Amendment No. 2 to SB0713

Stevens
Signature of Sponsor

AMEND Senate Bill No. 713* House Bill No. 873

by deleting the following language from SECTION 3 of the bill as amended:

( ) "Alter ego of a trustee" means, that absent clear and convincing evidence, no settlor of an irrevocable trust may be deemed to be the alter ego of a trustee of such trust; none of the following factors, by themselves or in combination, may be considered sufficient evidence for a court to conclude that the settlor controls a trustee, or is the alter ego of a trustee, of such trust:

(A) Any combination of the factors listed in the definition of dominion and control over trust contained in this section;

(B) Isolated occurrences where the settlor has signed checks, made disbursements, or executed other documents related to such trust as a trustee, when in fact the settlor was not a trustee;

(C) Making any requests for distributions on behalf of beneficiaries; or

(D) Making any requests to the trustee to hold, purchase, or sell any trust property;

( ) "Dominion and control over trust" means, that in the event a person challenges a settlor's or a beneficiary's influence over a trust, none of the following factors, alone or in combination, shall enter into a determination that dominion and control over a trust exists:

(A) The settlor or a beneficiary serving as a trustee, cotrustee or other fiduciary as described in § 35-15-508;

(B) The settlor or a beneficiary holds an unrestricted power to remove or replace a trustee, cotrustee or other fiduciary;

(C) The settlor or a beneficiary is a trust administrator, a general partner of a partnership, a manager of a limited liability company, an officer of a corporation, or holds any other managerial function relative to any type of entity specified in this subdivision ( )(C), or relative to any other type of entity not so specified, and part or all of the trust property consists of an interest in such entity;

(D) A person related by blood or adoption to the settlor or a beneficiary is appointed as a trustee, cotrustee or other fiduciary;

(E) The settlor's or a beneficiary's agent, accountant, attorney, financial advisor, or friend is appointed as a trustee, cotrustee or other fiduciary;

(F) A business associate is appointed as a trustee, cotrustee or other fiduciary;

(G) A beneficiary holds any power of appointment over any or all of the trust property;

(H) The settlor holds a power to substitute property of equivalent value for property held by the trust, regardless of whether such power is:

(i) Held in a fiduciary or nonfiduciary capacity;

(ii) Exercisable with or without the approval of any person in a fiduciary capacity; or

(iii) Exercisable with or without the approval of any person having an interest adverse to such settlor;

(I) A trustee, cotrustee or other fiduciary has the power to loan trust property to the settlor for less than a full and adequate rate of interest or without adequate security;

(J) Any language relative to the power to make any distribution provides for any discretion relative to such distribution;

(K) The trust has only one beneficiary eligible for current distributions; or

(L) The beneficiary is serving as a cotrustee or a trust advisor or trust protector under part 12, or as any other fiduciary;

AND FURTHER AMEND by deleting from the definition of “directed trust” in SECTION 3 of the bill as amended the word “is” and substituting instead the word “are”.

AND FURTHER AMEND by deleting the language ""Reach" means" in SECTION 3 of the bill as amended and substituting instead the language ""Reach" means,".

AND FURTHER AMEND by deleting SECTION 5 of the bill as amended and substituting instead the following:

SECTION 5. Tennessee Code Annotated, Section 35-15-105, is further amended by deleting subdivision (b)(3) and by substituting instead the following:

(b)

(3) The requirement that a trust and its terms be for the benefit of its beneficiaries as the interests of such beneficiaries are defined under the terms of the trust, and that the trust has a purpose that is lawful and possible to achieve;

AND FURTHER AMEND by deleting the language "that preparation" from subdivision (a)(2)(B) of § 35-15-108 in SECTION 9 of the bill as amended and substituting instead the language "the preparation".

AND FURTHER AMEND by deleting the language “their” wherever it appears in SECTION 29 of the bill as amended and substituting instead the language “its”.

AND FURTHER AMEND by deleting the language “relative to trustee’s bonds apply” in subsection (a) of § 35-15-712 in SECTION 29 of the bill as amended and substituting instead the language “applies”.

AND FURTHER AMEND by deleting the language "relative to bonds" from subsection (b) of § 35-15-712 in SECTION 29 of the bill as amended.

