

## TRUST ADMINISTRATION—JURISDICTION AND VENUE

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### TRUST ADMINISTRATION—JURISDICTION

Section 30-2804 of the Nebraska Probate Code is designed to give Nebraska courts territorial jurisdiction over all trust matters when a principal place of administration of the trust is Nebraska. A Nebraska judicial decision with respect to a trust primarily administered in Nebraska is intended to affect all of the beneficial interests under the trust instrument relating to all of the trust property wherever located—including real and personal property, and beneficiaries in other states. This not to say that a Nebraska court would “try title” to real estate in another state. Instead, Nebraska courts could, in interpreting the trust instrument, enter a judgment in Nebraska which would be entitled to full faith and credit in any other state. The judgment would still require enforcement in the other state under the concepts of full faith and credit with respect to any other rights in the foreign state concerning the property in that state.

Section 30-2804 of the Code generally attempts to do within a “permissive” trust registration system what the Uniform Probate Code sought to do by mandatory trust registration. Mandatory registration of trusts would fix the trust jurisdictionally in one state so that, under constitutional requirements of Supreme Court decisions, all issues concerning the trust could be determined in a single jurisdiction. Trust registration is made permissive rather than mandatory under section 30-2801, but by section 30-2804 it is intended that Nebraska courts will be able to go as far as is constitutionally permissible in adjudicating all issues concerning “Nebraska trusts.”

Section 30-2805 deals with the qualification of a foreign trustee in Nebraska. A foreign corporation must qualify in Nebraska if it maintains the principal place of administration of any trust within the state. However, a foreign co-trustee is not required to qualify in Nebraska, solely because its co-trustee maintains the principal place of administration in Nebraska.

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As to foreign corporate trustees, if (1) not otherwise doing business in Nebraska, (2) Nebraska is not the principal place of administration of the trust or there is a Nebraska co-trustee, and (3) the laws of the state of the foreign corporate trustee grant the same authority to a Nebraska corporate trustee, then the foreign corporate trustee can receive distributions from a Nebraska estate and act as a trustee of Nebraska property:

- a) under the Nebraska Probate Code, by section 30-2805;
- b) without qualification as a foreign corporation, under section 21-20, 105 (11), as amended in 1975; and
- c) without qualification under the banking laws of Nebraska, by section 8-201, as amended in 1975.

The Nebraska provisions depart from the Uniform Probate Code by making operation of section 30-2805 reciprocal. The Troyer Committee apparently felt that, because the Arizona Code did not contain the Uniform Probate Code provision allowing foreign trustees to act in Arizona, it was unfair. If a Nebraska resident went to Arizona and had property in both states, an Arizona corporate trustee could act in Nebraska, but a Nebraska corporate trustee could not act in Arizona. The Legislature agreed that the authorization of foreign "corporate" trustees should be made reciprocal with other states giving Nebraska corporate trustees similar authority. Both the Technical Memorandum of the Judiciary Committee explaining the amendment and the Nebraska Comment in the 1974 Cumulative Supplement refer only to "foreign corporate trustees in Nebraska." But the reciprocity language is contained in a sentence pertaining to "local qualification by a foreign trustee, corporate or individual." For that reason, the reciprocity feature also apparently applies to foreign individual trustees, as well as corporate trustees. The application to foreign individual trustees probably was unintended and probably represents a change in previous Nebraska probate practice.

Section 30-2806 is a tremendously important section on the jurisdiction of county courts of trust proceedings—not just testamentary trusts, but inter vivos trusts as well. Remember that in 1970 the judicial article of the Nebraska Constitution was amended to eliminate many of the previous limitations on county courts. The 1970 constitutional amendments were followed with the Court Reform Act of 1972 and now the Nebraska Probate Code. So if you are doing research in the area of the county court trust jurisdiction, you will find that most of the pre-1970 rules have been changed.

Section 30-2806 gives county courts subject matter jurisdiction of proceedings concerning the internal affairs of trusts. Jurisdiction extends to both testamentary and inter vivos trusts. The Nebraska Legislature struck the word "exclusive" before "jurisdiction" in the Uniform Probate Code, inferring that there is concurrent jurisdiction of these proceedings with district courts, in view of Article V, Section 9, of the Nebraska Constitution giving district courts general law and equity jurisdiction. Although you can still bring an inter vivos trust matter in the district court, and undoubtedly a testamentary trust matter, too, the proper place to bring those suits after January 1, 1977, will be in the county courts. The superior procedures provided by the Nebraska Probate Code in county courts will be a strong factor for bringing the proceedings there rather than under the general equity jurisdiction of a district court.

