

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 1431

By: Representatives Lundstrum, Maddox

By: Senator C. Penzo

## For An Act To Be Entitled

AN ACT TO AMEND DEFINITIONS UNDER THE ARKANSAS TRUST CODE; TO AMEND THE ARKANSAS TRUST CODE TO ALLOW FOR THE DECANTING OF TRUSTS; AND FOR OTHER PURPOSES.

## Subtitle

TO AMEND THE ARKANSAS TRUST CODE TO ALLOW FOR THE DECANTING OF TRUSTS.

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

SECTION 1. Arkansas Code § 28-73-103(2), concerning the definition of "ascertainable standard" under the Arkansas Trust Code, is amended as follows:

(2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of ~~Section 2041(b)(1)(A) or Section 2514(c)(1) of the Internal Revenue Code of 1986, as in effect~~ 26 U.S.C. § 2041(b)(1)(A) or 26 U.S.C. § 2514(c)(1) as they existed on September 1, 2005 January 1, 2023.

SECTION 2. Arkansas Code Title 28, Chapter 73, Subchapter 8 is amended to add an additional section to read as follows:

28-73-818. Discretionary powers – Appointment of property of one trust to another trust – Circumstances authorized – Definitions.

(a) As used in this section:

(1) "Pooled trust" means a trust described in 42 U.S.C. § 1396p(d)(4)(C), as it existed on January 1, 2023, that meets the requirements



for that trust under any law or regulation of the State of Arkansas relating to the treatment of trusts for purposes of eligibility for Medicaid or other needs-based public assistance;

(2) "Related or subordinate party" means any nonadverse party who is:

(A) The grantor's spouse if living with the grantor; or

(B) Any one of the following:

(i) The grantor's father, mother, issue, brother, or sister;

(ii) An employee of the grantor;

(iii) A corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; or

(iv) A subordinate employee of a corporation in which the grantor is an executive;

(3) "Second trust" means an irrevocable trust that receives trust income or principal appointed by the trustee of the original trust, and may be established by any person, including without limitation a new trust created by the trustee of the original trust who is acting in that capacity;

(4) "Special needs trust" means a trust under 42 U.S.C. § 1396p(d)(4)(A), as it existed on January 1, 2023, that meets the requirements for that trust under any law or regulation of the State of Arkansas relating to the treatment of trusts for purposes of eligibility for Medicaid or other needs-based public assistance;

(5) "Third-party trust" means a trust that is:

(A) Established by a third party with the assets of the third party to provide for the supplemental needs of a person who is eligible for needs-based public assistance at or after the time of the creation of the trust; and

(B) Exempt from the provisions of any law or regulation of the State of Arkansas relating to the treatment of trusts for purposes of eligibility for Medicaid; and

(6) "Unitrust" means a trust for which net income is a unitrust amount and includes an express unitrust.

(b) Except as otherwise provided in this section, unless the terms of a testamentary instrument or irrevocable trust provide otherwise, a trustee

with discretion or authority to distribute trust income or principal to or for a beneficiary of the trust, whether acting in the trustee's own discretion or at the direction or with the consent of another party under the terms of the trust instrument, may exercise that discretion or authority by appointing the property subject to that discretion or authority in favor of a second trust as provided in this section.

(c)(1) The second trust to which a trustee appoints property of the original trust may only have as beneficiaries one (1) or more of the beneficiaries of the original trust who are:

(A) To or for whom a distribution of income or principal may be made from the original trust;

(B) To or for whom a distribution of income or principal may be made in the future from the original trust at a time or upon the happening of an event specified under the original trust; or

(C) Both subdivisions (c)(1)(A) and (B).

(2) If the trustee of the original trust establishes the second trust, then for purposes of creating the new second trust, the requirement of the Arkansas Custodial Trust Act, § 28-72-401 et seq., that the instrument be signed by the settlor is satisfied by the signature of the trustee of the original trust.

(3) The second trust may be a trust created under the original trust instrument, as modified after an appointment of property made under this section, or a different trust instrument.

(4) If the second trust is created under the original trust instrument, as modified after an appointment of property made under this section, and is therefore the modified original trust, a trustee may exercise the power to appoint the trust property from the original trust to the second trust without an actual distribution of the property subject to the appointment.

(5) For purposes of this subsection, a permissible appointee of a power of appointment exercised by a beneficiary of the second trust is not considered a beneficiary of the second trust.