AND FURTHER AMEND by deleting subsections (b) and (c) from § 35-15-1014 of SECTION 41 of the bill as amended and substituting instead the following:

(b) Regardless of whether or not the beneficiary sought, received or relied upon legal counsel, a no-contest provision shall be enforceable according to the express terms of the no-contest provision without regard to the beneficiary's good or bad faith in taking the action that would justify the complete or partial forfeiture of the beneficiary's interest in the trust under the terms of the no-contest provision unless probable cause exists for the beneficiary taking such action on the grounds of:

(1) Fraud;

(2) Duress;

(3) Revocation;

(4) Lack of testamentary capacity;

(5) Undue influence;

(6) Mistake;

(7) Forgery; or

(8) Irregularity in the execution of the trust instrument.

(c) Subsection (b) shall not apply to:

(1) Any action brought solely to challenge the acts of the trustee or other fiduciary of the trust to the extent that the trustee or other fiduciary has committed a breach of fiduciary duties or breach of trust;

(2) Any action brought by the trustee or any other fiduciary serving under the terms of the trust, unless the trustee or other fiduciary is a beneficiary against whom the no-contest provision is otherwise enforceable;

(3) Any agreement among the beneficiaries and any other interested persons in settlement of a dispute or resolution of any other matter relating to the trust, including without limitation any nonjudicial settlement agreement;

(4) Any action to determine whether a proposed or pending motion, petition, or other proceeding constitutes a contest within the meaning of a no-contest provision;

(5) Any action brought by a beneficiary or on behalf of any such beneficiary for a construction or interpretation of the terms of the trust; or

(6) Any action brought by the attorney general for a construction or interpretation of a charitable trust or a trust containing a charitable interest if a provision exists in a trust purporting to penalize a charity or charitable interest for contesting the trust if probable cause exists for instituting proceedings.

AND FURTHER AMEND by deleting all language following the first semicolon in subdivision (a)(9) of § 35-15-1201 in SECTION 43 of the bill as amended.

AND FURTHER AMEND by deleting the language “if the trust instrument allows for such” from subsection (d) in § 35-15-1201 in SECTION 43 of the bill as amended and substituting instead the language “to the extent provided in the trust instrument”.

AND FURTHER AMEND by adding the following new subsection (e) to § 35-15-1201 in SECTION 43 of the bill as amended:

(e) Notwithstanding anything in this section to the contrary, no modification, amendment or grant of a power of appointment with respect to a trust all of whose beneficiaries are charitable organizations may authorize a trust protector or trust advisor to grant a beneficial interest in such trust to any non-charitable interest or purpose.

AND FURTHER AMEND by deleting subdivision (1) in § 35-15-1205 of SECTION 43 of the bill as amended and substituting instead the following:

(1) Any loss resulting from compliance with a direction of a trustee, trust advisor or trust protector, including but not limited to, any loss from the trustee, trust advisor or trust protector breaching fiduciary responsibilities or acting beyond the trustee's, trust advisor's or trust protector's scope of authority;

AND FURTHER AMEND by deleting subdivision (b)(2)(B) in SECTION 46 of the bill as amended and substituting instead the following:

(b)

(2)

(B) 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.

AND FURTHER AMEND by deleting the language "members" in SECTION 49 of the bill as amended and by substituting instead the language "duly authorized representatives".

AND FURTHER AMEND by adding the following new sections immediately preceding SECTION 49 of the bill as amended and by renumbering the subsequent sections accordingly:

SECTION ___. Tennessee Code Annotated, Section 35-15-103(13), is amended by adding the following new subdivision (D):

(D) Notwithstanding any other provisions of this subdivision (13), no ultimate beneficiary or potential ultimate beneficiary shall be a qualified beneficiary.

(i) In determining who is or may be an ultimate beneficiary, all of the following shall be taken into consideration:

(*a*) The terms of the trust naming any ultimate beneficiary or potential ultimate beneficiary and the intention of the settlor relative to any such beneficiary as expressed in such terms; and

(*b*) Any terms or provisions related to the exercise of any power by any person naming any ultimate beneficiary or potential ultimate beneficiary and the intention of the person exercising such power relative to any such beneficiary as expressed in such terms or provisions;

(ii) Determined as provided in subdivision (13)(D)(i), an ultimate beneficiary or potential ultimate beneficiary is any beneficiary who the settlor or power holder did not reasonably anticipate would take any interest upon termination of all or any part of a trust absent all other beneficiaries or members of classes of beneficiaries named in the trust instrument or in the exercise of the power, respectively, predeceasing or otherwise not being in existence at the time at which such trust or part thereof terminates.