Proceedings may be initiated by an "interested party." Section 30-2209(21) states that "interested person" includes "heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person which may be affected by the proceeding. . . . The meaning as it relates to particular persons may vary from time to time, and it must be determined according to the particular purposes of, and matter involved in, any proceeding."

Section 30-2811 covers initiation of these proceedings. A proceeding is initiated when an interested party (the same as section 30-2806(a)) files a petition and gives notice to the other interested parties pursuant to section 30-2220. These are "formal" proceedings. The main difference from present practice is that each petition is a separate proceeding. There is no continuing judicial supervision over the trust, in the absence of a court order to that effect. The petition under section 30-2806 invokes the court's jurisdiction only as to the matters adjudicated in that proceeding. Another change from present practice is that "A decree is valid as to all who are given notice of the proceeding though fewer than all interested parties are notified." That, of course, is a change from the present practice in which the absence of an interested party might be a jurisdictional defect in the proceedings.

Specifying the types of proceedings which can be initiated in county courts, section 30-2806 also contains broad jurisdictional grants, such as "the determination of other matters involving trustees and beneficiaries of trusts" and "any question arising in the administration or distribution of any trust." An easy memory aid

is that anything worth litigating with respect to the "internal affairs" of trusts can be brought in the county court. The statute allows proceedings of the following types:

- a) "those concerning the administration and distribution of trusts";
- b) "the declaration of rights . . . involving trustees and beneficiaries of trusts";
- c) "the determination of other matters involving trustees and beneficiaries of trusts"; and
- d) the foregoing categories "include, but are not limited to, proceedings to:
  - (1) appoint or remove a trustee;
  - (2) review trustees' fees and to review and settle interim or final accounts;
  - (3) ascertain beneficiaries, determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, to instruct trustees, and determine the existence or nonexistence of any immunity, power, privilege, duty or right; and
  - (4) release registration of a trust."

These matters need not be presented to the court for determination, unless proceedings are initiated by an interested party. Trust administration is not subject to judicial supervision unless (1) required by the terms of the trust instrument, (2) jurisdiction is invoked by an interested party, (3) supervision is required by court order, or (4) otherwise provided by law.

The Nebraska Comment to section 30-2806 indicates that the scope of judicial review of a trustee's discretion under a trust instrument will remain the same as the current Nebraska rules, as set forth in *Scully v. Scully*, 162 Neb. 368, 76 N.W.2d 239 (1956): "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." In other words, the court will require the trustee to exercise the discretion but won't specify *how* the trustee must exercise the discretion as long as the exercise by the trustee is within the permissible limits of the discretion given under the governing trust instrument.

#### TRUST ADMINISTRATION—VENUE

The territorial jurisdiction of Nebraska courts in these proceedings is also contained in section 30-2210, which states that, "Except as otherwise provided, this code applies to . . . (2) the property

of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state, . . . and (5) trusts subject to administration in this state." Section 30-2807 provides that the venue for trust administration proceedings is:

a) the place of registration, if the trust is registered in Nebraska;

b) if the trust is not registered, in any county where the trust could properly have been registered in Nebraska; or

c) otherwise, in any place allowed by the rules of civil procedure (see Chapter 25, Article 4).

Section 30-2212(c) should be a very handy venue provision allowing a change of venue to another court in this state "in the interest of justice." This will be useful where a decedent died a resident of one county but the property and beneficiaries are in another, and in a variety of other situations in which the convenience of the parties is not served by the basic venue provisions.

Finally, county courts have a full range of legal and equitable powers under the Nebraska Probate Code. Section 30-2203 provides that "Unless displaced by the particular provisions of this code, the principles of law and equity supplement its provisions." Section 30-2211(b) states that "The court has full power to make orders, judgments, decrees, and take all other action necessary and proper to administer justice in the matters which come before it." Clearly county courts will continue to have broad equitable powers to effectuate its jurisdiction under the Nebraska Probate Code.

Section 30-2208 precludes Nebraska courts from taking jurisdiction of a foreign trust matter which can be brought in the state of registration. If a party objects, and the several statutory requirements are met, Nebraska will not entertain the proceeding or will condition a stay or dismissal of the Nebraska proceeding upon a consent to jurisdiction in the foreign state.

Section 30-2809 gives the court where the trust is registered concurrent jurisdiction with other Nebraska courts of actions to determine the existence or nonexistence of trusts created other than by will, of actions by or against creditors or debtors of trusts, and of other actions and proceedings involving trustees and third parties.

