer to the spendthrift trust or domestic asset protection trust shall be disregarded for the purpose of determining whether a person may bring an action under to subsection (a) of this section with respect to a prior transfer to the spendthrift trust or domestic asset protection trust; and

(2) Any distribution to a beneficiary from the spendthrift trust or domestic asset protection trust shall be deemed to have been made from the most recent transfer made to the spendthrift trust or domestic asset protection trust.

(h) Notwithstanding any other provision of law, no action of any kind, including without limitation an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity against the trustee of a spendthrift trust or domestic asset protection trust if, as of the date the action is brought, an action by a creditor with respect to a transfer to the spendthrift trust or domestic asset protection trust would be barred pursuant to this section.

(i) For purposes of this section, if a trustee exercises his or her discretion or authority to distribute trust income or principal to or for a beneficiary of the spendthrift trust or domestic asset protection trust, by appointing the property of the original spendthrift trust or domestic asset protection trust in favor of a second spendthrift trust or domestic asset protection trust for the benefit of one (1) or more of the beneficiaries under the Trustee Division of Trusts Act, § 28-69-701 et seq., the time of the transfer for purposes of this section shall be deemed to have occurred on the date the settlor of the original spendthrift trust or domestic asset protection trust transferred assets into the original spendthrift trust or domestic asset protection trust, regardless of whether the property of the original spendthrift trust or domestic asset protection trust may have been transferred to a second spendthrift trust or domestic asset protection trust.

28-72-713. Trust administered under laws of another state or jurisdiction.

(a) A trust administered under the laws of another state or another jurisdiction is a spendthrift trust or domestic asset protection trust under this subchapter if the:

(1) Trustee of the trust complies with the requirements set

forth in the trust instrument and the requirements of the laws of the state or jurisdiction from which the trust is being transferred;

(2) Trustee or other person having the power to transfer the domicile of the trust declares the intent to transfer the domicile of the trust in writing;

(3) Document declaring the intent to transfer the domicile of the trust is delivered to the trustee, if it is executed by a person other than the trustee; and

(4) Requirements of this subchapter are satisfied simultaneously with or immediately after the change of the domicile.

(b) For purposes of § 28-72-712, if the domicile of an existing trust is transferred from another state or jurisdiction to this state and the laws of the other state or jurisdiction are similar to the provisions of this subchapter, the transfer of the trust is deemed to have occurred:

(1) On the date on which the settlor of the trust transferred assets into the trust, if the applicable law of the trust has at all times been substantially similar to the provisions of this subchapter; or

(2) On the earliest date on which the applicable laws of the trust were substantially similar to the provisions of this subchapter.

28-72-714. Applicability to trust or estate.

This subchapter applies to a trust or estate existing or created on or after the effective date of this act, except as otherwise expressly provided in the terms of the trust or this subchapter.

SECTION 2. Arkansas Code § 28-73-505(a), concerning a creditor's claim against a settlor of a spendthrift or discretionary trust, is amended to read as follows:

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors. If a trust has more than one (1) settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(2) ~~With~~ Except for a trust created under § 28-72-701 et seq.,

with respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one (1) settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.