(d) A trustee may not appoint property of the original trust to a second trust if:

(1) Appointing the property will reduce any income interest of any income beneficiary of the original trust if the original trust is:

(A) A trust for which a marital deduction has been taken for federal or state income, gift, or estate tax purposes;

(B) A trust for which a charitable deduction has been taken for federal or state income, gift, or estate tax purposes; or

(C) A grantor-retained annuity trust interest or unitrust interest under 26 C.F.R. § 25.2702-3(b) and (c);

(2) The property to be appointed is subject to a power of withdrawal that is held by a beneficiary of the original trust and may be executed at the time of the proposed appointment, unless after the exercise of that appointment, the beneficiary of the original trust's power of withdrawal is unchanged with respect to the trust property; and

(3) A contribution made to the original trust is qualified for a gift tax exclusion under 26 U.S.C. § 2503(b), as it existed on January 1, 2023, by reason of the application of 26 U.S.C. § 2503(c), as it existed on January 1, 2023, unless the second trust provides that the beneficiary's remainder interest shall vest not later than the date upon which that interest would have vested under the terms of the original trust.

(e) A trustee who is a beneficiary of the original trust may not exercise the authority to appoint property of the original trust to a second trust if:

(1) Under the terms of the original trust or under law governing the administration of the original trust:

(A) The trustee does not have discretion to make distributions to himself or herself;

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

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

(2) Under the terms of the original trust or under 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.

(f) Notwithstanding the provisions of subsection (b) of this section, a trustee who may be removed by a beneficiary of the original trust and replaced with a trustee that is a related or subordinate party to a beneficiary may not exercise the authority to appoint property of the original trust to a second trust to the extent that the exercise of the authority by such trustee would have the effect of increasing the distributions that may be made from the second trust to one (1) or more beneficiaries that held the power to remove the trustee of the original trust and replace that trustee with a related or subordinate person, unless the distributions that may be made from the second trust to such beneficiary or group of beneficiaries described in subdivision (e)(1) of this section are limited by an ascertainable standard.

(g) The provisions of subsections (e) and (f) of this section do not prohibit a trustee who is not a beneficiary of the original trust or who may not be removed by a beneficiary and replaced with a trustee that is a related or subordinate party from exercising the authority to appoint property of the original trust to a second trust under subsection (b) of this section.

(h)(1) Before appointing property under subsection (b) of this section, a trustee may give notice of a proposed action or may petition a court for approval.

(2) Notice of a proposed action or a petition for a court's approval must include the trustee's opinion of how the appointment of property will affect the trustee's compensation and the administration of other trust expenses.

(i) The trust instrument of the second trust may:

(1) Grant a general or limited power of appointment to one (1) or more of the beneficiaries of the second trust who are beneficiaries of the original trust; and

(2) Provide that, at a time or occurrence of an event specified in the trust instrument, the remaining trust assets in the second trust must be held for the beneficiaries of the original trust upon terms and conditions that are substantially identical to the terms and conditions of the original trust.

(j) The power to appoint the property of the original trust under

subsection (b) of this section must be exercised by a document that is signed by the trustee and filed with the records of the trust.

(k) The exercise of the power to invade principal of the original trust under subsection (b) of this section is considered the exercise of a power of appointment, other than power to appoint the property to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate and the provisions of § 18-3-101 et seq. apply to that power of appointment.

(1) The provisions of this section do not:

(1) Preclude the right of any trustee who has the power to appoint property that arises under any other law or under the terms of the original trust; or

(2) Impose upon a trustee a duty to exercise the power to appoint property under subsection (b) of this section.

(m)(1) The power to appoint property to another trust under subsection (b) of this section is not a power to amend the trust.

(2) A trustee is not prohibited from appointing property to another trust under subsection (b) of this section if the original trust is irrevocable or provides that it may not be amended.

(n) A trustee's power to appoint property to another trust under subsection (b) of this section is not limited by the existence of a spendthrift provision in the original trust.

(o) A trustee exercising any power granted under this section may designate himself or herself or any other person permitted to act as a trustee as the trustee of the second trust.

(p) The trustee of a second trust, resulting from the exercise of the power to appoint property to another trust under subsection (b) of this section, may also exercise the powers granted under this section with respect to the second trust.

(q)(1) Except as otherwise provided under the terms of the trust, the power of a trustee to appoint property to another trust is in addition to any other powers conferred by the terms of the trust or under the laws of the State of Arkansas.

(2) This section does not expand, restrict, eliminate, or otherwise alter any power that a person holds in a nonfiduciary capacity with respect to a trust.

(r) A trustee's power to appoint property to another trust is an administrative act under this section and, therefore, regardless of whether a trust applies the laws of the State of Arkansas for construction or validity issues, this section applies to a trust that is governed by, situated in, or administered under the laws of the State of Arkansas, regardless of whether the trust is initially governed by, situated in, or administered under the laws of the State of Arkansas under the terms of the trust instrument or whether the governing law, situs, or administration of the trust is moved to the State of Arkansas from another state or foreign jurisdiction.

(s) The power to appoint property to a second trust under this section may be exercised to appoint property to a second trust that is a:

- (1) Special needs trust;
- (2) Pooled trust; or
- (3) Third-party trust.