

## **Section 41 - Trusts**

### 41.10 In General

This section discusses the most common procedural and legal issues related to testamentary and inter vivos trusts in the Probate Division. A comprehensive overview of trusts is outside the scope of this manual. The reader is referred to the Restatement (Second) of Trusts (1959); Vols. 1-16, G. Bogert, The Law of Trusts and Trustees (rev. 2d ed. 1984); Vols. 1-6, A. Scott, The Law of Trusts (Wm. F. Fratcher 1987) 4th ed.; 1 Guardianship & Trust Law (Mo Bar CLE 1985, 1987) and Chapter 456 Missouri Revised Statutes.

### 41.20 Jurisdiction

The Probate Division possesses concurrent jurisdiction to hear and determine any litigation relating to testamentary and inter vivos trusts.

References: §§ 456.400, 456.450, 472.020, 472.300

### 41.30 Trust Registration

Registration of a trust may be effected by compliance with § § 456.400-.440, RSMo. The "statement" referred to in § 456.410, RSMo, need not be in any particular form, but it must contain all information required by that section. Upon the filing of the statement and the payment of a filing fee, a file will be opened in the name of the trust. The registration of the trust merely establishes the situs of the trust and nothing else. Before the Court can enter any judgment in connection with the trust, a petition must be filed seeking appropriate relief and service must be obtained upon all necessary parties.

References: §§ 456.400 - 456.440

### 41.40 Adversary Proceeding

Any issue in connection with a testamentary or inter vivos trust may be determined by the filing of a petition in the Probate Division. Such a petition is an independent adversary civil proceeding and is not ancillary to any related decedent's estate administration, thus it may not be filed within the decedent's estate, except that a will construction action involving the terms of a testamentary trust may be filed in a pending decedent's estate administration. See also Section 7, Adversary Proceedings.

### 41.50 Testamentary Trusts

#### 41.50.1 Terms of a Will

A trust may be created by the terms of a valid will admitted to probate. The will itself or an existing instrument which the will incorporates by reference must evidence:

- (1) The intention of the testator to create the trust,
- (2) The property to be held in trust,
- (3) The beneficiary, and
- (4) The purpose of the trust.

#### 41.50.2 "Pour-Over" Provisions

A will may provide that some or all of the testator's estate is to be distributed to an existing inter vivos trust to be held under the terms of that trust.

### 41.60 Trustees

#### 41.60.1 Identity of Trustee and

#### Beneficiaries

The trustee will either be appointed in the will which creates the trust or in an inter vivos trust to which the testator's estate pours over. In the latter situation, the personal representative of the decedent's estate must provide the Court with a copy of the inter vivos trust instrument to establish the identities of the trustee and beneficiaries.

Reference: § 456.120

#### 41.60.2 Personal Representative as Trustee

It is fairly common for the personal representative of the estate to also be named as trustee. If the personal representative/trustee executes a document that requires the consent of the trustee/distributee, then the consent is inferred by execution of the document, absent evidence to the contrary. When an individual is acting as both personal representative and trustee, the individual must avoid any conflict of interest when acting in either capacity. The Court is sensitive to this relationship and will review the relationship when any petition is filed seeking action which might create a conflict of interest.

#### 41.60.3 Nonresident Corporate Fiduciaries - Reciprocity

A "foreign corporation" which has authority to act in a fiduciary capacity in the foreign state and is qualified to do business in Missouri, is authorized to act as a trustee in Missouri if it meets the requirements of § 362.600, RSMo. "Foreign Corporations" include any bank or corporation incorporated in states which adjoin or touch a state adjoining Missouri and a national banking association whose principal place of business is in a state which adjoins or next adjoins Missouri.

Upon proper application and showing of this reciprocal privilege, the Missouri Director of Finance will issue a certificate of reciprocity to the foreign corporation which authorizes the

foreign corporate fiduciary to serve without a Missouri-resident co-trustee. See Sections 24 and 25, Distribution and Discharge, regarding the requirement for filing the certificate of reciprocity.

References: §§ 362.600, 456.120

#### 41.60.4 Resignation, Death, Inability or Refusal to Act - Successor Trustee

A trust instrument may provide for the appointment of a successor trustee upon the resignation, death, inability or refusal to act of the trustee. It may give the beneficiaries, remaining trustees or other persons the power to appoint a successor. Provisions in the trust instrument control.

However, where no provision for a successor trustee is made in the trust instrument, there must be compliance with §§ 456.190 and 456.200, RSMo, for appointment of a successor trustee. The Court will appoint a successor trustee only after appropriate documents/pleadings are filed, the filing fee is paid and service on interested persons (co-trustees, beneficiaries) has been made or their consents have been obtained.

If there are minor beneficiaries and the doctrine of virtual representation does not apply, it may be necessary to appoint a guardian ad item.

References: §§ 456.190, 456.200, 472.300

#### 41.60.5 Accounting

Regardless of whether the trust instrument or court order requires the trustee to file an annual accounting with the Court, the Court will not, on its own motion, audit or otherwise take any action with respect to the accounting filed. The trustee may secure approval of an annual accounting by filing a petition to that effect and securing service of notice of hearing on all necessary parties. If objections to an accounting are filed, the Court will issue an order requiring the trustee to file a responsive pleading within a specified time. After a reasonable period for completion of pretrial discovery has expired, the Court will, on request of one of the parties, set the matter for hearing.

Reference: § 456.233

#### 41.70 Modification, Revocation and Termination

The Court, upon petition by the trustee or by any person beneficially interested under the trust, may by order, confer necessary powers upon the trustees for any transaction that is expedient where such a power is not vested in the trustee by the trust instrument or by law; or may, with the consent of all adult beneficiaries who are not disabled, vary the terms of a private trust or provide for termination of the trust at a time earlier than that provided in the trust instrument.

To vary the terms or provide for early termination of the trust, the Court must find that the variation will benefit the disabled, minor, unborn or unascertained beneficiaries. Any such petition is an adversary civil proceeding subject to the Civil Rules and the Civil Code (Chapters 506 through 516, RSMo). See Section 7, Adversary Proceedings.

Reference: § 456.590

[END OF SECTION]