

SESSION OF 2002

SUPPLEMENTAL NOTE ON SENATE BILL NO. 297

As Amended by House Committee of the Whole

Brief*

SB 297 enacts the Uniform Trust Code promulgated by the National Conference of Commissioners on Uniform Laws with amendments adopted for Kansas practitioners suggested by the Kansas Bar Association and the Kansas Bankers Association in conjunction with the Kansas Judicial Council.

The Uniform Trust Code is divided into 11 articles. The first and eleventh articles deal with general provisions like definitions and rules of statutory interpretation, respectively. Article 9 clarifies the Uniform Prudent Investor Act (already codified at KSA 59-24a01 *et seq.*) governs investment and management of trust assets. The other eight articles are Article 2, Judicial Proceedings; Article 3, Representation; Article 4, Creation, Validity, Modification, and Termination of a Trust; Article 5, Creditor's Claims; Spendthrift and Discretionary Trusts; Article 6, Revocable Trusts; Article 7, Office of Trustee; Article 8, Duties and Powers of a Trustee; and Article 10, Liability of Trustees and Rights of Persons Dealing with Trustee.

Article 1 – General Provisions and Definitions – In addition to definitions, this article addresses miscellaneous but important topics. The Uniform Trust Code is primarily default law, meaning a settlor (creator of the trust), within specified limitations, is free to draft trust terms departing from the provisions of this Code. The settlor, if minimum contacts are present, may, in addition, designate the trust's principal place of administration; the trustee, if certain standards are met, may transfer the principal place of administration to another State or country. To encourage nonjudicial resolution of disputes, the Uniform Trust Code provides rules and the scope of coverage for settlement agreements. While the Code does not prescribe the exact rules to be

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org/cgi-bin/fulltext/bills.cgi>

applied to the construction of trusts, it does extend to trust rules the enacting jurisdiction has on the construction of wills. The Code's provisions are supplemented by the common law of trusts and principles of equity.

Article 2 – Judicial Proceedings – This article addresses issues involving judicial proceedings concerning trusts and particularly trusts having contacts with more than one State or country. The courts in the trust's principal place of administration have jurisdiction over both the trustee and the beneficiaries as to any matter relating to the trust. Provisions on subject-matter jurisdiction and venue are covered.

Article 3 – Representation – This article deals with the representation of beneficiaries and other interested persons, both by fiduciaries (personal representatives, guardians and conservators), and through what is known as virtual representation where an unrepresented person may be represented by another beneficiary with a similar interest. The representation principles of the article apply to settlement of disputes, whether by a court or nonjudicially. They apply for the giving of required notices. They apply for the giving of consents to certain actions. The article also authorizes a court to appoint a representative if the court concludes that representation of a person might otherwise be inadequate. The court may appoint a representative to represent and approve a settlement on behalf of a minor, incapacitated, or unborn person or person whose identity or location is unknown and not reasonably ascertainable.

Article 4 – Creation, Validity, Modification and Termination of Trust – This article specifies the requirements for creating, modifying and terminating trusts. Most of the requirements relating to creation of trusts (Sections 22 to 30) reflect traditional trust doctrine, including requirements of intent, capacity, property, and valid trust purpose. The Uniform Trust Code articulates a three-part classification system for trusts: noncharitable, charitable, and honorary. Noncharitable trusts, the most common type, require an ascertainable beneficiary and a valid purpose. Charitable trusts, on the other hand, by their very nature are created to benefit the public at large. The so called honorary or purposes trust, although unenforceable at common law, is valid and enforceable under this Code despite the absence of an ascertainable beneficiary. The most common example is a trust for the care of an animal.

Sections 31 through 38 provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor's intent is paramount. Termination or modification may be allowed upon beneficiary consent if the court concludes that the trust or a particular provision no longer serves a material purpose or if the settlor concurs; by the court in response to unanticipated circumstances or to remedy ineffective administrative terms; or by the court or trustee if the trust is of insufficient size to justify continued administration under its existing terms. Trusts may be reformed to correct a mistake of law or fact, or modified to achieve the settlor's tax objectives. Trusts may be combined or divided. Charitable trusts may be modified or terminated under cy pres to more closely achieve the settlor's charitable purposes.

