

SESSION OF 2023

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2172

As Recommended by House Committee on
Judiciary

Brief*

The bill would enact the Uniform Trust Decanting Act (UTDA).

Definitions (Section 2)

The bill would define various terms used throughout the UTDA. Among the definitions in the bill:

- “Decanting power” would mean the power of an authorized fiduciary under the UTDA to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust;
- “Authorized fiduciary” would mean a:
 - Trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries;
 - Special fiduciary appointed by a court pursuant to Section 9 of the bill; or
 - Special-needs fiduciary under Section 13 of the bill;
- “Beneficiary” would mean a person that:

*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>

- Has a present or future, vested or contingent, beneficial interest in a trust;
- Holds a power of appointment over trust property; or
- Is an identified charitable organization that will or may receive distributions under the terms of the trust;
- “First trust” would mean a trust over which an authorized fiduciary may exercise the decanting power;
- “Second trust” would mean a first trust after modification under the UTDA or trust to which a distribution of property from a first trust is or may be made under UTDA;
- “Terms of the 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; or
 - The trust’s provisions as established, determined, or amended by a trustee or other person in accordance with applicable law, court order, or nonjudicial settlement agreement;
- “Trust instrument” would mean a record executed by the settlor to create a trust or by any person to create a second trust that contains some or all of the terms of the trust, including any amendments; and
- “Settlor” would mean, except as otherwise provided in Section 25 of the bill, a person, including a testator, that creates or contributes property to a trust. If more than one person creates or

contributes property to a trust, each person would be a “settlor” of the portion of the trust property attributable to the person’s contribution except to the extent another person has power to revoke or withdraw that portion.

Applicability (Sections 3 and 5)

The bill would state the UTDA applies to irrevocable express trusts, or express trusts that are only revocable with the consent of the trustee or person holding an adverse interest. The UTDA would not be applicable to trusts held solely for a charitable purpose.

Additionally, the bill would allow a trust instrument to restrict or prohibit exercise of the decanting power.

The bill would specify that the UTDA does not limit the power of a trustee, powerholder, or other person to distribute or appoint property in a further trust or to modify a trust under the instrument, other state laws, common law, a court order, or a nonjudicial settlement agreement. The bill would also specify the UTDA does not affect the ability of a settlor to make provisions in a trust instrument for the distribution of trust property, appointment in further trust of the trust property, or for modification of the trust instrument.

The UTDA would apply to any trust created before, on, or after July 1, 2023, that:

- Has its principal place of administration in Kansas, including trusts whose principal place of administration has changed to Kansas; or
- Provides by its trust instrument that it is governed by Kansas law or is governed by Kansas law for the purpose of:

- Administration, including administration of a trust whose governing law has changed to Kansas;
- Construction of the terms of the trust; or
- Determining the meaning or effect of the terms of the trust.

***Fiduciary Duties With Respect to Decanting Power
(Section 4)***

The UTDA would require authorized fiduciaries to exercise decanting power in accordance with their fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

The bill would specify the UTDA does not create or imply a duty to exercise the decanting power or to inform the beneficiaries about the applicability of the UTDA.

The bill would further provide for purposes of the UTDA and certain duties of trustees contained in the Kansas Uniform Trust Code, the terms of the first trust are deemed to include the decanting power, except as otherwise provided in the first-trust instrument.

Reliance on Prior Decanting (Section 6)

The UTDA would specify that a trustee or other person's reliance upon the validity of the decanting of property or a modification of a trust pursuant to the UTDA or other state law would not make such person liable for any action or failure to act as a result of this reliance.

Notice Requirements for Decanting (Section 7)

The bill would provide the notice period for decanting begins when such notice is given under the terms of the

UTDA (described below), and ends 59 days after the day notice is given. The bill would also provide an authorized fiduciary may exercise the decanting power without consent of any person and without court approval, provided other requirements of the UTDA are met.

The UTDA would require notice be given in a record of the intended exercise of the decanting power not later than 60 days before such exercise to certain persons as specified by the bill. Such notice would be required to contain certain information related to the manner and reason for the proposed decanting and to include copies of related agreements, instruments, and statements.

