

SECOND REGULAR SESSION

[CORRECTED]

# HOUSE BILL NO. 1845

99TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE CORNEJO.

5584H.011

D. ADAM CRUMBLISS, Chief Clerk

## AN ACT

To repeal sections 456.985, 456.1035, 456.1080, 456.1-103, and 456.8-808, RSMo, and to enact in lieu thereof five new sections relating to estate planning.

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

Section A. Sections 456.985, 456.1035, 456.1080, 456.1-103, and 456.8-808, RSMo, are repealed and five new sections enacted in lieu thereof, to be known as sections 456.985, 456.1035, 456.1080, 456.1-103, and 456.8-808, to read as follows:

456.985. 1. Except as otherwise provided in the terms of an instrument creating or exercising a power of appointment, sections 456.970 to 456.1135 govern powers of appointment.

2. The terms of an instrument creating or exercising a power of appointment prevail over any provisions of sections 456.970 to 456.1135 except:

(1) **The requisites for the creation of a power of appointment under subsections 1 to 4 of section 456.990;**

(2) The transferability of a power of appointment by a powerholder under subsection 1 of section 456.995;

~~(2)~~ (3) The limitations on the authority of a donor to extend a general power of appointment beyond the death of a powerholder under subsection 3 of section 456.995;

~~(3)~~ (4) The power is exclusionary if the permissible appointees of a power of appointment are not defined and limited under subsection 3 of section 456.1005;

~~(4)~~ (5) The requisites for the exercise of a power of appointment under section 456.1015;

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.

15           ~~[(5)]~~ (6) The effect of an impermissible appointment under section 456.1045;  
16           ~~[(6)]~~ (7) A general power of appointment which is presently exercisable may be reached  
17 by the creditors of the powerholder or the powerholder's estate under section 456.1100.

          456.1035. 1. A powerholder of a general power of appointment that permits  
2 appointment to the powerholder or the powerholder's estate may make any appointment,  
3 including an appointment in trust or creating a new power of appointment, that the powerholder  
4 could make in disposing of the powerholder's own property.

5           2. A powerholder of a general power of appointment that permits appointment only to  
6 the creditors of the powerholder or of the powerholder's estate may appoint only to those  
7 creditors.

8           3. The powerholder of a nongeneral power may:

- 9           (1) Make an appointment in any form, including an appointment in trust, in favor of a  
10 permissible appointee;  
11           (2) Create a general power **or nongeneral power** in a permissible appointee; or  
12           (3) Create a nongeneral power in any person to appoint to one or more of the permissible  
13 appointees of the original nongeneral power.

          456.1080. As provided by sections 469.010 to ~~[469.210]~~ **469.120**, a powerholder may  
2 disclaim all or part of a power of appointment, and a permissible appointee, appointee, or taker  
3 in default of appointment may disclaim all or part of an interest in appointive property.

          456.1-103. In sections 456.1-101 to 456.11-1106:

- 2           (1) "Action~~[-]~~", with respect to an act of a trustee, includes a failure to act;  
3           (2) "Ascertainable standard", means a standard relating to an individual's health,  
4 education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or Section  
5 2541(c)(1) of the Internal Revenue Code;  
6           (3) "Beneficiary", means a person that:  
7           (a) has a present or future beneficial interest in a trust, vested or contingent; or  
8           (b) in a capacity other than that of trustee, holds a power of appointment over trust  
9 property;  
10           (4) "Charitable trust", means a trust, or portion of a trust, created for a charitable purpose  
11 described in subsection 1 of section 456.4-405;  
12           (5) "Conservator", means a person described in subdivision (3) of section 475.010. This  
13 term does not include a conservator ad litem;  
14           (6) "Conservator ad litem", means a person appointed by the court pursuant to the  
15 provisions of section 475.097;  
16           (7) "**Directed trust**", means any trust, including a split interest trust, where the  
17 **trust instrument authorizes a trust protector to instruct or direct the trustee or that**

18 **charges a trust protector with any responsibilities regarding the trust or that grants the**  
19 **trust protector one or more powers over the trust;**

