

SENATE BILL NO. 555

INTRODUCED BY G. HERTZ

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A SPECIAL SPOUSAL TRUST; PROVIDING FOR THE CREATION, AMENDMENT, AND REVOCATION OF A SPECIAL SPOUSAL TRUST; REQUIRING THAT PROPERTY HELD IN A SPECIAL SPOUSAL TRUST IS TREATED AS COMMUNITY PROPERTY; PROVIDING FOR ADJUSTMENTS IN CALCULATING MONTANA TAXABLE INCOME FOR PROPERTY THAT IS SPECIAL SPOUSAL PROPERTY; PROVIDING RULEMAKING AUTHORITY; PROVIDING DEFINITIONS; AMENDING SECTION 15-30-2120, MCA; AND PROVIDING A DELAYED EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 15] may be cited as the "Montana Special Spousal Trust Act".

NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 15], unless the context clearly indicates otherwise, the following definitions apply:

(1) "Bona fide purchaser" means a purchaser of property for value who has not knowingly been a party to fraud or illegality affecting the interest of the spouses or other parties to the transaction, does not have notice of an adverse claim by a spouse, and has acted in the transaction in good faith.

(2) "Purchaser" means a person who acquires property by sale, lease, discount, negotiation, mortgage, pledge, or lien, or otherwise deals with property in a voluntary transaction other than making a gift. A purchaser gives value for property if the property is acquired:

- (a) in return for a binding commitment to extend credit;
- (b) as security for or in total or partial satisfaction of a preexisting claim;
- (c) by accepting delivery under a preexisting contract for purchase; or
- (d) in return for other consideration sufficient to support a contract.

(3) "Qualified person" means, without regard to whether the person is the transferor:

(a) an individual who, except for brief intervals, military service, attendance at an educational or training institution, or for absences for good cause shown, resides in this state, whose true and permanent home is in this state, who does not have a present intention of moving from this state, and who has the intention of returning to this state when away;

(b) a trust company that is organized under the laws of this state or under federal law and that has its principal place of business in this state; or

(c) a bank or savings association that possesses and exercises trust powers, has its principal place of business in this state, and the deposits of which are insured by the federal deposit insurance corporation.

(4) "Special spousal property" means property in trust that is treated as community property as provided in [section 7].

(5) "Surviving spouse's property" means the property that consists of the surviving spouse's property that is not Montana special spousal property and the surviving spouse's share of the special spousal property determined as of the date of the first spouse's death.

NEW SECTION. Section 3. Arrangement qualifying as special spousal trust -- state law or jurisdiction provision valid, effective, and conclusive. (1) An arrangement is a Montana special spousal trust if one or both spouses in a marriage transfer property to a trust, the trust expressly declares that some or all the property transferred is Montana special spousal property as provided in [sections 1 through 15], and at least one trustee is a qualified person. A Montana special spousal trust is enforceable without consideration. Both spouses or either spouse may be a trustee. The trust must be signed by both spouses. The trust may be revocable or irrevocable.

(2) (a) Except as expressly provided by the terms of a governing instrument or by a court order, a general law or a state jurisdiction provision stating that the laws of this state govern is valid, effective, and conclusive for a Montana special spousal trust if all of the following are true:

(i) some or all of the trust assets are deposited in this state or physical evidence of the assets is held in this state and the trust is being administered by a qualified person;

1 (ii) a trustee is a qualified person who is designated as a trustee under the governing instrument, a
2 successor trusteeship, or designated by a court having jurisdiction over the trust; and

3 (iii) the administration, for example, physically maintaining trust records in this state and preparing
4 or arranging for the preparation of, on an exclusive basis or a nonexclusive basis, an income tax return that
5 must be filed by the trust, occurs wholly or partly in this state.

6 (b) For the purpose of subsection (2)(a), deposited in this state includes being held in a checking
7 account, time deposit, certificate of deposit, brokerage account, trust company fiduciary account, or other
8 similar account or deposit that is located in this state, including state investments.

9 (3) This state and the courts of this state have jurisdiction over a trust created in a foreign
10 jurisdiction if the administration of the trust meets the three requirements in subsection (2)(a).

11 (4) Nothing in this section may be construed to be the exclusive means of providing a valid,
12 effective, and conclusive state jurisdiction provision.

