

Recent Developments

*Corey L. Moomaw & Tim O'Sullivan*

FOULSTON  
ATTORNEYS AT LAW

1

---

---

---

---

---

---

---

---

Uniform Directed Trust Act

FOULSTON  
ATTORNEYS AT LAW

2

---

---

---

---

---

---

---

---

Uniform Directed Trust Act

- The Uniform Directed Trust Act or "UDTA" was enacted by the Kansas legislature and will go into effect July 1, 2022.
- The UDTA applies to a trust, whenever created, that has its principal place of administration in Kansas, subject to the following rules:
  - If the trust was created before July 1, 2022, the UDTA applies only to a decision or action occurring on or after July 1, 2022.
  - If the principal place of administration of the trust is changed to Kansas on or after July 1, 2022, the UDTA applies only to a decision or action occurring on or after July 1, 2022.

FOULSTON  
ATTORNEYS AT LAW

3

---

---

---

---

---

---

---

---

## UDTA Fundamentals

- **Development of UDTA**
  - **Uniform Trust Code, KSA 58a-808(b)**
    - If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.
    - Terminology is broad and vague; should not be used as authority for a directed trust.
  - **Restatement of Trusts 2<sup>nd</sup> Section 185 (1959)**
  - **Restatement of Trusts 3<sup>rd</sup>, Section 75 (2007)**
  - **Uniform Directed Trust Act (2017)**
    - 16 states have enacted (AR, CO, CT, FL, GA, IN, KS, ME, MI, MT, NE, NM, UT, VA, WA, WV).

FOULSTON  
ATTORNEYS AT LAW

4

---

---

---

---

---

---

---

---

## UDTA

### Key Terms

- A **directed trust** is a trust for which the terms of the trust grant a power of direction.
- **Power of direction** means a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration. The term excludes:
  - power of appointment;
  - power to appoint or remove a trustee or trust director;
  - power of a settlor over a trust to the extent the settlor has a power to revoke the trust;
  - power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of the beneficiary;
  - power over a trust if the terms of the provide that the power is held in a nonfiduciary capacity AND the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives.

FOULSTON  
ATTORNEYS AT LAW

5

---

---

---

---

---

---

---

---

## UDTA

### Key Terms

- A **directed trustee** means a trustee that is subject to a trust director's power of direction.
- A **trust director** means 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. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust.
- The **terms of a trust** means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or established by other evidence that is admissible in a judicial proceeding. "Terms of the trust" also may mean the trust provisions as established, determined, or amended by a trustee or trust director in accordance with applicable law, court order, or a nonjudicial settlement agreement under the UTC

FOULSTON  
ATTORNEYS AT LAW

6

---

---

---

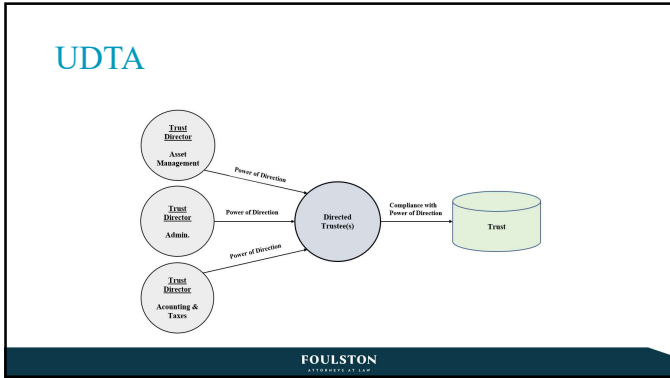
---

---

---

---

---



7

---

---

---

---

---

---

---

---

## UDTA

**- Trust Director**

- **Responsibilities**
  - Trust document grants specific powers of direction.
  - Uses power of direction to direct directed trustee.
  - Can appoint agents or delegate authority where appropriate.
  - A trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director.

**FOULSTON**  
ATTORNEYS AT LAW

8

---

---

---

---

---

---

---

---

## UDTA

**- Trust Director**

- **Fiduciary Duties**
  - A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction.
  - Refer to K.S.A. § 58a-801:
    - Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this code.
- **Settlor's Authority to Limit Duties and Liability**
  - The terms of a trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.

**FOULSTON**  
ATTORNEYS AT LAW

9

---

---

---

---

---

---

---

---

## UDTA

### - Directed Trustee

#### - Responsibilities

- Trust document describes directed trustee as subject to the powers of the trust director.
- Must follow the directions of the trust director as long as those powers are within scope of trust agreement.
- May voice concerns with directions, but under no compulsion to do so under most circumstances.

FOULSTON  
ATTORNEYS AT LAW

10

---

---

---

---

---

---

---

---

## UDTA

### - Directed Trustee

#### - Fiduciary Duties

- A directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction and the trustee is not liable for the action.
  - Not required to assess the reasonableness of the direction itself.
- **However**, A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction to the extent that by complying the trustee would engage in willful misconduct.
  - Must not breach trust agreement.
  - Must not engage in "willful misconduct."
    - **Willful Misconduct**: Not defined under UDTA; Delaware standard: intentional wrongdoing, not mere negligence or gross negligence.
- The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under the UDTA.
- A directed trustee that has reasonable doubt about its duty may petition the district court for instructions.