20 (8) "Environmental law", means a federal, state, or local law, rule, regulation, or  
21 ordinance relating to protection of the environment;

22 ~~[(8)]~~ (9) "Financial institution", means a non-foreign bank, savings and loan or trust  
23 company chartered, regulated and supervised by the Missouri division of finance, the office of  
24 the comptroller of the currency, the office of thrift supervision, the National Credit Union  
25 Administration, or the Missouri division of credit union supervision. The term "non-foreign  
26 bank" shall mean a bank that is not a foreign bank within the meaning of subdivision (1) of  
27 section 361.005;

28 ~~[(9)]~~ (10) "Guardian", means a person described in subdivision (7) of section 475.010.  
29 The term does not include a guardian ad litem;

30 ~~[(10)]~~ (11) "Interested persons", include beneficiaries and any others having a property  
31 right in or claim against a trust estate which may be affected by a judicial proceeding. It also  
32 includes fiduciaries and other persons representing interested persons. The meaning as it relates  
33 to particular persons may vary from time to time and must be determined according to the  
34 particular purposes of, and matter involved in, any proceeding;

35 ~~[(11)]~~ (12) "Interests of the beneficiaries", means the beneficial interests provided in the  
36 terms of the trust;

37 ~~[(12)]~~ (13) "Internal Revenue Code", means the United States Internal Revenue Code  
38 of 1986, as in effect on January 1, 2005, or as later amended;

39 ~~[(13)]~~ (14) "Jurisdiction~~[-]~~", with respect to a geographic area, includes a state or  
40 country;

41 ~~[(14)]~~ (15) "Person", means an individual, corporation, business trust, estate, trust,  
42 partnership, limited liability company, association, joint venture, government; governmental  
43 subdivision, agency, or instrumentality; public corporation, or any other legal or commercial  
44 entity;

45 ~~[(15)]~~ (16) "Permissible distributee", means a beneficiary who is currently eligible to  
46 receive distributions of trust income or principal, whether mandatory or discretionary;

47 ~~[(16)]~~ (17) "Power of withdrawal", means a presently exercisable power of a beneficiary  
48 to withdraw assets from the trust without the consent of the trustee or any other person;

49 ~~[(17)]~~ (18) "Principal place of administration" of a trust is the trustee's usual place of  
50 business where the records pertaining to the trust are kept, or the trustee's residence if the trustee  
51 has no such place of business, unless otherwise designated by the terms of the trust as provided  
52 in section 456.1-108. In the case of cotrustees, the principal place of administration is, in the  
53 following order of priority:

54 (a) The usual place of business of the corporate trustee if there is but one corporate  
55 cotrustee;

56 (b) The usual place of business or residence of the trustee who is a professional fiduciary  
57 if there is but one such trustee and no corporate cotrustee; or

58 (c) The usual place of business or residence of any of the cotrustees;

59 ~~[(18)]~~ **(19)** "Professional fiduciary", means an individual who represents himself or  
60 herself to the public as having specialized training, experience or skills in the administration of  
61 trusts;

62 ~~[(19)]~~ **(20)** "Property", means anything that may be the subject of ownership, whether  
63 real or personal, legal or equitable, or any interest therein;

64 ~~[(20)]~~ **(21)** "Qualified beneficiary", means a beneficiary who, on the date the  
65 beneficiary's qualification is determined:

66 (a) is a permissible distributee;

67 (b) would be a permissible distributee if the interests of the permissible distributees  
68 described in paragraph (a) of this subdivision terminated on that date; or

69 (c) would be a permissible distributee if the trust terminated on that date;

70 ~~[(21)]~~ **(22)** "Record", means information that is inscribed on a tangible medium or that  
71 is stored in an electronic or other medium and is retrievable in perceivable form;

72 ~~[(22)]~~ **(23)** "Revocable<sup>[-]</sup>", as applied to a trust, means that the settlor has the legal power  
73 to revoke the trust without the consent of the trustee or a person holding an adverse interest,  
74 regardless of whether the settlor has the mental capacity to do so in fact;

