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MEMORANDUM

To: House Committee on Judiciary

From: Office of Revisor of Statutes

Date: January 31, 2023

Subject: Bill Brief on HB 2172

HB 2172 enacts the uniform trust decanting act.

Section 1 names the act, and Section 2 provides the definitions to be used throughout the act. “Decanting power” means the power of an authorized fiduciary under the act to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.

Section 3 describes the applicability of the act and addresses the types of trust the act applies to and does not apply to.

Section 4 requires an authorized fiduciary to act in accordance with fiduciary duties. The act does not create or imply a duty to exercise the decanting power or inform beneficiaries about the act. The terms of the first trust are deemed to include the decanting power except as provided in the instrument.

Section 5 applies the act to a trust created before, on or after July 1, 2023, that (1) has its principal place of administration in this state or (2) provides that it is governed by the law of this state for the purpose of administration, construction of terms or determining the meaning or effect of the terms of the trust.

Section 6 provides that a person who reasonably relies on the validity of a distribution to another trust or a modification of a trust under the act is not liable to any person for any action or failure to act as a result of the reliance.

Section 7 provides the notice requirements for decanting. An authorized fiduciary may exercise the decanting power without the consent of any person and without court approval. The fiduciary shall give notice of intent to exercise the decanting power to certain individuals not later than 60 days before the exercise. The fiduciary is not required to give notice to a person who is not known to the fiduciary or cannot be located after reasonable diligence. Subsection (e)

provides the contents required in the notice. People may waive the notice requirements in a signed record. An exercise of decanting power is not ineffective because of the failure to give notice if the fiduciary acted with reasonable care to provide notice.

Section 8 provides that notice to a person with authority to represent another person has the same effect as notice. Consent of or waiver by a person with authority to represent another person unless the person is binding on the person represented represented objects to the representation before the consent or waiver would become effective. A person with authority to represent another person may file an application under section 9. A settlor shall not represent or bind a beneficiary under the act.

Section 9 describes the authority of the court with respect to decanting. These actions may be taken by the court on application of an authorized fiduciary, a person entitled to notice, a beneficiary or, for charitable interest, the attorney general or another person with standing to enforce the charitable interest.

Section 10 requires that an exercise of decanting power shall be made in a record signed by an authorized fiduciary. The record shall identify the first and second trust and state the property of the first trust being distributed to each second trust or remaining in the first trust.

Section 11 delineates the decanting power when the authorized fiduciary has expanded distributive discretion and Section 12 delineates the decanting power when the authorized fiduciary has limited distributive discretion.

Section 13 contains rules to facilitate decanting into a special-needs trust for a beneficiary with a disability. The act allows a trust to be decanted to modify the interest of the beneficiary with a disability, even if the trustee does not have expanded distributive discretion. When a trust has a beneficiary with a disability, it allows the trust to be restructured into a special-needs trust.

Section 14 provides rules to prevent diminishing charitable interest. If the first trust contains a determinable charitable interest, the attorney general has the rights of a qualified beneficiary and may represent the trust. This section provides limitations for the second trust when the first trust contains a charitable interest.

Section 15 provides limitations on exercising the decanting power. A first-trust instrument may restrict the decanting power.

Section 16 provides that a fiduciary shall not exercise the decanting power to increase their compensation unless certain criteria are met. If the first-trust instrument does not specify a fiduciary's compensation, the decanting power cannot be exercised to increase compensation

above the compensation permitted by the Kansas uniform trust code unless certain criteria are met.

Section 17 restricts use of the decanting power to increase the authorized fiduciary's protection from liability.

Section 18 restricts use of the decanting power to modify a provision granting another person power to remove or replace the fiduciary unless certain criteria are met.

Section 19 imposes limitations on the decanting power that might be necessary to avoid disqualifying a trust for a particular tax benefit. Section 20 addresses limits on the duration of a trust.

Section 21 provides that an authorized fiduciary may exercise the decanting power even if the first trust's discretionary distribution standard wouldn't have allowed the fiduciary to make a discretionary distribution at the time of exercise.

Section 22 provides that if the exercise of the decanting power would be effective except that the second-trust instrument doesn't comply with the act, the exercise of power is effective and it provides rules for exercising that power.

Section 23 provides that the decanting power may be exercised over an animal trust that has a protector to the extent that the trust could be decanted under the act if each animal that benefits were an individual if the protector consents in a signed record to the exercise of power. A protector for an animal acts as a beneficiary. If the first trust is an animal trust, the second trust shall provide that trust property may be applied only to its intended purpose for the period the first trust benefited the animal.

Section 24 provides that a reference in the trust code to a trust includes a second-trust instrument. Section 25 provides that a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

Section 26 provides that if the exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property is part of the trust estate of the second trust. The section also provides exceptions to this general rule.

Section 27 provides that the liabilities of the first trust are also liabilities of the second trust to the extent it received property from the first trust.

Section 28 provides that consideration shall be given to uniformity in applying the act. Section 29 provides that the act modifies certain parts of the electronic signatures in global and

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national commerce act. Section 30 provides that it is the intent of the legislature that the provisions of the act are severable.