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HOUSE BILL 184

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

INTRODUCED BY

Zachary J. Cook

AN ACT

RELATING TO TRUSTS; AMENDING SECTIONS OF THE UNIFORM TRUST
CODE.

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

SECTION 1. Section 46A-1-107 NMSA 1978 (being Laws 2003,
Chapter 122, Section 1-107, as amended) is amended to read:

"46A-1-107. GOVERNING LAW.--The meaning and effect of the
terms of a trust are determined by:

A. the law of the jurisdiction designated in the
terms [~~unless the designation of that jurisdiction's law is
contrary to a strong public policy of the jurisdiction having
the most significant relationship to the matter at issue~~]; or

B. in the absence of a controlling designation in
the terms of the trust, the law of the jurisdiction having the
most significant relationship to the matter at issue."

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1 SECTION 2. Section 46A-3-304 NMSA 1978 (being Laws 2003,
2 Chapter 122, Section 3-304) is repealed and a new Section
3 46A-3-304 NMSA 1978 is enacted to read:

4 "46A-3-304. [NEW MATERIAL] REPRESENTATION BY PERSON
5 HAVING SUBSTANTIALLY IDENTICAL INTEREST.--

6 A. Unless otherwise represented by counsel, a
7 minor, incapacitated person, unborn person or persons whose
8 identity or location is unknown and not reasonably
9 ascertainable may be represented by another person who has a
10 substantially similar interest with respect to the particular
11 question or dispute.

12 B. A person may only be represented by another
13 person pursuant to Subsection A of this section if there is no
14 material conflict of interest between the person and the
15 representative with respect to the question or dispute for
16 which the person is being represented. If a person is
17 represented pursuant to Subsection A of this section, the
18 results of that representation in the question or dispute will
19 be binding on that person.

20 C. A presumptive remainder beneficiary may
21 represent and bind a beneficiary with a contingent remainder
22 for the same purpose, in the same circumstance and to the same
23 extent as an ascertainable beneficiary may bind a minor,
24 incapacitated person, unborn person or person who cannot be
25 ascertained.

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1 D. If a trust has a minor or incapacitated
2 beneficiary who may not be represented by another person
3 pursuant to this section, the custodial parent or guardian of
4 the estate of the minor or incapacitated beneficiary may
5 represent the minor or incapacitated beneficiary in any
6 judicial proceeding or nonjudicial matter pertaining to the
7 trust. A minor or incapacitated beneficiary may only be
8 represented by a parent or guardian if there is no material
9 conflict of interest between the minor or incapacitated
10 beneficiary and the parent or guardian with respect to the
11 question or dispute. If a minor or incapacitated beneficiary
12 is represented pursuant to this subsection, the results of that
13 representation will be binding on the minor or incapacitated
14 beneficiary. The representation of a minor or incapacitated
15 beneficiary pursuant to this subsection is binding on an unborn
16 person or a person who cannot be ascertained, if:

17 (1) the unborn person or a person who cannot
18 be ascertained has an interest substantially similar to the
19 minor or incapacitated person; and

20 (2) there is no material conflict of interest
21 between the unborn person or the person who cannot be
22 ascertained and the minor or incapacitated person with respect
23 to the question or dispute.

24 E. As used in this section, "presumptive remainder
25 beneficiary" means:

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1 (1) a beneficiary who would receive income or
2 principal of the trust if the trust were to be terminated as of
3 that date, regardless of the exercise of a power of
4 appointment; or

5 (2) a beneficiary who, if the trust does not
6 provide for termination, would receive or be eligible to
7 receive distributions of income or principal of the trust if
8 all beneficiaries of the trust who were receiving or eligible
9 to receive distributions were deceased."

10 SECTION 3. Section 46A-5-503 NMSA 1978 (being Laws 2003,
11 Chapter 122, Section 5-503, as amended) is repealed and a new
12 Section 46A-5-503 NMSA 1978 is enacted to read:

13 "46A-5-503. [NEW MATERIAL] EXCEPTIONS TO SPENDTHRIFT
14 PROVISION.--

15 A. A spendthrift provision is unenforceable
16 against:

17 (1) a judgment creditor who has provided
18 services for the protection of a beneficiary's interest in the
19 trust; and

20 (2) a claim of this state or the United States
21 to the extent a statute of this state or federal law so
22 provides.

23 B. A claimant against whom a spendthrift provision
24 is unenforceable may obtain from a court an order attaching
25 present or future distributions to or for the benefit of the

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1 beneficiary. The court may limit the award to such relief as
2 is appropriate under the circumstances. The order attaching
3 present or future distributions to or for the benefit of the
4 beneficiary shall be the exclusive remedy available to a
5 claimant against whom a spendthrift provision cannot be
6 enforced."

