

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

4031

2005 SENATE JUDICIARY

SCR 4031

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SCR 4031

Senate Judiciary Committee

☐ Conference Committee

Hearing Date February 2, 2005

Tape Number	Side A	Side B	Meter #
1	X		420 - End
Committee Clerk Signature <i>Maria L. Solberg</i>			

Minutes: Relating to Uniform Trust Codes

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Senate Concurrent Resolution:

This resolution was a result of failed SB 2122. Sen. Traynor presented this resolution to the committee to commensurate all parties involved into working to a successful Uniform Law Bill.

Testimony in Opposition of the Senate Concurrent Resolution:

none

Senator John (Jack) T. Traynor, Chairman closed the Hearing

Senator Triplett made the motion to do pass and **Sen. Trenbeath** seconded the motion. All were in favor, motion passes.

Carrier: **Sen. Nelson**

Senator John (Jack) T. Traynor, Chairman closed the Hearing.

Roll Call Vote #: /

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. ~~SB~~ SCR 4031

Senate	Judiciary	Committee
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☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Sen. Triplett Seconded By Sen. Trenbeath

[illegible]

Total (Yes) 6 No 0

Absent	0
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Floor Assignment Sen. Nelson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 2, 2005 1:17 p.m.

Module No: SR-22-1690
Carrier: Nelson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SCR 4031: Judiciary Committee (Sen. Traynor, Chairman) recommends DO PASS
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SCR 4031 was placed on the
Eleventh order on the calendar.

2005 HOUSE JUDICIARY

SCR 4031

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SCR 4031

House Judiciary Committee

☐ Conference Committee

Hearing Date 3/15/05

Tape Number	Side A	Side B	Meter #
1		xx	20.1-28.8
1		xx	41.4-42.6
Committee Clerk Signature <i>Dawn Penrose</i>			

Minutes: 13 members present, 1 member absent (Rep. Charging).

Chairman DeKrey: We will open the hearing on SCR 4031.

Marilyn Foss, ND Bankers Association: I am testify on a neutral position (see written testimony).

Chairman DeKrey: Thank you.

Representative William Kretschmar: Support (see Uniform Trust Code handout). I'm on the ND Uniform Law Commission, and this was one of the bills that the national commission promulgated to send out to the states for adoption. There's no question that, unless there's consensus in the state for the adoption of the resolution, and that would come primarily from bankers and probably the State Bar Association, it would be a difficult thing to get it passed. But I think this study approach will give the parties involved, the bankers and the Bar Association and others, time to study the matter and see whether it would be a good thing for ND to adopt it. Basically, it's what's called default provisions. You can put in your trust agreement anything you

want, but if your trust agreement is silent on something, then the provisions of the Act would take over. I would certainly support the resolution and it will get into a study committee during the next interim, so that all parties involved can have a good, careful look at the matter and bring their concerns about it, to the Interim committee that studies it.

Chairman DeKrey: Thank you.

Marilyn Foss: I just wanted you all to know that the Attorney General's office appeared on the UTC and expressed concerns about provisions for dealing with charitable foundations and charities.

Chairman DeKrey: We will close the hearing.

(Reopened later in the same session).

Chairman DeKrey: What are the committee's wishes in regard to SCR 4031.

Representative Delmore: I move a Do Pass and place it on the Consent calendar.

Representative Maragos: Seconded.

12 YES 0 NO 2 ABSENT DO PASS ON CONSENT CALENDAR

CARRIER: Rep. Kretschmar

Date: 3/15/05
Roll Call Vote #: /

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SCR 4031

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass - Consent Calendar

Motion Made By Rep. Delmore Seconded By Rep. Maragos

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	✓		Representative Meyer	✓	
Representative Bernstein	✓		Representative Onstad	✓	
Representative Boehning	✓		Representative Zaiser	A	
Representative Charging	A				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar	✓				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 15, 2005 11:37 a.m.

