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Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts

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Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts***

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I. INTRODUCTION

The Uniform Trust Code [hereinafter UTC] will become “the first national codification of the law of trusts”¹ as it is enacted by state legislatures. The National Conference of Commissioners on Uniform State Laws [hereinafter NCCUSL] is the body responsible for the drafting of the UTC. The UTC is available in Volume 7C (Business and Financial Laws) of the Uniform Laws Annotated (West Group) and online at the University of Pennsylvania web site.² The UTC is also reproduced in the study report of the Nebraska Unicameral Legislature, *Comments and Recommendations For Enactment of a Nebraska Uniform Trust Code, LR 367, December 2002* [hereinafter Report].³

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1. Uniform Trust Code (2000), Prefatory Note. The Nebraska enactment is based on the Uniform Trust Code (2000), “Last Revised or Amended in 2001,” bearing a publication date of February 15, 2002. The references in this article are to that published version of the Code. See David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143 (2002). See also William J. Lindsay, Jr., *The Nebraska Uniform Trust Code from the Trenches: A Practitioner’s Guide to Understanding Nebraska’s New Uniform Trust Code*, 37 CREIGHTON L. REV. ____ (2003); Ronald R. Volkmer, *The Nebraska Uniform Trust Code: Nebraska Trust Law in Transition*, 37 CREIGHTON L. REV. ____ (2003).
 2. [Http://www.law.upenn.edu/bll/ulc/ulc_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm).
 3. The Report includes the official text of the *Uniform Trust Code with Prefatory Note and Comments*, annotated with an analysis of each UTC section containing a brief general statement of current Nebraska law, UTC provisions that appear to reflect current Nebraska law, UTC provisions that appear to change current Nebraska law, UTC provisions that appear to provide rules where there is no clear current Nebraska law, Nebraska statutes to be amended, Nebraska statutes to be repealed, and, finally, UTC provisions that the study group recommended to be amended in the Nebraska enactment. The Report can be found online at <http://www.nebar.com/trustcode/barhome.htm>. The amendments and repeals of existing Nebraska statutes are clearly shown in the final reading and slip law versions of LB 130 (2003), which can be found at <http://www.unicam.state.ne.us/>. Amendments to LB 130 by the Legislature in the en-

The UTC applies “to express trusts, charitable⁴ or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.”⁵ The UTC becomes “operative” in Nebraska on January 1, 2005.⁶

The UTC applies generally to “all trusts” in existence on its operative date. UTC section 1106 provides:⁷

- (a) Except as otherwise provided in this [Code],⁸ on [the effective date of this [Code]]:
 - (1) this [Code] applies to all trusts created before, on, or after [its effective date];
 - (2) this [Code] applies to all judicial proceedings concerning trusts commenced on or after [its effective date];
 - (3) this [Code] applies to judicial proceedings concerning trusts commenced before [its effective date] unless the court finds that application of a particular provision of this [Code] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this [Code] does not apply and the superseded law applies;
 - (4) any rule of construction or presumption provided in this [Code] applies to trust instruments executed before [the effective date of the [Code]] unless there is a clear indication of a contrary intent in the terms of the trust; and

actment of the UTC are set out in Memo of William A. Marienau, Legal Counsel of the Banking, Commerce & Insurance Committee, April 2003, in the official Committee files on LB 130 (2003) [hereinafter Memo of William A. Marienau].