75 ~~[(23)]~~ **(24)** "Settlor", means a person, including a testator, who creates, or contributes  
76 property to, a trust. If more than one person creates or contributes property to a trust, each  
77 person is a settlor of the portion of the trust property attributable to that person's contribution  
78 except to the extent another person has the power to revoke or withdraw that portion pursuant  
79 to the terms of the trust;

80 ~~[(24)]~~ **(25)** "Sign", means<sup>[-]</sup> with present intent to authenticate or adopt a record:

81 (a) to execute or adopt a tangible symbol; or

82 (b) to attach to or logically associate with the record an electronic sound, symbol, or  
83 process;

84 ~~[(25)]~~ **(26)** "Spendthrift provision", means a term of a trust which restrains either the  
85 voluntary or involuntary transfer or both the voluntary and involuntary transfer of a beneficiary's  
86 interest;

87 ~~[(26)]~~ **(27)** "State", means a state of the United States, the District of Columbia, Puerto  
88 Rico, the United States Virgin Islands, or any territory or insular possession subject to the

89 jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal  
90 law or formally acknowledged by a state;

91 ~~[(27)]~~ **(28)** "Terms of a trust", means the manifestation of the settlor's intent regarding  
92 a trust's provisions as expressed in the trust instrument or as may be established by other  
93 evidence that would be admissible in a judicial proceeding;

94 ~~[(28)]~~ **(29)** "Trust instrument", means an instrument executed by the settlor that contains  
95 terms of the trust, including any amendments thereto;

96 ~~[(29)]~~ **(30)** "Trust protector", means any person, group of persons, or entity not  
97 serving as a trustee and not the settlor or a beneficiary designated in a trust instrument to  
98 instruct or direct the trustee or charged in the trust instrument with any responsibilities  
99 regarding the trust or expressly granted in the trust instrument one or more powers over  
100 the trust. The term "trust protector" includes, but is not limited to, persons or entities  
101 identified in the trust instrument as trust advisors, trust directors, distribution advisors,  
102 or investment advisors;

103 **(31)** "Trustee", includes an original, additional, and successor trustee, and a cotrustee.

456.8-808. 1. While a trust is revocable, the trustee may follow a direction of the settlor  
2 that is contrary to the terms of the trust.

3 2. A trust instrument may provide for ~~[the appointment of a trust protector. For purposes~~  
4 ~~of this section, a "trust protector", whether referred to in the trust instrument by that name or by~~  
5 ~~some other name, is a person, other than the settlor, a trustee, or a beneficiary, who is expressly~~  
6 ~~granted in the trust instrument one or more powers over the trust] one or more persons, not~~  
7 ~~then serving as a trustee and not the settlor or a beneficiary, to be given any powers over~~  
8 ~~the trust as expressly granted in the trust instrument. Any such person may be identified~~  
9 ~~and appointed as a trust protector or similar term. Whenever a trust instrument names,~~  
10 ~~appoints, authorizes, or otherwise designates a trust protector, the trust shall be deemed~~  
11 ~~a directed trust.~~

12 3. A trust protector appointed in the trust instrument shall have only the powers granted  
13 to the trust protector by the express terms of the trust instrument, and a trust protector is only  
14 authorized to act within the scope of the authority expressly granted in the trust instrument.  
15 Without limiting the authority of the settlor to grant powers to a trust protector, the express  
16 powers that may be granted include, but are not limited to, the following:

17 (1) Remove and appoint a trustee **or a trust protector** or name a successor trustee or  
18 trust protector;

19 (2) Modify or amend the trust instrument to:

20 (a) Achieve favorable tax status or respond to changes in the Internal Revenue Code or  
21 state law, or the rulings and regulations under such code or law;

- 22 (b) Reflect legal changes that affect trust administration;  
23 (c) Correct errors or ambiguities that might otherwise require court construction; or  
24 (d) Correct a drafting error that defeats a grantor's intent;  
25 (3) Increase, decrease, modify, or restrict the interests of the beneficiary or beneficiaries  
26 of the trust;  
27 (4) Terminate the trust in favor of the beneficiary or beneficiaries of the trust;  
28 (5) Change the applicable law governing the trust and the trust situs; or  
29 (6) Such other powers as are expressly granted to the trust protector in the trust  
30 instrument.

