

FIRST REGULAR SESSION

# HOUSE BILL NO. 399

96TH GENERAL ASSEMBLY

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INTRODUCED BY REPRESENTATIVE DIEHL.

0557L.011

D. ADAM CRUMBLISS, Chief Clerk

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## AN ACT

To repeal section 456.5-505, RSMo, and to enact in lieu thereof three new sections relating to fiduciaries.

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*Be it enacted by the General Assembly of the state of Missouri, as follows:*

Section A. Section 456.5-505, RSMo, is repealed and three new sections enacted in lieu thereof, to be known as sections 456.4-419, 456.5-505, and 456.5-508, to read as follows:

**456.4-419. 1. Unless the terms of the trust instrument expressly provide otherwise, a trustee 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 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 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.**

**2. 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**

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

17 principal may have been made in the future from the first trust at a time or upon the  
18 happening of an event specified under the first trust;

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

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

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

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

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

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

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

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

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

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

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

49 (d) A trust which has been qualified as a Subchapter S trust under Section 1361(d)  
50 of the Internal Revenue Code or an electing small business trust under Section 1361(e) of  
51 the Internal Revenue Code;

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

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

60           **3. At least sixty days prior to making a discretionary distribution under subsection**  
61 **1 of this section, the trustee of the first trust shall notify the permissible distributees of the**  
62 **second trust, or the qualified beneficiaries of the second trust if there are no permissible**  
63 **distributees of the second trust, of the distribution. A beneficiary may waive the right to**  
64 **the notice required by this subsection and, with respect to future distributions, may**  
65 **withdraw a waiver previously given.**

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

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

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

456.5-505. 1. Whether or not the terms of a trust contain a spendthrift provision, during  
2 the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's  
3 creditors.

4           2. With respect to an irrevocable trust without a spendthrift provision, a creditor or  
5 assignee of the settlor may reach the maximum amount that can be distributed to or for the  
6 settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a  
7 particular settlor may reach may not exceed the settlor's interest in the portion of the trust  
8 attributable to that settlor's contribution.

9           3. With respect to an irrevocable trust with a spendthrift provision, a spendthrift  
10 provision will prevent the settlor's creditors from satisfying claims from the trust assets except:

11           (1) Where the conveyance of assets to the trust was fraudulent as to creditors pursuant  
12 to the provisions of chapter 428; or

13 (2) To the extent of the settlor's beneficial interest in the trust assets, if at the time the  
14 trust became irrevocable:

15 (a) The settlor was the sole beneficiary of either the income or principal of the trust or  
16 retained the power to amend the trust; or

17 (b) The settlor was one of a class of beneficiaries and retained a right to receive a  
18 specific portion of the income or principal of the trust that was determinable solely from the  
19 provisions of the trust instrument.

20 **4. In the event that a trust meets the requirements set forth in subsection 3 of this**  
21 **section, a settlor's creditors may not reach the settlor's beneficial interest in that trust**  
22 **regardless of any testamentary power of appointment retained by the settlor that is**  
23 **exercisable by the settlor in favor of any appointees other than the settlor, the settlor's**  
24 **estate, the settlor's creditors, or the creditors of the settlor's estate.**

25 **5.** Any trustee who has a duty or power to pay the debts of a deceased settlor may publish  
26 a notice in a newspaper published in the county designated in subdivision (3) of this subsection  
27 once a week for four consecutive weeks in substantially the following form:

28 To all persons interested in the estate of ....., decedent. The  
29 undersigned ..... is acting as Trustee under a trust the terms of which  
30 provide that the debts of the decedent may be paid by the Trustee(s) upon receipt of proper proof  
31 thereof. The address of the Trustee is ..... All creditors of the  
32 decedent are noticed to present their claims to the undersigned within six (6) months from the  
33 date of the first publication of this notice or be forever barred.

34 .....

35 Trustee

36 (1) If such publication is duly made by the trustee, any debts not presented to the trustee  
37 within six months from the date of the first publication of the preceding notice shall be forever  
38 barred as against the trustee and the trust property.

39 (2) A trustee shall not be liable to account to the decedent's personal representative under  
40 the provisions of section 461.300 by reason of any debt barred under the provisions of this  
41 subsection.

42 (3) Such publication shall be in a newspaper published in:

43 (a) The county in which the domicile of the settlor at the time of his or her death is  
44 situated;

45 (b) If the settlor had no domicile in this state at the time of his or her death, any county  
46 wherein trust assets are located; except that, when the major part of the trust assets in this state  
47 consist of real estate, the notice shall be published in the county in which the real estate or the  
48 major part thereof is located; or

49 (c) If the settlor had no domicile in this state at the time of his or her death and no trust  
50 assets are located therein, the county wherein the principal place of administration of the trust  
51 is located.

52 (4) For purposes of this subsection, the term "domicile" means the place in which the  
53 settlor voluntarily fixed his or her abode, not for a mere special or temporary purpose, but with  
54 a present intention of remaining there permanently or for an indefinite term.

55 [5.] 6. For purposes of this section:

56 (1) During the period the power may be exercised, the holder of a power of withdrawal  
57 is treated in the same manner as the settlor of a revocable trust to the extent of the property  
58 subject to the power; and

59 (2) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of  
60 the trust only to the extent the value of the property affected by the lapse, release, or waiver  
61 exceeds the greater of the amount specified in Sections 2041(b)(2), 2514(e) or 2503(b) of the  
62 Internal Revenue Code.

63 [6.] 7. This section shall not apply to a spendthrift trust described, defined, or established  
64 in section 456.014.

**456.5-508. 1. A creditor or other claimant of a beneficiary or other person holding  
2 a special power of appointment or a testamentary general power of appointment may not  
3 attach trust property or beneficial interests subject to the power, obtain an order from a  
4 court forcing a judicial sale of the trust property, compel the exercise of the power, or  
5 reach the trust property or beneficial interests by any other means.**

6 **2. This section shall not limit the ability of a creditor or other claimant to reach a  
7 beneficial interest as otherwise provided in sections 456.5-501 to 456.5-507.**

8 **3. In this section "special power of appointment" means a power of appointment  
9 exercisable in favor of one or more appointees other than the holder, the holder's estate,  
10 the holder's creditors, or the creditors of the holder's estate, and a "testamentary general  
11 power of appointment" means a power of appointment exercisable at the death of the  
12 holder, without the consent of the creator of the power or of a person holding an adverse  
13 interest in favor of the holder, the holder's estate, the holder's creditors, or the creditors  
14 of the holder's estate.**