FOULSTON  
ATTORNEYS AT LAW

11

---

---

---

---

---

---

---

---

## UDTA

### - Directed Trustee

#### - Fiduciary Duty Example

- A directed trustee is directed by a trust director to invest funds into certain securities.
- The directed trustee has a fiduciary duty to make sure the funds are invested in a reasonable time at a reasonable cost.
- The directed trustee *does not* have a duty to assess the appropriateness of the investment.

FOULSTON  
ATTORNEYS AT LAW

12

---

---

---

---

---

---

---

---

## UDTA

### - Information Sharing

- A trustee is required to provide information to a trust director to the extent the information is reasonably related to both the powers or duties of the trustee and the powers or duties of the director.
- A trust director is required to provide information to a trustee or another trust director to the extent the information is reasonably related to both the powers or duties of the director and the powers or duties of the trustee or other director.
- Trust document may impose more extensive duties.
- **Safe Harbor:** A trustee or director that acts in reliance on information provided by a trustee or another director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in willful misconduct.

FOULSTON  
ATTORNEYS AT LAW

13

---

---

---

---

---

---

---

---

## UDTA

### - Information Sharing Example

- Trust director directs the trustee to make a distribution to beneficiaries; however, the trust director did not provide updated beneficiary ownership percentages to trustee.
- When the trustee makes incorrect distributions, the trustee is not liable unless the error was a result of willful misconduct by the trustee.

FOULSTON  
ATTORNEYS AT LAW

14

---

---

---

---

---

---

---

---

## UDTA

### - Monitoring, Informing, Advising

- A trustee does not have a duty to:
  - Monitor a trust director; or
  - inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director; and
- A trust director does not have a duty to:
  - Monitor a trustee or another trust director; or
  - inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director.
- A trustee/director, by taking such an action, does not assume a duty.
- The terms of the trust instrument or UTC may impose additional duties here.

FOULSTON  
ATTORNEYS AT LAW

15

---

---

---

---

---

---

---

---

## UDTA

### - Monitoring, Informing, Advising Example

- A trust director is given the power to direct investments.
- The trustee does not owe a duty to advise the grantor or beneficiary of the risks of those investments.
- However, under the UTC, the trustee would still owe a duty to provide periodic reports or accountings to the beneficiary and answer questions.

FOULSTON  
ATTORNEYS AT LAW

16

---

---

---

---

---

---

---

---

## UDTA

### - Breach of Trust

- An action against a trust director for breach of trust may be commenced in the same manner as against a trustee.
- In an action against a trust director for breach of trust, the director may assert the same defenses a trustee in a like position and under similar circumstances could assert.
- By accepting appointment as a trust director of a trust subject to the Kansas UDTA, the director submits to personal jurisdiction of Kansas courts.

FOULSTON  
ATTORNEYS AT LAW

17

---

---

---

---

---

---

---

---

## UDTA

### - Other Provisions

- Unless the terms of a trust provide otherwise, the rules applicable to a trustee in the UTC also apply to a trust director regarding the following:
  - Acceptance of trusteeship/directorship;
  - Giving of bond to secure performance of a trustee's duties;
  - Reasonable compensation of a trustee;
  - Resignation of a trustee;
  - Removal of a trustee; and
  - Vacancy in trusteeship and appointment of a successor trustee/director.

FOULSTON  
ATTORNEYS AT LAW

18

---

---

---

---

---

---

---

---

## UDTA

### - Practical Application

- Facts
  - Kansas couple ("H" & "W")
  - "F" is trusted financial advisor of many years
  - H & W create a joint trust
  - H & W serve as co-trustees, Bank serves after death of survivor
- Issue
  - H & W would like F to continue managing the families' assets following their deaths
  - Bank will typically assume management of assets as soon as it takes over as trustee following death of H & W
  - F, as trusted financial advisor, no longer has a hand in managing the families' assets, contrary to wishes of H & W

FOULSTON  
ATTORNEYS AT LAW

19

---

---

---

---

---

---

---

---

## UDTA

### - Practical Application

- UDTA Solutions
  - H & W's trust can designate F as directed trustee for purposes of asset management following their death.
    - Allows F to continue management of assets without fear of corporate trustee bringing assets in-house.
    - Allows the "decision-making" of trust to be left to specialized trust director.
- Other Applications
  - Divide trust decisions among select Trust Directors depending on trust complexity:
    - Accounting & Tax
    - Asset Management
    - Distributions
    - Trust Instrument management (legal)
    - Real Estate management

FOULSTON  
ATTORNEYS AT LAW

20

---

---

---

---

---

---

---

---

## UDTA

### - Potential Issues

- "Too many cooks in the kitchen"
  - Information sharing
  - Ability of directors and trustees to work together
  - How are issues resolved when director and trustee disagree, other than through judicial process

