

## 1 SENATE BILL NO. 239

2 INTRODUCED BY M. MCNALLY

3  
4 A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING THE UNIFORM DIRECTED TRUST ACT;  
5 PROVIDING FOR APPLICABILITY; PRESERVING COMMON LAW; PROVIDING EXCEPTIONS; DETAILING  
6 THE POWERS, LIMITATIONS, AND DUTIES OF TRUST DIRECTORS; ESTABLISHING THE DUTY AND  
7 LIABILITY OF CERTAIN TRUSTEES; PROVIDING FOR COTRUSTEES; PROVIDING FOR ACTIONS  
8 AGAINST AND JURISDICTION OVER TRUST DIRECTORS; PROVIDING FOR UNIFORMITY OF  
9 APPLICATION AND CONSTRUCTION; SPECIFYING THIS ACT'S RELATION TO THE ELECTRONIC  
10 SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT; PROVIDING DEFINITIONS; AMENDING  
11 SECTIONS 72-38-103, 72-38-105, 72-38-603, AND 72-38-703, MCA; AND REPEALING SECTION 72-38-808,  
12 MCA."

13  
14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

15  
16 NEW SECTION. Section 1. Short title. [Sections 1 through 18] may be cited as the Uniform Directed  
17 Trust Act.

18  
19 NEW SECTION. Section 2. Definitions. In [sections 1 through 18]:

20 (1) "Breach of trust" includes a violation by a trust director or trustee of a duty imposed on that director  
21 or trustee by the terms of the trust, [sections 1 through 18], or law of this state other than [sections 1 through 18]  
22 pertaining to trusts.

23 (2) "Directed trust" means a trust for which the terms of the trust grant a power of direction.

24 (3) "Directed trustee" means a trustee that is subject to a trust director's power of direction.

25 (4) "Person" has the meaning in section 72-38-103(12).

26 (5) "Power of direction" means a power over a trust granted to a person by the terms of the trust to  
27 the extent the power is exercisable while the person is not serving as a trustee. The term includes a power over  
28 the investment, management, or distribution of trust property or other matters of trust administration. The term

1 excludes the powers described in [section 5(2)].

2 (6) "Settlor" has the meaning in section 72-38-103(18).

3 (7) "State" has the meaning in section 72-38-103(20).

4 (8) "Terms of a trust" means:

5 (a) except as otherwise provided in subsection (8)(b), the manifestation of the settlor's intent  
6 regarding a trust's provision as:

7 (i) expressed in the trust instrument; or

8 (ii) established by other evidence that would be admissible in a judicial proceeding; or

9 (b) the trust's provisions as established, determined, or amended by:

10 (i) a trustee or trust director in accordance with applicable law;

11 (ii) court order; or

12 (iii) a nonjudicial settlement agreement under section 72-38-111.

13 (9) "Trust director" means a person that is granted a power of direction by the terms of a trust to the  
14 extent the power is exercisable while the person is not serving as a trustee. The person is a trust director  
15 whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a  
16 beneficiary or settlor of the trust.

17 (10) "Trustee" has the meaning in section 72-38-103(23).

18

19 **NEW SECTION. Section 3. Application -- principal place of administration.** (1) [Sections 1  
20 through 18] apply to a trust, whenever created, that has its principal place of administration in this state, subject  
21 to the following rules:

22 (a) if the trust was created before October 1, 2021, [sections 1 through 18] apply only to a decision or  
23 action occurring on or after October 1, 2021; and

24 (b) if the principal place of administration of the trust is changed to this state on or after October 1,  
25 2021, [sections 1 through 18] apply only to a decision or action occurring on or after the date of the change.

26 (2) Without precluding other means to establish a sufficient connection with the designated jurisdiction  
27 in a directed trust, terms of the trust that designate the principal place of administration of the trust are valid and  
28 controlling if:

1 (a) a principal place of business is located in or a trustee is a resident of the designated jurisdiction;

2 (b) a trust director's principal place of business is located in or a trust director is a resident of the  
3 designated jurisdiction; or

4 (c) all or part of the administration occurs in the designated jurisdiction.

5  
6 **NEW SECTION. Section 4. Common law and principles of equity.** The common law and principles  
7 of equity supplement [sections 1 through 18], except to the extent modified by [sections 1 through 18] or law of  
8 this state other than [sections 1 through 18].

