

HOUSE BILL REPORT

SSB 6029

As Reported by House Committee On:
Civil Rights & Judiciary

Title: An act relating to the uniform directed trust act.

Brief Description: Concerning the uniform directed trust act.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Pedersen and Padden; by request of Uniform Law Commission).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 2/14/20, 2/21/20 [DP].

Brief Summary of Substitute Bill

- Enacts the Uniform Directed Trust Act (replacing the Washington Directed Trust Act, which is repealed).

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass. Signed by 14 members: Representatives Kilduff, Chair; Thai, Vice Chair; Irwin, Ranking Minority Member; Dufault, Assistant Ranking Minority Member; Goodman, Graham, Kirby, Klippert, Orwall, Peterson, Rude, Valdez, Walen and Ybarra.

Staff: Cece Clynch (786-7195).

Background:

Washington Directed Trust Act.

Trusts provide a means of transferring real or personal property. A trust is created by a trustor, who gives his or her property to a trustee. The trustee holds legal title to the property, but only manages the property for the benefit of other individuals specified by the trustor. The beneficiaries hold equitable title to the property, meaning the beneficiaries enjoy the property, but do not have control over the trustee or how the trustee manages the legal title.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Washington statutes governing trust and estate law address a range of issues relating to trusts, including the requirements for creating and amending trusts, the duties and powers of trustees, trust administration, distribution of assets, liability issues, and the investment of trust funds. The Trust and Estate Dispute Resolution Act provides procedures for resolving trust and estate disputes.

In 2015 the Washington Directed Trust Act (WDTA) was enacted, which recognizes and provides for situations in which a trustor directs specific powers or duties to third parties, called "statutory trust advisors," rather than having all powers and duties vested in the trustee. The WDTA applies to a trust only if the governing instrument, such as a will or a trust instrument, expressly invokes the WDTA and the situs of the trust is in Washington.

Powers and Duties of Statutory Trust Advisors.

A statutory trust advisor is a person who under the terms of the governing instrument has a power or duty to direct, consent to, or disapprove an action, or who has a power or duty that would normally be required of a trustee. The WDTA recognizes a variety of powers that may be held by a statutory trust advisor, including the power to:

- direct the acquisition, management, disposition, or retention of trust investments;
- direct a trustee to make or withhold distributions to beneficiaries;
- consent to a trustee's action or inaction relating to investments and distributions; and
- modify or amend the governing instrument to achieve favorable tax status or respond to changes in tax laws or other laws affecting trust administration.

A statutory trust advisor has a fiduciary duty with respect to any granted power to act in accordance with the terms and purposes of the trust and solely in the interests of the beneficiaries. A statutory trust advisor does not have a duty to monitor the administration of the trust to determine whether a granted power should be exercised unless requested by the trustee or a qualified beneficiary or required in the governing instrument. A governing instrument may not relieve a statutory trust advisor from his or her fiduciary duty or from the duty to act in good faith and with honest judgment.

A statutory trust advisor has a duty to keep the trustee and qualified beneficiaries reasonably informed and provide requested information. A statutory trust advisor may request from a trustee or beneficiary information that is reasonably necessary for the statutory trust advisor to perform his or her duties under the governing instrument.

Statutory Trust Advisor Appointment.

Procedures are provided for a statutory trust advisor to accept or decline appointment, or to resign. A statutory trust advisor is entitled to reasonable compensation. By accepting appointment, a statutory trust advisor submits personally to the jurisdiction of Washington courts and may be made a party to any action relating to his or her decision, action, or inaction.

Remedies for Breach of Duty by Statutory Trust Advisor.

A trustee or beneficiary of the trust may file an action in court when a statutory trust advisor breaches a fiduciary duty. A statutory trust advisor who breaches a fiduciary duty is liable for the greater of the amount required to restore the value of the trust property and distributions or the profit made by the statutory trust advisor as a result of the breach. The court may

excuse a statutory trust advisor from liability if the advisor acted reasonably and in good faith under the circumstances known to the advisor.

A statutory trust advisor is protected from liability relating to any power, duty, or function granted or reserved exclusively to a trustee or another statutory trust advisor.

Directed Trustees.

A "directed trustee" is a trustee that, with respect to a particular duty or function:

- must follow the direction of a statutory trust advisor, to the extent the trustee follows the direction;
- may not undertake the particular duty or function without direction from a statutory trust advisor, to the extent the trustee fails to undertake the duty or function due to absence of direction from the statutory trust advisor;
- must obtain consent or authorization of a statutory trust advisor, to the extent the trustee timely seeks but fails to obtain consent or authorization; or
- must obtain consent or authorization of a statutory trust advisor, to the extent the trustee obtains consent or authorization, but only if and to the extent the governing instrument indicates that the protections of directed trustee status are intended.

A directed trustee is not liable for any loss resulting from: following directions of the statutory trust advisor; actions taken with the statutory trust advisor's consent; or an action or inaction of the statutory trust advisor relating to any power of the statutory trust advisor. A directed trustee also is not liable for any loss resulting from a failure to take any action proposed by the directed trustee that requires the statutory trust advisor's prior consent, if the directed trustee sought but was unable to obtain the consent.