FOULSTON  
ATTORNEYS AT LAW

21

---

---

---

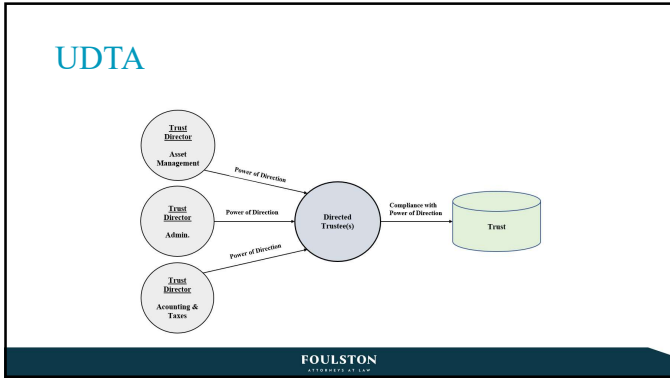
---

---

---

---

---



22

---

---

---

---

---

---

---

---

## Other Legislative Developments

---

**FOULSTON**  
ATTORNEYS AT LAW

23

---

---

---

---

---

---

---

---

## KS Legislative Developments

- Resolution by Nonjudicial Settlement Agreement
  - SB 400 added the following matters to those that may be resolved by a nonjudicial settlement agreement:
    - The interpretation or construction of the terms of the trust;
    - The direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power; and
    - The governing law of the trust. See KSA 58a-111.

**FOULSTON**  
ATTORNEYS AT LAW

24

---

---

---

---

---

---

---

---



## KS Legislative Developments

- Non-Economic Trusts
  - SB 400 increased from \$100,000 to \$250,000 the total value of a trust before a trustee may seek termination of the trust based on its value being insufficient to justify the cost of administration. See KSA 58a-414.
- Definition of Resident Trust
  - SB 400 amended "resident trust" to mean a trust that is administered in this state and that was created by or consisting of property owned by a person domiciled in this state on the date the trust or portion of the trust became irrevocable. See KSA 79-32,109(d).
  - Prior Definition: "Resident trust" means a trust which is administered in this state. A trust shall not be deemed to be administered in this state solely because it is subject to the jurisdiction of a district court within this state. "Nonresident trust" means a trust other than a resident trust.

FOULSTON  
ATTORNEYS AT LAW

25

---

---

---

---

---

---

---

---

## Judicial Developments

FOULSTON  
ATTORNEYS AT LAW

26

---

---

---

---

---

---

---

---

## Judicial Developments

- In the Matter of the Estate of Lanny Lentz, Kansas Court of Appeals (Unpublished), August 13, 2021
  - Appellees were successive executors of their father's estate. Appellant was a third sister who objected to valuations for the estate inventory and final settlement. The Court of Appeals panel rejected appellant's argument that an executor must use certified market appraisals to provide the value for the probate inventory. The panel even noted that the statute does not require the use of "fair market value," as K.S.A. 59-1201 just requires a "full and fair value."
  - The Court noted, "This establishes a broad standard for acceptable valuations."
  - The values determined by the executor were "verified" in both the inventory and the petition for final settlement as required by K.S.A. 59-1201 and 59-2201. The Court cited K.S.A. 59-2213 that the verification of the petition constitutes sufficient proof of the statements made absent a written defense or adverse appearance. Consequently, the executor's valuations (as verified) constituted sufficient proof. Appellant provided no contradictory evidence, so she lost.

FOULSTON  
ATTORNEYS AT LAW

27

---

---

---

---

---

---

---

---

## Judicial Developments

- **Belmore v. Goldizen, Kansas Court of Appeals (Unpublished), September 10, 2021**
  - Margaret Goldizen removed her mother, Alma Belmore, from her long-time residence in Washington state and put her in an RV on the property where Margaret resided (that was owned by Alma). Margaret persuaded Alma to give her power of attorney and to add her name to Alma's bank accounts and real estate. Margaret stopped paying rent to Alma for the house she and her husband resided in on Alma's land, where Alma was in an RV. Margaret also moved Alma's funds to her own account to "protect" them.
  - The Court found similarities between this case and the oft cited Cresto opinion, 302 Kan. 820, 358 P.3d 831 (2015), as to the suspicious circumstances creating a presumption of undue influence. It upheld the district court's finding, and noted that Margaret did not rebut the presumption of undue influence.
  - Cresto: "A presumption of undue influence can be established by showing that (1) the person who is alleged to have exerted undue influence was in a confidential and fiduciary relationship with the person executing the document and (2) there were "suspicious circumstances" surrounding the making of the document. If this presumption is established, the burden then shifts to the opposing party to rebut the presumption."

FOULSTON  
ATTORNEYS AT LAW

28

---

---

---

---

---

---

---

---

## Judicial Developments

- **In re Estate of Raney, Kansas Court of Appeals (Unpublished), August 6, 2021**
- Carl Raney contested his mother's will. His brother, as executor, moved to enforce a no contest clause. The district court and Court of Appeals did not find "probable cause" for Carl to avoid the imposition of the in terrorem clause.
- The Court of Appeals cited Hamel, 296 Kan. at 1078, for the definition of "probable cause" required to avoid effectiveness of a no contest clause as: "[T]he existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful."
- The district court's determination was a "negative finding" for which the Court of Appeals did not find arbitrary disregard of undisputed evidence or reliance on some improper extrinsic consideration such as bias, passion or prejudice.