7 SECTION 4. Section 46A-5-504 NMSA 1978 (being Laws 2003,
8 Chapter 122, Section 5-504, as amended) is repealed and a new
9 Section 46A-5-504 NMSA 1978 is enacted to read:

10 "46A-5-504. [NEW MATERIAL] DISCRETIONARY TRUSTS.--

11 A. As used in this section:

12 (1) "beneficial interest" means a distribution
13 interest or a remainder interest. A beneficial interest
14 specifically excludes a power of appointment or a reserved
15 power;

16 (2) "beneficiary" means a person that has a
17 present or future beneficial interest in a trust, vested or
18 contingent. The holder of a power of appointment is not a
19 beneficiary;

20 (3) "distribution beneficiary" means a
21 beneficiary who is an eligible distributee or permissible
22 distributee of trust income or principal;

23 (4) "distribution interest" means a
24 distribution interest held by a distribution beneficiary. A
25 distribution interest may be a current distribution interest or

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1 a future distribution interest. A distribution interest may be
2 classified as a mandatory interest, a support interest or a
3 discretionary interest;

4 (5) "power of appointment" means an
5 inter-vivos or testamentary power to direct the disposition of
6 trust property, other than a distribution decision by a trustee
7 to a beneficiary. Powers of appointment are held by a person
8 to whom a power has been given, not the settlor;

9 (6) "reach" means, with respect to a
10 distribution interest or a power of appointment, to subject the
11 distribution interest or power of appointment to a judgment,
12 decree, garnishment, attachment, execution, levy, creditor's
13 bill or other legal, equitable or administrative process,
14 relief or control of any court, agency or other entity as
15 provided by law;

16 (7) "remainder interest" means an interest
17 where a trust beneficiary will receive the property outright at
18 some time during the future; and

19 (8) "reserved power" means a power held solely
20 by the settlor.

21 B. For purposes of this section, improper motive is
22 demonstrated by actions including:

23 (1) a trustee refusing to make or limiting
24 distributions to beneficiaries other than the trustee due to
25 the trustee's self-interest when the trustee also holds a

1 beneficial interest subject to a discretionary interest; or

2 (2) a trustee making a distribution in excess
3 of an ascertainable standard to himself or herself as
4 beneficiary when the trustee is restricted by an ascertainable
5 standard in the trust.

6 C. A withdrawal power allows a beneficiary a right
7 to withdraw a part of the trust income or principal. The
8 holder of a power of withdrawal is not deemed to be the settlor
9 of the trust by failing to exercise withdrawal power or letting
10 a withdrawal power lapse.

11 D. Regardless of whether or not a trust contains a
12 spendthrift provision:

13 (1) no beneficial interest, power of
14 appointment or reserved power in a trust may be judicially
15 foreclosed;

16 (2) no creditor may reach a power of
17 appointment or a remainder interest at the trust level. The
18 creditor shall wait until the funds are actually distributed to
19 a beneficiary before the creditor may reach the funds; and

20 (3) no power of appointment is a property
21 interest.

22 E. Although a remainder interest may be an
23 enforceable right, where it is not absolutely certain based on
24 the language of the trust that the remainder interest will be
25 distributed within one year, it shall not be classified as a

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1 property interest.

2 F. A creditor may not reach a beneficial interest
3 of a beneficiary or any other person who holds an unconditional
4 or conditional removal or replacement power over a trustee.
5 This power is personal to the beneficiary and may not be
6 exercised by the beneficiary's creditors. A court shall not
7 direct a beneficiary to exercise the power. A creditor may not
8 reach a beneficial interest of a beneficiary who is also a
9 trustee or a co-trustee, or otherwise compel a distribution
10 because the beneficiary is then serving as a trustee or
11 co-trustee. A court shall not foreclose against such an
12 interest.

13 G. Trust income and principal is not subject to the
14 personal obligations of the trustee, even if the trustee
15 becomes insolvent or bankrupt.

16 H. A distribution interest or a remainder interest
17 is the beneficiary's separate property. A distribution
18 interest or a remainder interest is not relevant in the
19 division of marital property and shall not be considered for
20 purposes of spousal support or marital property division.

21 I. Unless otherwise provided in the trust, if the
22 settlor's spouse is named as beneficiary, the settlor's spouse
23 is still living and the trust is classified as a support trust,
24 the trustee shall consider the resources of the settlor's
25 spouse, including the settlor's obligation of support, prior to

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1 making a distribution. In all other cases, unless otherwise
2 provided in the terms of a trust, the trustee need not consider
3 the beneficiary's resources in determining whether a
4 distribution should be made.

