

SESSION OF 2022

SUPPLEMENTAL NOTE ON SENATE BILL NO. 141

As Amended by Senate Committee on Judiciary

Brief*

SB 141, as amended, would enact the Kansas Uniform Directed Trust Act (UDTA) to allow for the creation of directed trusts and amend provisions in the Kansas Uniform Trust Code (UTC) to reflect the enactment of the UDTA.

Definitions (New Section 2)

The bill would define several terms referenced in the UDTA, including “breach of trust,” “directed trust,” “directed trustee,” “person,” “power of direction,” “settlor,” “state,” “terms of a trust,” “trust director,” and “trustee.” Among the UDTA definitions in the bill:

- “Directed trust” would mean a trust for which the terms of the trust grant a power of direction;
- “Power of direction” would mean a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee;
- “Directed trustee” would mean a trustee that is subject to a trust director’s power of direction, including a power over the investment, management, or distribution of trust property or other matters of trust administration. The term would exclude the powers described in a power of appointment described elsewhere in the UDTA;

*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>

- “Trust director” would mean a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust; and
- “Terms of a trust” would mean the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or established by other evidence that would be admissible in a judicial proceeding. “Terms of the trust” also could mean the trust provisions as established, determined, or amended by a trustee or trust director in accordance with applicable law, court order, or a nonjudicial settlement agreement under the UTC.

Applicability (New Section 3)

The bill would state, for trusts that have the principal place of administration in Kansas and are created before July 1, 2022, the UDTA would apply only to a decision or action occurring on or after that date. If the principal place of administration of the trust is changed to Kansas on or after July 1, 2022, the UDTA would apply only to a decision or action occurring on or after July 1, 2022.

The bill also would state without precluding other means to establish a sufficient connection with the designated jurisdiction in a directed trust, terms of the trust which designate the principal place of administration of the trust are valid and controlling if:

- A trustee’s principal place of business is located in or a trustee is a resident of the designated jurisdiction;

- A trust director's principal place of business is located in or a trust director is a resident of the designated jurisdiction; or
- All or part of the administration occurs in the designated jurisdiction.

Governing Law (New Section 4)

The bill would state that common law and principles of equity supplement the UDTA except to the extent modified by the UDTA or other Kansas law.

Power of Appointment (New Section 5)

The bill would define, for the purposes of this section, "power of appointment" to mean power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property and would further specify the UDTA does not apply to a:

- Power of appointment;
- Power to appoint or remove a trustee or trust director;
- Power of a settlor over a trust to the extent the settlor has a power to revoke the trust;
- Power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of the beneficiary or beneficiary's representative, with respect to the exercise or nonexercise of the power; or
- Power over a trust if the terms of the trust provide that the power is held in a nonfiduciary capacity in

order to achieve the settlor's tax objectives under the Internal Revenue Code.

The bill also would state unless the terms of a trust provide otherwise, a power granted to a person to designate a recipient of an ownership interest in or power of appointment over trust property which is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction.

Power of Direction; General Principles (New Sections 6 and 7)

The bill would state the terms of a trust may grant a power of direction to a trust director, and unless the terms of a trust provide otherwise, such trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director under this section and trust directors with joint powers must act by majority decision.

The bill would state a trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction or further power regarding a payback provision in the terms of a trust necessary to comply with Medicaid reimbursement requirements and a charitable interest in the trust, including notice regarding the interest to the Attorney General.

Fiduciary Duties and Liabilities of Trust Director (New Section 8)

The bill would outline the trust director's fiduciary duties and liabilities with respect to a power of direction or further power of direction. If the power is held individually, a trust director would have the same fiduciary duty and liability in the exercise or nonexercise of the power as a sole trustee in a like position and under similar circumstances. If the power is

held jointly with a trustee or another trust director, the trust director would have such duty and liability as a cotrustee in a like position and under similar circumstances.

The bill would further specify that the terms of the trust could impose additional duties and liabilities not specified by the UDTA and also could vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstance. In addition, unless the terms of a trust provide otherwise, a trust director that is licensed, certified, or otherwise authorized by law other than the UDTA to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director would have no duty or liability under the UDTA.

***Duties of Directed Trustee; Release for Breach of Trust
(New Section 9)***

Under provisions of the bill, a directed trustee would be required to take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power, unless by complying the trustee would engage in willful misconduct. If a directed trustee has reasonable doubt about its duty under this section, it could petition the district court for instructions. The terms of a trust would be permitted to impose additional duties and liabilities on a directed trustee in addition to the duties and liabilities specified by this section.

A trust director purporting to release a trustee or another trust director from liability for breach of trust would not be effective if:

- The breach involved the trustee's or other director's willful misconduct;

- The release was induced by improper conduct of the trustee or other director in procuring the release; or
- At the time of the release, the director did not know the material facts relating to the breach.