FOULSTON  
ATTORNEYS AT LAW

29

---

---

---

---

---

---

---

---

## Judicial Developments

- **Roenne v. Miller, 58 Kan.App.2d 836 (2020)**
  - **Summary of Case**
    - Sonya Marie Miller died in 1995, survived by five children.
      - Four children were appellants.
      - The other child, Brad, was the sole trustee of a testamentary trust created to receive the residue of her probate estate.
    - Brad was given very broad discretion, used trust for his sole benefit, and ultimately distributed all assets to himself.
      - Brad used the trust income for his own purposes and then transferred all the assets to himself.
      - Brad did not set up a bank account for the trust, but just transferred the oil income (exceeding \$1,000,000 during the life of the trust) directly into his personal checking account that he owned jointly with his wife.
    - Other beneficiaries sued, claiming breach of trust.
      - District Court held for Brad because the trust instrument gave him discretion to act.
    - Court of Appeals reversed; despite broad discretion, Trustee still owes duties of loyalty, impartiality, and prudence.

FOULSTON  
ATTORNEYS AT LAW

30

---

---

---

---

---

---

---

---

## Judicial Developments

- Trust Language
  - The net income may be paid to, or applied for the benefit of, any or all of the beneficiaries from time to time, in such amount or amounts as the said trustee, in his **uncontrolled discretion** may determine; any net income in any year which is not paid to, or applied for the benefit of, any of said beneficiaries, shall be added to the principal at the end of the year; and in addition, the principal may be paid to, or applied for the benefit of, any of the said beneficiaries, from time to time, in such amount or amounts as the said trustee in his **uncontrolled discretion** may determine.

FOULSTON  
ATTORNEYS AT LAW

31

---

---

---

---

---

---

---

---

## Judicial Developments

- Trust Language
  - The said trustee, in his **uncontrolled discretion**, may at any time he deems it advisable and for the best interests of the said beneficiaries, distribute such income and principal to any of the beneficiaries designated herein at any time and in any amount. I want it made clear however that it is strictly within the discretion of the said trustee as to what income is paid to each of the beneficiaries entitled thereto as well as what principal may be provided to any of the beneficiaries entitled thereto.

FOULSTON  
ATTORNEYS AT LAW

32

---

---

---

---

---

---

---

---

## Judicial Developments

- Trust Language
  - At all times, the entitlement of the beneficiaries to the income or principal shall be in the **sole and exclusive discretion** of the trustee named herein and his successors and at all times, **his decision concerning distribution shall be final both as to the amount to be received by each of the said beneficiaries, as well as which beneficiary shall receive.** At no time shall any of the beneficiaries named have the absolute right or entitlement to any of the income or principal or either of them, except for the right of the grandchildren of the said decedent for distribution upon liquidation of the said trust.
  - All powers given to the trustee or trustees by this instrument are exercisable by the trustees only in a **fiduciary capacity**. No power given to the trustee or trustees hereunder shall be construed to enable any person to purchase, exchange, or otherwise deal with or dispose of the principal of the income therefrom for less than adequate consideration in money or money's worth.

FOULSTON  
ATTORNEYS AT LAW

33

---

---

---

---

---

---

---

---

## Judicial Developments

- Holdings:
  - In reviewing discretionary trusts, a court may only interfere in cases of an abuse of discretion by a trustee or where the trustee acted in bad faith or the trustee's conduct is so arbitrary and unreasonable that it amounts to practically the same thing.
  - A trustee who reasonably and in good faith relied on the express provisions of a trust is not liable to a beneficiary for a breach of trust to the extent the breach resulted from such reliance.
  - Three fiduciary duties are imposed by law on all trustees: loyalty, impartiality, and prudence.
    - The duty of loyalty requires a trustee to administer the trust consistent with the terms of the trust and solely in the interests of the beneficiaries.
    - The duty of impartiality is imposed by law if a trust has two or more beneficiaries. The trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.
    - The duty of prudent administration requires a trustee to administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.
  - A trustee must act in good faith and in the interests of the beneficiaries. While a trust can eliminate strict prohibitions, such as that against self-dealing, it cannot eliminate the duty of loyalty. That limit preserves the fundamental fiduciary character of trust relationships recognized by law.
  - It is contrary to sound policy, and a contradiction in terms, to permit the settlor to relieve a trustee of all accountability. Even under the broadest grant of fiduciary discretion, a trustee must act honestly and in a state of mind contemplated by the settlor. What this means is that courts will intervene to prevent trustees from acting in bad faith, or without regard to the terms and purposes of the trust or the interests of its beneficiaries.

FOULSTON  
ATTORNEYS AT LAW

34

---

---

---

---

---

---

---

---

## Judicial Developments

- Where are we after Roenne?
  - Game changer
  - Continuum of discretion per Third Restatement and KUTC
  - Perhaps closer to trustee discretion in Support Trusts
  - Thus, continued need for precise drafting

FOULSTON  
ATTORNEYS AT LAW

35

---

---

---

---

---

---

---

---

## Judicial Developments

- General Drafting Considerations
  - The greater the discretion accorded the Trustee, the less likely Grantor's/Testator's intent will be carried out by Trustee.
    - With broad discretion and little guidance, essentially a "do what you feel is right" approach.
    - Left to own devices, Trustee unlikely to weigh all of the various factors that play into distribution decisions in the same manner as Grantor/Testator.
  - Lack of drafting precision creates arguments between Trustee and beneficiary as to intent, increases administrative costs, and frequently fosters family disharmony if family member or beneficiary serving as Trustee.

