



SB 896 (Stevens) / HB 1186 (Garrett) – Trust Law Updates
Amendment 004455 Makes the Bill

Tennessee has become one of the leading trust jurisdictions in the country, frequently ranking in the top 3 states to locate a trust because of the strength of our laws. Part of this is due to the Tennessee Bankers Association making comprehensive updates to Tennessee’s laws over the years. This has resulted in an increase in trust companies chartering in Tennessee and increased business opportunities for existing trust companies. In the past 5 years, the total trust assets under management in Tennessee increased from \$25 billion to \$125 billion.

TBA has a working committee of trust officers and lawyers from across the state that meets annually to review Tennessee’s trust laws and determine what updates are needed for Tennessee to remain a leading trust jurisdiction and to enable trust officers to better serve their clients. The committee developed the following legislative proposals:

Section 1. Clarify the determination of partial liquidation under T.C.A. § 35-6-401(d)(2):

Revises T.C.A. § 35-6-401(d)(2) [Character of Receipts] under the Uniform Principal and Income Act to clarify the threshold for a deemed partial liquidation and that an entity still has the flexibility to declare a partial distribution when one is not deemed under the statute.

Section 2. Adds clarifying language to definition of qualified beneficiary:

Makes a technical correction to the definition of qualified beneficiary under T.C.A § 35-15-103(24) to distinguish subdivision (B) from (C) by adding the language underlined below:

(B) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subdivision (24)(A) terminated on that date without causing the trust to terminate;

Section 3 - 5. Clarifications to T.C.A. §§ 35-15-107 and -108:

TCA § 35-15-107(a) provides that “[t]he validity, construction and administration of a trust are determined by the law of the jurisdiction designated in the terms of the trust instrument, which is called a state jurisdiction provision [SJP].”

TCA § 35-15-107(c) provides that “[i]n the absence of the existence of a [SJP], the laws of the jurisdiction where the trust was executed determine the validity of the trust and the laws of descent, while the laws of the principal place of administration determine the administration of the trust.”

TCA § 35-15-108 provides that the terms of a trust designating that jurisdiction’s laws in a SJP are valid and controlling if certain requirements are met.

Amends TCA §§ 35-15-107 and -108 to clarify that the validity and construction of a trust are to be based on the law designated in the SJP (as provided for in -107) and cannot be changed merely by a change in administrative situs of the trust; however, the law governing the administration of the trust can initially be set forth in a SJP, but, as provided in -108, the portion of a SJP addressing administrative law only remains valid if the trust is administered in such state; otherwise, the applicable administrative law is the state where administration is then occurring.

Section 6. Clarify nonjudicial settlement agreements can be used to establish directed trusts

Tennessee trust companies believe that TCA § 35-15-111(c)(3) allows trustees and qualified beneficiaries to agree via non-judicial settlement agreements (NJSAs) to a trust being administered as a directed trust, but it is not clear. This situation comes up when transferring a trust to Tennessee from another state.

This clarifies that NJSAs can be used to approve an investment decision, policy, plan or program of a trustee, which includes establishing a directed trust by agreement with the qualified beneficiaries as allowed under TCA § 35-15-710 and § 35-15-1201.

Section 7. Increase maximum duration/enforceability of purpose trusts

In passing the 2013 trust legislation, TBA prioritized some matters, leaving others to wait for later legislation, including the “purpose trust” section in TCA § 35-15-409.

In 2013, the 90-year period was somewhat arbitrary in light of the language of T.C.A. § 66-1-202(f), which states: “As to any trust created after June 30, 2007, or that becomes irrevocable after June 30, 2007, the terms of the trust shall require that all beneficial interests in the trust vest or terminate or the power of appointment is exercised within three hundred sixty (360) years.”

Given recent changes to Tennessee trust law (authorizing private trust companies and special purpose entities), 90 years is no longer sufficient and this section extends that period to 360 years.

Section 8. Remove the reference to § 35-15-111 in the newly enacted § 35-15-411(c):

In TBA’s 2019 trust legislation, TCA § 35-15-411(c) was amended to allow for nonjudicial modification of irrevocable trusts after the settlor’s death if the change would not be inconsistent with a material purpose of the trust and the trustee and all qualified beneficiaries agree to the change(s). When drafting that legislation, reference was made to TCA § 35-15-111, but in hindsight, the reference is unnecessary. This section removes that reference to TCA § 35-15-111 in the recently enacted § 35-15-411(c).