A directed trustee when following the directions of a statutory trust advisor generally has no duty to monitor, advise, or consult with the statutory trust advisor, communicate with or warn any beneficiary concerning matters the directed trustee may have exercised in a different manner from the manner directed by the statutory trust advisor, or commence a proceeding against the statutory trust advisor. However, these limitations do not relieve a trustee of the duty to act in good faith and with honest judgment.

Absent clear and convincing evidence to the contrary, an action of a directed trustee relating to matters within the scope of the statutory trust advisor's authority are presumed to be administrative actions solely to allow the directed trustee to perform his or her duties, and the administrative actions do not constitute an undertaking by the directed trustee to monitor the statutory trust advisor or otherwise participate in actions within the scope of the statutory trust advisor's authority.

Uniform Directed Trust Act.

The Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL), is a nonprofit unincorporated association, comprised of state commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands. Each jurisdiction determines the method of appointment and the number of commissioners actually appointed. The purpose of the ULC is to determine which areas of law should be made

uniform, and to promote uniformity by drafting and proposing uniform statutes. States decide whether to enact a uniform law.

In 2017 the Uniform Directed Trust Act (UDTA) was approved and recommended for enactment by the NCCUSL. In a directed trust, the terms of the trust grant a person other than a trustee a power over one or more aspects of the administration of the trust. According to its prefatory note, the UDTA brings consistency and certainty by providing a consistent vocabulary and explicitly addressing fiduciary duties which not all of the existing nonuniform state laws on directed trusts do. To date, 10 states have enacted the UDTA and it has been introduced in three other states, including Washington.

Summary of Bill:

Uniform Directed Trust Act.

The Washington Directed Trust Act is repealed in its entirety and replaced with the Uniform Directed Trust Act (UDTA).

Trust Directors.

A "trust director" is 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. A trust director may exercise any further power appropriate to the exercise or nonexercise of a granted power of direction. Trust directors with joint powers must act by majority decision.

A trust director has the same fiduciary duty and liability in the exercise or nonexercise of a granted power as a sole trustee if the power is held individually and as a cotrustee if the power is held jointly with another trust director. The terms of a trust may vary the director's duty or liability to the same extent the terms of a trust could do so with respect to a trustee. The same rules that apply to a trustee regarding reimbursement requirements of Medicaid law in a trust for a beneficiary with a disability and rules regarding a charitable interest in a trust apply to a trust director.

An action against a trust director for breach of trust must be commenced within the same limitation period as for an action against a trustee. In such an action, a trust director may assert the same defenses as could a similarly situated trustee.

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:

- the breach involved the trustee's or other director's willful misconduct;
- the release was induced by improper conduct of the trustee or other director; or
- at the time of the release, the director did not know the material facts relating to the breach.

Directed Trustees.

A "directed trustee" is a trustee that is subject to a trust director's power of direction. A directed trustee must take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power that is granted by the trust, and the

trustee is not liable for such action. However, if by complying, the directed trustee would engage in willful misconduct, the trustee must not comply.

A directed trustee may petition the court for instructions if the trustee has reasonable doubt about his or her duties.

Duty to Monitor and Report and Right to Information.

Trust directors and directed trustees each have duties to provide information to each other. If one acts in reliance on information provided by the other, the recipient is not liable for breach of trust if the breach resulted from the reliance, unless by so acting the recipient engages in willful misconduct.

Trust directors and directed trustees do not have duties to:

- monitor the other; or
- inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance or situation in which the other might have acted differently.

Miscellaneous.

Unless the terms of a trust provide otherwise, if a trust director is licensed or certified to provide health care in the ordinary course of the director's business or practice, to the extent the director acts in that capacity, the director has no duty or liability under the UDTA. According to the comments to the UDTA, this provision addresses the concern that a healthcare professional might refuse appointment as a trust director to determine, for example, the capacity or sobriety of a beneficiary if this would make him or her subject to duty or liability under the UDTA.

As with other uniform laws, the UDTA includes a provision requiring that, in applying and construing the UDTA, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

The UDTA also includes a section which responds to the specific language of the Electronic Signatures in Global and National Commerce Act and is designed to avoid preemption of state law under that federal legislation.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect on January 1, 2021.

Staff Summary of Public Testimony:

(In support) This is quite a consequential bill. As trust law has become more complicated, it is very important that Washington's laws are up to date with respect to fiduciary duty. Traditionally, trust law contemplated a single trustee. That single trustee had all of the powers and was the fiduciary. Now, trusts frequently split up the powers between more than

one person. It is therefore important to clarify who has the powers, duties, and responsibilities. The committee members should have received a letter from Professor Karen Box in which she talks about Washington's Directed Trust Act on which she and the Washington State Bar Association's Real Property, Probate, and Trust section worked. Professor Box then participated with the Uniform Law Commission's drafting committee on this uniform law. Professor Box feels that the Uniform Directed Trust Act is an improvement on the Washington Directed Trust Act. This will affect trust administration and will help those who rely on trusts, such as persons with disabilities who must rely on others to manage trusts for their benefits. In addition, trusts are often used by persons with large estates. As a preview of things to come, this is the first of three uniform laws that will be introduced in the years to come.

(Opposed) None.

Persons Testifying: Senator Pedersen, prime sponsor.

Persons Signed In To Testify But Not Testifying: None.