FOULSTON  
ATTORNEYS AT LAW

36

---

---

---

---

---

---

---

---

**SECURE Act**

---

**FOULSTON**  
ATTORNEYS AT LAW

37

---

---

---

---

---

---

---

---

**SECURE Act**

- Background
  - "Setting Every Community Up for Retirement Enhancement" Act enacted as part of the Further Consolidated Appropriations Act, 2020 (H.R. 1865, P.L. 116-94).
- Effective Date
  - Signed into law December 20, 2019.
  - Effective date was 1/1/2020.

**FOULSTON**  
ATTORNEYS AT LAW

38

---

---

---

---

---

---

---

---

**SECURE Act**

- Key Provisions
  - Raises the required minimum distribution (RMD) age.
  - Modification of post-death RMD rules.
  - Repeal of the maximum age for traditional IRA contributions.
  - Allows penalty-free withdrawals for certain expenses related to birth or adoption of a child.
  - Expands Section 529 plans to cover registered apprenticeships and distributions to repay certain student loans.
  - Repeals changes to the "kiddie tax" added by the TCJA.

**FOULSTON**  
ATTORNEYS AT LAW

39

---

---

---

---

---

---

---

---

## SECURE Act: Increase in RMD Age

- Prior Law
  - Plan participants generally required to begin taking RMDs by April 1 of the year following the year they reach age 70½.
  - Known as the "required beginning date" or RBD.
- SECURE Act
  - Required beginning date now April 1 of the year after turning age 72.

FOULSTON  
ATTORNEYS AT LAW

40

---

---

---

---

---

---

---

---

## SECURE Act: RMD Rules

- Prior Law
  - Post-death RMD rules varied depending on whether the participant: (1) named a designated beneficiary; and (2) died before, on, or after their RBD.
- SECURE Act
  - Under SECURE, post-death RMD rules generally depend on whether the participant named a designated beneficiary, eligible designated beneficiary, or non-designated beneficiary.
  - Effective Dates
    - New post-death RMD rules generally apply to all distributions with respect to participant who die after Dec. 31, 2019.
  - Exceptions
    - Collective Bargaining
    - Governmental Plans
    - Existing Annuity Contracts
    - Certain Beneficiaries

FOULSTON  
ATTORNEYS AT LAW

41

---

---

---

---

---

---

---

---

## SECURE Act: RMD Rules

- Designated Beneficiaries and Eligible Designated Beneficiaries
  - Non-Designated Beneficiaries
    - Participant's estate
    - Charities
    - Trust that is not a "See Through Trust"
  - Designated Beneficiaries
    - Same definition as under prior law
    - Individuals and certain trusts qualifying as "see-through" trusts
  - Eligible Designated Beneficiaries
    - Surviving Spouse
    - Minor Child
    - Disabled Beneficiary
    - Chronically Ill Individual
    - Beneficiary Less than 10 Years Younger than Participant

FOULSTON  
ATTORNEYS AT LAW

42

---

---

---

---

---

---

---

---

## SECURE Act: RMD Rules

- Death Before RBD
  - Non-Designated Beneficiary
    - 5-year rule (no change)
  - Designated Beneficiary
    - 10-year rule (can no longer use the DB's life expectancy)
  - Eligible Designated Beneficiary
    - Spouse – if no rollover, life expectancy, then 10-year rule
    - Minor – life expectancy until 21, then 10-year rule
    - Disabled - life expectancy, then 10-year rule
    - Chronically Ill - life expectancy, then 10-year rule
    - Within 10 years - life expectancy, then 10-year rule

FOULSTON  
ATTORNEYS AT LAW

43

---

---

---

---

---

---

---

---

## SECURE Act: RMD Rules

- Death On or After RBD
  - Non-Designated Beneficiary
    - "Ghost Rule" – life expectancy of decedent
  - Designated Beneficiary
    - 10-year rule (no longer able to use life expectancy)
  - Eligible Designated Beneficiary
    - Spouse – if no rollover, life expectancy, then 10-year rule
    - Minor – life expectancy until 21, then 10-year rule
    - Disabled - life expectancy, then 10-year rule
    - Chronically Ill - life expectancy, then 10-year rule
    - Within 10 years - life expectancy, then 10-year rule

FOULSTON  
ATTORNEYS AT LAW

44

---

---

---

---

---

---

---

---

## SECURE Act: RMD Rules

- 10-Year Rule
  - General Rule
    - Must withdraw entire account balance by December 31 of year containing the 10-year anniversary of the decedent's death.
  - Death Before RBD
    - When the IRA owner or retirement plan participant dies before his or her RBD, there are no annual RMDs under the 10-year rule.
  - Death On or After RBD
    - Beneficiary must withdraw from account at least as rapidly as decedent and withdraw entire account balance by the end of the 10<sup>th</sup> year.

