



Ninety-Eighth Legislature - Second Session - 2004
Introducer's Statement of Intent
LB 885

Chairperson: Mark Quandahl
Committee: Banking, Commerce and Insurance
Date of Hearing: January 20, 2004

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

OVERVIEW

LB 885 would amend the Nebraska Uniform Trust Code (UTC), Neb. Rev. Stat. Sections 30-3801 to 30-38,110 (Supp. 2003) [UTC Sections 101 to 1106], in order to make clarifying and clean-up changes recommended by (1) the National Conference of Commissioners on Uniform State Laws, and (2) the Nebraska UTC Study Group assembled pursuant to interim study resolution LR 84. The Nebraska UTC was enacted in 2003 and becomes operative on January 1, 2005. The Uniform Law Commissioners promulgated the UTC in 2000 as the first truly national codification of the law of trusts.

SECTION-BY-SECTION SUMMARY

Section 1 would amend subsection (c) of section 30-3811 [UTC Section 111(c)](Nonjudicial settlement agreements) to provide that, with regard to binding nonjudicial settlement agreements, a spendthrift provision in the terms of the trust is presumed to constitute a material purpose of the trust. The experience of Nebraska practitioners is that spendthrift provisions are most often intended to be a material purpose of the trust. Nebraska Supreme Court decisions have consistently been to the same effect. This amendment corresponds to the proposed amendment in subsection (c) of section 30-3837 [UTC Section 411(c)] on modification or termination of a noncharitable irrevocable trust by consent. This amendment is recommended by the LR 84 Interim Study Group.

Section 2 would amend subsection (a) of section 30-3837 [UTC Section 411(a)] (Modification or termination of noncharitable irrevocable trust by consent) to provide that a settlor's power to consent to a noncharitable irrevocable trust's "modification" as well as termination may be exercised as otherwise provided in this section by an agent under a power of attorney or by the settlor's conservator or guardian with court approval. This amendment is recommended to the states by the Uniform Law Commissioners.

This section would also amend subsection (c) of section 30-3837 [UTC Section 411(c)] to provide that a spendthrift provision in the terms of a noncharitable irrevocable trust is presumed (rather than is "not" presumed) to constitute a material purpose of the trust. The experience of Nebraska practitioners is that spendthrift provisions are most often intended to be a

material purpose of the trust. Nebraska Supreme Court decisions have consistently been to the same effect. This amendment corresponds to the proposed amendment in subsection (c) of section 30-3811 [UTC Section 111(c)] on nonjudicial settlement agreements. This amendment is recommended by the LR 84 Interim Study Group.

Section 3 would amend section 30-3854 [UTC Section 602] (Revocation or amendment of revocable trust) to provide in a new subdivision (b)(3) that upon the revocation or amendment of a revocable trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment. This amendment, in conjunction with the proposed repeal of subsection (b) of section 30-3855 [UTC Section 603(b)], is recommended to the states by the Uniform Law Commissioners.

Section 4 would amend section 30-3855 [UTC Section 603] (Settlor's powers) to repeal subsection (b) which provides that if a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust. This amendment, in conjunction with the proposed adoption of new subdivision (b)(3) of section 30-3854 [UTC Section 602(b)(3)], is recommended to the states by the Uniform Law Commissioners.

This section also would insert language in subsection (a) of section 30-3855 [UTC Section 603(a)] to clarify that upon the incapacity of the settlor of a revocable trust, the duties of the trustee continue to be owed exclusively to the settlor so long as the power to revoke the trust may be exercised by an agent, conservator, or guardian of the settlor, or if an agent, conservator, or guardian holds a power of withdrawal on behalf of the settlor. This amendment incorporates language contained in the official comment to UTC Section 602. This amendment is recommended by the LR 84 Interim Study Group.

Section 5 would amend subsection (e) of section 30-3867 [UTC Section 802(f)] (Duty of loyalty) to clarify provisions which impose duties on a trustee which receives compensation for providing investment advisory or investment management services from an investment company or investment trust in which the trustee invests trust property. This amendment is recommended to the states by the Uniform Law Commissioners.

Section 6 would amend subsection (b) of section 30-3897 [UTC Section 1008(b)] to provide that this subsection's presumption that an exculpatory term drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship does not apply if the settlor was represented by independent legal counsel. This amendment makes clear in statute what is stated in the official comment to UTC Section 1008: "If the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's forms." This amendment was recommended by the LR 84 Interim Study Group.

Section 7 would amend section 30-38,110 [UTC Section 1106] (Application to existing relationships) to repeal subdivision (a)(4) which provides that, on January 1, 2005, any rule of construction or presumption provided in the Nebraska UTC applies to trust instruments executed before January 1, 2005, unless there is a clear indication of a contrary intent in the terms of the trust. This amendment is similar to a modification made by the Nebraska Legislature in 1974 when it omitted similar uniform language from the enactment of the Nebraska Probate Code.

The main purpose is to assure that the intention of the settlor is measured by the conditions in effect when the trust instrument was written. This amendment is recommended by the LR 84 Interim Study Group.

This section would also insert a new subsection (d) in section 30-38,110 [UTC Section 1106] to provide that the following provisions apply only to trusts which become irrevocable on or after January 1, 2005:

--- Subsection (a) of section 30-3838 [UTC Section 412(a)] (Modification or termination because of unanticipated circumstances or inability to administer trust effectively) which provides that the court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust.

--- Section 30-3839 [UTC Section 413] (*Cy pres*) which provides that the court may modify or terminate a charitable trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful.

--- Subsection (b) of section 30-3848 [UTC Section 503(b)] (Exceptions to spendthrift provision) which provides that, even if a trust contains a spendthrift provision, holders of a judgment or court order for support or maintenance or judgment creditors may obtain a court order attaching present or future distributions to or for the benefit of the beneficiary.

--- Subsection (c) of section 30-3849 [UTC Section 504(c)] (Discretionary trusts; effect of standard) which provides that to the extent a trustee of a discretionary trust has not complied with a standard of distribution or has abused a discretion, a distribution may be ordered by the court against the beneficiary for support or maintenance.

--- Subdivision (b)(1) of section 30-3879 [UTC Section 814(b)(1)] (Discretionary powers) which provides that, unless the terms of the trust otherwise expressly indicate, a person other than a settlor who is a beneficiary and a trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee's individual health, education, support, or maintenance.

Each of these provisions, described above, appears to change Nebraska law with respect to beneficial or ownership trust interests. The LR 84 Interim Study Group recommends that they should be applicable only to trusts which become irrevocable on or after the operative date of the Nebraska UTC. (January 1, 2005)

Section 8 would provide that this bill becomes operative on January 1, 2005.

Section 9 would provide repealers.

Principal Introducer:

_____ **Senator Mark Quandahl**