

Kansas Uniform Directed Trust Act; SB 141

SB 141 enacts the Kansas Uniform Directed Trust Act (UDTA) to allow for the creation of directed trusts and amends provisions in the Kansas Uniform Trust Code (UTC) to reflect the enactment of the UDTA.

Definitions (New Section 2)

The bill defines 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” means a trust for which the terms of the trust grant a power of direction;
- “Power of direction” means 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” means 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 excludes the powers described in a power of appointment described elsewhere in the UDTA;
- “Trust director” means 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” means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or established by other evidence that is admissible in a judicial proceeding. “Terms of the trust” also may 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 states, for a trust with its principal place of administration in Kansas and created before July 1, 2022, the UDTA applies 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 applies only to a decision or action occurring on or after July 1, 2022.

The bill also states 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 states 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 defines, 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 further specifies 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 states 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 states 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 states 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 outlines 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 has 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 has such duty and liability as a cotrustee in a like position and under similar circumstances.

The bill further specifies that the terms of the trust may impose additional duties and liabilities not specified by the UDTA and also may vary the director's duty or liability to the same extent the terms of the trust may vary the duty or liability of a trustee in a like position and under similar circumstances. 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, has 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 is 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 may petition the district court for instructions. The terms of a trust may 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 is not 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 provides that a trustee is 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.

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The bill also specifies that when a trustee or trust director acts in reliance on information provided by the other, the trustee or director is not 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 states, unless the terms of a trust provide otherwise, neither a trustee nor a trust director has a duty to monitor a trustee, trust director, or another director or to 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 specifies 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 provides that the terms of a trust may 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 requires an action against a trust director for breach of trust 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 has the same effect on the limitation period for an action against a trust director for breach of trust that the report or accounting has 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 may 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 states 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 further specifies this section does not preclude other methods of obtaining jurisdiction over a trust director.

Rules (New Section 16)

The bill states unless the terms of a trust provide otherwise, the rules applicable to a trustee in the UTC 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 includes 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 makes several amendments to the UTC to reflect the new provisions of the UDTA, as follows:

- Updates 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";
- Amends the definition of "terms of a trust" to be consistent with the definition created in the UDTA;
- Amends 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;

- States, 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
- Amends 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.