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HOUSE BILL 124

52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015

INTRODUCED BY

Zachary J. Cook

AN ACT

RELATING TO TRUSTS; ENACTING NEW SECTIONS OF THE UNIFORM TRUST CODE; PROVIDING FOR THE APPOINTMENT OF TRUST ASSETS BETWEEN TRUSTS; SETTING CONDITIONS AND LIMITATIONS ON THE APPOINTMENT OF ASSETS BETWEEN TRUSTS; PROVIDING FOR NOTICE OF APPOINTMENTS BETWEEN TRUSTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. A new Section 46A-8-818 NMSA 1978 is enacted to read:

"46A-8-818. [NEW MATERIAL] TRUSTEE AUTHORIZATION-- RESTRICTIONS--POWER TO APPOINT.--

A. Unless the terms of the trust instrument expressly provide otherwise, if a trustee has discretion under the terms of a trust instrument to make a distribution of income or principal to or for the benefit of one or more

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1 beneficiaries of a trust, whether or not a distribution is
2 subject to any distribution standard, including but not limited
3 to an ascertainable standard, then the trustee, independently
4 or with court approval, may exercise that discretion by
5 appointing part or all of the income or principal subject to
6 the discretion in favor of a trustee of a second trust under a
7 trust instrument separate from the trust instrument of the
8 first trust. Before exercising its discretion to appoint and
9 distribute assets to a second trust, the trustee of the first
10 trust shall determine whether the appointment is necessary or
11 desirable after taking into account the purposes of the first
12 trust, the terms and conditions of the second trust and the
13 consequences of the distribution.

14 B. For the purposes of this section, a trustee of
15 the first trust is a restricted trustee if either the trustee
16 is a beneficiary of the first trust or if a beneficiary of the
17 first trust has a power to change the trustees as provided in
18 Section 46A-8-822 NMSA 1978.

19 C. The following apply to all appointments made
20 under this section:

21 (1) the second trust may only have as
22 beneficiaries one or more of the beneficiaries of the first
23 trust:

24 (a) to or for whom a discretionary
25 distribution of income or principal may be made from the first

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1 trust;

2 (b) to or for whom a distribution of
3 income or principal may be made in the future from the first
4 trust at a time or upon the happening of an event specified
5 under the first trust; or

6 (c) to or for whom the provisions of
7 both Subparagraphs (a) and (b) of this paragraph apply;

8 (2) no restricted trustee of the first trust
9 may exercise authority over the first trust to the extent that
10 doing so could have the effect of:

11 (a) benefiting the restricted trustee as
12 a beneficiary of the first trust, unless the exercise of that
13 authority is limited by an ascertainable standard based on or
14 related to health, education, maintenance or support; or

15 (b) removing restrictions on
16 discretionary distributions to a beneficiary imposed by the
17 trust instrument under which the first trust was created,
18 except that a provision in the second trust that limits
19 distributions by an ascertainable standard based on or related
20 to the health, education, maintenance or support of that
21 beneficiary is permitted, or as to a trust established pursuant
22 to 42 United States Code Section 1396p(d)(4), as amended;

23 (3) no restricted trustee of the first trust
24 shall exercise authority over the first trust to the extent
25 that doing so would have the effect of increasing the

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1 distributions that can be made from the second trust to the
2 restricted trustee of the first trust or to a beneficiary who
3 may change the trustee of the first trust within the meaning of
4 Section 46A-8-822 NMSA 1978 when compared to the distributions
5 that can be made to that trustee or beneficiary under the first
6 trust, unless the exercise of that authority is limited by an
7 ascertainable standard based on or related to health,
8 education, maintenance or support;

9 (4) the provisions of Paragraphs (2) and (3)
10 of this subsection only apply to restrict the authority of a
11 trustee, or a beneficiary who may change the trustee, who is a
12 United States citizen or domiciliary under the Internal Revenue
13 Code of 1986, as amended, or the trust owns property that would
14 be subject to United States estate or gift taxes if owned
15 directly by that trustee or beneficiary;

16 (5) in the case of trust contributions that
17 have been trusted as gifts qualifying for the exclusion from
18 gift tax described in Section 2503(b) of the Internal Revenue
19 Code of 1986, as amended, by reason of the application of
20 Section 2503(c) of the Internal Revenue Code of 1986, as
21 amended, the trust instrument for the second trust shall
22 provide that the beneficiary's remainder interest shall vest no
23 later than the date upon which that interest would have vested
24 under the terms of the trust instrument for the first trust;

25 (6) the exercise of authority pursuant to this

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1 section shall not reduce the income interest of an income
2 beneficiary of the following trusts:

3 (a) a trust for which a marital
4 deduction has been taken for federal tax purposes pursuant to
5 Section 2056 or 2523 of the Internal Revenue Code of 1986, as
6 amended, or for state tax purposes under a comparable provision
7 of applicable state law;