Section 9. Clarify tenancy by the entirety statute

In the TBE statute (TCA § 35-15-510), subsection (i) states: “After a conveyance to a trustee described in subsection (b), the property transferred shall no longer be held by the husband and wife as TBE”. This has negative connotations in bankruptcy. This section changes that language to: “After a conveyance to a trustee, the property transferred shall be deemed to be TBE property held by husband and wife subject to the provisions of this section.”

Section 10 & 11. Trustee’s duty to inform and report to beneficiaries

Current law governing a trustee’s duty to inform and report to beneficiaries about the administration of the trust and of the material facts necessary for them to protect their interests – TCA §35-15-813 – does not adequately protect trustees in the event they follow the direction of the grantor, pursuant

to TCA § 35-15-813(e), to not inform and report to the qualified beneficiaries in the manner stipulated in TCA § 35-15-813(a) & (b).

These sections clarify protections for trustees when following the direction of: (1) a grantor to administer a trust as a silent trust and (2) a beneficiary to waive receipt of reports under TCA § 35-15-813(d).

This amends TCA § 35-15-813(e) to allow the statute of limitations to start running for actions of the trustee during the time the grantor has directed notice/reports not be sent, so long as the grantor or a person designated by the grantor to represent the beneficiary(ies) under TCA § 35-15-303 receives said notice/reports.

Section 11 amends TCA § 35-15-813(D) to allow the statute of limitations to start running as to a particular beneficiary during the time the beneficiary waives receipt of statements, so long as that particular beneficiary designates a person to represent him/her under TCA § 35-15-303 or acknowledges at the time of the waiver that he/she understands the statute will start running from the time of waiver of the notice/reports and that he/she understands he/she can revoke the consent to waive notice/reports at any time.

Sections 12. Update decanting statute to allow remainder beneficiaries to become current permissible beneficiaries and allow for decanting to eliminate a beneficiary’s mandatory distribution rights as to income.

This amends the decanting statute – TCA § 35-15-816(b)(27) – to allow a trustee to decant a trust to accelerate the interests of a remainder beneficiary in order to make that remainder a current permissible beneficiary. A few states already allow for this under their decanting statute – Nevada, South Dakota, and Missouri.

This also amends the decanting statute to allow for the ability to eliminate a beneficiary’s mandatory distribution rights as to income. Trust companies have had clients in the past that did not want to receive mandatory income and had some clients that were concerned mandatory income distributions could frustrate their benefits. Nevada, South Dakota, Missouri, and Delaware allow for this type of change with certain restrictions – GRATS, marital trusts, and charitable trusts.

Sections 13 & 23. Broaden definition of person under T.C.A. § 35-16-102(8):

The current definition of “person” under the Tennessee Investment Services Act [TCA § 35-16-103(8)] is inconsistent with other definitions of “person” within the Trust Code [TCA § 35-15-103(20)]. This modernizes the definitions of “person”; makes them consistent; and makes clear that an individual is a person for purposes of the statute.

Section 14– 15. Remove requirement for signing affidavit for asset protection trust additions

Tennessee’s asset protection trust statutes (Title 35, Chapter 16), requires an affidavit be obtained from the transferor when the trust is established and when assets are transferred to it. The purpose of the affidavit is to swear at the time of the transfer that the transferor did not have any creditors with claims to the asset and the transfer is not fraudulent.

Tennessee recently dropped from 3rd to a tie for 5th in the annual domestic asset protection trust state rankings because of the requirement for signing a new affidavit each time additions are made the asset protection trust.

This removes the statutory requirement for signing a new affidavit each time additions are made, but an affidavit would still be required upon establishment of the trust. By making this change, Tennessee will move back to the 3rd in the national rankings. Additionally, a trustee who receives additional assets could still require an affidavit, but it would not be statutorily required.

Section 16. Recordkeeping and identification of trust property

This amends TCA § 35-15-810 to clarify that separate trusts may be maintained despite commingling of assets for investment and tax reporting purposes, by adding the following language:

For all purposes under the Tennessee Uniform Trust Code, when a trust is apportioned into separate shares for a single beneficiary or related beneficiary group, the apportioned separate share of the trust shall be treated as separate trusts even though such share may be commingled with other separate shares for investment and tax reporting purposes as provided in this section.

