**Ninety-Eighth Legislature - First Session - 2003**

# Introducer's Statement of Intent
# LB 130

**Chairperson:** **Mark Quandahl**
**Committee:** **Banking, Commerce and Insurance**
**Date of Hearing:** **January 28, 2003**

The following constitutes the reasons for this bill and the purposes which are sought to be accomplished thereby:

LB 130 would enact the Uniform Trust Code (UTC) as approved by the National Conference of Commissioners on Uniform State Laws in 2000. The UTC is the first truly national codification of the law of trusts. It draws from common law sources, including the Restatements of the Law of Trusts from the American Law Institute. Existing statutory law is also a source. The objective is a codification of existing trust law. There are elements of law reform, also, in order to tune trust law to modern needs. The UTC provides fundamental rules that apply to all voluntary trusts. It is a default statute for the most part, because the terms of a trust will govern even if inconsistent with the statutory rules.

LB 130, as introduced, was finalized by a study group called for and assembled pursuant to interim study resolution LR 367 (Landis) of 2002. The study group developed non-uniform changes in the official text of the UTC and amendments to existing Nebraska statutes in order to properly incorporate the UTC within the framework of Nebraska law. Those changes and amendments have been made part of this bill and are explained in detail in the study group’s final report, Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code, December 2002, submitted to the Banking, Commerce and Insurance Committee pursuant to LR 367. For purposes of this Introducer’s Statement of Intent, those explanations of the changes and amendments are incorporated herein.

What follows, as substantially borrowed from materials provided by the Uniform Law Commissioners except as otherwise noted, highlights central characteristics of the official version of the UTC:

**Article 1 - General Provisions and Definitions**, does not address substantive topics, but deals with general provisions like definitions and rules of statutory interpretation. (Sections 1 to 11 of the bill.)

**Article 2 - Judicial Proceedings**, deals with jurisdiction over a trust in any state. It asserts the important rule that a trust is not supervised by a court unless there is a proceeding by an interested person that invokes the jurisdiction of the appropriate court. The place of administration of the trust is the place with jurisdiction over the trustee and beneficiaries of that trust. (Sections 12 to 15 of the bill.) The bill includes within Article 2 four sections transferred from the Nebraska Probate Code (NPC) (sections 30-2801 to 30-2803 and 30-2805) and an all-new section based on section 30-2214 of the NPC regarding procedures for registration of trusts in county court. (Sections 16 to 20 of the bill.) The bill also includes within Article 2 an all-new section based on section 30-2217 of the NPC to specify that appellate review under the UTC shall be governed by section 30-1601 of the NPC. (Section 21 of the bill.)

**Article 3 - Representation**, deals with the rather complex issues of who may represent whom in transactions or proceedings relating to a trust. In part, this article sets out a series of specialized agency rules, answering the question of who may be the agent of whom. Some of it is fundamental, such as the clear rule that the trustee represents the beneficiaries of a trust. Some of it is common-sense, such as the rule that a guardian represents a ward or a conservator (if appointed) represents the estate of a ward. (Sections 22 to 26 of the bill.)

**Article 4 - Creation, Validity, Modification and Termination of a Trust**, has a self-evident set of rules. A trust is created when property is transferred to a trustee with the intent to create a trust relationship. There must be a definite beneficiary or the trust must be a charitable trust, a trust for animals (specially provided for as a kind of honorary trust), or a trust for a noncharitable purpose (also a kind of honorary trust). These kinds of honorary trusts, which have a limited life, legitimize honorary trusts that are not generally allowed under the common law. They are, therefore, an innovation in the UTC. It is not necessary to have a trust instrument to create a trust. Oral trusts are allowed, but the standard of proof for an oral trust is the higher "clear and convincing evidence" standard. By not requiring a writing, the UTC avoids issues of electronic record and signature adequacy. There are clear (default) rules that apply upon consent of the parties to the trust or that govern a court in modifying or terminating a trust. A court may apply the doctrine of cy pres to charitable trusts, when the charitable purpose is no longer obtainable. A comparable charitable purpose may be selected. (Sections 27 to 43 of the bill.) The bill includes within Article 4 an all-new section based on 30-2338 of the Nebraska Probate Code (NPC) to provide for a separate writing disposing of items of tangible personal property. (Section 44 of the bill.) The bill also includes within Article 4 an all-new section to provide that renunciations shall be governed by section 30-2352 of the NPC. (Section 45 of the bill.)