9  
10 **NEW SECTION. Section 5. Exclusions.** (1) In this section, "power of appointment" means a power  
11 that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or  
12 another power of appointment over trust property.

13 (2) [Sections 1 through 18] do not apply to a:

14 (a) power of appointment;

15 (b) power to appoint or remove a trustee or trust director;

16 (c) power of a settlor over a trust to the extent the settlor has a power to revoke the trust;

17 (d) power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects  
18 the beneficial interest of:

19 (i) the beneficiary; or

20 (ii) another beneficiary represented by the beneficiary under sections 72-38-301 through 72-38-305  
21 with respect to the exercise or nonexercise of the power; or

22 (e) power over a trust if:

23 (i) the terms of the trust provide that the power is held in a nonfiduciary capacity; and

24 (ii) the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the  
25 United States Internal Revenue Code of 1986, as amended, and regulations issued under it, as amended.

26 (3) Unless the terms of a trust provide otherwise, a power granted to a person to designate a recipient  
27 of an ownership interest in or power of appointment over trust property, which is exercisable while the person is  
28 not serving as a trustee, is a power of appointment and not a power of direction.

1

2           **NEW SECTION. Section 6. Powers of trust director.** (1) Subject to [section 7], the terms of a trust  
3 may grant a power of direction to a trust director.

4           (2) Unless the terms of a trust provide otherwise:

5           (a) a trust director may exercise any further power appropriate to the exercise or nonexercise of a  
6 power of direction granted to the director under subsection (1); and

7           (b) trust directors with joint powers shall act by majority decision.

8

9           **NEW SECTION. Section 7. Limitations on trust director.** A trust director is subject to the same  
10 rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of  
11 direction or further power under [section 6(2)(a)] regarding:

12           (1) a payback provision in the terms of a trust necessary to comply with the reimbursement  
13 requirements of medicaid law in section 1917 of the Social Security Act, 42 U.S.C. 1396p(d)(4)(A), as  
14 amended, and regulations issued under it, as amended; and

15           (2) a charitable interest in the trust, including notice regarding the interest to the attorney general.

16

17           **NEW SECTION. Section 8. Duty and liability of trust director.** (1) Subject to subsection (2), with  
18 respect to a power of direction or further power under [section 6(2)(a)]:

19           (a) a trust director has the same fiduciary duty and liability in the exercise or nonexercise of the  
20 power:

21           (i) if the power is held individually, as a sole trustee in a like position and under similar circumstances;

22 or

23           (ii) if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position  
24 and under similar circumstances; and

25           (b) the terms of the trust may vary the director's duty or liability to the same extent the terms of the  
26 trust could vary the duty or liability of a trustee in a like position and under similar circumstances.

27           (2) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise  
28 authorized or permitted by law other than [sections 1 through 18] to provide health care in the ordinary course

1 of the director's business or practice of a profession, to the extent the director acts in that capacity, the director  
2 has no duty or liability under [sections 1 through 18].

3 (3) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and  
4 liabilities under this section.

5  
6 **NEW SECTION. Section 9. Duty and liability of directed trustee.** (1) Subject to subsection (2), a  
7 directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power  
8 of direction or further power under [section 6(2)(a)], and the trustee is not liable for the action.

9 (2) A directed trustee may not comply with a trust director's exercise or nonexercise of a power of  
10 direction or further power under [section 6(2)(a)] to the extent that by complying the trustee would engage in  
11 willful misconduct.

12 (3) An exercise of a power of direction under which a trust director may release a trustee or another  
13 trust director from liability for breach of trust is not effective if:

14 (a) the breach involved the trustee's or other director's willful misconduct;

15 (b) the release was induced by improper conduct of the trustee or other director in procuring the  
16 release; or

17 (c) at the time of the release, the director did not know the material facts relating to the breach.

18 (4) A directed trustee that has reasonable doubt about its duty under this section may petition the  
19 court for instructions.

20 (5) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties  
21 and liabilities under this section.

22  
23 **NEW SECTION. Section 10. Duty to provide information to trust director or trustee.** (1) Subject  
24 to [section 11], a trustee shall provide information to a trust director to the extent the information is reasonably  
25 related both to:

26 (a) the powers or duties of the trustee; and

27 (b) the powers or duties of the director.

28 (2) Subject to [section 11], a trust director shall provide information to a trustee or another trust

1 director to the extent the information is reasonably related both to:

2 (a) the powers or duties of the director; and

3 (b) the powers or duties of the trustee or other director.

