

1 State of Arkansas
2 94th General Assembly
3 Regular Session, 2023
4

A Bill

HOUSE BILL 1431

5 By: Representatives Lundstrum, Maddox
6 By: Senator C. Penzo
7

For An Act To Be Entitled

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

14 TO AMEND THE ARKANSAS TRUST CODE TO ALLOW
15 FOR THE DECANTING OF TRUSTS.
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19 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
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21 SECTION 1. Arkansas Code § 28-73-103(2), concerning the definition of
22 "ascertainable standard" under the Arkansas Trust Code, is amended as
23 follows:

24 (2) "Ascertainable standard" means a standard relating to an
25 individual's health, education, support, or maintenance within the meaning of
26 ~~Section 2041(b)(1)(A) or Section 2514(c)(1) of the Internal Revenue Code of~~
27 ~~1986, as in effect~~ 26 U.S.C. § 2041(b)(1)(A) or 26 U.S.C. § 2514(c)(1) as
28 they existed on September 1, 2005 January 1, 2023.
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30 SECTION 2. Arkansas Code Title 28, Chapter 73, Subchapter 8 is amended
31 to add an additional section to read as follows:

32 28-73-818. Discretionary powers – Appointment of property of one trust
33 to another trust – Circumstances authorized – Definitions.

34 (a) As used in this section:

35 (1) "Pooled trust" means a trust described in 42 U.S.C. §
36 1396p(d)(4)(C), as it existed on January 1, 2023, that meets the requirements



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

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

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

7 (B) Any one of the following:

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

10 (ii) An employee of the grantor;

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

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

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

20 (4) "Special needs trust" means a trust under 42 U.S.C. §
 21 1396p(d)(4)(A), as it existed on January 1, 2023, that meets the requirements
 22 for that trust under any law or regulation of the State of Arkansas relating
 23 to the treatment of trusts for purposes of eligibility for Medicaid or other
 24 needs-based public assistance;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 (3) A contribution made to the original trust is qualified for a
13 gift tax exclusion under 26 U.S.C. § 2503(b), as it existed on January 1,
14 2023, by reason of the application of 26 U.S.C. § 2503(c), as it existed on
15 January 1, 2023, unless the second trust provides that the beneficiary's
16 remainder interest shall vest not later than the date upon which that
17 interest would have vested under the terms of the original trust.

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

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

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

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

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

34 (2) Under the terms of the original trust or under law governing
35 the administration of the original trust, the trustee of the original trust
36 does not have discretion to make distributions that will discharge the

1 trustee's legal support obligations but, under the second trust, the
2 trustee's discretion is not limited.

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

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

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

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

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

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

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

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

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

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

9 (l) The provisions of this section do not:

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

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

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

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

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

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

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

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

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

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

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

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

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17 **APPROVED: 3/16/23**
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