- 4. UTC section 103(3) defines the term “charitable trust” as “a trust, or portion of a trust, created for a charitable purpose described in [UTC] Section 405(a).” (emphasis added) NEB. REV. STAT. § 30-3803(3) (Supp. 2003).
- 5. UTC § 102; NEB. REV. STAT. § 30-3802 (Supp. 2003).
- 6. LB 130 98th Legis., 1st Sess. § 140 (Neb. 2003) (“This act becomes operative on the second January 1 following the effective date of this act.”). LB 130 section 140 will not appear in the Reissue Revised Statutes of Nebraska, but each section of the statutes to which it is applicable will carry a notation that it becomes operative January 1, 2005. The effective date of LB 130 is August 31, 2003. The operative date of the provisions contained in LB 130 is January 1, 2005.
- 7. NEB. REV. STAT. § 30-38,110 (Supp. 2003). The Nebraska UTC adds:
 - (c) Any reference to the powers authorized under the Nebraska Trustees’ Powers Act as such act existed prior to the operative date of this act is deemed to be a reference to the powers authorized under the Nebraska Uniform Trust Code.
- 8. See UTC § 602(a) (presumption that a trust is revocable); NEB. REV. STAT. § 30-3854(a) (Supp. 2003). Nebraska also made the provisions of UTC sections 813(b)(2) and (3) (notice to qualified beneficiaries by trustee accepting trusteeship on creation of an irrevocable trust or when a previously revocable trust becomes irrevocable) effective on or after the operative date of the Nebraska UTC. NEB. REV. STAT. § 30-3878(f) (Supp. 2003).

- (5) an act done before [the effective date of the [Code]] is not affected by this [Code].
- (b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of the [Code]], that statute continues to apply to the right even if it has been repealed or superseded.

Apparently the UTC drafters decided, as a general rule, to make the UTC applicable to preexisting trusts to avoid having two complete sets of trust rules in effect at the same time.⁹ There are sound policy reasons for applying the UTC to trusts created before its effective date: the nature of the substantive, procedural, and administrative improvements in trust law; the complexity generated by having two bodies of trust law; and the relative ease with which issues involving the application of the UTC rules to preexisting trusts can be resolved. All but one of the five states that have adopted the UTC have reached the same conclusion. Arizona,¹⁰ Kansas,¹¹ Nebraska,¹² and New Mexico¹³ have enacted the language of UTC section 1106(a). To date, only Wyoming¹⁴ has omitted the language of UTC section 1106(a).

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9. The drafters' only statement about the decision to make the UTC applicable to preexisting trusts appears in the Comment to UTC section 1106: "By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen." Notwithstanding the drafters' assertion about the effect of applying the UTC to preexisting trusts, there will continue to be a need to have substantial knowledge of two bodies of trust law. As discussed in this article, some provisions of current law will need to be considered with respect to preexisting trusts, particularly in the determination of the settlor's intent and in the basic determinations of whether or not provisions of the UTC, rather than the previous law, are applicable to the situation. And in states which have changed their versions of the Rule Against Perpetuities to permit so called "dynasty trusts," *see, e.g.*, NEB. REV. STAT. § 76-2005(9) (Cum. Supp. 2002), there will be lengthy periods during which preexisting trusts will be subject to some portions of the former rules and some portions of the UTC. The UTC eliminates having two complete sets of trust rules in effect at the same time, but it only reduces the scope of the former law which will continue to apply to preexisting trusts subject to that state's trust law.
10. Act of May 12, 2003, ch. 212, § 16, 2003 Ariz. Sess. Laws S.B. 1351 (LEXIS through 2003 legislation).
11. Kan. Stat. Ann. § 58a-1106 (2002).
12. NEB. REV. STAT. § 30-38,110 (Supp. 2003).
13. Act of April 2, 2003, ch. 122, § 11-1104, 2003 N. M. Laws H.B. 48 (LEXIS).
14. Wyo. Stat. Ann. § 4-10-1103 (2003). The Wyoming enactment provides:
- (c) This act applies to a trust created before July 1, 2003 if the settlor, if living, and all qualified beneficiaries consent to the application. If the settlor is not living, this act may apply to a trust created before July 1, 2003 if all qualified beneficiaries consent to the application. If all of the qualified beneficiaries do not consent to a proposed application of this act to the trust, the court may apply this act to the trust after determining that the interests of the nonconsenting qualified beneficiary will be adequately protected.