31 4. Notwithstanding any provision in the trust instrument to the contrary, a trust protector  
32 shall have no power to modify a trust to:

33 (1) Remove a requirement from a trust created to meet the requirements of 42 U.S.C.  
34 Section 1396p(d)(4) to pay back a governmental entity for benefits provided to the permissible  
35 beneficiary of the trust at the death of that beneficiary; or

36 (2) Reduce or eliminate an income interest of the income beneficiary of any of the  
37 following types of trusts:

38 (a) A trust for which a marital deduction has been taken for federal tax purposes under  
39 Section 2056 or 2523 of the Internal Revenue Code or for state tax purposes under any  
40 comparable provision of applicable state law, during the life of the settlor's spouse;

41 (b) A charitable remainder trust under Section 664 of the Internal Revenue Code, during  
42 the life of the noncharitable beneficiary;

43 (c) A grantor retained annuity trust under Section 2702 of the Internal Revenue Code,  
44 during any period in which the settlor is a beneficiary; or

45 (d) A trust for which an election as a qualified Sub-Chapter S Trust under Section  
46 1361(d) of the Internal Revenue Code is currently in place.

47 5. Except to the extent otherwise provided in a trust instrument specifically referring to  
48 this subsection, the trust protector shall not exercise a power in a way that would result in a  
49 taxable gift for federal gift tax purposes or cause the inclusion of any assets of the trust in the  
50 trust protector's gross estate for federal estate tax purposes.

51 6. Except to the extent otherwise provided in the trust instrument and in subsection 7 of  
52 this section, and notwithstanding any provision of sections 456.1-101 to 456.11-1106 to the  
53 contrary:

54 (1) A trust protector shall act in a fiduciary capacity in carrying out the powers granted  
55 to the trust protector in the trust instrument, and shall have such duties to the beneficiaries, the  
56 settlor, or the trust as set forth in the trust instrument, **provided that the trust instrument may**  
57 **provide that the trust protector shall act in a nonfiduciary capacity.** A trust protector is not

58 a trustee, and is not liable or accountable as a trustee when performing or declining to perform  
59 the express powers given to the trust protector in the trust instrument. A trust protector is not  
60 liable for the acts or omissions of any fiduciary or beneficiary under the trust instrument;

61 (2) A trust protector is exonerated from any and all liability for the trust protector's acts  
62 or omissions, or arising from any exercise or nonexercise of the powers expressly conferred on  
63 the trust protector in the trust instrument, unless it is established by a preponderance of the  
64 evidence that the acts or omissions of the trust protector were done or omitted in breach of the  
65 trust protector's duty, in bad faith or with reckless indifference;

66 (3) A trust protector is authorized to exercise the express powers granted in the trust  
67 instrument at any time and from time to time after the trust protector acquires knowledge of their  
68 appointment as trust protector and of the powers granted. **The trust protector may take any**  
69 **action, judicial or otherwise, necessary to carry out the duties given to the trust protector**  
70 **in the trust instrument;**

71 (4) A trust protector is entitled to receive, from the assets of the trust for which the trust  
72 protector is acting, reasonable compensation, and reimbursement of the reasonable costs and  
73 expenses incurred, in determining whether to carry out, and in carrying out, the express powers  
74 given to the trust protector in the trust instrument;

75 (5) A trust protector is entitled to receive, from the assets of the trust for which the trust  
76 protector is acting, reimbursement of the reasonable costs and expenses, including attorney's  
77 fees, of defending any claim made against the trust protector arising from the acts or omissions  
78 of the trust protector acting in that capacity unless it is established by clear and convincing  
79 evidence that the trust protector was acting in bad faith or with reckless indifference; and

80 (6) The express powers granted in the trust instrument shall not be exercised by the trust  
81 protector for the trust protector's own personal benefit.