FOULSTON  
ATTORNEYS AT LAW

45

---

---

---

---

---

---

---

---

## SECURE Act: RMD Rules

### - 10-Year Rule Example

#### - Example 1

- Joe, age 76, died on Feb. 3, 2022. Joe owned a traditional IRA at the time of his death and had named his daughter Sarah, age 45, as his designated non-EDB. Since Joe died after his RBD, Sarah will have to take annual RMDs from the inherited IRA during years 1 through 9 following the year that Joe died. Her RMDs are calculated based on her life expectancy during the years 2023-2031 (years 1-9) of the 10-year payment period. She must also receive any remaining balance of the inherited IRA no later than Dec. 31, 2032.

#### - Example 2

- Amy, age 65, died on March 15, 2022. She owned a traditional IRA and designated her son Robert, age 32, as her designated non-EDB. Robert does not have to take RMDs during years one through nine because Amy died before her RBD. But Robert must withdraw the entire inherited traditional IRA no later than Dec. 31, 2032.

FOULSTON  
ATTORNEYS AT LAW

46

---

---

---

---

---

---

---

---

---

---

## SECURE Act: RMD Rules

### - 10-Year Rule: Additional Rules

- Proposed regulations additionally provide that a full distribution from the plan must be made by the earliest of the following dates:

- The end of the tenth calendar year following the calendar year in which an eligible designated beneficiary dies. If the eligible designated beneficiary is receiving benefits over their life expectancy at death, their beneficiary must also take distributions under the life expectancy rule until the account is fully distributed under the 10-year rule.
- If the eligible designated beneficiary is the child of the employee who has not yet reached the age of majority as of the employee's death, the end of the tenth calendar year following the calendar year in which the child reaches the age of majority.

FOULSTON  
ATTORNEYS AT LAW

47

---

---

---

---

---

---

---

---

---

---

## SECURE Act: RMD Rules

### - Effect on Conduit and Accumulation Trusts

#### - Conduit Trusts

- Conduit trust will still qualify as see-through trusts under the Act.
- Application of life expectancy payout or 10-year rule depends on classification of beneficiary.

#### - Accumulation Trusts

- Absent additional guidance, accumulation trusts cannot qualify as an eligible designated beneficiary (except trust for sole benefit of disabled or chronically ill beneficiary).
- Accordingly, accumulation trust that is a see-through trust is subject to the 10-year rule.
- Application of 10-year rule means oldest trust beneficiary no longer relevant.
- Accumulation trust not qualifying as see-through trust must take distributions under prior law.

FOULSTON  
ATTORNEYS AT LAW

48

---

---

---

---

---

---

---

---

---

---



## SECURE Act: IRA Contributions

- Prior Law
  - Contributions to traditional IRAs by individuals who had attained age 70½ were not deductible.
  - Qualified charitable distributions (QCD) from traditional IRAs were potentially excludible from income up to \$100,000 per year.
- SECURE Act
  - Repeals IRC § 219(d)(1), which prohibited contributions to a traditional IRA by an individual who has attained age 70½.
  - Prevents owner from making a tax-deductible IRA contribution and an income excludible QCD with same dollars.
  - Effective for contributions and distributions made for taxable years beginning after Dec. 31, 2019.

FOULSTON  
ATTORNEYS AT LAW

49

---

---

---

---

---

---

---

---

## The Enhancing American Retirement Now (EARN) Act

FOULSTON  
ATTORNEYS AT LAW

50

---

---

---

---

---

---

---

---

## EARN Act

- RBD to 75
  - The proposal changes the age on which the required beginning date for required minimum distributions is based, from the calendar year in which the employee or IRA owner attains age 72 to the calendar year in which the employee or IRA owner attains age 75, for calendar years after 2031.
- Reduce Penalty for Missed RMDs
  - The proposal reduces the excise tax that generally applies to the failure to take required minimum distributions from 50 percent of the shortfall to 25 percent.
- Terminal Illness
  - Under the proposal, an exception to the 10-percent early withdrawal tax applies in the case of a distribution made to an employee who is a terminally ill individual on or after the date on which such employee has been certified by a physician as having a terminal illness.

FOULSTON  
ATTORNEYS AT LAW

51

---

---

---

---

---

---

---

---

## EARN Act

- Catch-Up Contributions
  - A 401(k) plan, 403(b) plan, and governmental 457(b) plan may generally permit catch-up contributions up to \$6,500 in 2022 (indexed for inflation) for those 50 or older. The proposal would increase this to \$10,000 for individuals turning 60, 61, 62, or 63.
  - Under the proposal, a section 401(a) qualified plan, section 403(b) plan, or governmental section 457(b) plan that permits an eligible participant to make catch-up contributions must require such catch-up contributions to be designated Roth contributions.