5 J. In the event that a party challenges a settlor
6 or a beneficiary's influence over a trust, none of the
7 following factors, alone or in combination, may be considered
8 control over a trust:

9 (1) the settlor or a beneficiary serving as a
10 trustee or a co-trustee as described in this section;

11 (2) the settlor or a beneficiary holds an
12 unrestricted power to amend or replace any term of the trust;

13 (3) the settlor or a beneficiary is a trust
14 administrator, a general partner of a partnership, a manager of
15 a limited liability company, an officer of a corporation or any
16 other managerial function of any other type of entity, and part
17 or all of the trust property consists of an interest in the
18 entity;

19 (4) a person related by blood or adoption to
20 the settlor or a beneficiary is appointed as trustee;

21 (5) the settlor's or a beneficiary's agent,
22 accountant, attorney, financial advisor or friend is appointed
23 as trustee;

24 (6) a business associate is appointed as
25 trustee;

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1 (7) a beneficiary holds any power of
2 appointment over any or all of the trust property;

3 (8) the settlor holds a power to substitute
4 property of equivalent value;

5 (9) the trustee may loan trust property to the
6 settlor for less than a full and adequate rate of interest or
7 without adequate security;

8 (10) the distribution language provides any
9 discretion;

10 (11) the trust has only one beneficiary
11 eligible for current distributions; or

12 (12) the beneficiary serving as a trust
13 advisor for investments.

14 K. Absent clear and convincing evidence, no settlor
15 of an irrevocable trust may be deemed to be the alter ego of a
16 trustee. The following factors by themselves or in combination
17 are not sufficient evidence for a court to conclude that the
18 settlor controls a trustee or is the alter ego of a trustee:

19 (1) any combination of the factors listed in
20 Subsection J of this section;

21 (2) isolated occurrences where the settlor has
22 signed checks, made disbursements, or executed other documents
23 related to the trust as a trustee, when in fact the settlor was
24 not a trustee;

25 (3) the settlor making any requests for

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1 distributions on behalf of beneficiaries; and

2 (4) the settlor making any requests to the
3 trustee to hold, purchase or sell any trust property.

4 L. A settlor may provide in the terms of the trust
5 that a beneficiary's beneficial interest in a trust's income,
6 principal or both may not be voluntarily or involuntarily
7 transferred before payment or delivery of the beneficial
8 interest to the beneficiary by the trustee.

9 M. A declaration in the terms of a trust that the
10 interest of a beneficiary shall be held subject to a
11 spendthrift trust is sufficient to restrain voluntary or
12 involuntary alienation of a beneficial interest by a
13 beneficiary to the maximum extent provided by law. Regardless
14 of whether a beneficiary has any outstanding creditor, a
15 trustee of a spendthrift trust may directly pay any expense on
16 behalf of such beneficiary and may exhaust the income and
17 principal of the trust for the benefit of such beneficiary. A
18 trustee is not liable to any creditor for directly paying the
19 expenses of a beneficiary of a spendthrift trust.

20 N. A settlor's creditors may not satisfy claims
21 from principal of the trust because of the existence of a
22 discretionary power granted to the trustee by the terms of the
23 trust creating the trust, or any other provisions of law, to
24 pay directly to the taxing authorities or to reimburse the
25 settlor for any tax on trust income or principal that is

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1 payable by the settlor under the law imposing such tax; or
2 reimbursements made to the settlor or direct tax payments made
3 to a taxing authority for the settlor's benefit for any tax or
4 trust income or principal that is payable by the trustor under
5 the law imposing the tax.

6 O. A spendthrift provision is a material provision
7 of a trust.

8 P. A distribution interest may be classified as:

9 (1) a "mandatory interest", which is a
10 distribution interest in which the timing of any distribution
11 shall occur within one year from the date the right to the
12 distribution arises, and the trustee has no discretion in
13 determining whether a distribution shall be made or the amount
14 of such distribution;

15 (2) a "support interest", which is not a
16 mandatory interest but still contains mandatory language such
17 as "shall make distribution" and is coupled with a standard
18 capable of judicial interpretation; or

19 (3) a "discretionary interest", which is any
20 interest where a trustee has any discretion to make or withhold
21 a distribution. A discretionary interest may be evidenced by
22 permissive language such as "may make distributions" or it may
23 be evidenced by mandatory distribution language that is negated
24 by the discretionary language of the trust, such as "the
25 trustee shall make distributions in the trustee's sole and

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1 absolute discretion". An interest that includes mandatory
2 distribution language such as "shall" but is subsequently
3 qualified by discretionary distribution language shall be
4 classified as a discretionary interest and not as a support or
5 a mandatory interest. A discretionary interest is any interest
6 that is not a mandatory or a support interest.