Article 5 – Creditor's Claims; Spendthrift and Discretionary Trusts – This article addresses the validity of a spendthrift provision and other issues relating to the rights of creditors to reach the trust to collect a debt. To the extent a trust is protected by a spendthrift provision, a beneficiary's creditor may not reach the beneficiary's interest until distribution is made by the trustee. To the extent not protected by a spendthrift provision, a creditor can reach the beneficiary's interest, subject to the court's power to limit the award. Certain categories of claims are exempt from a spendthrift restriction, including certain governmental claims and claims for child support or alimony. Other issues addressed in this article include creditor claims against discretionary trusts; creditor claims against a settlor, whether the trust is revocable or irrevocable; and the rights of creditors when a trustee fails to make a required distribution within a reasonable time.

Article 6 – Revocable Trusts – This short article deals with issues not totally settled under current law. The basic policy of the article and of the Uniform Trust Code in general is to treat the revocable trust as the functional equivalent of a will. The article specifies a standard of capacity, provides that a trust is presumed revocable unless its terms provide otherwise, prescribes the procedure for revocation or amendment of a revocable trust, addresses the rights of beneficiaries during the settlor's lifetime, and provides a statute of limitations on contests.

Article 7 – Office of Trustee – This article contains a series of default rules dealing with the office of trustee, all of which may be

modified in the terms of the trust. Rules are provided on acceptance of office and bonding. The role of the cotrustee is addressed, including the extent that one cotrustee may delegate to another, and the extent to which one cotrustee can be held liable for actions of another trustee. Also covered are changes in trusteeship, including the circumstances when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the process for appointing a successor trustee. Finally, standards are provided for trustee compensation and reimbursement for expenses.

Article 8 – Duties and Powers of Trustee – This article states the fundamental duties of a trustee and enumerates the trustee's powers. This article was drafted in general to conform to the Uniform Prudent Investor Act. This article also addresses a trustee's duties regarding distributions to beneficiaries.

Article 9 – Uniform Prudent Investor Act – This article provides for the Uniform Prudent Investor Act at KSA 59-24a01 *et seq.* and applies to investment and management of trust assets.

Article 10 – Liability of Trustees and Rights of Persons Dealing With Trustees – Sections 78 to 86 list the remedies for breach of trust, describe how money damages are to be determined, provide a statute of limitations on claims against a trustee, and specify other defenses, including consent of a beneficiary and recognition of and limitations on the effect of an exculpatory clause. Sections 87 through 90 address trustee relations with persons other than beneficiaries with the objective of encouraging third parties to engage in commercial transactions with trustees to the same extent as if the property were not held in trust.

Article 11 – Miscellaneous Provisions – The Code applies not only to trusts created on or after the effective date, but also to trusts in existence on the date of enactment.

The Senate Committee amendments include the following:

- ! The definition of "qualified beneficiary" narrows the persons to whom notice is required to be given to persons with vested interests.

- ! The list of mandatory provisions that cannot be changed by the language of a trust is amended to strike provisions relating to spendthrift, notice, and venue. This allows these subjects to be changed by a trust pursuant to the settlor's desires.
- ! 2001 amendments to the 2000 Uniform Trust Code adopted by the Uniform Law Commissioners are adopted.
- ! Venue is allowed to remain in the county even if there is not real estate in the county and the trustee has moved to another jurisdiction.
- ! Conflicts between inconsistent beneficiary designations for property that was not titled in the name of the trust are resolved.
- ! Spendthrift provisions are modified.
- ! The current Kansas law with regard to bond is retained.
- ! Additional language was added to allow real estate to be taken in the name of the trust.
- ! The statute of limitations is reduced to one year if notice is given (which is consistent with the Uniform Trust Code's original recommendation) and reduces the statute of limitation from the five years to two years in other circumstances.
- ! The repealer is amended by adding "KSA 58-12a01 through 58-12a06" which is a certification of trust statute enacted in 2001 and is similar to provisions contained in the bill.

Background

SB 297 was recommended by the Probate Law Advisory Committee of the Kansas Judicial Council.

Representatives of the Kansas Bar Association and the Kansas Bankers Association met with representatives of the Kansas Judicial Council and reached an agreement on the Senate Committee amendments.

The bill has no fiscal impact on the state.

The House Committee of the Whole further amended the definition of "qualified beneficiary" by reinserting two factors contained in the original bill, namely:

- ! Is a distributee of trust income or principal and;
- ! Would be a distributee of trust income or principal if the trust terminated on that date.

Another change is the insertion in the definition of "spendthrift provision" as a term of trust which restrains "either" voluntary "or" involuntary transfer of a beneficiary.