**Article 5 - Creditor's Claim, Spendthrift and Discretionary Trusts**, deals with creditor claims against the interests of a beneficiary or a settlor. A spendthrift provision in a trust restricts a beneficiary's creditor from attaching the beneficiary's interest in the trust until there is a distribution to the beneficiary. If there is no spendthrift provision, a creditor of a beneficiary may attach a distribution interest before it is distributed. A spendthrift provision is created simply by general reference to "spendthrift trust" in the trust instrument. A creditor may not compel a trustee to make a distribution to a beneficiary that is discretionary. A beneficiary who owes child support, spousal maintenance, or a creditor for services provided to protect the beneficiary's interest in the trust, cannot rely on spendthrift provisions in a trust to avoid attachment of that interest. Creditors of the settlor of a revocable trust may attach the corpus of the trust, but only a settlor's distribution interest in an irrevocable trust. (Sections 46 to 52 of the bill.)

**Article 6 - Revocable Trusts**, expressly recognizes the most popular, modern trust form for estate planning. A revocable trust is one in which the settlor retains the power to control, amend, or revoke the trust. Property held in trust reverts back to the settlor if it is revoked. The revocable trust is viewed primarily as a will substitute, used to avoid probate. A trust is revocable unless a trust instrument expressly provides that it is irrevocable. While the settlor of a revocable trust yet lives and has capacity, the trustee owes its duties exclusively to the settlor. The settlor controls the rights of beneficiaries. If the settlor becomes incapacitated or dies, the beneficiaries control their rights under the trust and the duties of the trustee shift to the beneficiaries. The trust is no longer a revocable trust. (Sections 53 to 56 of the bill.)

**Article 7 - Office of Trustee**, deals with acceptance of the trust by the trustee, bond for the trustee, decision-making by co-trustees, and like matters. Perhaps the most important of the rules govern removal and compensation of the trustee. The settlor, a co-trustee, a beneficiary or the court on its own initiative may request that a trustee be removed. The grounds are breach of trust, lack of cooperation among co-trustees substantially impairing the administration of the trust, defects of the trustee that require removal in the best interests of the beneficiaries, or substantial change of circumstances. The trustee may be removed upon the request of all qualified beneficiaries if removal is in the best interests of the beneficiaries, is not inconsistent with trust purposes and a successor trustee is available. A trustee is entitled to reasonable compensation. A court may review and change a trustee's compensation. (Sections 57 to 65 of the bill.)

**Article 8 - Duties and Powers of the Trustee**, articulates the basic fiduciary obligations of a trustee, except for those articulated in the Prudent Investor Rule. (See UTC Article 9). The basic duty is the duty of loyalty, which requires the trustee to manage the trust solely for the beneficiaries and to avoid conflicts of interest between trustee's interests and beneficiaries' interests. If a trustee provides services to an investment company or investment trust in which the trust invests money pursuant to the Prudent Investor Rule, conflict of interest is not presumed. Other fiduciary obligations include the duty of impartiality, the obligation of prudent administration, the obligation to incur only reasonable costs, and the obligation to apply the trustee's special skills when there is reliance on those skills when the trustee is named. A trustee generally has all the powers necessary to carry on the business of the trust. The UTC contains an updated list of specific powers derived from the widely accepted Uniform Trustee's Powers Act. (Sections 66 to 82 of the bill.)

**Article 9 – Prudent Investor Rule**, provides a place, as recommended by the Uniform Law Commissioners, for the incorporation within the UTC of the pertinent provisions of the Uniform Prudent Investor Act not otherwise already covered by UTC Article 8. (Sections 83 to 89 of the bill.) The current Nebraska Uniform Prudent Investor Act is codified at sections 8-2201 to 8-2213.

**Article 10 - Liability of Trustees and Rights of Persons Dealing with the Trustee**, provides for remedies when there is breach of an obligation by the trustee, who and under what circumstances there is a right of action by anybody, and a trustee's immunity from personal liability when doing business with others on behalf of the trust. A breach of duty to a beneficiary invokes a court's equity powers to compel performance, suspend or remove the trustee upon grounds noted earlier in this statement of intent. Available damages restore a beneficiary's position as if breach had not occurred. The trustee's profit (if any) is also a measure of damage. A trust instrument may not waive or vary the obligation of good faith or exculpate the trustee for reckless indifference. An exculpatory term in a trust is not enforceable if the inclusion of the term abuses the settlor's confidential relationship with the trustee. A trustee does not incur personal liability to third parties for contracts on behalf of the trust so long as the fiduciary status of the trustee is disclosed. A trustee is not liable for a tort action against the trust unless the trustee also has personal liability. A third party dealing with a trust, also, is not liable for any breach of the trustee's obligations to the beneficiaries resulting from the transaction, unless the third party has knowledge of the actual breach by the trustee. (Sections 90 to 101 of the bill.) The bill includes within Article 10 six transferred sections governing certification of trusts (sections 30-3701 to 30-3706) and omits the UTC's section governing certification of trusts (UTC section 1013). (Sections 102 to 107 of the bill.)

**Article 11 - Miscellaneous Provisions**, provides for applicability, an operative date, severability, repealers, etc. (Sections 108 to 110 and 140 to 143 of the bill.)

**Principal Introducer:** ________________________________

**Senator David M. Landis**