13
14 **NEW SECTION. Section 4. Required language.** A Montana special spousal trust must contain the
15 following language in at least 14-point type and capital letters at the beginning of the trust:

16 "THE CONSEQUENCES OF THIS TRUST MAY BE VERY EXTENSIVE, INCLUDING YOUR RIGHTS
17 WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR
18 SPOUSE BOTH DURING THE COURSE OF YOUR MARRIAGE, AT THE TIME OF A DIVORCE, AND AT
19 THE DEATH OF YOU OR YOUR SPOUSE. ACCORDINGLY, THIS TRUST AGREEMENT SHOULD ONLY BE
20 SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS TRUST
21 AGREEMENT, YOU SHOULD SEEK INDEPENDENT LEGAL ADVICE."

22
23 **NEW SECTION. Section 5. Classification of property -- interest of each spouse.** Spouses may
24 classify all or any of their property as special spousal property by transferring property to a Montana special
25 spousal trust established pursuant to [sections 1 through 15], and by expressly declaring in the trust that the
26 property is community property. Unless there is a specific provision in the governing instrument stating
27 otherwise, each spouse's respective interest in the special spousal property is 50%.

1 **NEW SECTION. Section 6. Amendment and revocation.** A Montana special spousal trust may not
2 be amended or revoked unless the trust agreement provides for amendment or revocation, or unless the trust
3 agreement is amended or revoked by a later Montana special spousal trust. To amend or revoke the trust, the
4 later Montana special spousal trust is not required to declare any property held by the trustee as special
5 spousal property. The amended trust or the revocation is enforceable without consideration. However,
6 notwithstanding the other provisions of [sections 1 through 15], unless the Montana special spousal trust
7 expressly provides otherwise, at any time after the death of the first spouse the surviving spouse may amend
8 the Montana special spousal trust with regard to the surviving spouse's property to be disposed of at the
9 surviving spouse's death.

10
11 **NEW SECTION. Section 7. Application of Internal Revenue Code -- community property**
12 **classified by another jurisdiction -- state income taxes.** (1) For purposes of the application of section
13 1014(b)(6) of the Internal Revenue Code, 26 U.S.C. 1014(b)(6), a Montana special spousal trust is considered
14 a trust established under the community property laws of Montana. Community property as classified by a
15 jurisdiction other than Montana transferred to a Montana special spousal trust retains its character as
16 community property while in the trust. If the trust is revoked and property is transferred on revocation of the
17 trust, the community property as classified by a jurisdiction other than Montana retains its character as
18 community property to the extent otherwise provided by law.

19 (2) The provisions of subsection (1) apply to determining the gain or loss from the sale or transfer
20 of property under Title 15, chapter 30, regardless of whether the property is considered community property
21 under the Internal Revenue Code.

22
23 **NEW SECTION. Section 8. Types of transfers to special spousal trust.** In addition to other
24 transfers of property to a Montana special spousal trust, property is considered transferred to a Montana
25 special spousal trust if the property is subject to a nonprobate transfer on death under an insurance policy,
26 contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account
27 agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement
28 plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written

instrument of a similar nature and the Montana special spousal trust is designated as a beneficiary to receive the property under the transfer. The property is considered the surviving spouse's property that is not Montana special spousal property.

NEW SECTION. Section 9. Records. The trustee of a Montana special spousal trust shall maintain records that identify which property held by the trust is Montana special spousal property and which property held by the trust is not Montana special spousal property.

NEW SECTION. Section 10. Matters upon which spouses may agree. Except as provided in [sections 11 through 13], in a Montana special spousal trust, spouses may agree on:

- (1) the rights and obligations in the property transferred to the trust, notwithstanding when and where the property is acquired or located;
- (2) the management and control of the property transferred to the trust;
- (3) the disposition of the property transferred to the trust on dissolution, death, or the occurrence or nonoccurrence of another event; if there is no provision in the governing instrument on disposition of the property transferred to the trust on dissolution, state law on disposition of property on dissolution applies;
- (4) the choice of law governing the interpretation of the trust; and
- (5) any other matter that affects the property transferred to the trust and does not violate public policy or a statute imposing a criminal penalty.

NEW SECTION. Section 11. Right of child to support. Notwithstanding anything contained in [section 10] to the contrary, a Montana special spousal trust may not adversely affect the right of a child to support.