4 (3) A trustee that acts in reliance on information provided by a trust director is not liable for a breach  
5 of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in willful  
6 misconduct.

7 (4) A trust director that acts in reliance on information provided by a trustee or another trust director is  
8 not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust  
9 director engages in willful misconduct.

10  
11 **NEW SECTION. Section 11. No duty to monitor, inform, or advise.** (1) Unless the terms of a trust  
12 provide otherwise:

13 (a) a trustee does not have a duty to:

14 (i) monitor a trust director; or

15 (ii) inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in  
16 which the trustee might have acted differently than the director; and

17 (b) by taking an action described in subsection (1)(a), a trustee does not assume the duty excluded  
18 by subsection (1)(a).

19 (2) Unless the terms of a trust provide otherwise:

20 (a) a trust director does not have a duty to:

21 (i) monitor a trustee or another trust director; or

22 (ii) inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an  
23 instance in which the director might have acted differently than a trustee or another trust director; and

24 (b) by taking an action described in subsection (2)(a), a trust director does not assume the duty  
25 excluded by subsection (2)(a).

26  
27 **NEW SECTION. Section 12. Application to cotrustee.** The terms of a trust may relieve a cotrustee  
28 from duty and liability with respect to another cotrustee's exercise or nonexercise of a power of the other

1 cotrustee to the same extent that in a directed trust a directed trustee is relieved from duty and liability with  
2 respect to a trust director's power of direction under [sections 9 through 11].

3  
4 **NEW SECTION. Section 13. Limitation of action against trust director.** (1) An action against a  
5 trust director for breach of trust must be commenced within the same limitation period as under 72-38-1005 for  
6 an action for breach of trust against a trustee in a like position and under similar circumstances.

7 (2) A report or accounting has the same effect on the limitation period for an action against a trust  
8 director for breach of trust that the report or accounting would have under 72-38-1005 in an action for breach of  
9 trust against a trustee in a like position and under similar circumstances.

10  
11 **NEW SECTION. Section 14. Defenses in action against trust director.** In an action against a trust  
12 director for breach of trust, the director may assert the same defenses a trustee in a like position and under  
13 similar circumstances could assert in an action for breach of trust against the trustee.

14  
15 **NEW SECTION. Section 15. Jurisdiction over trust director.** (1) By accepting appointment as a  
16 trust director of a trust subject to [sections 1 through 18], the director submits to personal jurisdiction of the  
17 courts of this state regarding any matter related to a power or duty of the director.

18 (2) This section does not preclude other methods of obtaining jurisdiction over a trust director.

19  
20 **NEW SECTION. Section 16. Office of trust director.** Unless the terms of a trust provide otherwise,  
21 the rules applicable to a trustee apply to a trust director regarding the following matters:

- 22 (1) acceptance under 72-38-701;  
23 (2) giving of bond to secure performance under 72-38-702;  
24 (3) reasonable compensation under 72-38-708;  
25 (4) resignation under 72-38-705;  
26 (5) removal under 72-38-706; and  
27 (6) vacancy and appointment of successor under 72-38-704.

28

1            **NEW SECTION. Section 17. Uniformity of application and construction.** In applying and  
2            construing this uniform act, consideration must be given to the need to promote uniformity of the law with  
3            respect to its subject matter among states that enact it.

4  
5            **NEW SECTION. Section 18. Relation to electronic signatures in global and national commerce**  
6            **act.** [Sections 1 through 18] modify, limit, or supersede the Electronic Signatures in Global and National  
7            Commerce Act, 15 U.S.C. 7001 et seq., but does not modify, limit, or supersede section 101(c) of that act, 15  
8            U.S.C. 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15  
9            U.S.C. 7003(b).

10

11            **Section 19.** Section 72-38-103, MCA, is amended to read:

12            **"72-38-103. Definitions.** As used in this chapter, unless the context clearly requires otherwise, the  
13            following definitions apply:

14            (1) "Action", with respect to an act of a trustee, includes a failure to act.

15            (2) "Ascertainable standard" means a standard relating to an individual's health, education, support,  
16            or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of  
17            1986, as in effect on the effective date of this chapter, or as later amended.

