

Section 1 Short Title.

A new subchapter of KRS 386 is created to be known as the "Kentucky Qualified Dispositions in Trust Act."

Section 2 Subchapter Definitions.

As used in this subchapter, unless the context otherwise requires:

- (1) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured;
- (2) "Creditor" means, with respect to a transferor, a person who has a claim;
- (3) "Debt" means liability on a claim;
- (4) "Disposition" means a transfer, conveyance or assignment of property, including a change in the legal ownership of property occurring upon the substitution of one (1) trustee for another or the addition of one (1) or more new trustees. "Disposition" also includes the exercise of a power so as to cause a transfer of property to a trustee or trustees, but shall not include the release or relinquishment of an interest in property that, until the release or relinquishment, was the subject of a qualified disposition;
- (5) "Investment advisor" means a person given authority by the terms of a qualified trust to direct, consent to or disapprove a transferor's actual or proposed investment decisions, distribution decisions or other decisions of the transferor;
- (6) "Investment decision" means the retention, purchase, sale, exchange, tender or other transaction affecting the ownership of or rights in investments;
- (7) "Qualified trust" means an instrument appointing a qualified trustee or qualified trustees for the property that is the subject of a disposition, which instrument:
 - (a) Expressly incorporates the law of this state to govern the validity, construction and administration of the trust;
 - (b) Is irrevocable; and
 - (c) Provides that the interest of the transferor or other beneficiary in the trust property or the income from the trust property may not be transferred, assigned, pledged or mortgaged, whether voluntarily or involuntarily, before the qualified trustee or qualified trustees actually distribute the property or income from the property to the beneficiary;
- (8) "Person" has the meaning ascribed to it in KRS 386B.1-010(10);
- (9) "Property" includes real property, personal property, and interests in real or personal property;

(10) "Qualified affidavit" means a sworn affidavit signed by the transferor before a disposition of assets to a qualified trust that meets the requirements of section 3. In the event of a disposition by a transferor who is a trustee, the affidavit shall be signed by the transferor who made the original disposition to the trustee, or a predecessor trustee, in a form that meets the requirements of subdivisions (7)(b) and (c) of this section and shall state facts as of the time of the original disposition;

(11) "Qualified disposition" means a disposition by or from a transferor with or without consideration, to a qualified trust after the transferor executes a qualified affidavit;

(12) "Qualified trustee" means a person who:

(a) In the case of a natural person, is a resident of this state, or, in all other cases, is authorized by the law of this state to act as a trustee and whose activities are subject to supervision by the Kentucky department of financial institutions, the federal deposit insurance corporation, the comptroller of the currency, or the office of thrift supervision or any successor to them;

(b) Maintains or arranges for custody in this state of some or all of the property that is the subject of the qualified disposition, maintains records for the qualified trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation of required income tax returns for the qualified trust, or otherwise materially participates in the administration of the qualified trust; and

(c) Is not the transferor;

(13) "Spouse" or "former spouse" means only persons to whom the transferor was legally married at, or before, the time the qualified disposition is made;

(14) "Transferor" means a person who, directly or indirectly, makes a disposition or causes a disposition to be made in such person's capacity:

(a) As an owner of property;

(b) As a holder of a power of appointment that authorizes the holder to appoint in favor of the holder, the holder's creditors, the holder's estate or the creditors of the holder's estate; or

(c) As a trustee; and

(15) Unless the context or a provision contained in this subchapter provides otherwise, throughout this subchapter, any form of the word "trustee," whether singular or plural means a trustee as defined at KRS 386B.1-010(21) who is a fiduciary relative to any power or duty held by such person that could otherwise be held by a trustee.

Section 3. Qualified affidavit requirements.

A qualified affidavit shall state that:

- (1) The transferor has full right, title, and authority to transfer the assets to the trust;
- (2) The transfer of the assets to the trust will not render the transferor insolvent;
- (3) The transferor does not intend to defraud a creditor by transferring the assets to the trust;
- (4) The transferor does not have any pending or threatened court actions against the transferor, except for those court actions identified by the transferor on an attachment to the affidavit;
- (5) The transferor is not involved in any administrative proceedings, except for those administrative proceedings identified on an attachment to the affidavit;
- (6) The transferor does not contemplate filing for relief under the federal bankruptcy code; and
- (7) The assets being transferred to the trust were not derived from unlawful activities.

Section 4. Restrictions on actions, remedies and claims.