NEW SECTION. Section 12. Creditor rights -- good faith between spouses. Notwithstanding anything contained in [section 10] to the contrary:

- (1) a provision of a revocable Montana special spousal trust does not adversely affect the interest of a creditor unless the creditor has actual knowledge of the trust when the obligation to the creditor is incurred.

1 The interest of a creditor in an irrevocable Montana special spousal trust may be subject to the rights and
2 liabilities of a creditor with respect to transfers in this state.

3 (2) a spouse shall act in good faith with respect to the other spouse in matters involving Montana
4 special spousal property. The obligation under and effect of this section may not be varied by a Montana
5 special spousal trust.

6
7 **NEW SECTION. Section 13. Bona fide purchasers.** Notwithstanding anything contained in [section
8 10] to the contrary:

9 (1) notice of the existence of a Montana special spousal trust, a marriage, or the termination of a
10 marriage does not affect the status of a purchaser as a bona fide purchaser; and

11 (2) special spousal property purchased by a bona fide purchaser from a spouse having the right to
12 manage and control the property is acquired free of any claim of the other spouse. The effect of this subsection
13 may not be varied by a Montana special spousal trust.

14
15 **NEW SECTION. Section 14. Unenforceable trusts.** (1) A Montana special spousal trust executed
16 during marriage is not enforceable if the spouse against whom enforcement is sought proves that:

17 (a) the trust was unconscionable when made;

18 (b) the spouse against whom enforcement is sought did not execute the Montana special spousal
19 trust agreement voluntarily; or

20 (c) before execution of the Montana special spousal trust agreement, the spouse against whom
21 enforcement is sought:

22 (i) was not given a fair and reasonable disclosure of the property and financial obligations of the
23 other spouse;

24 (ii) did not voluntarily sign a written waiver expressly waiving right to disclosure of the property and
25 financial obligations of the other spouse beyond the disclosure provided; and

26 (iii) did not have notice of the property or financial obligations of the other spouse.

27 (2) The determination of whether a Montana special spousal trust is unconscionable is determined
28 by a court as a matter of law.

1

2 **NEW SECTION.** **Section 15. Rulemaking.** The department of revenue may enact rules and
3 promulgate forms to administer and implement [sections 1 through 15] for the purpose of administering the
4 provisions of Title 15, chapter 30, and the valuation of property to establish the fair market value at death for
5 state income tax purposes.

6

7 **Section 16.** Section 15-30-2120, MCA, is amended to read:

8 **"15-30-2120. (Effective January 1, 2024) Adjustments to federal taxable income to determine**

9 **Montana taxable income.** (1) The items in subsection (2) are added to and the items in subsection (3) are
10 subtracted from federal taxable income to determine Montana taxable income.

11 (2) The following are added to federal taxable income:

12 (a) to the extent that it is not exempt from taxation by Montana under federal law, interest from
13 obligations of a territory or another state or any political subdivision of a territory or another state and exempt-
14 interest dividends attributable to that interest except to the extent already included in federal taxable income;

15 (b) that portion of a shareholder's income under subchapter S. of Chapter 1 of the Internal
16 Revenue Code that has been reduced by any federal taxes paid by the subchapter S. corporation on the
17 income;

18 (c) depreciation or amortization taken on a title plant as defined in 33-25-105;

19 (d) the recovery during the tax year of an amount deducted in any prior tax year to the extent that
20 the amount recovered reduced the taxpayer's Montana income tax in the year deducted;

21 (e) an item of income, deduction, or expense to the extent that it was used to calculate federal
22 taxable income if the item was also used to calculate a credit against a Montana income tax liability;

23 (f) a deduction for an income distribution from an estate or trust to a beneficiary that was included
24 in the federal taxable income of an estate or trust in accordance with sections 651 and 661 of the Internal
25 Revenue Code, 26 U.S.C. 651 and 661;

26 (g) a withdrawal from a medical care savings account provided for in Title 15, chapter 61, used for
27 a purpose other than an eligible medical expense or long-term care of the employee or account holder or a
28 dependent of the employee or account holder;

(h) a withdrawal from a first-time home buyer savings account provided for in Title 15, chapter 63, used for a purpose other than for eligible costs for the purchase of a single-family residence;

