Prepared by the North Dakota Legislative Council
staff for the Judiciary Committee
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UNIFORM TRUST CODE - BACKGROUND MEMORANDUM

Senate Concurrent Resolution No. 4031 (attached as an appendix) directs the Legislative Council to study the Uniform Trust Code. The purpose of the study is to determine the feasibility and desirability of adopting the Uniform Trust Code in North Dakota. The 2005 Legislative Assembly considered Senate Bill No. 2122, which would have provided for the adoption of the Uniform Trust Code. The bill was opposed by the North Dakota Bankers Association, the North Dakota Credit Union League, and the State Bar Association of North Dakota. Senate Bill No. 2122 failed to pass the Senate. The resolution was passed to provide the opponents of the Uniform Trust Code with the opportunity to identify the specific provisions that would be detrimental to settlors, beneficiaries, and trustees and those provisions that should be modified to make North Dakota unique in the area of laws governing trusts.

BACKGROUND

North Dakota Statutory Provisions

North Dakota law regarding trusts are contained in North Dakota Century Code Chapters 59-01 through 59-05. Chapter 59-01 provides for the general provisions with regard to trusts, Chapter 59-02 provides for trusts for the benefit of third persons, Chapter 59-03 provides for trusts in relation to real property, Chapter 59-04 provides for procedures for the administration of trusts, Chapter 59-04.2 is the codification of the Uniform Principal and Income Act, and Chapter 59-05 addresses powers in relation to real property. With the exception of Chapter 59-04.2, which was enacted in 1999, the majority of the statutes contained in these chapters are based upon the California Civil Code and have remained unchanged since their enactment in 1877.

Uniform Trust Code (2000)

According to the National Conference of Commissioners on Uniform State Laws (NCCUSL), the purpose of the Uniform Trust Code is to provide a comprehensive model for codifying the law on trusts. According to NCCUSL, 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 Uniform Trust Code is intended to enable states that enact it to specify their rules on trusts with precision and to provide individuals with a readily available source for determining their state's law on trusts. The Uniform Trust Code was completed by NCCUSL in 2000 and amended in 2001, 2003, and 2005. The Uniform Trust Code has been enacted in Arkansas, the District of Columbia, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Virginia, and Wyoming.

A trust is a fiduciary relationship with respect to property in which one person--the trustee--holds the legal title to the trust property, subject to enforceable equitable rights in another--the beneficiary. A trust is basically a device whereby one or more persons manage the property for the benefit of others. The trustee ordinarily has legal title to the property and the beneficiaries have equitable title. The person who creates an express trust is the trustor or settlor. Most trusts have identifiable beneficiaries. There are, however, charitable and honorary trusts, which do not have actual beneficiaries. These trusts 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, Restatement of the Law of Trusts, 3rd. There are also statutes in most states that govern aspects of the trust relationship. A handful of states have codified the law of trusts. California is an example.

In 2000 the NCCUSL adopted the first national codification of the law of trusts with the Uniform Trust Code. The Uniform Trust Code has its basis in common law sources, including the Restatements. Existing statutory law is also a source. The objective of the Uniform Trust Code is a codification of existing law, but with elements of law reform. According to NCCUSL, the reforms are intended to conform trust law to modern needs. The Uniform Trust Code provides fundamental rules that apply to all voluntary trusts.

According to NCCUSL, 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 1st and 11th 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. The following material highlights central characteristics of the Uniform Trust Code.

Article 2, Judicial Proceedings, deals with jurisdiction over a trust in any state. This article provides 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 issues of who may represent whom in transactions or proceedings relating to a trust.

Article 4, Creation, Validity, Modification, and Termination of a Trust, provides that a trust is created when property is transferred to a trustee with the intent to create a trust relationship. Under this article, 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. According to NCCUSL, 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.

Article 5, Creditor's Claims; 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. However, 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, decisionmaking by cotrustees and like matters.

Article 8, Duties and Powers of a 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 trustees' 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.

Article 10, Liability of Trustees and Rights of Persons Dealing With 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.

PREVIOUS STUDIES AND LEGISLATION

2003-04 Interim

During the 2003-04 interim, the Judicial Process Committee, pursuant to the responsibility delegated to the committee to review uniform laws recommended to the Legislative Council by the Commission on Uniform State Laws, studied the Uniform Trust Code (2000). Testimony in support of the Uniform Trust Code indicated support for adoption of the Uniform Trust Code subject to possible proposed amendments. According to the testimony, the Uniform Trust Code appeared to do a lot to fill in gaps in the current law regarding trusts and is considerably more expansive than the state's current trust law. It was noted that North Dakota has fairly minimal requirements for trusts and that there is a limited amount of case law on the topic. According to the testimony, the Uniform Trust Code would give answers to those areas that were lacking. The committee received no testimony in opposition to the Uniform Trust Code. The committee made no recommendation regarding the adoption of the Uniform Trust Code.

2005 Legislation

Senate Bill No. 2122 (2005) would have codified the Uniform Trust Code (2000). Testimony in opposition to the bill indicated concerns that the Uniform Trust Code may compromise the privacy of grantor, endanger estate plans, and interfere with special needs trusts that are established for disabled persons. The testimony also indicated that the time may not be right for North Dakota to adopt the Uniform Trust Code and that there is nothing critical in the new code that requires its adoption. Other testimony indicated that the Uniform Trust Code has not been studied by the State Bar Association nor has it been tested in the courts of any jurisdictions in which it has been enacted. It was noted that the Uniform Trust Code may be an attempt to fix something that is not broken. It was suggested that the Uniform Trust Code needs further study. Senate Bill No. 2122 failed to pass the Senate.

SUGGESTED STUDY APPROACH

The committee, in its study of the Uniform Trust Code (2000), may wish to approach this study as follows:

- Receive information from the National Conference of Commissioners on Uniform State Laws regarding adoption of the Uniform Trust Code.
- Receive information comparing current North Dakota laws on trusts with the Uniform Trust Code.
- Receive information and testimony from the State Bar Association of North Dakota, the North Dakota Bankers Association, and the North Dakota Credit Union League regarding the feasibility and desirability of adopting the Uniform Trust Code.
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:1