The bill would not require notice be provided to persons not known to the fiduciary or who cannot be located after reasonable diligence. Additionally, the bill would state an exercise of the decanting power is not ineffective because of failure to give the required notice to one or more persons if the authorized fiduciary acted with reasonable care in providing notice pursuant to the bill.

Before expiration of the notice period, the bill would allow exercise of the decanting power if all persons entitled to receive notice waive the period in a signed record.

The bill would state receipt of notice, waiver of the notice period, or expiration of the notice period would not affect the right of persons to seek judicial instruction or approval related to a proposed decanting.

Authority to Represent and Bind (Section 8)

The bill would specify notice provided to a person with the authority to represent and bind another person under a first-trust instrument or the Kansas Uniform Trust Code has the same effect as notice provided directly to such person.

Consent or waiver by the person with the authority described above would be binding on the person represented unless objected to by such person before the consent or waiver could otherwise become effective.

A person with the above authority could also file an application with a court on behalf of the person represented to inquire whether the decanting power could be exercised in accordance with the UTDA.

The bill would also specify that a settlor may not represent or bind a beneficiary under the UTDA.

Authority of the Court to Intervene in the Exercise of Decanting Power (Section 9)

The bill would allow certain specified persons to file an application with a court seeking further instruction or approval with respect to an exercise of decanting power and would specify the actions a court could take upon such application.

- The bill would specify a proceeding to determine whether a proposed or attempted exercise of the decanting power is ineffective could not be commenced by a person entitled to notice under the UTDA or by a beneficiary unless such proceeding is commenced within six months from the day notice is given. Failure to receive a notice would not extend the time by which such proceeding would be required to be commenced if the authorized fiduciary acted with reasonable diligence to comply with the UTDA.

The bill would allow a court in a judicial proceeding involving the decanting of a trust, as justice and equity may require, to award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party, or from the trust that is the subject of the controversy.

Signed Record (Section 10)

The bill would require an exercise of the decanting power to be made in a record signed by an authorized fiduciary. The signed record would be required to identify either directly, or by reference, the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust, and the property, if any, that remains in the first trust.

Decanting Power Of Fiduciary With Expanded Distributive Discretion (Section 11)

The bill would define several terms used in this section, including “noncontingent right,” “presumptive remainder beneficiary,” “successor beneficiary,” and “vested interest.” [Note: Some other terms used in this section are defined in Section 2 of the bill, including “current beneficiary,” “expanded distributive discretion,” “power of appointment,” and “powerholder.”]

Under the provisions of the UTDA, an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

The bill would specify that in an exercise of the decanting power, a second trust could not:

- Include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in the bill;
- Include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in the bill; or

- Reduce or eliminate a vested interest.

The bill would further specify that in an exercise of the decanting power, a second trust could be created or administered under the law of any jurisdiction and such exercise could:

- Retain a power of appointment granted in the first trust;
- Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;
- Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and
- Create or modify a power of appointment if the powerholder is a presumptive remainder or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

The bill would specify that a power of appointment may be general or nongeneral and that the class of permissible appointees may be broader than or different from the beneficiaries of the first trust. If an authorized fiduciary has expanded distributed discretion over part, but not all, of the principal of a first trust, the bill would allow the fiduciary to exercise the decanting power over that part of principal over which the authorized fiduciary has expanded distributive discretion.

Decanting Power of Fiduciary With Limited Distributive Discretion (Section 12)

The bill would define “limited distributive discretion” to mean discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

The bill would provide that an authorized fiduciary with limited distributive discretion over the principal of the first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

The bill would allow a second trust to be created or administered under the law of any jurisdiction. Under the bill, second trusts in the aggregate would grant each beneficiary of the first trust beneficial interests that are substantially similar to those of the beneficiary in the first trust.

The bill would specify that the power to make a distribution under a second trust for the benefit of an individual beneficiary is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. The bill would classify a distribution as being for the benefit of the beneficiary if the:

- Distribution is applied for the benefit of the beneficiary;
- The beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under the Kansas Uniform Trust Code; or
- Distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the beneficiary’s benefit.

If an authorized fiduciary has limited distributive discretion, the bill would allow a fiduciary to exercise the

decanting power over the part of the principal that the authorized fiduciary has limited distributive discretion.

