

## LEGISLATIVE BILL 536

Approved by the Governor March 12, 2019

Introduced by Pansing Brooks, 28.

A BILL FOR AN ACT relating to trusts; to amend sections 30-3805, 30-3808, 30-3855, and 30-3859, Reissue Revised Statutes of Nebraska; to adopt the Nebraska Uniform Directed Trust Act; to provide for applicability; to change and eliminate related Uniform Trust Code provisions; to harmonize provisions; to repeal the original sections; and to outright repeal section 30-3873, Reissue Revised Statutes of Nebraska.

Be it enacted by the people of the State of Nebraska,

Section 1. (UDTA 1) Sections 1 to 19 of this act shall be known and may be cited as the Nebraska Uniform Directed Trust Act.

Sec. 2. (UDTA 2) In the Nebraska Uniform Directed Trust Act:

(1) Breach of trust includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust, the Nebraska Uniform Directed Trust Act, or law of this state other than the Nebraska Uniform Directed Trust Act pertaining to trusts.

(2) Directed trust means a trust for which the terms of the trust grant a power of direction.

(3) Directed trustee means a trustee that is subject to a trust director's power of direction.

(4) Person means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(5) 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. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration, including, but not limited to, amendment, reform, or termination of the trust. The term excludes the powers described in subsection (b) of section 5 of this act.

(6) Settlor has the same meaning as in section 30-3803.

(7) State means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States.

(8) Terms of a trust means:

(A) except as otherwise provided in subdivision (8)(B) of this section, the manifestation of the settlor's intent regarding a trust's provisions as:

(i) expressed in the trust instrument; or

(ii) established by other evidence that would be admissible in a judicial proceeding; or

(B) the trust's provisions as established, determined, or amended by:

(i) a trustee or trust director in accordance with applicable law;

(ii) court order; or

(iii) a nonjudicial settlement agreement under section 30-3811.

(9) 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.

(10) Trustee has the same meaning as in section 30-3803.

Sec. 3. (UDTA 3) The Nebraska Uniform Directed Trust Act applies to a trust, whenever created, that has its principal place of administration in this state, subject to the following rules:

(1) If the trust was created before the effective date of this act, the Nebraska Uniform Directed Trust Act applies only to a decision or action occurring on or after the effective date of this act.

(2) If the principal place of administration of the trust is changed to this state on or after the effective date of this act, the Nebraska Uniform Directed Trust Act applies only to a decision or action occurring on or after the date of the change.

Sec. 4. (UDTA 4) The common law and principles of equity supplement the Nebraska Uniform Directed Trust Act, except to the extent modified by the Nebraska Uniform Directed Trust Act or law of this state other than the Nebraska Uniform Directed Trust Act.

Sec. 5. (UDTA 5) (a) In this section, power of appointment means a 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.

(b) The Nebraska Uniform Directed Trust Act does not apply to a:

(1) power of appointment;

(2) power to appoint or remove a trustee or trust director;

(3) power of a settlor over a trust to the extent the settlor has a power to revoke the trust;

(4) power of a beneficiary over a trust to the extent the exercise or

nonexercise of the power affects the beneficial interest of:

(A) the beneficiary; or

(B) the beneficial interest of another beneficiary represented by the beneficiary under sections 30-3822 to 30-3826 with respect to the exercise or nonexercise of the power; or

(5) power over a trust if:

(A) the terms of the trust provide that the power is held in a nonfiduciary capacity; and

(B) the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the Internal Revenue Code of 1986 as defined in section 49-801.01.

(c) 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.

Sec. 6. (UDTA 6) (a) Subject to section 7 of this act, the terms of a trust may grant a power of direction to a trust director.

(b) Unless the terms of a trust provide otherwise:

(1) a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the trust director under subsection (a) of this section; and

(2) trust directors with joint powers must act by majority decision.

(c) A power of direction includes only those powers granted by the terms of the trust and further powers pursuant to subdivision (b)(1) of this section must be appropriate to the exercise or nonexercise of such power of direction granted by the terms of the trust.

Sec. 7. (UDTA 7) 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 under subdivision (b)(1) of section 6 of this act regarding:

(1) a payback provision in the terms of a trust necessary to comply with the medicaid reimbursement requirements of section 68-919; and

(2) a charitable interest in the trust, including notice regarding the interest to the Attorney General.