(iii) By way of example and not in limitation of this subdivision (13)(D), an ultimate beneficiary is a person or persons often included in a trust instrument or under the exercise of a power to take an interest in a trust at the time all or any part of such trust terminates only in a case where all other named beneficiaries or classes of beneficiaries that have or had an affinity through either familial connection or friendship with any of:

(*a*) The settlor;

(*b*) The person holding any power; or

(*c*) Any prior beneficiary or potential beneficiary of the trust;

are predeceased or are otherwise not in existence at the time all or any part of the trust terminates.

SECTION____. Tennessee Code Annotated, Section 35-15-404, is amended by deleting the section and by substituting instead the following:

35-15-404. **Trust Purposes.**

A trust may be created only to the extent its purposes are lawful and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries as the interests of such beneficiaries are defined under the terms of the trust.

SECTION____. Tennessee Code Annotated, Section 35-15-410, is amended by deleting subsection (a) and by substituting instead the following:

(a) In addition to the methods of termination prescribed by §§ 35-15-411 – 35-15-414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful or impossible to achieve.

SECTION____. Tennessee Code Annotated, Title 35, Chapter 15, Part 11, is amended by adding the following new appropriately designated sections thereto:

35-15-1104. **Alter Ego.**

(a) Absent clear and convincing evidence, no settlor of an irrevocable trust may be deemed to be the alter ego of a trustee of such trust.

(b) None of the following factors, by themselves or in combination, may be considered sufficient evidence for a court to conclude that the settlor controls a trustee, or is the alter ego of a trustee of such trust:

(1) Any combination of the factors listed in § 35-15-1105 regarding dominion and control over a trust;

(2) Isolated occurrences where the settlor has signed checks, made disbursements, or executed other documents related to such trust as a trustee, a

trust advisor or a trust protector, when in fact the settlor was not such a trustee, trust advisor or trust protector;

(3) Making any requests for distributions on behalf of beneficiaries; or

(4) Making any requests to the trustee to hold, purchase, or sell any trust property.

35-15-1105. **Dominion and Control over a Trust.**

In the event a person challenges a settlor's or a beneficiary's influence over a trust, none of the following factors, alone or in combination, shall enter into a determination that dominion and control over a trust exists:

(1) The settlor or a beneficiary is serving as a trustee, a trust advisor, a trust protector or other fiduciary as described in § 35-15-508;

(2) The settlor or a beneficiary holds an unrestricted power to remove or replace a trustee, a trust advisor, a trust protector or other fiduciary;

(3) The settlor or a beneficiary is a trust administrator, a general partner of a partnership, a manager of a limited liability company, an officer of a corporation, or holds any other managerial function relative to any type of entity specified in this subdivision, or relative to any other type of entity not so specified, and part or all of the trust property consists of an interest in such entity;

(4) A person related by blood or adoption to the settlor or a beneficiary is appointed as a trustee, a trust advisor, a trust protector or other fiduciary;

(5) The settlor's or a beneficiary's agent, accountant, attorney, financial advisor, or friend is appointed as a trustee, a trust advisor, a trust protector or other fiduciary;

(6) A business associate is appointed as a trustee, a trust advisor, a trust protector or other fiduciary;

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

(8) The settlor holds a power to substitute property of equivalent value for property held by the trust, regardless of whether such power is:

(A) Held in a fiduciary or nonfiduciary capacity;

(B) Exercisable with or without the approval of any person in a fiduciary capacity; or

(C) Exercisable with or without the approval of any person having an interest adverse to such settlor;

(9) A trustee, a trust advisor, a trust protector or other fiduciary has the power to loan trust property to the settlor for less than a full and adequate rate of interest or without adequate security;

(10) Any language relative to the power to make any distribution provides for any discretion relative to such distribution;

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

(12) The beneficiary is serving as a cotrustee, or as a trust advisor or trust protector under part 12, or as any other fiduciary.

SECTION____. Tennessee Code Annotated, Section 35-16-111(2), is amended by deleting the language “exercisable by will or other written instrument of the transferor effective only upon the transferor’s death” and by substituting instead the language “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”.