8 (b) a charitable remainder trust under
9 Section 664 of the Internal Revenue Code of 1986, as amended;
10 or

11 (c) a grantor retained annuity or
12 unitrust trust under Section 2702 of the Internal Revenue Code
13 of 1986, as amended;

14 (7) the exercise of authority pursuant to this
15 section does not apply to trust property subject to a presently
16 exercisable power of withdrawal held by a trust beneficiary to
17 whom, or for the benefit of whom, the trustee has authority to
18 make distributions, unless after the exercise of that authority
19 the beneficiary's power of withdrawal is unchanged with respect
20 to the trust property;

21 (8) the exercise of authority pursuant to this
22 section is not prohibited by a spendthrift clause or by a
23 provision in the trust instrument that prohibits amendment or
24 revocation of the trust;

25 (9) an appointment made by a trustee shall be

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1 considered a distribution by the trustee pursuant to the
2 trustee's distribution powers and authority; and

3 (10) if the trustee's distribution discretion
4 is not subject to a standard, or if the trustee's distribution
5 discretion is subject to a standard that does not create a
6 support interest, then the court may review the trustee's
7 determination or a related appointment.

8 D. Notwithstanding the provisions of this section,
9 the trust instrument of the second trust may grant a power of
10 appointment to one or more of the beneficiaries of the second
11 trust who are beneficiaries of the first trust. The power of
12 appointment may include the power to appoint trust property to
13 the holder of the power of appointment, the holder's creditors,
14 the holder's estate, the creditors of the holder's estate or
15 another person, whether or not that person is a trust
16 beneficiary.

17 E. This section applies to a trust administered
18 under the laws of New Mexico or to a trust whose governing
19 jurisdiction is transferred to New Mexico."

20 SECTION 2. A new Section 46A-8-819 NMSA 1978 is enacted
21 to read:

22 "46A-8-819. [NEW MATERIAL] EXERCISE OF POWER TO
23 DISTRIBUTE INCOME OR PRINCIPAL BY WRITTEN INSTRUMENT--NOTICE TO
24 BENEFICIARIES OF FIRST TRUST.--The exercise of the power to
25 distribute the income or principal of the trust pursuant to

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1 Section 46A-8-818 NMSA 1978 shall be an instrument in writing,
2 signed and acknowledged by the trustee and filed with the
3 records of the trust. The trustee of the first trust shall
4 notify all beneficiaries of the first trust, in writing, at
5 least twenty days prior to the effective date of the trustee's
6 exercise of the power pursuant to Section 46A-8-818 NMSA 1978.
7 A copy of the proposed exercise of this authority and the
8 second trust agreement shall satisfy this notice provision.
9 For the purpose of this section, "beneficiaries" means those
10 persons who would be entitled to notice and a copy of the first
11 trust instrument pursuant to Section 46A-8-813 NMSA 1978."

12 SECTION 3. A new Section 46A-8-820 NMSA 1978 is enacted
13 to read:

14 "46A-8-820. [NEW MATERIAL] POWER TO DISTRIBUTE INCOME OR
15 PRINCIPAL.--The exercise of the power to distribute the income
16 or principal of the trust under Section 46A-8-818 NMSA 1978
17 shall be considered the exercise of a power of appointment
18 other than a power to appoint to the trustee, the trustee's
19 creditors, the trustee's estate or the creditors of the
20 trustee's estate."

21 SECTION 4. A new Section 46A-8-821 NMSA 1978 is enacted
22 to read:

23 "46A-8-821. [NEW MATERIAL] IMPERMISSIBLE USE OF POWER.--
24 The power pursuant to Section 46A-8-818 shall not be exercised
25 to suspend the power to alienate trust property to extend the

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1 first trust beyond the permissible period of a rule against
2 perpetuities applicable to the first trust."

3 SECTION 5. A new Section 46A-8-822 NMSA 1978 is enacted
4 to read:

5 "46A-8-822. [NEW MATERIAL] CHANGE OF TRUSTEE.--For the
6 purposes of Section 46A-8-818 NMSA 1978, a beneficiary shall
7 have the power to change the trustee if the beneficiary can be
8 named as a trustee or can remove a trustee and replace that
9 trustee with a successor trustee who is a beneficiary or who is
10 related or subordinate, as defined in Section 672 of the
11 Internal Revenue Code of 1986, as amended, to the beneficiary."

12 SECTION 6. A new Section 46A-8-823 NMSA 1978 is enacted
13 to read:

14 "46A-8-823. [NEW MATERIAL] TRUSTEE'S RIGHTS NOT
15 ABRIDGED.--No provision of Sections 46A-8-818 through 46A-8-822
16 NMSA 1978 shall be construed to abridge the right of a trustee
17 who has power to distribute income or principal in trust that
18 arises under the common laws of the terms of the first trust."

19 SECTION 7. EFFECTIVE DATE.--The effective date of the
20 provisions of this act is July 1, 2015.