

SB 576 -- MISSOURI UNIFORM POWERS OF APPOINTMENT

SPONSOR: Keaveny (Cornejo)

COMMITTEE ACTION: Voted "Do Pass" by the Standing Committee on Civil and Criminal Proceedings by a vote of 8 to 0. Voted "Do Pass" by the Select Committee on Judiciary by a vote of 6 to 0.

This bill creates the Missouri Uniform Powers of Appointment Act, and unless provided in the terms of an instrument creating a power of appointment the bill shall be the law governing powers of appointment.

A power of appointment is a power enabling a person, known as the powerholder, to designate a recipient of an ownership interest in property subject to the power of appointment, known as appointive property. A power of appointment is created when a document or instrument, such as a trust or a will, manifests the donor's intent to create in a powerholder a power of appointment over the appointive property exercisable in favor of a permissible appointee. A donor is defined in the bill as a person who creates the power of appointment, and a permissible appointee is a person in whose favor a powerholder may exercise a power of appointment. A power of appointment cannot be created in an individual who is deceased, but may be created in an unborn or an unascertained powerholder.

A powerholder cannot transfer a power of appointment, and the power to direct the assets lapses upon his or her death. However, a general power of appointment may provide that the power shall survive and pass to the powerholder's personal representative, if the powerholder dies after receiving the general power, and the powerholder did exercise, release, or disclaim the power within the applicable time limits. If this happens then the personal representative may either exercise the power in favor of the powerholder's estate if the estate is a permissible appointee, or disclaim the power. The bill sets forth circumstances under which a personal representative may or may not be individually held liable for actions or inactions regarding the power of appointment.

The general rule of construction is that a power of appointment is presently exercisable, exclusionary, and general unless the terms of the instrument specify otherwise.

A donor may only revoke or amend a power of appointment if the instrument creating the power is revocable or the donor reserves a power of revocation or amendment in the instrument.

A residuary clause in a powerholder's will or a comparable clause

in the powerholder's revocable trust does not manifest an intent to exercise a power of appointment, unless the power is a general power exercisable in favor of the powerholder's estate, there is no gift-in-default clause, and the powerholder did not release the power.

Unless the terms of the instrument indicate otherwise, a blanket-exercise clause extends to a power of appointment acquired after the powerholder executed the instrument containing the blanket-exercise clause. If the powerholder is also the donor of the power then the blanket-exercise clause only extends to the power if there is not a gift-in-default clause or the gift-in-default clause is ineffective.

A powerholder of a general power of appointment that permits appointment to the powerholder or the powerholder's estate may make any appointment. However, a powerholder of a general power of appointment that permits appointment only to the creditors of the powerholder or the powerholder's estate may appoint only to those creditors. The powerholder of a nongeneral power may make an appointment in any form in favor of a permissible appointee, create a general power in a permissible appointee, or create a nongeneral power in any person to appoint to permissible appointees of the original nongeneral power.

The bill prohibits an appointment to a deceased appointee, but a powerholder of a nongeneral power may exercise the power in favor of descendant of a deceased permissible appointee.

If a powerholder of a general power of appointment makes an ineffective appointment then either the gift-in-default clause controls the disposition of the appointed property or if there is no such clause then the property passes to the powerholder if he or she is a permissible appointee. If the powerholder is not a permissible appointee then the property passes to the powerholder's estate if the estate is a permissible appointee. If neither option is available then the property passes under a reversionary interest to the donor.

Likewise, if the powerholder releases or fails to exercise a general power of appointment then the gift-in-default clause controls the disposition of the unappointed property or if one does not exist then such property shall pass to the powerholder, the powerholder's estate, or under a reversionary interest to the donor.

When a powerholder makes an appointment to a taker in default of appointment who would have taken the property under a gift-in-default clause if the appointment had not occurred, then the power

of appointment is deemed not to have been exercised, and the taker in default takes under the clause.

A powerholder may revoke or amend an exercise of a power of appointment at any time before the exercise becomes effective to transfer property to the appointee. A powerholder may also disclaim all or part of a power of appointment or release a power of appointment in whole or in part. A permissible appointee, appointee, or taker in default of appointment may disclaim all or part of an interest in appointive property.

A powerholder of a presently exercisable power may contract to make or not to make an appointment if the contract does not confer a benefit on an impermissible appointee. If the power of appointment is not presently exercisable then the powerholder may contract to exercise or not to exercise the power only if the powerholder is also the donor and has reserved the power in a revocable trust. The remedy for a powerholder's breach of contract to appoint or not to appoint property is damages payable from the appointive property or specific performance of the contract.

If a donor fraudulently transfers appointive property, retaining a power of appointment, then the appointive property may be subject to a claim of the donor/powerholder's creditor under the Uniform Fraudulent Transfer Act. Such appointive property is not subject to a claim of a creditor of the powerholder to the extent the powerholder irrevocably appointed the property in favor of a person other than the powerholder, and if the power is not presently exercisable. Appointive property subject to a general power of appointment created by the powerholder is subject to a claim of a creditor to the same extent as if the powerholder owned the appointive property and the power is presently exercisable.

Appointive property subject to a presently exercisable general power of appointment not created by the powerholder is subject to a claim of a creditor of the powerholder to the extent the powerholder's property is insufficient. However, if the appointive property is subject to testamentary or not presently exercisable general power of appointment then the property is not subject to a claim of a creditor of the powerholder.

In situations where the appointive property is subject to a nongeneral power of appointment then the property is exempt from a claim of a creditor of the powerholder, unless there is a fraudulent transfer.

The bill provides that the provisions regarding rights of creditors does not limit the ability of a creditor to reach a beneficial interest as provided in the Missouri Uniform Trust Code.

The bill applies to a power of appointment created before, on, or after the bill's effective date. The bill shall apply to judicial proceedings concerning a power of appointment commenced before the effective date of the bill unless the court finds the application of a particular provision would interfere substantially with the conduct of the proceeding or prejudice a right of a party.

The bill also modifies existing law regarding power of attorney by specifying that the authority of an attorney in fact authorized in the power of attorney to disclaim a gift or devise of property to or for the benefit of the principal includes the ability of the attorney in fact to disclaim or release any power of appointment granted to the principal and to disclaim all or part of the principal's interest in appointive property. A power of attorney can also grant an attorney in fact the authority to exercise, revoke or amend the release of, or contract to exercise any power of appointment granted to the principal.

The bill repeals provisions which provide that a creditor may not attach trust property or beneficial interests subject to the power of appointment, obtain a court order forcing judicial sale, compel the exercise of the power, or reach the trust property by any other means.

PROPOSERS: Supporters say that this is the Missouri Uniform Powers of Appointment Act. This contains clean-up language and will codify powers of appointment. The Missouri Bar Association is in support of these changes.

Testifying for the bill were Senator Keaveny and The Missouri Bar.

OPPOSERS: There was no opposition voiced to the committee.