Although there are sound practical and policy reasons for avoiding having two sets of trust rules in effect at the same time, it is not constitutionally possible to avoid this result entirely. As the drafters recognize in the Prefatory Note and Comments¹⁵ to the UTC, there are additional constitutional limitations on the applicability of UTC section 1106. The Prefatory Note to the UTC states that “The Uniform Trust Code is intended to have the widest possible application, consistent with constitutional limitations.”¹⁶ The Comment to UTC section 1106 repeats this statement¹⁷ and adds: “The Code cannot be fully retroactive, however. Constitutional limitations preclude application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date.”¹⁸

Further, the Nebraska Uniform Trust Code [hereinafter Nebraska UTC] cannot displace the constitutional equity jurisdiction of Nebraska district courts.¹⁹ It is not intended to restrict “the traditional broad equitable jurisdiction of the court.”²⁰ There will continue to be a body of Nebraska judicial trust law to be integrated with the new statutory code.

Each application of the Nebraska UTC to a preexisting trust will need to be examined for potential limitations on retroactivity. The examination will include a determination of whether or not the Nebraska UTC changes prior Nebraska law, and, if so, whether it alters beneficial interests under trusts that became irrevocable before January 1, 2005; an interpretation and application of the transitional rules in UTC section 1106; federal and state constitutional requirements concerning retroactive state legislation; and, if necessary, Nebraska constitutional requirements affecting litigation of these constitutional questions.

The drafters of the UTC did not attempt to identify the additional potential federal or state constitutional limits on the retroactive application of the UTC. Instead, the drafters left the fine tuning of the retroactive application of the UTC to the parties, practitioners and the courts. As a result, there will be for some time a “gray zone” in which possible federal and state constitutional limitations on the application of the Nebraska UTC to preexisting trusts will require careful examination. Although this “gray zone” will exist, as a practical matter

15. Following each section of the UTC, the drafters have provided a Comment explaining and analyzing the section. In this article, when we refer to a Comment we use the following citation form: Comment, UTC § 1106.

16. UTC Prefatory Note, Overview of Uniform Trust Code, Article 11- Miscellaneous Provisions.

17. “The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations.” Comment, UTC § 1106.

18. Comment, UTC § 1106.

19. Discussed in Part VIII of this article, *infra*.

20. Comment, UTC § 106.

there should be few disputes over the retroactive application of the UTC. Such disputes should be relatively easy to identify because they will relate to beneficial interests and may lend themselves to settlement rather than judicial resolution.²¹ An understanding of the practical aspects of the “gray zone” will facilitate a smooth and effective implementation of the Nebraska UTC.

II. GENERAL APPLICABILITY TO TRUSTS CREATED BEFORE JANUARY 1, 2005

A. Scope of Retroactive Applicatoin

UTC section 102 provides that the UTC “applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.”²² The drafters of the UTC intend the UTC “to have the widest possible effect within constitutional limitations.”²³ UTC section 1106(a)(1) provides that “[e]xcept as otherwise provided in this [Code], on [the effective date of this [Code]]: (1) this [Code] applies to all trusts created²⁴ before, on, or after [its effective date]”²⁵ The Nebraska UTC becomes operative²⁶ on January 1, 2005, at which time it will apply to all trusts described in UTC section 102, whether revocable or irrevocable, and whether written or oral,²⁷ in existence on that date. There are several statutory exceptions to the retroactive application of the Nebraska UTC.²⁸ In addition to the

21. In some situations, if judicial resolution is necessary due to a lack of clarity in the applicable prior law, it may be possible for the court to resolve the issue under its constitutional equity jurisdiction rather than under the Nebraska UTC. See, for example, the discussion of equitable deviation under UTC section 412(a) with respect to dispositive provisions in private express trusts, in text beginning *infra* at note 233.