18            (3) "Beneficiary" means a person who:

19            (a) has a present or future beneficial interest in a trust, vested or contingent; or

20            (b) in a capacity other than that of trustee, holds a power of appointment over trust property.

21            (4) "Charitable trust" means a trust or portion of a trust created for a charitable purpose described in  
22            72-38-405(1).

23            (5) "Conservator" means a person appointed by the court to administer the estate of a minor or adult  
24            individual.

25            (6) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to  
26            protection of the environment.

27            (7) "Guardian" means a person appointed by the court, by a parent, or by a spouse to make decisions  
28            regarding the support, care, education, health, and welfare of a minor or adult individual. The term does not



1 include a guardian ad litem.

2 (8) "Interested person" means:

3 (a) the trustee;

4 (b) the qualified beneficiaries who are entitled to notice; and

5 (c) the attorney general if the petition is related to a charitable trust subject to the jurisdiction of the  
6 attorney general.

7 (9) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

8 (10) "Jurisdiction", with respect to a geographic area, includes a state or country.

9 (11) "Permissible distributee" means a beneficiary who is currently eligible to receive distributions of  
10 trust income or principal, whether mandatory or discretionary, or who holds a presently exercisable power of  
11 appointment over trust property. The term includes a charitable organization only if it is expressly designated to  
12 receive distributions under the terms of the charitable trust.

13 (12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability  
14 company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public  
15 corporation, or any other legal or commercial entity.

16 (13) "Power of withdrawal" means a presently exercisable general power of appointment other than a  
17 power:

18 (a) exercisable by a trustee and limited by an ascertainable standard; or

19 (b) exercisable by another person only upon consent of the trustee or a person holding an adverse  
20 interest.

21 (14) (a) "Principal place of administration" means the usual place ~~where~~ in which the day-to-day  
22 activity of the trust is carried on by the trustee or its representative who is primarily responsible for the  
23 administration of the trust unless otherwise designated by the terms of the trust as provided in 72-38-108.

24 (b) If the principal place of administration of the trust cannot be determined under subsection (14)(a),  
25 then it must be determined as follows:

26 (i) if the trust has a single trustee, the principal place of administration of the trust is the trustee's  
27 residence or usual place of business; or

28 (ii) if the trust has more than one trustee, the principal place of administration of the trust is the

1 residence or usual place of business of any of the cotrustees as agreed upon by them. If not agreed upon by  
 2 the cotrustees, the principal place of administration of the trust is the residence or usual place of business of  
 3 any of the cotrustees.

4 (15) "Property" means anything that may be the subject of ownership, whether real or personal, legal  
 5 or equitable, or any interest therein.

6 (16) "Qualified beneficiary" means a beneficiary who on the date the beneficiary's qualification is  
 7 determined:

8 (a) is a distributee or permissible distributee of trust income or principal;

9 (b) would be a distributee or permissible distributee of trust income or principal if the interests of the  
 10 distributees described in subsection (16)(a) terminated on that date without causing the trust to terminate; or

11 (c) would be a distributee or permissible distributee of trust income or principal if the trust terminated  
 12 on that date.

13 (17) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the  
 14 trustee or a person holding an adverse interest.

15 (18) "Settlor" means a person, including a testator, who creates or contributes property to a trust. If  
 16 more than one person creates or contributes property to a trust, each person is a settlor of the portion of the  
 17 trust property attributable to that person's contribution except to the extent another person has the power to  
 18 revoke or withdraw that portion.

19 (19) "Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary  
 20 transfer of a beneficiary's interest.

21 (20) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United  
 22 States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The  
 23 term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

24 (21) "Terms of a trust" means: ~~the manifestation of the settlor's intent regarding a trust's provisions as~~  
 25 ~~expressed in the trust instrument or as may be established by other evidence that would be admissible in a~~  
 26 ~~judicial proceeding.~~

27 (a) except as otherwise provided in subsection (21)(b), the manifestation of the settlor's intent  
 28 regarding a trust's provisions as:

- 1            (i) expressed in the trust instrument; or  
 2            (ii) established by other evidence that would be admissible in a judicial proceeding; or  
 3            (b) the trust's provisions as established, determined, or amended by:  
 4            (i) a trustee or trust director in accordance with applicable law;  
 5            (ii) court order; or  
 6            (iii) a nonjudicial settlement agreement under 72-38-111.

7            (22) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust,  
 8 including any amendments thereto.