Special-needs Trust (Section 13)

Definitions

The bill would define terms related to special-needs trusts, including “beneficiary with a disability” and “governmental benefits.” The bill would define a special-needs trust to mean a trust the trustee believes would not be considered a resource for the purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

The bill would also define special-needs fiduciary to mean, with respect to a trust that has a beneficiary with a disability, a trustee or other fiduciary, other than a settlor, that has discretion to distribute:

- The principal of a first trust to one or more current beneficiaries; or
- The income of the first trust to one or more current beneficiaries, if no trustee or fiduciary has discretion to distribute part or all of the principal of a first trust.

The term would also encompass a trustee or other fiduciary, other than a settlor, who is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries, if no trustee or fiduciary has discretion under the above provisions.

Decanting Power

The bill would allow a special-needs fiduciary to exercise the decanting power over the principal of a first trust as if the

fiduciary had the authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

- A second trust is a special-needs trust that benefits the beneficiary with a disability; and
- The special-needs fiduciary determines that exercise of the decanting power would not be inconsistent with a material purpose of the first trust.

The bill would specify the following rules apply to an exercise of the decanting power:

- Notwithstanding the bill's provisions, the interest in the second trust of a beneficiary with a disability may:
 - Be a pooled trust as defined by federal Medicaid law for the benefit of the beneficiary with a disability; or
 - Contain payback provisions complying with the reimbursement requirements of federal Medicaid law;
- Provisions prohibiting a second trust from reducing or eliminating a vested interest would not apply to the interests of the beneficiary with a disability; and
- Except as affected by any change to the interests of the beneficiary with a disability, the second trusts in aggregate would be required to grant each other beneficiary of the first trust beneficial interests in the second trusts that are substantially similar to the beneficiary's interests in the first trust.

Special Rules to Protect Charitable Interests (Section 14)

The bill would define the term “determinable charitable interest” to mean a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event, or after the passage of a specified time, and is unconditional (as defined in the section) or will be held solely for charitable purposes.

If the first trust contains a determinable charitable interest, the UTDA would designate the Attorney General as having the rights of a qualified beneficiary and allow them to represent and bind the charitable interest.

If a first trust contains a charitable interest, the bill would specify the second trust or trusts could not:

- Diminish the charitable interest;
- Diminish the interest of an identified charitable organization that holds the charitable interest;
- Alter any charitable purpose stated in the first-trust instrument; or
- Alter any condition or restriction related to the charitable interest.

The bill would provide that if there are two or more second trusts, the second trusts would be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of the bill.

If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to the bill would be administered under the laws of Kansas unless the:

- Attorney General consents in a signed record to the second trust or trusts being administered under the law of another jurisdiction; or
- A court approves the exercise of the decanting power.

The UTDA would not limit the powers and duties of the Attorney General under the laws of Kansas other than provided for in the UTDA.

Limitations on Decanting Power (Sections 15 – 20)

First-trust Instrument Restrictions (Section 15)

The bill would provide that an authorized fiduciary could not exercise the decanting power, to the extent the first-trust instrument expressly prohibits exercise of:

- The decanting power; or
- A power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

The bill would also state exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly applies to exercise of:

- The decanting power; or
- A power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

The bill would provide that a general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of

a beneficiary's interest would not preclude exercise of the decanting power.

The bill would allow an authorized fiduciary to exercise the decanting power under the UTDA even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

Additionally, the bill would provide that to the extent the creation of a second-trust instrument is permitted, if a first-trust instrument contains an express prohibition described above, the provision must be included in the second-trust instrument.

Fiduciary Compensation (Section 16)

The bill would state that if a first-trust instrument specifies an authorized fiduciary's compensation, such person could not exercise the decanting power to increase their compensation above the amount specified unless:

- All qualified beneficiaries of the second trust consent to the increase in a signed record; or
- The increase is approved by the court.

The bill would clarify that a change in the authorized fiduciary's compensation that is incidental to other changes made by the exercise of the decanting power would not be an increase in the fiduciary's compensation for purposes of the bill.