(i) for a taxpayer that deducts the qualified business income deduction pursuant to section 199A of the Internal Revenue Code, 26 U.S.C. 199A, an amount equal to the qualified business income deduction claimed; ~~and~~

(j) for a taxpayer that deducts state income taxes pursuant to section 164(a)(3) of the Internal Revenue Code, 26 U.S.C. 164(a)(3), an additional amount equal to the state income tax deduction claimed, not to exceed the amount required to reduce the federal itemized amount computed under section 161 of the Internal Revenue Code, 26 U.S.C. 161, to the amount of the federal standard deduction allowable under section 63(c) of the Internal Revenue Code, 26 U.S.C. 63(c); and

(k) for a taxpayer with a gain from the sale of Montana special spousal trust property with a lower basis under [sections 1 through 15] than the basis used for calculation of federal taxable income, an amount equal to the gain reported as federal taxable income minus the gain calculated pursuant to [sections 1 through 15].

(3) To the extent they are included as income or gain or not already excluded as a deduction or expense in determining federal taxable income, the following are subtracted from federal taxable income:

(a) a deduction for an income distribution from an estate or trust to a beneficiary in accordance with sections 651 and 661 of the Internal Revenue Code, 26 U.S.C. 651 and 661, recalculated according to the additions and subtractions in subsections (2) and (3)(b) through ~~(3)(m)~~ (3)(n);

(b) if exempt from taxation by Montana under federal law:

(i) interest from obligations of the United States government and exempt-interest dividends attributable to that interest; and

(ii) railroad retirement benefits;

(c) (i) salary received from the armed forces by residents of Montana who are serving on active duty in the regular armed forces and who entered into active duty from Montana;

(ii) the salary received by residents of Montana for active duty in the national guard. For the purposes of this subsection (3)(c)(ii), "active duty" means duty performed under an order issued to a national guard member pursuant to:

1 (A) Title 10, U.S.C.; or

2 (B) Title 32, U.S.C., for a homeland defense activity, as defined in 32 U.S.C. 901, or a contingency
3 operation, as defined in 10 U.S.C. 101, and the person was a member of a unit engaged in a homeland
4 defense activity or contingency operation.

5 (iii) the amount received pursuant to 10-1-1114 or from the federal government by a service
6 member, as defined in 10-1-1112, as reimbursement for group life insurance premiums paid;

7 (iv) the amount received by a beneficiary pursuant to 10-1-1201; and

8 (v) all payments made under the World War I bonus law, the Korean bonus law, and the veterans'
9 bonus law. Any income tax that has been or may be paid on income received from the World War I bonus law,
10 Korean bonus law, and the veterans' bonus law is considered an overpayment and must be refunded upon the
11 filing of an amended return and a verified claim for refund on forms prescribed by the department in the same
12 manner as other income tax refund claims are paid.

13 (d) interest and other income related to contributions that were made prior to January 1, 2024, that
14 are retained in a medical care savings account provided for in Title 15, chapter 61, and any withdrawal for
15 payment of eligible medical expenses or for the long-term care of the employee or account holder or a
16 dependent of the employee or account holder;

17 (e) contributions or earnings withdrawn from a family education savings account provided for in
18 Title 15, chapter 62, or from a qualified tuition program established and maintained by another state as
19 provided in section 529(b)(1)(A)(ii) of the Internal Revenue Code, 26 U.S.C. 529(b)(1)(A)(ii), for qualified
20 education expenses, as defined in 15-62-103, of a designated beneficiary;

21 (f) interest and other income related to contributions that were made prior to January 1, 2024, that
22 are retained in a first-time home buyer savings account provided for in Title 15, chapter 63, and any withdrawal
23 for payment of eligible costs for the first-time purchase of a single-family residence;

24 (g) for each taxpayer that has attained the age of 65, an additional subtraction of \$5,500;

25 (h) the amount of a scholarship to an eligible student by a student scholarship organization
26 pursuant to 15-30-3104;

27 (i) a payment received by a private landowner for providing public access to public land pursuant
28 to Title 76, chapter 17, part 1;

(j) the amount of any refund or credit for overpayment of income taxes imposed by this state or any other taxing jurisdiction to the extent included in gross income for federal income tax purposes but not previously allowed as a deduction for Montana income tax purposes;

(k) the recovery during the tax year of any amount deducted in any prior tax year to the extent that the recovered amount did not reduce the taxpayer's Montana income tax in the year deducted;

(l) an amount equal to 30% of net-long term capital gains, as defined in section 1222 of the Internal Revenue Code, 26 U.S.C. 1222, if and to the extent such gain is taken into account in computing federal taxable income; ~~and~~

(m) the amount of the gain recognized from the sale or exchange of a mobile home park as provided in 15-31-163; and

(n) for a taxpayer with a gain from the sale of Montana special spousal trust property with a higher basis under [sections 1 through 15] than the basis used for calculation of federal taxable income, an amount equal to the gain calculated pursuant to [sections 1 through 15] minus the gain reported as federal taxable income.

