Kansas Community Property Trust Act; HB 2590

HB 2590 creates the Kansas Community Property Trust Act (Act) and amends the Kansas Uniform Trust Code (Trust Code).

Definitions

The bill defines terms, including:

- "Community property" means property owned by a community property trust during the marriage of the settlor spouses;
- "Community property trust" means an express trust that complies with the requirements of the bill; and
- "Qualified trustee" means a natural person who is a resident of Kansas or a company authorized to act as a fiduciary in Kansas.

Kansas Community Property Trusts

The bill states that an arrangement is a Kansas community property trust (community trust) if one or both spouses transfer property to a trust that:

- Expressly declares the trust is a community trust;
- Has at least one qualified trustee whose powers include maintaining records for the trust and preparing for the preparation of any income tax returns that must be filed by the trust. Both spouses or either spouse may be a trustee;
- Is signed by both spouses; and
- Contains specific disclaimer text about the consequences of the trust, as noted in the bill.

The bill states that a community trust is enforceable without consideration. All property owned by a community trust is community property during marriage. When property is distributed from a community trust, the property no longer constitutes community property.

The right to manage and control property transferred to a community trust is determined by the terms of the trust.

Establishing and Amending a Community Trust

The agreement establishing the community trust allows spouses to agree on:

- Rights and obligations in the property transferred to the trust regardless of where the property is acquired or located;

- Management and control of the property transferred to the trust;

- Disposition of the property transferred to the trust upon dissolution, death, or the occurrence or non-occurrence of another event;

- Choice of law governing the trust's interpretation; and

- Any other matter affecting property transferred to the trust and does not violate public policy or a statute imposing a criminal penalty.

A community trust cannot be amended or revoked unless the community trust agreement provides for amendment or revocation. Regardless of the agreement, the bill allows either spouse to amend a community trust regarding the disposition of the spouse's one-half share of the community trust if the spouse dies. A community trust may not adversely affect the right of a child to support.

Obligations

An obligation incurred by only one spouse before or during marriage may be satisfied from the spouse's one-half share of a community trust. An obligation incurred by both spouses may be satisfied by the community trust.

Domicile and Property Laws

For purposes of the Internal Revenue Code of 1986, the bill states a community trust is considered a trust established under the community property laws of Kansas. Regardless of a spouse's state domicile, a spouse may transmute any or all of their property to community property by transferring the property to a community trust.

Community property, as classified by a non-Kansas jurisdiction, transferred to a community trust retains its character as community property while in the community trust. If the community trust is revoked, property transferred upon revocation of the community trust as classified by the non-Kansas jurisdiction retains its character as community property to the extent otherwise provided by Kansas law.

Death and Dissolution

Upon the death of a spouse, the bill provides that one-half of the aggregate value of the community trust property would reflect the surviving spouse's share and not be subject to testamentary disposition by the decedent spouse or distribution under Kansas succession laws. The other one-half share is subject to testamentary disposition or distribution under Kansas succession laws.

Unless otherwise provided in the community trust agreement, the trustee has the power to distribute the community trust assets to adjust resulting differences in valuation. A distribution in kind may be made on the basis of a non-*pro rata* division of the community trust's aggregate value of the trust assets, on the basis of each individual asset in the community trust, or by using both distribution bases. The decedent's spouse's one-half share is not included in the elective estate.

Marriage Dissolution

Upon the dissolution of marriage of the spouses, the bill provides for the community trust to terminate and the trustee must distribute one-half of the trust assets to each spouse. The bill does not allow the community trust to automatically terminate upon the initiation of an action to terminate a marriage, unless the spouses have a signed agreement in writing or otherwise ordered by the court having jurisdiction over the dissolution proceedings between the spouses.

If a marriage dissolution action remains pending for 180 days, the trust would automatically terminate, and the trustee would be required to distribute one-half of the community trust assets to each spouse, unless any of the following apply:

- A spouse objects to the termination within 180 days following the filing of the dissolution action, at which time either party could request the court determine whether good cause exists to terminate the community trust during the pendency of the dissolution of marriage action;

- The court over the dissolution proceedings enters an order directing otherwise;

- The spouses agree in writing while the dissolution of marriage action is pending; or

- The community trust agreement provides otherwise.

Unless the community trust agreement provides otherwise, the trustee has the power to distribute trust assets in divided or undivided interests and adjust resulting differences in valuation. A distribution in kind maybe made on the basis of a non-*pro rata* division of the aggregate value of the trust assets, on the basis of a *pro rata* division of each individual asset, or by using both distribution bases.

A trustee may not distribute real property or business interests in a manner that would leave the spouses as co-owners of such assets after the dissolution of the marriage or the termination of the community trust, unless otherwise agreed to by the spouses in a separate written agreement executed during the marriage dissolution action.

The community trust agreement may not be terminated and the assets distributed in a manner that could cause the trust assets to not be treated as community property.

The court over the dissolution proceedings has personal and subject matter jurisdiction over the spouses and the trustee of the community trust for the purpose of effectuating the distribution of the community trust assets consistent with the terms of the community trust

agreement and in a manner ensuring the community trust assets retain their community property character.

Enforceability

A community trust executed during marriage is not enforceable if the spouse against whom enforcement is sought proves that:

- The trust was unconscionable, as determined by a court, when made;
- The spouse against whom enforcement is sought did not execute the community trust agreement voluntarily;
- The community trust agreement was the product of fraud, duress, coercion, or overreaching; or
- Before executing the community trust agreement, the spouse against whom enforcement is sought:
    - Was not given a fair and reasonable disclosure of the other spouse's property and financial obligations;
    - Did not voluntarily sign a written waiver expressly waiving right to disclosure of the property and financial obligations of the other spouse beyond the provided disclosure; or
    - Did not have notice of the property or financial obligations of the other spouse.

A community trust cannot be deemed unenforceable solely on the fact the spouses did not have separate legal representation when executing the community trust agreement.

Designated Representative

The bill defines and adds to the Trust Code a "designated representative" as a person who has delivered to the trustee the person's written acceptance of the office of designated representative or has agreed to serve as such through at least one of the manners provided in the bill. The designated representative may be appointed for representing a beneficiary and would be presumed to be a fiduciary.

Freedom of Disposition

The bill gives maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.

The bill allows the agreement to expand, restrict, eliminate, or vary any laws of general application to fiduciaries, trusts, and trust administration. It does not allow the agreement to

permit exculpation or indemnification of a fiduciary for the fiduciary's own willful misconduct or preclude a court of jurisdiction from removing a fiduciary due to the fiduciary's willful misconduct.

Additionally, the bill allows the agreement to expand, restrict, eliminate, or otherwise vary the right of a beneficiary to be informed of the beneficiary's interest in a trust for a period of time. During the restriction or elimination of a beneficiary's right to be informed of their interest in the trust, any designated beneficiary is required to represent and bind such beneficiary for purposes of any judicial proceeds or any nonjudicial matter. If a corporate trustee is serving for any governing instruments, the corporate trustee must maintain a Kansas presence.

The bill adds provisions regarding freedom of disposition to the Trust Code.

Taxes and Distributions

The bill amends the Trust Code by not considering amount paid by a trustee's discretionary authority as a distributed benefit.

Keeping Beneficiaries Informed

The bill amends the Trust Code's provision related to keeping qualified trust beneficiaries reasonably informed about the administration of the trust. The bill provides an exception to allow the community trust agreement to instruct otherwise.

Trustee Powers

The bill amends the Trust Code's list of powers a trustee could exercise by permitting a trustee to exercise discretionary power to reimburse a settlor under current federal tax laws, except as otherwise provided under the terms of the trust.