22. NEB. REV. STAT. § 30-3802 (Supp. 2003).

23. Comment, UTC § 1106.

24. UTC section 402 sets forth the requirements for creation of a trust.

25. NEB. REV. STAT. § 30-38,110(a)(1) (Supp. 2003), the Nebraska equivalent of UTC section 1106(a)(1), provides: “(a) Except as otherwise provided in the Nebraska Uniform Trust Code, on the operative date of this act: (1) the code applies to all trusts created before, on, or after the operative date of this act”

26. See *supra* note 6.

27. See UTC § 407 (“[T]he creation of an oral trust and its terms may be established only by clear and convincing evidence.”); NEB. REV. STAT. § 30-3833 (Supp. 2003) (“[T]he creation of an oral trust and its terms, or an amendment or revocation of an oral trust may be established only by clear and convincing evidence.”).

28. The statutory exceptions are:

1. UTC section 602(a), which provides that “[u]nless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust,” applies only prospectively. “[UTC section 602(a)] does not apply to a trust created under an instrument executed before [the effective date of this [Code]].” UTC § 602(a) (second sentence), NEB. REV. STAT. § 30-3854(a) (Supp. 2003) (second sentence). The language “trust

statutory exceptions to retroactive application of the UTC, there are, as we explain in the following section, possible federal and Nebraska constitutional limitations to retroactive application of the UTC.

B. Constitutional Limitations

Enactment of the UTC is subject to federal and state constitutional limitations on state legislation having retroactive implications. Although the UTC contains no language pertaining expressly to potential constitutional implications, terse references to constitutional limitations appear in the Overview of the UTC²⁹ and in the Comment to UTC section 1106.³⁰ In all probability, these terse references re-

created under an instrument executed before" would appear to apply to revocable trusts "created" before the effective date which become irrevocable after the effective date and to trusts created under wills "executed before" the effective date of the UTC by decedents who die after the effective date.

2. Nebraska UTC section 813(f), a nonuniform provision clarifying that the notice requirements imposed by UTC sections 813(b)(2) and (3) on trustees apply only to trustees of trusts that became irrevocable on or after January 1, 2005. NEB. REV. STAT. § 30-3878(f) (Supp. 2003).

3. UTC section 1106(a)(2), which provides that the UTC "applies to all judicial proceedings concerning trusts commenced on after [its effective date]." UTC § 1106(a)(2), NEB. REV. STAT. § 30-38,110(a)(2) (Supp. 2003).

4. UTC section 1106(a)(3), which provides that the UTC "applies to judicial proceedings concerning trusts commenced before [its effective date] unless the court finds that application of a particular provision of this [Code] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this [Code] does not apply and the superseded law applies . . ." UTC § 1106(a)(3), NEB. REV. STAT. § 30-38,110(a)(3) (Supp. 2003).

5. UTC section 1106(a)(4), which provides that "any rule of construction or presumption provided in this [Code] applies to trust instruments executed before [the effective date of the [Code]] unless there is a clear indication of a contrary intent in the terms of the trust . . ." UTC § 1106(a)(4), NEB. REV. STAT. § 30-38,110(a)(4) (Supp. 2003).

6. UTC section 1106(a)(5), which provides that "an act done before [the effective date of the [Code]] is not affected by this [Code]." UTC § 1106(a)(5), NEB. REV. STAT. § 30-38,110(a)(5) (Supp. 2003).

7. UTC section 1106(b), which provides that "[i]f a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of the [Code]], that statute continues to apply to the right even if it has been repealed or superseded." UTC § 1106(b), NEB. REV. STAT. § 30-38,110(b) (Supp. 2003).

29. See Prefatory Note, Overview of Uniform Trust Code, Article 11—Miscellaneous Provisions:

The Uniform Trust Code is intended to have the widest possible application, consistent with constitutional limitations. The Code applies not only to trusts created on or after the effective date, but also to trusts in existence on the date of enactment.