(1) Notwithstanding any law to the contrary, including KRS 386B.5-020(7)(a), no action of any kind, including, but not limited to, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity for an attachment or other provisional remedy against property that is the subject of a qualified disposition to a qualified trust or for the avoidance of a qualified disposition to a qualified trust, unless the action is brought pursuant to the Kentucky Uniform Voidable Transactions Act, KRS chapter 378A, and, in the case of a creditor whose claim arose after a qualified disposition, unless the qualified disposition was also made with actual intent to defraud such creditor.

(2) (a) Notwithstanding KRS 378A.090, a creditor's claim under subsection (1) shall be extinguished:

1. If the person is a creditor when the qualified disposition to a qualified trust is made, unless the action is commenced within the later of two (2) years after the qualified disposition is made or six (6) months after the person discovers or reasonably should have discovered the qualified disposition; or

2. If the person becomes a creditor after the qualified disposition to a qualified trust is made, unless the action is commenced within two (2) years after the qualified disposition is made;

(b) If subdivision (2)(a) applies:

1. A person shall be deemed to have discovered the existence of a qualified disposition to a qualified trust at the time any public record is made of any transfer of property relative to such qualified disposition, including but not limited

to, the conveyance of real property that is recorded in the office of the county clerk of the county in which the property is located or the filing of a financing statement under KRS chapter 355, Article 9, or the equivalent recording or filing of either with the appropriate person or official under the laws of a jurisdiction other than this state; and

2. No creditor shall bring an action with respect to property that is the subject of a qualified disposition unless that creditor proves by clear and convincing evidence that the settlor's transfer of such property was made with the intent to defraud that specific creditor.

(3) For purposes of this chapter, a qualified disposition that is made by means of a disposition by a transferor who is a trustee shall be deemed to have been made as of the time, whether before, on or after the effective date of this Act, the property that is the subject of the qualified disposition was originally transferred to the transferor acting in the capacity of trustee, or any predecessor trustee, in a form that meets the requirements of Section 2 (7)(a) and (c).

(4) Notwithstanding any law to the contrary, a creditor, including a creditor whose claim arose before or after a qualified disposition, or any other person shall have only the rights with respect to a qualified disposition that are provided in this section and Section 6, and neither a creditor nor any other person shall have any claim or cause of action against the trustee, or an advisor of a qualified trust, or against any person involved in the counseling, drafting, preparation, execution or funding of a qualified trust. For purposes of this section, counseling, drafting, preparation, execution or funding of a qualified trust includes the counseling, drafting, preparation, execution and funding of a limited partnership or a limited liability company if interests in the limited partnership or limited liability company are subsequently transferred to the qualified trust.

(5) Notwithstanding any law to the contrary, no action of any kind, including, but not limited to, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity against a trustee or an advisor of a qualified trust, or against any person involved in the counseling, drafting, preparation, execution or funding of a qualified trust, if, as of the date such action is brought, an action by a creditor with respect to the qualified trust would be barred under this section.

(6) In circumstances where more than one (1) qualified disposition is made by means of the same qualified trust, then:

(a) The making of a subsequent qualified disposition shall be disregarded in determining whether a creditor's claim with respect to a prior qualified disposition is extinguished as provided in subsection (2); and

(b) Any distribution to a beneficiary shall be deemed to have been made from the latest qualified disposition.

(7) If, in any action brought against a qualified trust, a court takes any action whereby the

court declines to apply the law of this state in determining the effect of a spendthrift provision of the trust, the trustee of the trust shall immediately upon the court's action and without the further order of any court, cease in all respects to be trustee of the trust and a successor trustee shall succeed as trustee in accordance with the terms of the trust or, if the trust does not provide for a successor trustee and the trust would otherwise be without a trustee, a court of this state, upon the application of any beneficiary of the trust, shall appoint a successor trustee upon the terms and conditions it determines to be consistent with the purposes of the trust and this chapter. Upon the trustee's ceasing to be trustee, the trustee shall have no power or authority other than to convey the trust property to the successor trustee named in the trust in accordance with this section.

(8) A qualified trust shall be subject to this section whether or not the transferor retains any or all of the powers and rights described in section 11 or serves as an investment advisor pursuant to section 9.

(9) (a) Notwithstanding subsection (1) or (2) to the contrary, the limitations on actions by creditors in law or equity shall not apply and such creditors' claims shall not be extinguished if the transferor is indebted on account of an agreement, judgment or order of a court for the payment of one (1) of the following:

(1) Past due child support;

(2) Past due temporary or permanent maintenance to a spouse or former spouse;
or

(3) A written agreement, judgment or order of a court for division of marital property of a spouse or former spouse, but only to the extent of such debt, legally mandated interest and the reasonable cost of collection.