Information Required to be Provided by Director and Trustee (New Section 10)

The bill would provide that a trustee would be required to provide information to a trust director to the extent the information is reasonably related to both the powers or duties of the trustee and the powers or duties of the director.

A trust director would be required to provide information to a trustee or another trust director to the extent the information is reasonably related to both the powers or duties of the director and the powers or duties of the trustee or other director.

The bill also would specify that when a trustee or trust director acts in reliance on information provided by the other, the trustee or director would not be liable for a breach of trust resulting from the reliance, unless the trustee or director engages in willful misconduct.

Duties Not Required (New Section 11)

The bill would state, unless the terms of a trust provide otherwise, neither a trustee nor a trust director would have a duty to monitor a trustee, trust director, or another director or inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee or director might have acted differently than the trustee or other director. The bill would specify that if a trustee or trust director takes an action described in this section, that trustee

or trust director does not assume the duty excluded by this section.

Cotrustee Duty and Liability (Section 12)

The bill would provide that the terms of a trust could relieve a cotrustee from duty and liability with respect to another cotrustee's exercise or nonexercise of a power of the other cotrustee to the same extent that in a directed trust a directed trustee is relieved from duty and liability with respect to a trust director's power of direction under other provisions of the UDTA.

Breach of Trust Action (New Sections 13 and 14)

The bill would provide that an action against a trust director for breach of trust would be required to be commenced within the same limitation period as an action for breach of trust against a trustee in a like position and under similar circumstances under the UTC. A report or accounting would have the same effect on the limitation period for an action against a trust director for breach of trust that the report or accounting would have under the UTC in an action for breach of trust against a trustee in a like position and under similar circumstances. In an action against a trust director for breach of trust, the director could assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

Jurisdiction (New Section 15)

The bill would state that by accepting appointment as a trust director of a trust subject to the UDTA, the director submits to personal jurisdiction of Kansas courts regarding any matter related to a power or duty of the director. The bill would further specify this section would not preclude other methods of obtaining jurisdiction over a trust director.

Rules (New Section 16)

The bill would state unless the terms of a trust provide otherwise, the rules applicable to a trustee in the UTC would also apply to a trust director regarding the following:

- Acceptance of trusteeship;
- Giving of bond to secure performance of a trustee's duties;
- Reasonable compensation of a trustee;
- Resignation of a trustee;
- Removal of a trustee; and
- Vacancy in trusteeship and appointment of a successor trustee.

Other Provisions (New Sections 17 and 18)

The bill would include a uniformity provision and a provision specifying UDTA's interaction with the Electronic Signatures in Global and National Commerce (E-Sign) Act.

Amendments to the Kansas Uniform Trust Code (Sections 19-22)

The bill would make several amendments to the UTC to reflect the new provisions of the UDTA, as follows:

- Update an reference to the IRS Code of 1986 to reflect the version in effect on July 1, 2022, contained in the definition of "power of withdrawal";
- Amend the definition of "terms of a trust" to be consistent with the definition created in the UDTA;

- Amend provisions governing default and mandatory rules to reflect the duty of a trustee to act in good faith is subject to those duties described in related sections of the UDTA;
- State, in provisions pertaining to a settlor's powers in revocable trusts, a trustee may follow a direction of the settlor that is contrary to the terms of the trust while a trust is revocable; and
- Amend law related to a cotrustee's performance of a trustee's function and the requirement of a trustee to exercise reasonable care regarding a breach of trust to make each subject to the provisions governing cotrustees in the UDTA.

Background

The bill was introduced by the Senate Committee on Judiciary at the request of a representative of the Kansas Judicial Council.

Senate Committee on Judiciary

In the Senate Committee hearing on February 8, 2021, a representative of the Kansas Judicial Council testified as a **proponent** of the bill, stating directed trusts are being created in the state and a statutory framework is needed to clearly delineate the powers, fiduciary duties, and liabilities of trust directors and directed trustees. The representative noted the UDTA has been adopted in 13 states. No other testimony was provided.

On February 21, 2022, the Senate Committee adopted a technical amendment to extend by one year dates related to applicability of the bill's provisions and to update statutory references to reflect changes made in the 2021 Legislative Session.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the Office of Judicial Administration (OJA) indicates enactment of the bill could increase the number of cases filed in district court because it creates a new type of trust and is expected to result in various legal actions. This would increase the time spent by court employees and judges processing and hearing cases. OJA indicates enactment of the bill could result in the collection of additional docket fees for those cases filed under the bill's provisions.

Uniform laws; Kansas Uniform Directed Trust Act; Kansas Uniform Trust Code