FOULSTON  
ATTORNEYS AT LAW

52

---

---

---

---

---

---

---

---

## Uniform Fiduciary Income and Principal Act

FOULSTON  
ATTORNEYS AT LAW

53

---

---

---

---

---

---

---

---

## Adoption

- Kansas adopted the Uniform Fiduciary Income and Principal Act (UFIPA) effective July 1, 2021
- Repealed Uniform Principal and Income Act (UPIA)
- Many of the provisions of the UFIPA follow the UPIA
- Name reveals new focus
  - Fiduciary included in the name of act
  - Income prior to principal

FOULSTON  
ATTORNEYS AT LAW

54

---

---

---

---

---

---

---

---

## Major Changes

- Major Changes
  - Authority to make adjustments between income and principal from year to year has been significantly expanded.
    - Under the prior Act, the power to adjust was available only when, without the power, the fiduciary would have been "unable" to administer the trust impartially because prudent investment for total return was not producing an appropriate level of traditional trust income return to impartially balance the interests of the beneficiaries.
    - Under the revised Act, that standard is relaxed when "the fiduciary determines the exercise of the power to adjust will assist the fiduciary to administer the trust or estate impartially."
    - Standard of impossibility is replaced by a standard of assistance.
  - Application of Act to "a life estate or other term interest in which the interest of one or more persons will be succeeded by the interest of one or more other persons."
  - Clarification that the income and principal rules of the state that is the principal place of administration of the trust from time to time will be the governing law.

FOULSTON  
ATTORNEYS AT LAW

55

---

---

---

---

---

---

---

---

---

---

## Definitions

- Most definitions are the same or substantially similar to the definitions under the UPIA or have clarifying language
  - Expanded Definitions of:
    - Fiduciary, Income Interest, Net Income, Principal, terms of a trust, and Trustee
  - Added definitions of:
    - Court, current income beneficiary, distribution, estate, independent person, personal representative, record, settlor, special tax benefit, successive interest, successor beneficiary, trust, and will
  - Removed definitions of:
    - Income beneficiary and remainder beneficiary

FOULSTON  
ATTORNEYS AT LAW

56

---

---

---

---

---

---

---

---

---

---

## Scope and Governing Law

- Expanded from UPIA to provide that it applies to a trust or estate and a life estate or other term interest in which the interest of one or more persons will be succeeded by the interest of one or more other persons
- UFIPA applies, except where otherwise stated in the terms of the trust, when Kansas is the principal place of administration of a trust or estate or the situs of property that is not held in a trust or estate and is subject to a life estate or other term interest

FOULSTON  
ATTORNEYS AT LAW

57

---

---

---

---

---

---

---

---

---

---

## Judicial Review of Exercise of Discretionary Power

- For purposes of judicial review section, fiduciary decisions are:
  - Allocation between income and principal or other determination regarding income and principal
  - Exercise or nonexercised of discretionary power regarding income and principal granted under trust or the UFIPA, including change of percentage or method of unitrust or conversion to unitrust
- Court won't change a fiduciary decision absent abuse of discretion

FOULSTON  
ATTORNEYS AT LAW

58

---

---

---

---

---

---

---

---

## Request for Instruction

- Fiduciary may petition for instruction and determination if a decision is an abuse of discretion
- Opposing beneficiary's burden to establish proposed action would be an abuse of discretion
- Not seeking court instruction is not evidence that decision is an abuse of discretion

FOULSTON  
ATTORNEYS AT LAW

59

---

---

---

---

---

---

---

---

## Power to Adjust

- Revises and expands provisions from UPIA regarding power to adjust
- May adjust between income and principal if it will allow fiduciary to administer the trust estate impartially
- Does not create a duty to adjust or consider power to adjust
- No liability to person affected by decision to adjust or not adjust if power is exercised in good faith
- Requires a "record" of decision to adjust

FOULSTON  
ATTORNEYS AT LAW

60

---

---

---

---

---

---

---

---

## When Power to Adjust Cannot be Exercised

- Adjustment would reduce amount payable to a current income beneficiary that qualifies for a special tax benefit (QTIP or QSST)
- Adjustment would change a fixed annuity or fixed fraction of the value of the trust if such amounts are defined under the terms of the trust
- Adjustment would reduce amount permanently set aside for charitable purposes under trust terms, unless both income and principal are set aside for charitable purposes
- Possessing or exercising power would cause person exercising power to be considered owner of trust assets for income tax purposes
- Would cause inclusion in the gross estate of the person possessing or exercising
- Would cause person exercising power to be treated as making a gift
- Fiduciary is not an "independent person"
- Income is paid to settlor and possessing the power would cause the income or principal to be considered a resource to the settlor for government benefits

FOULSTON  
ATTORNEYS AT LAW

61

---

---

---

---

---

---

---

---

## Factors to Consider in Exercising Power to Adjust or Convert to a Unitrust

- Terms of the Trust
- Nature, distribution standards, and expected duration of the trust
- The effect of the allocations
- Desirability of liquidity and regularity of income
- Extent to which an asset is used or may be used by a beneficiary
- The increase or decrease in the value of principal assets
- Whether and to what extent trust gives the fiduciary power to accumulate income or invade principal or prohibits such action
- Extent to which fiduciary accumulated income or invaded principal in preceding accounting periods
- Current and reasonably expected economic conditions; and
- Reasonably expected tax consequences of the exercise of the power.