(b) (1) A claim provided under this subsection (9) shall be asserted against a trustee only:

(i) Upon a final non-appealable determination of a Kentucky court or a fully domesticated, final non-appealable order of a court of another state as defined by KRS 386B.1-010 that such debt is past due; and

(ii) After the court has determined that the claimant has made reasonable attempts to collect the debt from any other sources of the transferor or that such attempts would be futile.

(2) Nothing in this subdivision (9)(b) shall be construed to prohibit the court from making the findings required in subdivisions (9)(b)(1)(i) and (ii) in the same proceeding and order.

(10) Subsection (9) shall not apply to any claim for forced heirship, legitime or elective share.

Section 5 Powers and rights of transferor.

A transferor shall have only the powers and rights conferred by the qualified trust. The powers and rights conferred by the qualified trust upon the transferor are personal powers and rights that may not be exercised by a creditor or any other person, except as expressly permitted by the trust. Except as permitted by sections 9 and 11, the transferor shall have no rights or authority with respect to the corpus of the qualified trust or the income from the trust, and any agreement or understanding purporting to grant or permit the retention of any greater rights or authority shall be void.

Section 6 Avoidance of qualified dispositions.

(1) A qualified disposition to a qualified trust shall be avoided only to the extent necessary to satisfy the transferor's debt to the creditor at whose instance the disposition had been avoided, together with costs, including attorneys' fees, that the court may allow.

(2) In the event any qualified disposition shall be avoided as provided in subsection (1), then:

(a) If the court is satisfied that a qualified trustee has not acted in bad faith in accepting or administering the property that is the subject of the qualified disposition:

(1) The qualified trustee shall have a first and paramount lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorneys' fees, properly incurred by the qualified trustee in the defense of the action or proceedings to avoid the qualified disposition;

(2) The qualified disposition shall be avoided subject to the proper fees, costs, preexisting rights, claims and interests of the qualified trustee and of any predecessor qualified trustee that has not acted in bad faith; and

(3) For purposes of this subdivision (2)(a), it shall be presumed that the qualified trustee did not act in bad faith merely by accepting the property; and

(b) If the court is satisfied that a beneficiary of a qualified trust has not acted in bad faith, the avoidance of the qualified disposition shall be subject to the right of the beneficiary to retain any distribution made upon the exercise of a trust power or discretion vested in the qualified trustee or qualified trustees of the qualified trust, which power or discretion was properly exercised prior to the creditor's commencement of an action to avoid the qualified disposition. For purposes of this subdivision (2)(b), it shall be presumed that the beneficiary, including a beneficiary who is also a transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made in accordance with the terms

of the trust.

(3) A disposition by a trustee that is not a qualified trustee to a trustee that is a qualified trustee shall not be treated as other than a qualified disposition solely because the trust instrument fails to meet the requirements of section 2(7)(a).

(4) In the case of a disposition to more than one (1) trustee, a disposition that is otherwise a qualified disposition shall not be treated as other than a qualified disposition solely because not all of the recipient trustees are qualified trustees.

Section 7. Spendthrift provisions.

A spendthrift provision as described in Section 2(7)(c) shall be deemed to be a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of § 541(c)(2) of the Bankruptcy Code (11 U.S.C. § 541(c)(2)), or any successor provision.

Section 8. Qualified trustees and advisors.

(1) For purposes of this chapter, neither the transferor nor any other natural person who is a nonresident of this state nor an entity that is not authorized by the law of this state to act as a trustee or whose activities are not subject to supervision as provided in section 2(12)(a) shall be considered a qualified trustee; however, nothing in this chapter shall preclude a transferor from appointing one (1) or more advisors, including, but not limited to:

(a) Advisors who have authority under the terms of the trust instrument to remove and appoint qualified trustees or trust advisors;

(b) Advisors who have authority under the terms of the trust instrument to direct, consent to or disapprove distributions from the trust; and

(c) Investment advisors, whether or not the advisors would meet the requirements imposed by section 2(12).

(2) For purposes of subsection (1), "advisor" includes a trust "protector" or any other person who, in addition to a qualified trustee, holds one (1) or more trust powers.

Section 9. Transferor as investment advisor.

A person may serve as an investment advisor notwithstanding that the person is the transferor of the qualified disposition.