Sec. 8. (UDTA 8) (a) Subject to subsection (b) of this section, with respect to a power of direction or further power under subdivision (b)(1) of section 6 of this act:

(1) a trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:

(A) if the power is held individually, as a sole trustee in a like position and under similar circumstances; or

(B) if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and

(2) the terms of the trust may 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 circumstances.

(b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than the Nebraska Uniform Directed Trust Act 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 has no duty or liability under the Nebraska Uniform Directed Trust Act.

(c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

Sec. 9. (UDTA 9) (a) Subject to subsections (b) and (c) of this section, a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under subdivision (b)(1) of section 6 of this act, and the trustee is not liable for the action.

(b) A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under subdivision (b)(1) of section 6 of this act to the extent that by complying the trustee would engage in willful misconduct.

(c) A directed trustee must determine that the trust director's exercise of power of direction under subsection (a) of section 6 of this act or appropriation of further power under subsection (b) of section 6 of this act is granted by the terms of the trust pursuant to subsection (c) of section 6 of this act.

(d) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if:

(1) the breach involved the trustee's or other director's willful misconduct;

(2) the release was induced by improper conduct of the trustee or other director in procuring the release; or

(3) at the time of the release, the director did not know the material facts relating to the breach.

(e) A directed trustee that has reasonable doubt about its duty under this section may petition the court for instructions.

(f) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this section.

Sec. 10. (UDTA 10) (a) Subject to section 11 of this act, a trustee shall provide information to a trust director to the extent the information is

reasonably related both to:

- (1) the powers or duties of the trustee; and
- (2) the powers or duties of the director.

(b) Subject to section 11 of this act, a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to:

- (1) the powers or duties of the director; and
- (2) the powers or duties of the trustee or other director.

(c) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in willful misconduct.

(d) A trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in willful misconduct.

Sec. 11. (UDTA 11) (a) Unless the terms of a trust provide otherwise:

(1) a trustee does not have a duty to:

(A) monitor a trust director; or

(B) inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director; and

(2) by taking an action described in subdivision (a)(1) of this section, a trustee does not assume the duty excluded by such subdivision.

(b) Unless the terms of a trust provide otherwise:

(1) a trust director does not have a duty to:

(A) monitor a trustee or another trust director; or

(B) inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director; and

(2) by taking an action described in subdivision (b)(1) of this section, a trust director does not assume the duty excluded by such subdivision.

Sec. 12. (UDTA 12) 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 sections 9 to 11 of this act.

Sec. 13. (UDTA 13) (a) An action against a trust director for breach of trust must be commenced within the same limitation period as under section 30-3894 for an action for breach of trust against a trustee in a like position and under similar circumstances.

(b) 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 would have under section 30-3894 in an action for breach of trust against a trustee in a like position and under similar circumstances.

Sec. 14. (UDTA 14) 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.

Sec. 15. (UDTA 15) (a) By accepting appointment as a trust director of a trust subject to the Nebraska Uniform Directed Trust Act, the director submits to personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the director.

(b) This section does not preclude other methods of obtaining jurisdiction over a trust director.

Sec. 16. (UDTA 16) Unless the terms of a trust provide otherwise, the rules applicable to a trustee apply to a trust director regarding the following matters:

(1) acceptance under section 30-3857;

(2) giving of bond to secure performance under section 30-3858;

(3) reasonable compensation under section 30-3864;

(4) resignation under section 30-3861;

(5) removal under section 30-3862; and

(6) vacancy and appointment of successor under section 30-3860.

Sec. 17. (UDTA 17) In applying and construing the Nebraska Uniform Directed Trust Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Sec. 18. (UDTA 18) The provisions of the Nebraska Uniform Directed Trust Act governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7002, as such section existed on January 1 immediately preceding January 1, 2005, and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

Sec. 19. (a) Except as otherwise provided in the Nebraska Uniform Directed Trust Act, on January 1, 2021:

(1) the Nebraska Uniform Directed Trust Act applies to all trusts created before, on, or after January 1, 2021;

(2) the Nebraska Uniform Directed Trust Act applies to all judicial proceedings concerning trust directors, trustees, and cotrustees commenced on or after January 1, 2021;

(3) the Nebraska Uniform Directed Trust Act applies to judicial proceedings concerning trusts commenced before January 1, 2021, unless the court finds that application of a particular provision of the Nebraska Uniform Directed Trust Act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of the Nebraska Uniform Directed Trust Act does not apply and the superseded law applies; and

(4) an act done before January 1, 2021, is not affected by the Nebraska Uniform Directed Trust Act.

