

386.454 Trustee's power to adjust -- Personal representative's power to adjust -- Considerations when adjusting principal and income -- Circumstances prohibiting adjustment -- Circuit Court proceeding.

- (1) Notwithstanding any provision of Kentucky law to the contrary, the trustee of a trust to which by law KRS 286.3-277 does not apply may elect to have such provisions apply to the administration of the trust with approval of the District Court.
- (2) A trustee may adjust between principal and income to the extent the trustee considers necessary if KRS 286.3-277 applies by law or by election made and approved under subsection (1) of this section, the terms of the trust describe the amount that may or shall be distributed to a beneficiary by referring to the trust's income, the trustee determines, after applying the rules in KRS 386.452(1), that the trustee is unable to comply with KRS 386.452(2) and the adjustment, including an adjustment method such as an annual percentage distribution if the percentage is not less than three percent (3%) nor more than five percent (5%) of the fair market value of the trust assets determined annually, is approved by the District Court.
- (3) A personal representative may adjust between principal and income in the same manner as a trustee if KRS 286.3-277 applies to the personal representative by law or if the personal representative elects to have KRS 286.3-277 apply to the administration of the estate, upon approval of the District Court, which approval may be an adjustment method such as an annual percentage distribution if the percentage is not less than three percent (3%) nor more than five percent (5%) of the fair market value of the trust assets determined annually, and:
 - (a) The amount distributable to a beneficiary of the estate is determined by reference to the income of the estate; and
 - (b) The personal representative determines, and after applying the rules of KRS 386.452(1), that the personal representative is unable to comply with KRS 386.452(2).
- (4) In deciding whether and to what extent to exercise the power conferred by subsection (2) or (3) of this section, a fiduciary shall consider all factors relevant to the trust or estate and its beneficiaries, including the following factors to the extent they are relevant:
 - (a) The nature, purpose, and expected duration of the trust or estate;
 - (b) The intent of the settlor or testator;
 - (c) The identity and circumstances of the beneficiaries;
 - (d) The needs for liquidity, regularity of income, and preservation and appreciation of capital;
 - (e) The assets held in trust or estate and:
 1. The extent to which those assets consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property;
 2. The extent to which an asset is used by a beneficiary; and

3. Whether an asset was purchased by the fiduciary or received from the settlor or testator;
 - (f) The net amount allocated to income under the other sections of KRS 386.450 to 386.504 and the increase or decrease in the value of the principal assets, which the fiduciary may estimate as to assets for which market values are not readily available;
 - (g) Whether and to what extent the terms of the trust or will give the fiduciary the power to invade principal or accumulate income or prohibit the fiduciary from invading principal or accumulating income, and the extent to which the fiduciary has exercised a power from time to time to invade principal or accumulate income;
 - (h) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and
 - (i) The anticipated tax consequences of an adjustment.
- (5) A fiduciary shall not make an adjustment:
- (a) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the fiduciary did not have the power to make the adjustment;
 - (b) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;
 - (c) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;
 - (d) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;
 - (e) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust or estate for income tax purposes, and the individual would not be treated as the owner if the fiduciary did not possess the power to make an adjustment;
 - (f) If possessing or exercising the power to make an adjustment causes all or part of the trust or estate assets to be included for estate tax purposes in the estate of an individual who has the power to remove a fiduciary, appoint a fiduciary, or both, and the assets would not be included in the estate of the individual if the fiduciary did not possess the power to make an adjustment;
 - (g) If the fiduciary is a beneficiary of the trust or estate; or
 - (h) If the fiduciary is not a beneficiary, but the adjustment would benefit the fiduciary directly or indirectly; except that any effect on the fiduciary's compensation shall not preclude an adjustment so long as the fiduciary's fees are reasonable and otherwise comply with the applicable law.
- (6) If paragraph (e), (f), (g), or (h) of subsection (5) of this section applies to a fiduciary and there is more than one (1) fiduciary, a cofiduciary to whom the provision shall

not apply may make the adjustment unless the exercise of the power by the remaining fiduciary or fiduciaries is not permitted by the terms of the trust.

- (7) A fiduciary may release the entire power conferred by subsection (2) or (3) of this section or may release only the power to adjust from income to principal or the power to adjust from principal to income if the fiduciary is uncertain about whether possessing or exercising the power will cause a result described in paragraphs (a) to (f) of subsection (5) of this section or paragraph (h) of subsection (5) of this section, or if the fiduciary determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (5) of this section. The release may be permanent or for a specified period, including a period measured by the life of an individual. Such release shall require approval of the District Court. Further, with approval of the District Court, a fiduciary may divide a trust into one (1) or more fractional shares if the division does not change the beneficial interests.
- (8) Terms of a trust or will that limit the power of a fiduciary to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust or will that the terms are intended to deny the fiduciary the power of adjustment conferred by subsection (2) or (3) of this section.
- (9) An aggrieved party may, no later than thirty (30) days from the date of the order approving a power to adjust under subsection (2) or (3) of this section, institute an adversary proceeding in Circuit Court pursuant to KRS 24A.120(2).

Effective: July 15, 2010

History: Amended 2010 Ky. Acts ch. 21, sec. 6, effective July 15, 2010. -- Created 2004 Ky. Acts ch. 158, sec. 3, effective January 1, 2005.

Legislative Research Commission Note (7/12/2006). 2006 Ky. Acts ch. 247 instructs the Reviser of Statutes to adjust KRS references throughout the statutes to conform with the 2006 renumbering of the Financial Services Code, KRS Chapter 286. Such an adjustment has been made in this statute.

Legislative Research Commission Note (1/1/2005). In 2004 Ky. Acts ch. 158, sec. 3, subsec. (2), a reference is made to "subsection (1) of this Act." Because it is clear from the subject matter of ch. 158, sec. 3, subsec. (1), that the reference was intended to be to "subsection (1) of this section" instead, this manifest clerical or typographical error has been corrected during codification by the Reviser of Statutes under KRS 7.136(1).