Section 10. Successor trustees.

In the event that a qualified trustee of a qualified trust ceases to meet the requirements of section 2(12)(a), and there remains no trustee that meets the requirements, the qualified trustee shall be deemed to have resigned as of the time of that cessation, and thereupon

the successor qualified trustee provided for in the qualified trust shall become a qualified trustee of the qualified trust, or in the absence of any successor qualified trustee provided for in the qualified trust, then a court of this state shall, upon application of any interested party, appoint a successor qualified trustee.

Section 11. Revocability of trusts.

A qualified trust shall not be deemed revocable on account of its inclusion of one (1) or more of the following:

- (1) A transferor's power to veto a distribution from the trust;
- (2) A power of appointment, other than a power to appoint to the transferor, the transferor's creditors, the transferor's estate or the creditors of the transferor's estate, either exercisable by written instrument of the transferor during the transferor's life or exercisable by will or other written instrument of the transferor effective upon the transferor's death;
- (3) The transferor's potential or actual receipt of income, including rights to the income retained in the trust;
- (4) The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as those terms are defined in § 664 of the Internal Revenue Code of 1986 (26 U.S.C. § 664), and any successor provision;
- (5) The transferor's receipt each year of an amount specified in the trust, the amount not to exceed five percent (5%) of the initial value of the trust or its value determined from time to time pursuant to the trust;
- (6) The transferor's potential or actual receipt or use of principal if the potential or actual receipt or use of principal would be the result of a qualified trustee's or qualified trustees' acting:
 - (a) In the qualified trustee's or qualified trustees' discretion. For purposes of this section, a qualified trustee is presumed to have discretion with respect to the distribution of principal unless the discretion is expressly denied to the trustee by the terms of the trust;
 - (b) Pursuant to a standard that governs the distribution of principal and does not confer upon the transferor a power to consume, invade or appropriate property for the benefit of the transferor, unless the power of the transferor is limited by an ascertainable standard relating to the health, education, support, or maintenance within the meaning of § 2041(b)(1)(A) or § 2514(c)(1) of the Internal Revenue Code of 1986 (26 U.S.C. § 2041(b)(1)(A) or 26 U.S.C. § 2514(c)(1)), as in effect on [the effective date of this Act], or as later amended; or
 - (c) At the direction of an advisor described in section 8 who is acting:

(1) In the advisor's discretion; or

(2) Pursuant to a standard that governs the distribution of principal and does not confer upon the transferor a power to consume, invade, or appropriate property for the benefit of the transferor, unless the power of the transferor is limited by an ascertainable standard relating to the health, education, support, or maintenance within the meaning of § 2041(b)(1)(A) or § 2514(c)(1) of the Internal Revenue Code of 1986 (26 U.S.C. § 2041(b)(1)(A) or 26 U.S.C. § 2514(c)(1)), as in effect on [the effective date of this Act], or as later amended;

(7) The transferor's right to remove a trustee or advisor and to appoint a new trustee or advisor; provided, however, that the right shall not include the appointment of a person who is a related or subordinate party with respect to the transferor within the meaning of § 672(c) of the Internal Revenue Code of 1986, (26 U.S.C. § 672(c)), and any successor provision;

(8) The transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of the term as described in § 2702(c) of the Internal Revenue Code of 1986 (26 U.S.C. § 2702(c)), and any successor provision;

(9) The transferor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes due on income of the trust if such potential or actual receipt of income or principal is pursuant to a provision in the trust instrument that expressly permits a distribution to the transferor as reimbursement for such taxes and if such distribution would be the result of a qualified trustee's or qualified trustees' acting:

(a) In such qualified trustee's or qualified trustees' discretion or pursuant to a mandatory direction in the trust instrument; or

(b) At the direction of an advisor described in section 8, who is acting in such advisor's discretion;

(10) The ability, whether pursuant to direction in the qualified trust or discretion of a qualified trustee to pay, after the death of the transferor, all or any part of the debts of the transferor outstanding at the time of the transferor's death, the expenses of administering the transferor's estate, or any estate or inheritance tax imposed on or with respect to the transferor's estate; and

(11) A qualified trustee's or qualified trustees' authority to make distributions to pay taxes in lieu of or in addition to the power to make a distribution for taxes pursuant to subdivision (3), (6), (9), or (10) by direct payment to the taxing authorities.

Section 12. Applicability.

This chapter applies to qualified dispositions to qualified trusts and dispositions by transferors who are trustees made on or after [the effective date of this Act].

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