Second-trust Instrument—Fiduciary Liability (Section 17)

The bill would provide that except as otherwise provided in the bill, a second-trust instrument would not relieve an authorized fiduciary from liability for a breach of trust to a greater extent than the first-trust instrument.

Further, the bill would state a second-trust instrument could provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

The bill would specify that a second-trust instrument would not reduce fiduciary liability in the aggregate. However, a second-trust instrument could divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by Kansas law other than the UTDA.

*Modification of the Power to Remove or Replace a Fiduciary
(Section 18)*

The bill would state an authorized fiduciary could not exercise the decanting power to modify a provision in a first-trust instrument granting another person power to remove or replace the fiduciary unless the:

- Person holding the power consents to such modification in a signed record and the modification only applies to such person;
- Person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or
- A court approves the modification, and the modification grants a substantially similar power to another person.

*Limitations on Decanting Power With Respect to Tax Liability
(Section 19)*

The bill would define relevant terms used in this section and set limitations for an exercise of the decanting power with respect to transfers of property affecting tax liability.

Tax deductions. Under the UTDA, if a first trust contains property that qualified, or would have qualified but for the UTDA for certain types of tax deductions as specified in the bill, a second-trust instrument could not include or omit any terms that would have a consequence of preventing the transfer from qualifying for the deduction, or reducing the amount of such deduction.

S corporation stock. The bill would specify that if the property of the first trust includes shares of stock in an S corporation as defined in federal law and the first trust is, or but for the provisions of the UTDA would be, a permitted shareholder, an authorized fiduciary could exercise the decanting power with respect to any or all of such stock, but only if the second trust receiving the stock is a permitted shareholder under federal law. If the first trust would be a qualified subchapter-S trust under federal law, the second trust could not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.

Generation-skipping transfer tax. If the trust contains property that qualified or would have qualified but for the purposes of the UTDA for a zero inclusion ratio for purposes of the federal generation-skipping transfer tax, the second trust could not include or omit a term that prevents the second trust from qualifying for a zero inclusion ratio under federal law.

Qualified benefits property. If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument could not include or omit any term that if included in or omitted from the first-trust instrument, would have increased the minimum distributions required

under federal law, including any applicable regulations or similar requirements. If an attempted exercise of the decanting power violates such, the trustee would be deemed to have held such property and any reinvested distributions of the property as a separate share from the date of the exercise of the power applies to such share.

Grantor trust. If the first trust qualifies as a grantor trust under federal law, the second trust could not include or omit a term that if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under federal law.

Tax benefit. The bill would define the term “tax benefit” to mean a federal or state tax deduction, exemption, exclusion, or other benefit not discussed by the UTDA, except for a benefit arising from being a grantor trust.

The bill would specify a second-trust instrument could not include or omit a term that if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if the:

- First-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and
- Transfer of property held by the first trust or the first trust qualified, or but for the UTDA would have qualified for the tax benefit.

The bill would further specify that subject to the S-corporation provisions, except as otherwise provided, the second trust may be a nongrantor trust, even if the first trust is a grantor trust.

Objection by a settlor. The bill would specify that an authorized fiduciary could not exercise the decanting power if

a settlor objects in a signed record delivered to the fiduciary within the notice period and:

- The first trust and a second trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or other person; or
- The first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless the:
 - Settlor has the power at all times to cause the second trust to cease to be a grantor trust; or
 - First-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains such provision.

Trust Duration (Section 20)

The bill would specify that a second trust could have a duration that is the same as or different from the duration of the first trust. But, to the extent the property of a second trust is attributable to property of the first trust, such property would be subject to any rules governing maximum perpetuity, accumulation, or suspension of the power of alienation that apply to the property of the first trust.

Discretionary Distribution Standard (Section 21)

The bill would allow an authorized fiduciary to exercise the decanting power whether or not under the discretionary distribution standard of the first trust, the fiduciary could have made or would have been compelled to make a discretionary distribution of principal at that time.

Second-trust Instrument Noncompliance (Section 22)

Under the bill, if exercise of the decanting power would be effective under the UTDA except the second-trust does not comply in part with the UTDA, the decanting is effective. The following rules would apply with respect to the principal of the second trust attributable to the exercise of the power:

- A provision in the second-trust instrument that is not permitted under the UTDA is void to the extent necessary to comply;
- A provision required by the UTDA to be in the second-trust instrument, but is absent, is deemed to be included to the extent necessary to comply.