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before January 1, 2021, that statute continues to apply to the right even if it has been repealed or superseded.

Sec. 20. Section 30-3805, Reissue Revised Statutes of Nebraska, is amended to read:

30-3805 (UTC 105) (a) Except as otherwise provided in the terms of the trust, the Nebraska Uniform Trust Code governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of the code except:

(1) the requirements for creating a trust;

(2) subject to sections 9, 11, and 12 of this act, the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

(3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;

(4) the power of the court to modify or terminate a trust under sections 30-3836 to 30-3842;

(5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in sections 30-3846 to 30-3852;

(6) the power of the court under section 30-3858 to require, dispense with, or modify or terminate a bond;

(7) the power of the court under subsection (b) of section 30-3864 to adjust a trustee's compensation specified in the terms of the trust;

(8) the duty under subsection (a) of section 30-3878 to keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, and to respond to the request of a qualified beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust;

(9) the effect of an exculpatory term under section 30-3897;

(10) the rights under sections 30-3899 to 30-38,107 of a person other than a trustee or beneficiary;

(11) periods of limitation for commencing a judicial proceeding;

(12) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice;

(13) the subject matter jurisdiction of the court and venue for commencing a proceeding as provided in sections 30-3814 and 30-3815;

(14) the power of a court under subdivision (a)(1) of section 30-3807; and

(15) the power of a court to review the action or the proposed action of the trustee for an abuse of discretion.

Sec. 21. Section 30-3808, Reissue Revised Statutes of Nebraska, is amended to read:

30-3808 (UTC 108) (a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(1) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; ~~or~~

(2) all or part of the administration occurs in the designated jurisdiction; ~~or~~

(3) a trust director's principal place of business is located in or a trust director is a resident of the designated jurisdiction.

(b) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.

(c) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (b) of this section, may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.

(d) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than sixty days before initiating the transfer. The notice of proposed transfer must include:

(1) the name of the jurisdiction to which the principal place of administration is to be transferred;

(2) the address and telephone number at the new location at which the trustee can be contacted;

(3) an explanation of the reasons for the proposed transfer;

(4) the date on which the proposed transfer is anticipated to occur; and

(5) the date, not less than sixty days after the giving of the notice, by

which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(e) The authority of a trustee under this section to transfer a trust's principal place of administration terminates if a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice.

(f) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to section 30-3860.

Sec. 22. Section 30-3855, Reissue Revised Statutes of Nebraska, is amended to read:

30-3855 (UTC 603) (a) To the extent a trust is revocable by a settlor, a trustee may follow a direction of the settlor that is contrary to the terms of the trust. To the extent a trust is revocable by a settlor in conjunction with a person other than a trustee or person holding an adverse interest, the trustee may follow a direction from the settlor and the other person holding the power to revoke even if the direction is contrary to the terms of the trust.

(b) While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(c) (b) While the trust is irrevocable and during the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section and the duties of the trustee are owed exclusively to the holder of the power to the extent of the property subject to the power.

(d) (c) While the trust is irrevocable and during the period the interest of any beneficiary not having a present interest may be terminated by the exercise of a power of appointment or other power, the duties of the trustee are owed exclusively to the holder of the power to the extent of the property subject to the power.

Sec. 23. Section 30-3859, Reissue Revised Statutes of Nebraska, is amended to read:

30-3859 (UTC 703) (a) Cotrustees who are unable to reach a unanimous decision may act by majority decision.

(b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

(c) Subject to section 12 of this act, a A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

(d) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(e) A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

(f) Except as otherwise provided in subsection (g) of this section, a trustee who does not join in an action of another trustee is not liable for the action.

(g) Subject to section 12 of this act, each ~~Each~~ trustee shall exercise reasonable care to:

(1) prevent a cotrustee from committing a serious breach of trust; and

(2) compel a cotrustee to redress a serious breach of trust.

(h) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

Sec. 24. Original sections 30-3805, 30-3808, 30-3855, and 30-3859, Reissue Revised Statutes of Nebraska, are repealed.

Sec. 25. The following section is outright repealed: Section 30-3873, Reissue Revised Statutes of Nebraska.