FOULSTON  
ATTORNEYS AT LAW

62

---

---

---

---

---

---

---

---

## Unitrusts

- Defined as a trust with respect to which net income is a unitrust amount
- Unitrust amount is an amount computed by multiplying a determined value of a trust by a determined percentage

FOULSTON  
ATTORNEYS AT LAW

63

---

---

---

---

---

---

---

---

## Authority with Respect to Unitrust

- A fiduciary may convert an income trust to a unitrust if the fiduciary adopts in a record a unitrust policy for the trust providing:
  - Net income of trust will be a unitrust amount rather than net income determined without regard to a unitrust amount; and
  - The percentage and method used to calculate the unitrust amount
- A fiduciary may change the percentage or method used to calculate the unitrust if the fiduciary adopts in a record a unitrust policy providing changes in the percentage or method used to calculate the unitrust amount
- A fiduciary may convert a unitrust to an income trust by adopting in a record that the net income of the trust will be determined without regard to a unitrust amount

FOULSTON  
ATTORNEYS AT LAW

64

---

---

---

---

---

---

---

---

## Standards for Unitrust Conversion

- Fiduciary may convert to or from a unitrust or change the method of determining the unitrust if:
  - Action will allow fiduciary to administer trust impartially;
  - Fiduciary sends notice in a record complying with the statute describing and proposing the action;
  - Fiduciary does not receive by the date specified in the notice an objection in a record to the proposed action.
- Beneficiary may request in a record that a fiduciary convert to or from a unitrust or change the method of determining the unitrust
  - If fiduciary declines to act or does not act within 90 days, the beneficiary may request the court to direct the fiduciary to take the requested action

FOULSTON  
ATTORNEYS AT LAW

65

---

---

---

---

---

---

---

---

## Notice

- Method of providing notice is the same as under UTC
  - First-class mail
  - Personal delivery
  - Delivering to person's last known residence or place of business
  - Properly directed email
- Notice of proposal to convert must be sent to:
  - Qualified beneficiaries, as defined in KSA 58a-103(12)
  - Each person granted a power over the trust to the extent the person is not serving as Trustee, including:
    - Power over investment, management or distribution of trust property or other trust administration; and
    - Power to appoint or remove a trustee

FOULSTON  
ATTORNEYS AT LAW

66

---

---

---

---

---

---

---

---

## Notice, continued

- Notice relating to unitrust must include:
  - Action proposed with respect to unitrust
  - Unitrust policy
  - A statement that the person receiving the notice may object to the proposed action
  - The date by which the objection must be received (which must be at least 30 days after the date the notice is sent)
  - Date on which the action is proposed to be taken
  - Name and contact information of fiduciary; and
  - Name and contact information of person that may be contacted for additional information.

FOULSTON  
ATTORNEYS AT LAW

67

---

---

---

---

---

---

---

---

## Unitrust Policy

- Unitrust policy must provide:
  - Unitrust rate or method of determining the rate;
  - The method for determining the applicable value.
- Unitrust rate may be:
  - A fixed unitrust rate; or
  - A rate determined for each period using:
    - A market index or other published data; or
    - A mathematical blend of market indices or other published data over a stated number of preceding periods.
- Unitrust policy may provide:
  - If the rate is determined based on an index or published data, a limit on how high or low the unitrust rate may rise or fall
  - If the rate is determined based on an index or published data, a limit on how much the unitrust rate may increase or decrease from preceding period.

FOULSTON  
ATTORNEYS AT LAW

68

---

---

---

---

---

---

---

---

## Applicable Value for Determining Unitrust

- Unitrust policy must provide the method for determining the FMV of an asset for purposes of determining the unitrust amount, including
  - Frequency for valuing the asset, which does not require valuation every period; and
  - The date for valuing the asset in each period in which the asset is valued.
- Methods for determining the amount of the net FMV to which rate is applicable, include:
  - Appraisal of an asset;
  - Exclusion of specific assets or groups of assets from amount;
  - Use of an average of FMV over a stated number of preceding periods;
  - Limitation on how much the applicable value can decrease below a preceding period.

FOULSTON  
ATTORNEYS AT LAW

69

---

---

---

---

---

---

---

---

## Receipts from Entity

- In general, money received from an entity is allocated to income
- Distributions from an entity which are principal:
  - Property which is not money or tangible personal property of nominal value
  - Money received in exchange for part or all of the fiduciary's interest in the entity, to the extent the distribution reduces the fiduciary's interest in the entity relative to the interests of the other persons that own or hold interests in the entity
  - Money received in an entity distribution that the fiduciary determines is a capital distribution
- Fiduciary may determine that a distribution is a capital distribution where the total amount of money or property received in the distribution or series of related distributions will be greater than 20% of the FMV of the interest in the entity

FOULSTON  
ATTORNEYS AT LAW

70

---

---

---

---

---

---

---

---

## Receipts from Interest in Minerals, Water and Other Natural Resources

- Continues the section from the UPIA but changes the default rule for allocation between income and principal from a 15% allocation to principal to an allocation between income and principal "equitably" for amounts received:
  - From an interest in non-renewable water;
  - As a royalty, shut-in-well payment, take-or-pay payment or bonus; or
  - From a working interest.
- An allocation is presumed to be equitable if the amount allocated to principal is equal to the amount allowed under the Internal Revenue Code as a deduction for depletion of the interest

FOULSTON  
ATTORNEYS AT LAW

71

---

---

---

---

---

---

---

---