9            (23) "Trustee" includes an original, additional, and successor trustee and a cotrustee."  
 10

11

11            **Section 20.** Section 72-38-105, MCA, is amended to read:

12            **"72-38-105. Default and mandatory rules.** (1) Except as otherwise provided in the terms of the trust,  
 13 this chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests  
 14 of a beneficiary.

15            (2) The terms of a trust prevail over any provision of this chapter except:

- 16            (a) the requirements for creating a trust;  
 17            (b) subject to [sections 9, 11, and 12], the duty of a trustee to act in good faith and in accordance with  
 18 the terms and purposes of the trust and the interests of the beneficiaries;  
 19            (c) the requirement that a trust and its terms be for the benefit of its beneficiaries and that the trust  
 20 have a purpose that is lawful, not contrary to public policy, and possible to achieve;  
 21            (d) the power of the court to modify or terminate a trust under 72-38-410 through 72-38-416;  
 22            (e) the effect of a spendthrift provision;  
 23            (f) the power of the court under 72-38-702 to require, dispense with, or modify or terminate a bond;  
 24            (g) the power of the court under 72-38-708(2) to adjust a trustee's compensation specified in the  
 25 terms of the trust that is unreasonably low or high;  
 26            (h) the effect of an exculpatory term under 72-38-1008;  
 27            (i) the rights under 72-38-1010 through 72-38-1013 of a person other than a trustee or beneficiary;  
 28            (j) the periods of limitation for commencing a judicial proceeding;

1 (k) the power of the court to take the action and exercise the jurisdiction that may be necessary in the  
2 interests of justice; and

3 (l) the subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in  
4 72-38-201 and 72-38-205."

5

6 **Section 21.** Section 72-38-603, MCA, is amended to read:

7 **"72-38-603. Settlor's powers -- powers of withdrawal.** (1) ~~Notwithstanding any other provision in~~  
8 ~~this chapter, while a trust is revocable, all rights of the beneficiaries, including the right to consent to any action,~~  
9 ~~are exercisable solely by the settlor, and all duties of the trustee, including the duty to provide notice, are owed~~  
10 ~~exclusively to the settlor.~~ To the extent a trust is revocable by a settlor, a trustee may follow a direction of the  
11 settlor that is contrary to the terms of the trust. To the extent a trust is revocable by a settlor in conjunction with  
12 a person other than a trustee or person holding an adverse interest, the trustee may follow a direction from the  
13 settlor and the other person holding the power to revoke even if the direction is contrary to the terms of the  
14 trust.

15 (2) To the extent a trust is revocable, rights of the beneficiaries are subject to the control of, and the  
16 duties of the trustee, including the duty to provide notice, are owed exclusively to, the settlor.

17 ~~(2)(3)~~ During the period the power may be exercised, the holder of a power of withdrawal has the  
18 rights of a settlor of a revocable trust under this section to the extent of the property subject to the power."

19

20 **Section 22.** Section 72-38-703, MCA, is amended to read:

21 **"72-38-703. Cotrustees.** (1) Cotrustees who are unable to reach a unanimous decision may act by  
22 majority decision.

23 (2) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

24 (3) ~~A~~Subject to [section 12], a cotrustee shall participate in the performance of a trustee's function  
25 unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under  
26 other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function  
27 to another trustee.

28 (4) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under

1 other law, or other temporary incapacity and prompt action is necessary to achieve the purposes of the trust or  
2 to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act  
3 for the trust.

4 (5) A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably  
5 expected the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a  
6 delegation previously made.

7 (6) Except as otherwise provided in subsection (7), a trustee who does not join in an action of another  
8 trustee is not liable for the action.

9 (7) ~~Each~~Subject to [section 12], each trustee shall exercise reasonable care to:

10 (a) prevent a cotrustee from committing a serious breach of trust; and

11 (b) compel a cotrustee to redress a serious breach of trust.

12 (8) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who  
13 notifies any cotrustee of the dissent at or before the time of the action is not liable for the action unless the  
14 action is a serious breach of trust."

15

16 NEW SECTION. Section 23. Repealer. The following section of the Montana Code Annotated is  
17 repealed:

18 72-38-808. Powers to direct.

19

20 NEW SECTION. Section 24. Codification instruction. [Sections 1 through 18] are intended to be  
21 codified as an integral part of Title 72, and the provisions of Title 72 apply to [sections 1 through 18].

22

- END -