7 Q. If the terms of a trust containing the
8 distribution language specifically provides that the trustee
9 exercise discretion in a reasonable manner with regard to a
10 discretionary interest, notwithstanding any other provision of
11 Subsections P through V of this section, the distribution
12 interest shall be classified as a support interest. A
13 beneficiary's right to a distribution as well as a creditor's
14 right regarding a beneficiary's support interest is governed by
15 Subsection U of this section.

16 R. To the extent that the terms of a trust contain
17 any combination of a mandatory provision and a support
18 provision, the trust shall be bifurcated as follows:

19 (1) the trust shall be a mandatory interest
20 only to the extent of the mandatory language;

21 (2) the trust shall be a support interest only
22 to the extent of such support language;

23 (3) the remaining trust principal shall be
24 held as a discretionary interest; and

25 (4) a support interest that includes mandatory

1 language such as "shall" but is subsequently qualified by
2 discretionary language, shall be classified as a discretionary
3 interest and not as a support interest.

4 S. Although not the exclusive means to create a
5 distribution interest, absent clear and convincing evidence to
6 the contrary, the following language by itself results in the
7 following classification of distribution interest:

8 (1) mandatory interest:

9 (a) "all of the net income shall be
10 distributed to (named beneficiary)"; or

11 (b) "(specific dollar amount) a year
12 shall be distributed to (named beneficiary)";

13 (2) support interest: "the trustee shall make
14 distributions for health, education, maintenance and support to
15 (named beneficiary)"; and

16 (3) discretionary interest:

17 (a) "the trustee, may, in the trustee's
18 sole and absolute discretion, make distributions for health,
19 education, maintenance and support";

20 (b) "the trustee, in the trustee's sole
21 and absolute discretion, shall make distributions for health,
22 education, maintenance and support";

23 (c) "the trustee may make distributions
24 for health, education, maintenance and support";

25 (d) "the trustee shall make

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1 distributions for health, education, maintenance and support.
2 The trustees may exclude any of the beneficiaries or may make
3 unequal distributions among them"; or

4 (e) "the trustee may make distributions
5 for health, education, maintenance, support, comfort and
6 general welfare".

7 T. If the trust contains a spendthrift provision, a
8 creditor may not reach present or future mandatory
9 distributions from the trust at the trust level.

10 U. A beneficiary of a mandatory or a support
11 interest has an enforceable right to a distribution pursuant to
12 a court's review. A trustee's distribution decision may be
13 reviewed for unreasonableness, dishonesty, improper motivation
14 or failure, if under a duty to do so, to act. This does not,
15 however, raise the beneficiary's support interest to the level
16 of a property interest. If the trust contains a spendthrift
17 provision, notwithstanding the beneficiary's right to force a
18 distribution with regard to a mandatory or support interest, a
19 creditor may not force a distribution with regard to a
20 mandatory or support interest, and no creditor may force a
21 distribution with regard to a mandatory or support interest. A
22 creditor may not reach present or support distributions with
23 regard to a mandatory or support interest. Regardless of
24 whether a beneficiary has any outstanding creditor, a trustee
25 of a mandatory or a support interest may directly pay any

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1 expense on behalf of such beneficiary. A trustee is not liable
2 to a creditor for directly paying the expenses of a beneficiary
3 of a mandatory or support interest.

4 V. The following provisions apply only to
5 discretionary interests:

6 (1) a discretionary interest is neither a
7 property interest nor an enforceable right. It is a mere
8 expectancy;

9 (2) a creditor may not force a distribution
10 with regard to a discretionary interest. A creditor may not
11 require the trustee to exercise the trustee's discretion to
12 make a distribution with regard to discretionary interest; and

13 (3) a court may review a trustee's
14 distribution discretion only if the trustee:

15 (a) acts dishonestly;

16 (b) acts with an improper motive; or

17 (c) fails, if under a duty to do so, to
18 act.

19 W. A reasonableness standard may not be applied to
20 the exercise of discretion by the trustee with regard to a
21 discretionary interest. Other than the circumstances provided
22 in Subsection V of this section, a court has no jurisdiction to
23 review the trustee's discretion or to force a distribution.

24 Absent express language in terms of a trust to the contrary, in
25 the event that the distribution language in a discretionary

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1 interest permits unequal distributions between beneficiaries or
2 distributions to the exclusion of other beneficiaries, the
3 trustee may distribute all of the accumulated, accrued or
4 undistributed income and principal to one beneficiary in the
5 trustee's discretion. Regardless of whether a beneficiary has
6 any outstanding creditor, a trustee of a discretionary interest
7 may directly pay any expense on behalf of such beneficiary and
8 may exhaust the income and principal of the trust for the
9 benefit of such beneficiary. No trustee is liable to any
10 creditor for directly paying the expenses of a beneficiary of a
11 discretionary interest."

12 SECTION 5. EFFECTIVE DATE.--The effective date of the
13 provisions of this act is July 1, 2015.