30. Comment, UTC § 1106:

flect the drafters' concerns about possible Federal and state constitutional limitations on the application of the UTC to preexisting irrevocable trusts. In addition, we must consider the application of the Nebraska UTC in the context of the Nebraska Constitution's grant of equity jurisdiction to the courts³¹ and, if constitutional issues are involved in litigation under the Nebraska UTC, in light of special Nebraska procedural requirements concerning their judicial resolution.³²

It is only with respect to trusts that have become irrevocable *before* its operative date that the UTC cannot constitutionally be "fully retroactive."³³ A revocable trust is one "revocable by the settlor without the consent of the trustee or a person holding an adverse interest."³⁴ Because the Nebraska UTC does not become operative until January 1, 2005,³⁵ there is ample time to satisfy any due process requirements concerning notice of changes in substantive law as they might be applicable to revocable trusts that become irrevocable *on or after* the operative date of the Nebraska UTC.³⁶ Assume, for example, that the settlor of a revocable trust died on the operative date of the Nebraska UTC, January 1, 2005, that creditors sought to secure payment under UTC section 505(a)(3)³⁷ from the trust assets, that such claims

The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to the judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

The Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

31. Discussed in Part VIII of this article, *infra*.
32. Discussed in Part IX of this article, *infra*.
33. See Comment, UTC § 1106.
34. See UTC § 103(13); NEB. REV. STAT. § 30-3803(14) (Supp. 2003). UTC section 603(a) provides that so long as the trust is revocable and the settlor has capacity to revoke the trust, the duties of the trustee are owed exclusively to the settlor. NEB. REV. STAT. § 30-3855(a) (Supp. 2003). The requirement of capacity to revoke the trust in this situation changes Nebraska law. See Report, *supra* note 3 at 185-86.
35. See *supra* note 6.
36. See discussion in *Kratochvil v. Motor Club Ins. Ass'n*, 255 Neb. 977, 588 N.W.2d 565 (1999) (Nebraska legislature may shorten a limitation period for commencement of a cause of action, and the change may be made applicable to existing claims, so long as a reasonable time is allowed to bring such action).
37. UTC section 505(a)(3) provides, in pertinent part:

against revocable trust assets were not authorized under prior law,³⁸ and that absent ability to reach the trust assets the creditors would collect nothing. There would be little doubt that the Nebraska UTC provisions could constitutionally be applied since they were not applied retroactively.³⁹

Even as to preexisting irrevocable trusts, the UTC is “primarily a default statute.”⁴⁰ Constitutional issues will arise only if a UTC default rule applies because the settlor has not “otherwise provided in the terms of the trust”⁴¹ or because the UTC rule is one which the terms of the trust cannot override.⁴²

Nebraska law, like that of most or all states, is nebulous and speculative concerning potential constitutional limits on the retroactive application of the UTC to preexisting irrevocable trusts. The most frequently stated Nebraska rule is that a legislative act will not be permitted to operate retroactively where it invalidates or impairs contractual obligations or interferes with vested rights.⁴³ But this language does not fit well with respect to trusts and trust law. The relationships among the settlor, trustee, and beneficiaries are not contractual in an ordinary sense. The term “vested right” is especially confusing as applied to a preexisting irrevocable trust since one principle of sound trust planning is to avoid establishing the sort of descendable, inheritable interests which are considered “vested” under normal property law rules. The difficulty in applying a “vested rights” analysis in this context becomes clear when we realize that, in one sense, the total sum of the beneficial interests in a trust is “vested” in the group of beneficiaries. Thus, whatever changes the beneficial interests existing in an irrevocable trust when the UTC becomes operative “interferes with vested rights” in a constitutional sense.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors

38. There was no prior law on this issue in Nebraska and a split of authority in other jurisdictions. See Report, *supra* note 3 at 162. The Nebraska enactment adopts the provisions of UTC section 505(a)(3) and provides procedures to assert the claims. NEB. REV. STAT. § 30-3850(a)(3) (Supp. 2003).
39. The Nebraska Legislature avoided possible questions of retroactive application of the Nebraska Uniform Probate Code by providing that it applied only to wills of decedents dying after the operative date of the statute. NEB. REV. STAT. § 30-2901(b)(1) (Reissue 1995).
40. Comment, UTC § 105.
41. UTC § 105(a); NEB. REV. STAT. § 30-3805(a) (Supp. 2003).
42. UTC § 105(b); NEB. REV. STAT. § 30-3805(b) (Supp. 2003).
43. See, e.g., *City of Lincoln v. Bruce*, 221 Neb. 61, 375 N.W.2d 118 (1985); *Dell v. City of Lincoln*, 170 Neb. 176, 102 N.W.2d 62 (1960); *Travelers Ins. Co. v. Ohler*, 119 Neb. 121, 227 N.W. 449 (1929).

Nebraska decisions have also used different criteria in evaluating retroactive legislation. One statement is that the determination “generally depends upon reasonableness”:⁴⁴

Constitutionality of a retroactive statute under the contract and due process clauses generally depends upon reasonableness. Relevant factors are the nature and strength of the public interest, the extent of modification of the asserted preenactment right, and the nature of the right altered by the statute. . . . [citations omitted] “The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line * * * are fixed by decisions that this or that concrete case falls on the nearer or farther side.” *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355, 28 S. Ct. 529, 531, 52 L. Ed. 828 (1908).

There is also a substantial line of Nebraska zoning ordinance cases which focus on good faith reliance upon the previous zoning ordinance as establishing a basis for “vested rights” entitled to protection against retroactive legislation.⁴⁵ These cases offer the following rationale:⁴⁶

Thus, a landowner has no vested right in the continuity of zoning in a particular area so as to preclude subsequent amendment, and a zoning regulation may be retroactively applied to deny an application for a building permit even though the permit could lawfully have issued at the time of application. . . . [citations omitted]

Nonetheless, a new zoning ordinance will not have retroactive effect where an applicant has substantially changed position in good-faith reliance upon the existing zoning by causing substantial construction to be made or by incurring substantial expenses related to construction. . . . [citations omitted] This substantial reliance exception is basically an application of the rule that a zoning ordinance may not, without providing a reasonable plan for discontinuance, operate retroactively to deprive a property owner of previously vested rights by preventing a use to which the property was put before enactment of the prohibitory ordinance.

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44. *Hiddleston v. Nebraska Jewish Educ. Soc’y*, 186 Neb. 786, 790, 186 N.W.2d 904, 906 (1971) (statute extinguishing possibilities of reverter after 30 years held constitutional). *See Wheelock v. Heath*, 201 Neb. 835, 842-843, 272 N.W.2d 768, 772-773 (1978) (statute providing that severed mineral interests, considered vested property rights, are abandoned if the record owner has not exercised publicly a right of ownership for 23 years, or judicially asserted a claim within two years of the enactment, held “unconstitutional as violative of the due process and contract clauses of the United States and the Nebraska Constitutions” insofar as it operated retroactively).
45. *See, e.g., Whitehead Oil Co. v. City of Lincoln*, 234 Neb. 527, 451 N.W.2d 702 (1990); *Omaha Fish and Wildlife Club, Inc. v. Comty. Refuse Disposal, Inc.*, 213 Neb. 234, 329 N.W.2d 335 (1983); *A.C. Nelsen Enter., Inc. v. Cook*, 188 Neb. 184, 195 N.W.2d 759 (1972); *Saunders County v. Moore*, 182 Neb. 377, 155 N.W.2d 317 (1967); *Bd. of County Comm’rs of Sarpy County v. Petsch*, 172 Neb. 263, 109 N.W.2d 388 (1961); *City of Omaha v. Glissman*, 151 Neb. 895, 39 N.W.2d 828 (1949), *appeal dismissed*, 339 U.S. 960, 70 S. Ct. 1002, 94 L. Ed. 1370 (1950); *Cassell Realty Co. v. City of Omaha*, 144 Neb. 753, 14 N.W.2d 600 (1944).
46. *Whitehead Oil Co. v. City of Lincoln*, 234 Neb. 527, 532-33, 451 N.W.2d 702, 706 (1990). *See also* cases cited *supra* note 45.