The bill would further specify that if a trustee or other fiduciary of a second trust determines the above provisions apply to a prior exercise of the decanting power, the fiduciary would be required to take corrective action consistent with their fiduciary duties.

Animal Trusts (Section 23)

The bill would define “animal trust” to mean a trust or interest in a trust created to provide for the care of one or more animals. “Protector” would mean a person appointed in an animal trust to enforce the trust on behalf of the animal, or, if no such person is appointed in the trust, a person appointed by the court for such purpose.

Under the bill, the decanting power could be exercised of an animal trust that has a protector to the extent the trust could be decanted under the UTDA if each animal that benefits from the trust were an individual, if such protector consents in a signed record.

The bill would provide that a protector for an animal has the same rights under the UTDA as a qualified beneficiary.

Notwithstanding other provisions of the UTDA, if a first trust is an animal trust, in an exercise of the decanting power, the second trust would be required to provide that trust property may be applied only to its intended purpose for the time period the first benefited such animal.

Kansas Uniform Trust Code—Second Trusts (Section 24)

The bill would provide that references in the Kansas Uniform Trust Code to a trust instrument or terms of a trust also include a second-trust instrument and its related terms.

Second Trust Settlor (Section 25)

Under the bill, and for purposes other than the UTDA, a settlor of a first trust would be deemed to be the settlor of a second trust with respect to the portion of the principal of the first trust that is subject to the decanting power.

The bill would specify that in determining settlor intent with respect to the second trust, the intent of the first trust settlor, the intent of the second trust settlor, and the authorized fiduciary may be considered.

Later-discovered Property (Section 26)

Pursuant to the bill, if exercise of the decanting power was intended to transfer all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust, and property paid to or acquired by the first trust after exercise of the decanting power would be part of the trust estate of the second trust or trusts.

Under the bill, if exercise of the decanting power was intended to distribute less than all the principal of the first trust to a second trust or trusts, such property as described above would remain part of the trust estate of the first trust.

The bill would also specify that an authorized fiduciary could provide in an exercise of the decanting power, or by the terms of a second trust for disposition of such property described above.

Debts and Liabilities (Section 27)

Under the bill, a debt, liability, or other obligation enforceable against the property of a first trust is enforceable to the same extent against property held by a second trust after exercise of the decanting power.

Uniformity (Section 28)

The bill would require that in applying and construing the UTDA, consideration be given to the need to promote uniformity of the law among states that enact such law.

Electronic Signatures (Section 29)

The bill would state that the UTDA modifies, limits, or supersedes the electronic signatures in the federal Global and National Commerce Act, but does not modify, limit, or supersede certain other federal laws, or authorize electronic delivery of any of the notices described in that Act.

Severability (Section 30)

The bill would provide that if any provision of the UTDA is held to be invalid, such invalidity would not affect other provisions or applications of the UTDA that can be given effect without such invalid provision or application.

Background

The Uniform Law Commission approved and recommended passage of the UTDA for all states in 2015, and it has recently been enacted in Alabama, California, Colorado, Illinois, Indiana, Maine, Montana, Nebraska, New Mexico, North Carolina, Virginia, Washington, and West Virginia.

The bill was introduced by the House Committee on Judiciary at the request of a representative of the Kansas Bar Association (KBA).

House Committee on Judiciary

In the House Committee hearing on January 31, 2023, a representative of the KBA testified as a **proponent** of the bill, stating the purpose of trust decanting is to provide greater flexibility to a trustee by allowing the trustee to modify a trust by distributing its assets to another trust. The representative further stated by enacting the UTDA, Kansas would allow trustees to decant under appropriate circumstances while preventing abuse and preserving the intent of the settlor.

Written-only proponent testimony was provided by representatives of the Midwest Trust Company and the Kansas Bankers Association. No other testimony was provided.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on the bill, the Office of Judicial Administration indicates enactment of the bill would have a negligible fiscal effect on Judicial Branch operations.

Uniform Trust Decanting Act; trust; uniform laws