Section 17. Creditors claims against settlor

This clarifies that the settlor's spouse is not treated as the settlor of a trust for the purposes of TCA § 35-15-505 by adding the following as a new subsection (h) to § 35-15-505:

(h) For purposes of this section, a person shall not be considered the settlor or deemed settlor of an irrevocable inter vivos trust where such person is a beneficiary with respect to property that was contributed to the trust by such person's spouse, regardless of whether or when such person was a settlor of an irrevocable inter vivos trust for the benefit of such person's spouse. For purposes of this subsection, the term "person's spouse" refers to the individual to whom the person was married at the time the irrevocable inter vivos trust was created, regardless of a subsequent dissolution of the marriage.

Section 18. Disbursements from principal, for increased flexibility.

This provides flexibility for the trustee to pay certain expenses, in addition to compensation for the trustee and investment advisory or custodial services, out of income if there is insufficient liquidity in the principal or if, due to the specific circumstances, payment out of income is prudent by adding the underlined language to TCA § 35-6-502:

(a) A trustee shall make the following disbursements from principal:

(1) The remaining one half (½) of the disbursements described in § 35-6-501(1) and (2); provided that, if in the judgment of the trustee, the charging of a part or all of that portion of the compensation described under T.C.A. § 35-6-501(1) to principal is impracticable because of the lack of sufficient principal cash and readily marketable intangible personal property, or inadvisable because of the nature of the assets, that part or all of such compensation shall be paid out of income. The decision of the trustee to pay a larger portion or all of such compensation out of income shall be conclusive, and the income of the trust shall not be entitled to reimbursement from principal at any subsequent time or times;

Section 19. Use of Electronic Signatures

Adds language to TCA § 35-15-1102 to clarify that the use of electronic signatures is appropriate for modification, termination, or settlement agreements pursuant to TCA §§ 35-15-111 (nonjudicial settlement agreements); 35-15-411 (modification/termination of noncharitable irrevocable trusts by

consent); or 35-15-412 (modification/termination because of unanticipated circumstances or inability to administer trust effectively).

Section 20. Judicial foreclosure of beneficial interests, powers of appointment, and reserved powers prohibited; certain reaches prohibited

This clarifies that the mere existence of a general power of appointment does not cause assets subject to the power to be reachable by the power holder's creditors by amending TCA § 35-15-509 to add the following language as new subsection (3) and renumbering the existing (3) as new subsection (4):

(3) Further, no creditor or assignee shall reach property transferred pursuant to a power of appointment exercised by a decedent unless the power of appointment was actually exercised in favor of the decedent or the decedent's estate; and

Section 21. Reduce asset protection trust statute from 2 years to 1.5 years

To enhance Tennessee's rankings with other leading jurisdictions, this reduces the statute of limitations for asset protection trusts from 2 years to 1.5 years.

Sections 22. Clarifies Standards for creation of trusts

Subdivision (a)(4) of TCA § 35-15-402 recites standard doctrine that a trust is created only if the trustee has duties to perform. Although trustees' duties are usually active, a validating duty may also be passive, implying only that the trustee has an obligation not to interfere with the beneficiary's enjoyment of the trust property. Such passive trusts, while valid under the Tennessee Uniform Trust Code, may be terminable if this state recognizes the common law Statute of Uses. New subdivision (d) would make clear that such passive trusts are not terminable regardless of whether the state has ever recognized the Statute of Uses (it is not clear whether or not this has been recognized).

Section 24. Registration with the Secretary of State

This section allows but does not require new trusts or trusts relocating from another state or country to register with the Secretary of State's office, which will allow the former jurisdiction to know definitively that the trust is no longer subject to its laws, taxes, etc.

Section 25. Code Commission Comments

This section allows the Tennessee Bankers Association to submit revised official comments for relevant trust statutes to the Tennessee Code Commission by July 1, 2021, to be published in the Tennessee Code.

Section 26. Effective Date

All sections are effective July 1, 2021, and applies to actions occurring after that date; however, Section 24 is effective January 1, 2022.