82 7. If a trust protector is granted a power in the trust instrument to direct, consent to, or  
83 disapprove a trustee's actual or proposed investment decision, distribution decision, or other  
84 decision of the trustee required to be performed under applicable trust law in carrying out the  
85 duties of the trustee in administering the trust, then only with respect to such power, excluding  
86 the powers identified in subsection 3 of this section, the trust protector shall have the same duties  
87 and liabilities as if serving as a trustee under the trust instrument **unless the trust instrument**  
88 **expressly provides otherwise. In carrying out any written directions given to the trustee**  
89 **by the trust protector concerning actual or proposed investment decisions, the trustee shall**  
90 **not be subject to the provisions of sections 469.900 to 469.913. For purposes of this**  
91 **subsection, "investment decisions" means, with respect to any investment, decisions to**  
92 **retain, purchase, sell, exchange, tender, or otherwise engage in transactions affecting the**

93 ownership of investments or rights therein and, with respect to nonpublicly traded  
94 investments, the valuation thereof.

95           8. Any trustee of a directed trust shall not be accountable under the law or equity  
96 for any act or omission of a trust protector and shall stand absolved from liability for  
97 executing the decisions or instructions from a trust protector or for monitoring the actions  
98 or inactions of a trust protector. A trustee shall take reasonable steps to facilitate the  
99 activity of a trust protector in a directed trust. A trustee shall carry out the written directions  
100 given to the trustee by a trust protector acting within the scope of the powers expressly granted  
101 to the trust protector in the trust instrument. Except [~~in cases of bad faith or reckless indifference~~  
102 ~~on the part of the trustee, or~~] as otherwise provided in the trust instrument, the trustee shall not  
103 be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of  
104 the written direction of the trust protector or the failure of the trust protector to provide consent.  
105 Except as otherwise provided in the trust instrument, the trustee shall have no duty to monitor  
106 the conduct of the trust protector, provide advice to or consult with the trust protector, or  
107 communicate with or warn or apprise any beneficiary concerning instances in which the trustee  
108 would or might have exercised the trustee's own discretion in a manner different from the manner  
109 directed by the trust protector. **Except as otherwise provided in the trust instrument, any**  
110 **actions taken by the trustee at the trust protector's direction shall be deemed to be**  
111 **administrative actions taken by the trustee solely to allow the trustee to carry out the**  
112 **instructions of the trust protector and shall not be deemed to constitute an act by the**  
113 **trustee to monitor the trust protector or otherwise participate in actions within the scope**  
114 **of the trust protector's authority.**

115           9. Except to the extent otherwise expressly provided in the trust instrument, the trust  
116 protector shall be entitled to receive information regarding the administration of the trust as  
117 follows:

118           (1) Upon the request of the trust protector, unless unreasonable under the circumstances,  
119 the trustee shall promptly provide to the trust protector any and all information related to the trust  
120 that may relate to the exercise or nonexercise of a power expressly granted to the trust protector  
121 in the trust instrument. The trustee has no obligation to provide any information to the trust  
122 protector except to the extent a trust protector requests information under this section;

123           (2) The request of the trust protector for information under this section shall be with  
124 respect to a single trust that is sufficiently identified to enable the trustee to locate the records  
125 of the trust; and

126           (3) If the trustee is bound by any confidentiality restrictions with respect to an asset of  
127 a trust, a trust protector who requests information under this section about such asset shall agree

128 to be bound by the confidentiality restrictions that bind the trustee before receiving such  
129 information from the trustee.

130           10. A trust protector may resign by giving thirty days' written notice to the trustee and  
131 any successor trust protector. A successor trust protector, if any, shall have all the powers  
132 expressly granted in the trust instrument to the resigning trust protector unless such powers are  
133 expressly modified for the successor trust protector.

134           11. A trust protector of a trust having its principal place of administration in this state  
135 submits personally to the jurisdiction of the courts of this state during any period that the  
136 principal place of administration of the trust is located in this state and the trust protector is  
137 serving in such capacity. **The trust instrument may also provide that a trust protector is**  
138 **subject to the personal jurisdiction of the courts of this state as a condition of appointment.**

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