



January 15, 2010

SENATE BILL No. 67

DIGEST OF SB 67 (Updated January 13, 2010 12:55 pm - DI 106)

Citations Affected: IC 30-4.

Synopsis: Trust matters. Prescribes trust interpretation rules to protect discretionary interests held by beneficiaries. Precludes creditor actions against certain trust interests. Authorizes matrimonial trusts. Authorizes a trustee to decant a trust. Authorizes a trustee to close a trust when a beneficiary cannot be found by selling the beneficiary's share and depositing the proceeds with the clerk of the court. Requires the clerk to hold the proceeds for the use and benefit of the person or persons thereafter determined by law to be entitled to the proceeds. (The introduced version of this bill was prepared by the probate code study commission.)

Effective: July 1, 2010.

Zakas

January 5, 2010, read first time and referred to Committee on Judiciary.
January 14, 2010, reported favorably — Do Pass.

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SB 67—LS 6211/DI 92+



January 15, 2010

Second Regular Session 116th General Assembly (2010)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2009 Regular and Special Sessions of the General Assembly.

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SENATE BILL No. 67



A BILL FOR AN ACT to amend the Indiana Code concerning trusts and fiduciaries.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 30-4-2.1-13 IS ADDED TO THE INDIANA CODE
2 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
3 1, 2010]: **Sec. 13. (a) The following rules apply only to discretionary**
4 **interests:**
5 (1) A discretionary interest is a mere expectancy that is
6 neither a property interest nor an enforceable right.
7 (2) A creditor may not:
8 (A) require a trustee to exercise the trustee's discretion to
9 make a distribution; or
10 (B) cause a court to foreclose a discretionary interest.
11 (3) A court may review a trustee's distribution discretion only
12 if the trustee acts dishonestly or with an improper motive.
13 (b) Words such as sole, absolute, uncontrolled, or unfettered
14 discretion dispense with the trustee acting reasonably.
15 (c) Absent express language to the contrary, if the distribution
16 language in a discretionary interest permits unequal distributions
17 between beneficiaries or distributions to the exclusion of other

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1 beneficiaries, a trustee may, in the trustee's discretion, distribute
2 all of the accumulated, accrued, or undistributed income and
3 principal to one (1) beneficiary to the exclusion of the other
4 beneficiaries.

5 (d) Regardless of whether a beneficiary has any outstanding
6 creditors, a trustee of a discretionary interest may directly pay any
7 expense on behalf of the beneficiary and may exhaust the income
8 and principal of the trust for the benefit of the beneficiary. A
9 trustee is not liable to a creditor for paying the expenses of a
10 beneficiary who holds a discretionary interest.

11 SECTION 2. IC 30-4-2.1-14 IS ADDED TO THE INDIANA CODE
12 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
13 1, 2010]: **Sec. 14. If a party challenges a settlor or a beneficiary's
14 influence over a trust, none of the following factors, alone or in
15 combination, may be considered dominion and control over a trust:**

- 16 (1) A beneficiary serving as a trustee or co-trustee.
- 17 (2) The settlor or beneficiary holds an unrestricted power to
18 remove or replace a trustee.
- 19 (3) The settlor or a beneficiary:
 - 20 (A) is a trust administrator, a general partner of a
21 partnership, a manager of a limited liability company, or
22 an officer of a corporation; or
 - 23 (B) has any other managerial function in any other entity;
24 that is owned in whole or in part by the trust.
- 25 (4) A person related by blood or adoption to a settlor or
26 beneficiary is appointed as trustee.
- 27 (5) An agent, accountant, attorney, financial adviser, or friend
28 of the settlor or a beneficiary is appointed as trustee.
- 29 (6) A business associate of the settlor or a beneficiary is
30 appointed as trustee.
- 31 (7) A beneficiary holds any power of appointment over part
32 or all of the trust property.
- 33 (8) The settlor holds a power to substitute property of
34 equivalent value.
- 35 (9) The trustee may loan trust property to the settlor for less
36 than a full and adequate rate of interest or without adequate
37 security.
- 38 (10) The trust contains broad purposes or highly
39 discretionary distribution language.
- 40 (11) The trust has only one (1) beneficiary eligible for current
41 distributions.

42 SECTION 3. IC 30-4-2.1-15 IS ADDED TO THE INDIANA CODE

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1 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
2 1, 2010]: **Sec. 15. Absent clear and convincing evidence otherwise,
3 a settlor of an irrevocable trust may not be considered the alter ego
4 of a trustee. The following factors, alone or in combination, are not
5 sufficient evidence to conclude that the settlor controls a trustee or
6 is the alter ego of the trustee:**

- 7 (1) Any combination of the factors listed in section 14 of this
8 chapter.
- 9 (2) Isolated occurrences of the settlor signing checks, making
10 disbursements, or executing other documents related to the
11 trust as a trustee when the settlor is, in fact, not a trustee.
- 12 (3) Requesting a trustee to make distributions on behalf of a
13 beneficiary.
- 14 (4) Requesting a trustee to hold, purchase, or sell any trust
15 property.