(4) (a) A taxpayer who, in determining federal taxable income, has reduced the taxpayer's business deductions:

(i) by an amount for wages and salaries for which a federal tax credit was elected under sections 38 and 51(a) of the Internal Revenue Code, 26 U.S.C. 38 and 51(a), is allowed to deduct the amount of the wages and salaries paid regardless of the credit taken; or

(ii) for which a federal tax credit was elected under the Internal Revenue Code is allowed to deduct the amount of the business expense paid when there is no corresponding state income tax credit or deduction, regardless of the credit taken.

(b) The deductions in subsection (4)(a) must be made in the year that the wages, salaries, or business expenses were used to compute the credit. In the case of a partnership or small business corporation, the deductions in subsection (4)(a) must be made to determine the amount of income or loss of the partnership or small business corporation.

(5) (a) An individual who contributes to one or more accounts established under the Montana family education savings program or to a qualified tuition program established and maintained by another state

1 as provided in section 529(b)(1)(A)(ii) of the Internal Revenue Code, 26 U.S.C. 529(b)(1)(A)(ii), may reduce
2 taxable income by the lesser of \$3,000 or the amount of the contribution. In the case of married taxpayers, each
3 spouse is entitled to a reduction, not in excess of \$3,000, for the spouses' contributions to the accounts.
4 Spouses may jointly elect to treat half of the total contributions made by the spouses as being made by each
5 spouse. The reduction in taxable income under this subsection (5)(a) applies only with respect to contributions
6 to an account of which the account owner is the taxpayer, the taxpayer's spouse, or the taxpayer's child or
7 stepchild if the taxpayer's child or stepchild is a Montana resident. The provisions of subsection (2)(d) do not
8 apply with respect to withdrawals of contributions that reduced federal taxable income.

9 (b) Contributions made pursuant to this subsection (5) are subject to the recapture tax provided for
10 in 15-62-208.

11 (6) (a) An individual who contributes to one or more accounts established under the Montana
12 achieving a better life experience program or to a qualified program established and maintained by another
13 state may reduce taxable income by the lesser of \$3,000 or the amount of the contribution. In the case of
14 married taxpayers, each spouse is entitled to a reduction, not to exceed \$3,000, for the spouses' contributions
15 to the accounts. Spouses may jointly elect to treat one-half of the total contributions made by the spouses as
16 being made by each spouse. The reduction in taxable income under this subsection (6)(a) applies only with
17 respect to contributions to an account for which the account owner is the taxpayer, the taxpayer's spouse, or
18 the taxpayer's child or stepchild if the taxpayer's child or stepchild is a Montana resident. The provisions of
19 subsection (2)(d) do not apply with respect to withdrawals of contributions that reduced taxable income.

20 (b) Contributions made pursuant to this subsection (6) are subject to the recapture tax provided in
21 53-25-118.

22 (7) By November 1 of each year, the department shall multiply the subtraction from federal taxable
23 income for a taxpayer that has attained the age of 65 contained in subsection (3)(g) by the inflation factor for
24 that tax year, rounding the result to the nearest \$10. The resulting amount is effective for that tax year and must
25 be used as the basis for the subtraction from federal taxable income determined under subsection (3)(g)."

26
27 **NEW SECTION. Section 17. Codification instruction.** [Sections 1 through 15] are intended to be
28 codified as a new part in Title 72, chapter 9, and the provisions of Title 72, chapter 9, apply to [sections 1

1 through 15].

2 NEW SECTION. **Section 18. Effective date.** [This act] is effective January 1, 2024.

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4 NEW SECTION. **Section 19. Applicability.** [This act] applies to income tax years beginning after
5 December 31, 2023.

6 - END -