Section 30-2810 is designed to provide a quick and efficient proceeding to review the employment of agents by a trustee and the compensation of any person so employed or the trustee's own compensation. The Nebraska Probate Code allows a trustee to

establish his own compensation, in the absence of a contrary trust provision or agreement. Section 30-2810 allows an interested party to petition for review of the (1) trustee's compensation; (2) the trustee's employment of any other person, including any attorney, auditor, investment advisor or other specialized agent or assistant; and (3) the compensation of such other person. Notice must be given to "all interested persons." The court can order any person receiving excessive compensation to make appropriate refunds.

There are a number of provisions outside the trust administration article which relate to trust administration. These will be covered in more detail in the forthcoming Nebraska Probate Manual and related materials. Some are:

a) Section 30-2202 provides that the Nebraska Probate Code shall be liberally construed and applied to promote its underlying purposes "to facilitate use and enforcement of certain trusts" and "to make uniform the law among the various jurisdictions".

b) Section 30-2208 allows the holder of a presently exercisable general power of appointment to give consents to the acts or accounts of a trustee. This will be very useful if beneficiary consents are needed for some trust purpose.

c) The general rules of sections 30-2220 to 30-2222 concerning notice, parties and representation are applicable to trust proceedings.

d) Nebraska amendments to the Uniform Probate Code language substantially broaden both the Code and the present Nebraska law concerning renunciation and deviation from any power of administration, management or allocation of benefit by a trustee upon certain statutory findings. See section 30-2352(a) (3) which is a new provision contained in the Code.

e) Totten trusts are validated under sections 30-2701 to 30-2713 and the presently uncertain validity of "trust accounts" in financial institutions under prior law is made clear under the same sections.

f) The provisions on testamentary additions to trusts (pour overs) is somewhat broader and more explicit than present law, under section 30-2336.

g) Section 30-2656 authorizes a conservator to make gifts from a revocable trust of a protected person under certain conditions.

The Nebraska Probate Code applies to existing trusts on and after January 1, 1977, unless in the opinion of a court, under section 30-2901 the former procedures would be made applicable in a particular case. The enactment of the Code does not impair any accrued right. Note that Nebraska omitted paragraph "(5)" of the

Uniform Probate Code language that the rules of construction or presumptions of the Code apply to instruments executed before the effective date unless there is a clear indication of a contrary intent. This is explained in something of a confusing fashion in the Nebraska Comment on page 1266 of the 1974 Cumulative Supplement, quoting the Technical Memorandum of the Judiciary Committee, page 17, December 21, 1973, that this deletion was:

To avoid a potentially harsh rule of construction with respect to instruments in effect on the operative date of the act. In determining the intention of a testator of a will or other party to a written instrument, the law in effect at the time the instrument was executed would be an important element. It is likely that a court would, as a matter of interpretation, apply the law in effect at the time of the original execution of an instrument to determine the testator's intention but consider amendments to the statute with respect to codicils or amendments of the will or other written instrument.

### TRUST PLANNING

Finally, I submit three suggestions concerning trust planning under the Nebraska Probate Code.

First, various sections of the Code permit a deviation from the statute if so provided in the trust instrument. Consideration should be given to inserting provisions in new instruments, or existing instruments subject to being amended, in the following areas:

a) whether to provide for registration of a trust in a court other than at the location of the trustee's usual place of business;

b) whether to deviate from the prudent man standard of care, in whole or as to management of any specific assets;

c) whether to provide that only current or vested beneficiaries should receive a copy of trust terms and trustee accountings, thereby eliminating the "contingents" from the requirement;

d) whether trust accountings or other matters should be made subject to court review;

e) whether the instrument should provide for a trustee's bond;

f) whether the trust instrument should deviate from the time limitations prescribed for proceeding against the trustee after trust termination; and

g) any special requirements as to judicial supervision.

Second, it will continue to be necessary to include trust powers in trust instruments, since Nebraska did not adopt the Trustees'

Powers Statute (see page 1265 of the 1974 Cumulative Supplement). The Nebraska Probate Code spells out elaborately the powers of personal representatives, conservators, guardians, ancillary representatives and everyone else except trustees. It is still necessary to spell out the trustee's powers at length in the trust instrument.

Third, consideration should be given in 1976 county court orders and proceedings to the procedures and status of the testamentary trust after January 1, 1977. Section 30-2901(2) states that

"The code applies to any proceedings in court then pending (on January 1, 1977) or thereafter commenced regardless of the time of the death of the decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this code."

Under the new probate Code, a testamentary trust can generally be administered free from judicial supervision except on petition of an interested party. As a matter of good housekeeping, it would seem that as part of the 1976 annual accountings, testamentary trust reports and orders should clarify whether the proceedings will continue under the present procedures or the new Nebraska Probate Code. This may be especially important if an interested party wishes to insure that judicial supervision of an existing testamentary trust will continue after January 1, 1977, without the necessity of initiating a new proceeding each year.