16 SECTION 4. IC 30-4-2.1-16 IS ADDED TO THE INDIANA CODE
17 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
18 1, 2010]: **Sec. 16. (a) A creditor may not reach, exercise, or
19 otherwise acquire an interest of a beneficiary or any other person
20 who holds an unconditional or conditional removal or replacement
21 power over a trustee. A power described in this subsection is
22 personal to a beneficiary or other person and may not be exercised
23 by the person's creditors. A court may not direct a person to
24 exercise the power.**

- 25 (b) A creditor may not:
 - 26 (1) reach an interest of a beneficiary who is also a trustee or
27 co-trustee; or
 - 28 (2) otherwise compel a distribution to a beneficiary who is
29 also a trustee or co-trustee.
- 30 (c) A court may not foreclose against an interest held by a
31 beneficiary described in subsection (b).

32 SECTION 5. IC 30-4-3-35 IS ADDED TO THE INDIANA CODE
33 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
34 1, 2010]: **Sec. 35. (a) As used in this section, "joint matrimonial
35 trust" means a single inter vivos trust established under this
36 section by settlors who are related as husband and wife.**

- 37 (b) As used in this section, "matrimonial property" means real
38 property that:
 - 39 (1) is subject to a written election to treat the property as
40 matrimonial property under this section; and
 - 41 (2) is owned by a matrimonial trust.
- 42 (c) As used in this section, "matrimonial trust" means a trust

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1 established under this section to own matrimonial property.
 2 (d) As used in this section, "separate matrimonial trust" means
 3 a separate trust that is also a matrimonial trust.
 4 (e) As used in this section, "separate trust" means a trust
 5 established by one (1) individual.
 6 (f) A matrimonial trust may be established:
 7 (1) jointly by a husband and wife; or
 8 (2) in two (2) or more separate trusts.
 9 (g) A husband and wife may elect to treat real property as
 10 matrimonial property with a written statement of the election:
 11 (1) in an instrument or instruments conveying the real
 12 property to a matrimonial trust or trusts; or
 13 (2) in a separate writing that must be recorded in the county
 14 where the real property is situated and indexed in the records
 15 of the county recorder's office to the instrument or
 16 instruments that convey the real property to a matrimonial
 17 trust or trusts.
 18 (h) A guardian of a husband and wife may make an election
 19 under this section:
 20 (1) without the approval of the court if the guardian has
 21 unlimited powers under IC 29-3-8-4; and
 22 (2) with the approval of the court in all other cases.
 23 (i) An attorney in fact of a husband and wife may make an
 24 election under this section under the powers conferred upon the
 25 attorney in fact by IC 30-5-5-2 if the power of attorney is recorded
 26 in the county where the real property is situated and indexed in the
 27 records of the county recorder's office to the instrument or
 28 instruments that convey the real property to a matrimonial trust
 29 or trusts.
 30 (j) An interest in matrimonial property is not severable during
 31 the marriage of the husband and wife unless:
 32 (1) both the husband and wife join in the severance in writing;
 33 or
 34 (2) a third party owns and forecloses a mortgage or other lien
 35 against the interests of both the husband and wife in the
 36 matrimonial property.
 37 (k) Notwithstanding any other provision of this section, the legal
 38 rights of a lienholder that exist at the time of an election to treat
 39 the real property subject to the lien as matrimonial property may
 40 not be subject to a severance described in subsection (j) without the
 41 lienholder's written consent.
 42 (l) A matrimonial trust established by an individual continues

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1 to be a matrimonial trust after the death of the settlor if the
2 deceased settlor's separate trust provides to the surviving spouse:

- 3 (1) a life estate;
- 4 (2) an interest that qualifies for a deduction from the gross
5 estate of the decedent under Section 2056 of the Internal
6 Revenue Code regardless of whether an election is made to
7 qualify the interest for the deduction; or
- 8 (3) in some respect the current right to occupy or receive rent,
9 royalties, or other kinds of income with respect to the
10 matrimonial property.

11 (m) A separate matrimonial trust ceases to be a matrimonial
12 trust upon the termination of payments to the surviving spouse as
13 a result of the surviving spouse's death or the surviving spouse's
14 disclaimer of all interests in the separate matrimonial trust.

15 (n) A joint matrimonial trust ceases to be a matrimonial trust
16 upon the death of one (1) of the settlors.

17 (o) A matrimonial trust ceases to be a matrimonial trust upon
18 the dissolution of the marriage of the settlors.

19 (p) A husband and wife may revoke a matrimonial trust by
20 together executing a writing expressing the revocation.