Module No: HR-47-4980
Carrier: Kretschmar
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SCR 4031: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO PASS and BE PLACED ON THE CONSENT CALENDAR (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SCR 4031 was placed on the Tenth order on the calendar.

2005 TESTIMONY

SCR 4031

TESTIMONY OF MARILYN FOSS -SCR 4031

Chairman DeKrey, members of the House Judiciary Committee, my name is Marilyn Foss. When I first learned that the UTC would likely be proposed for adoption, I expected to be supporting it with amendments. As we learned more about the UTC, we concluded a "go slow" approach would be advisable.

NCCUSL approved a Uniform Trust Code in 2000 and amended it in 2001 and 2003. Additional amendments were approved at the 2004 Annual Meeting. This need for immediate and ongoing amendments to a uniform law is unusual and indicates to me that there may be problems remaining hidden within the Act. This deeply concerns us.

We understand the UTC has been enacted in some form by nine states (Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, Tennessee, Utah, and Wyoming) and the District of Columbia, but that each of these jurisdictions has substantively amended it. The Act was also adopted in Arizona and then repealed. It has been rejected by Oklahoma and Colorado. When I asked the general counsel for the South Dakota Bankers Association whether South Dakota- a state which has actively "modernized" its trust laws in an effort to make itself attractive as a place in which to establish trust operations and from which to offer nationwide trustee services- was planning on adopting the UTC, his response was to the effect, "why would anyone want to do that?!!" Then NDBA trust committee members let me know of their hesitancy to support the UTC given the controversy which the Act is creating in the trust industry. More than one has sent me articles which describe problems with enactment across the states or contend the UTC includes provisions that compromise privacy of grantors,

endangers estate plans, and interferes with special needs trusts which are established for disabled persons.

I understand that the general attitude of the State Bar Association of North Dakota is that the UTC should not be enacted now and that the current law isn't broken. Furthermore, even the trust committee member who was originally enthusiastic about adopting the UTC now holds the view that there is nothing critical to require its adoption.

With this uncertainty and at best, ambivalence in the trust industry and among lawyers, NDBA concluded now is not the time to adopt the UTC "on faith". It is our position that the UTC should be "tabled" at this time and not adopted until the problems are worked out and the naysayers shown to be wrong. An interim study could be the vehicle to obtain the information you need to decide whether to adopt the UTC as law or not.



A Few Facts About The...

UNIFORM TRUST CODE

PURPOSE:

To provide a comprehensive model for codifying the law on trusts. While there are numerous Uniform Acts related to trusts, such as the Uniform Prudent Investor Act, the Uniform Principal and Income Act, the Uniform Trustees' Powers Act, the Uniform Custodial Trust Act, and parts of the Uniform Probate Code, none is comprehensive. The UTC will enable states which enact it to specify their rules on trusts with precision and will provide individuals with a readily available source for determining their state's law on trusts.

ORIGIN:

Completed by the Uniform Law Commissioners in 2000, and amended in 2001 and 2003.

APPROVED BY:

American Bar Association
ABA Real Property, Probate and Trust Law Section
AARP

STATE ADOPTIONS:

District of Columbia	New Hampshire
Kansas	New Mexico
Maine	Tennessee
Missouri	Utah
Nebraska	Wyoming

For any further information regarding the Uniform Trust Code (2000), please contact Michelle Clayton, John McCabe or Katie Robinson at 312-915-0195.

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SUMMARY

Uniform Trust Code

When a person transfers property to another person "in trust" for beneficiaries or for a legally-acknowledged beneficial purpose, a "trust" is formed. The recipient of the property is called a "trustee." The person who transfers property to the trustee "in trust" is usually called the settlor. Most trusts have identifiable beneficiaries. There are, however, charitable and honorary trusts, which do not have actual beneficiaries. They have a beneficial purpose that substitutes for named or identifiable beneficiaries. Trusts are recognized in the law for many purposes. Trusts are commonly used as part of an individual's estate plan, to avoid probate and to obtain favorable tax consequences.