21 SECTION 6. IC 30-4-3-36 IS ADDED TO THE INDIANA CODE
22 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
23 1, 2010]: Sec. 36. (a) Unless a trust expressly provides otherwise, a
24 trustee who has absolute power under the terms of a trust
25 (referred to in this section as the "first trust") to invade the
26 principal of the trust to make distributions to or for the benefit of
27 one (1) or more persons may instead exercise the power by
28 appointing all or part of the principal of the first trust in favor of
29 a trustee of another trust (referred to in this section as the "second
30 trust") for the benefit of one (1) or more persons under the same
31 trust instrument or under a different trust instrument as long as:

- 32 (1) the beneficiaries of the second trust are the same as the
33 beneficiaries of the first trust;
- 34 (2) the second trust does not reduce any income, annuity, or
35 unitrust interest in the assets of the first trust; and
- 36 (3) if any contributions to the first trust qualified for a marital
37 or charitable deduction for purposes of the federal income,
38 gift, or estate taxes, the second trust does not contain any
39 provision that, if included in the first trust, would have
40 prevented the first trust from qualifying for a deduction or
41 reduced the amount of a deduction.

42 (b) For purposes of this section, an absolute power to invade

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1 principal includes a power to invade principal that is not limited to
2 specific or ascertainable purposes, such as health, education,
3 maintenance, and support regardless of whether the term
4 "absolute" is used.

5 (c) The exercise of a power to invade principal under subsection
6 (a) must be by an instrument that is:

- 7 (1) in writing;
- 8 (2) signed and acknowledged by the trustee; and
- 9 (3) filed with the records of the first trust.

10 (d) The exercise of a power to invade principal under subsection
11 (a) is considered the exercise of a power of appointment, other than
12 a power to appoint to the trustee, the trustee's creditors, the
13 trustee's estate, or the creditors of the trustee's estate. The exercise
14 of the power does not extend the time at which the permissible
15 period of the rule against perpetuities begins and the law that
16 determines the permissible period of the rule against perpetuities
17 of the first trust.

18 (e) The trustee shall notify in writing all qualified beneficiaries
19 of the first trust at least sixty (60) days before the effective date of
20 the trustee's exercise of the power to invade principal under
21 subsection (a) of the manner in which the trustee intends to
22 exercise the power. A copy of the proposed instrument exercising
23 the power satisfies the trustee's notice obligation under this
24 subsection. If all qualified beneficiaries waive the notice period by
25 signed written instrument delivered to the trustee, the trustee's
26 power to invade principal may be exercised immediately. The
27 trustee's notice under this subsection does not limit the right of any
28 beneficiary to object to the exercise of the trustee's power to invade
29 principal, except as otherwise provided by this article.

30 (f) The exercise of the power to invade principal under
31 subsection (a) is not prohibited by a spendthrift clause or by a
32 provision in the trust instrument that prohibits amending or
33 revoking the trust.

34 (g) This section is not intended to create or imply a duty to
35 exercise a power to invade principal. No inference of impropriety
36 may be made as a result of a trustee not exercising the power to
37 invade principal conferred under subsection (a).

38 (h) This section may not be construed to abridge the right of any
39 trustee who has a power of invasion to appoint property in further
40 trust that arises under the terms of the first trust, under any other
41 provision of this article or any other statute, or under common law.

42 SECTION 7. IC 30-4-3-37 IS ADDED TO THE INDIANA CODE

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1 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
 2 1, 2010]: **Sec. 37. (a) If a beneficiary of a trust cannot be found**
 3 **after a reasonable search, the trustee may file a petition setting out**
 4 **the facts of the unsuccessful search. The court may order the**
 5 **trustee to sell the shares of the trust to which the beneficiary is**
 6 **entitled and to pay the proceeds to the clerk of the court. The clerk**
 7 **shall hold the proceeds for the use and benefit of the person or**
 8 **persons thereafter determined by law to be entitled to the proceeds.**
 9 (b) If a trustee pays any money to the clerk of the court under
 10 this section, the trustee shall file a receipt with the court. Filing the
 11 receipt is sufficient to discharge the trustee in the same manner
 12 and to the same extent as though the trustee had paid or
 13 distributed the appropriate share of the trust to the unlocated
 14 beneficiary.
 15 (c) This section does not apply to stocks, dividends, capital
 16 credits, patronage, refunds, utility deposits, membership fees,
 17 account balances, or book equities for which the owner cannot be
 18 found that are the result of distributable savings of a rural electric
 19 membership corporation formed under IC 8-1-13, a rural
 20 telephone cooperative corporation formed under IC 8-1-17, or an
 21 agricultural cooperative association formed under IC 15-12-1.

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COMMITTEE REPORT

Madam President: The Senate Committee on Judiciary, to which was referred Senate Bill No. 67, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill DO PASS.

(Reference is made to Senate Bill 67 as introduced.)

BRAY, Chairperson

Committee Vote: Yeas 9, Nays 1.

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