A trustee is a fiduciary, sometimes described as the utmost fiduciary. A fiduciary has enforceable obligations to the settlor, beneficiaries or beneficial purpose. There are many kinds of fiduciary relationships in the law. The vulnerability of the beneficiaries or the beneficial interest is the reason that the law imposes special obligations on the trustee as a fiduciary.

The prior law governing the trust relationship is fundamentally American common law, best represented in the Restatement of the Law of Trusts, 2nd and the subsequent, still being drafted, Restatement of the Law of Trusts, 3rd. The restatements come from the American Law Institute. There are also statutes in most states that govern aspects of the trust relationship. A handful of states have attempted a codification of the law of trusts. California is a leading example.

In the year 2000, however, the Uniform Law Commissioners have promulgated the first truly national codification of the law of trusts with the Uniform Trust Code. It draws from the common law sources, including the Restatements. The existing statutory law is also a source. The objective is a codification of existing law, but there are elements of law reform, also. The reforms tune trust law to modern needs. The Uniform Code provides fundamental rules that apply to all voluntary trusts.

However, the Uniform Trust Code does not try to incorporate detailed rules for every conceivable kind of trust, nor does it incorporate all of the kinds of trusts there are. It does not contain statutory rules that are already governing trusts in many jurisdictions, and that are working just fine. It does not displace, for example, the Uniform Prudent Investor Act or the Uniform Custodial Trust Act. What the Uniform Trust Code contains is a set of basic default rules that fairly, consistently and clearly govern voluntary trusts. It is a default statute for the most part, because the terms of a trust instrument will govern even if inconsistent with the statutory rules.

The Uniform Trust Code is divided into 11 articles. The first and eleventh articles do not address substantive topics, but deal with general provisions like definitions and rules of statutory interpretation. Article 9 has no content, but may be used to include the Uniform Prudent Investor Act within the Uniform Trust Code if a state wishes to include it there. The eight substantive articles are Article 2, Judicial Proceedings; Article 3, Representation; Article 4, Creation, Validity, Modification, and Termination of a Trust; Article 5, Creditor's Claims; Spendthrift and Discretionary Trusts; Article 6, Revocable Trusts; Article 7, Office of Trustee; Article 8, Duties and Powers of a Trustee; and, Article 10, Liability of Trustees and Rights of Persons Dealing with Trustee. It is not possible to provide a complete summary of the entire Uniform Trust Code, but what follows highlights central characteristics of this important code.

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.

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. The most significant innovation is the provision for "virtual" representation. A minor, incapacitated person, unborn individual, or a person whose identity is not known, may be represented by and legally bound "by another having a substantially identical interest with respect to the particular question or dispute" to the extent there is no conflict of interest in that representation.

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 Uniform Trust Code.

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 Uniform Trust Code 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.

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.

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.

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.

Article 8, Duties and Powers of the Trustee, articulates the basic fiduciary obligations of a trustee, except for those articulated in the Uniform Prudent Investor Act. 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 Uniform Prudent Investor Act, 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 may delegate certain duties and powers, but is held to a prudent standard of appointment in so doing. An agent is held to the fiduciary standard of the trustee in accepting an appointment. Delegation has not generally been permitted under the common law, but is an important feature of the Uniform Prudent Investor Act. The Uniform Code provision is based on the one in the Uniform Prudent Investor Act. The delegation rules in both acts are an innovation in trust law.

A trustee generally has all the powers necessary to carry on the business of the trust. The Uniform Code contains an updated list of specific powers derived from the widely accepted Uniform Trustee's Powers Act.

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 summary. 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.

The article on liability concludes the substantive parts of the Uniform Trust Code. The Uniform Trust Code provides a first effort at true codification of trust law. There is a serious need for certainty and clearly articulated rules as the use of trusts burgeons in the United States. The Uniform Trust Code is timely in the year 2000. It meets the needs of the citizens of the United States for decades to come.

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