Nebraska is not unusual in its jumbled and confusing rules concerning the constitutional limitations on retroactive state statutes. As one commentator notes:⁴⁷

Judicial opinions are full of standards which purport to govern decision concerning the legality of retroactive application of new law. On close examination most of them turn out to be little more than ways to restate the problem. Probably the most hackneyed example of such a rule is to the effect that a law cannot be retroactively applied to impair vested rights. But the statement of that proposition does nothing more than focus attention on the question concerning what circumstances qualify a right to be characterized as "vested." A most natural definition of the term "vested" is "accrued" or, as dictionaries put it, "completed and consummated." But in that sense, any claim or interest which has come into being and been perfected as a "right" would have to be said to be vested. This makes it clear that the formulation which uses "vested" as the basis for deciding the legality of retroactivity has to be using that concept in a more specialized sense than its ordinary and usual one. . . . The superficiality and inconclusive nature of most of these formulations make it necessary, or at least desirable, to search for more meaningful guidelines with which to make judgments about the fairness or unfairness of applying a new law to alter legal interests from what they had previously been.

Analysis of the practical considerations influencing the question whether a retroactive application of a new law is fair and just should afford more meaningful standards of judgment than either catchpenny phrases or the ambivalent concept of "vested." . . .

One of the fundamental considerations of fairness recognized in every legal system is that settled expectations honestly arrived at with respect to substantial interests ought not to be defeated. There is evidence that results achieved through application of judicial instinct, manifested in the pattern of decisions on retroactivity problems, are perhaps best explained in terms of this fundamental principle of justice.

The focus of an analysis of constitutional issues concerning retroactivity of the UTC should be on whether provisions operate in a manner that alters beneficial interests in an irrevocable trust. UTC provisions that relate only to trust administration and are not directed toward beneficial interests should not raise constitutional retroactivity issues. The principle that the focus of constitutional analysis relating to retroactive application of the UTC should be on alteration of beneficial interests in irrevocable trusts finds support in the Comment to UTC section 1106(a)(4). UTC section 1106(a)(4), discussed later in this article,⁴⁸ provides for retroactive application of "any rule of construction or presumption provided in this [Code] . . . unless there is a clear indication of a contrary intent in the terms of the trust."⁴⁹ The Comment to UTC section 1106 observes without additional explanation or refer-

47. 2 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 41.5, at 414-415 (6th ed. 2002).

48. The development of the Comment to UTC section 1106(a)(4) by its drafters is discussed in section ILC of this article, *infra*. The discussion of Rules of Construction is in section IV.B, *infra*.

49. UTC § 1106(a)(4), NEB. REV. STAT. § 30-38,110(a)(4) (Supp. 2003).

ence to other sources: "Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date."⁵⁰ The UTC defines the term "property" to mean "anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein."⁵¹ The term "interests of the beneficiaries" as used in the UTC "means the beneficial interests provided in the terms of the trust."⁵² The term "beneficiary" includes a person that "has a present or future beneficial interest in a trust, vested or contingent."⁵³ And the UTC provides "default" rules which govern "the rights and interests of a beneficiary."⁵⁴ The apparent purpose of the Comment to UTC section 1106 is to make clear that the drafters were concerned that beneficial interests under trusts that were or had become irrevocable prior to the operative date of the UTC could not constitutionally be altered by application of the new rules of the UTC.

Past enactments of uniform legislation relating to trusts and probate provide additional support for the principle that the focus of constitutional analysis relating to retroactive application of the UTC should be on alteration of beneficial interests in irrevocable trusts. Such legislation has dealt largely with trust administration and judicial procedures. These statutes have expressly covered trusts established before their enactment, have applied to transactions after enactment, and have not been subject to constitutional inquiry on the basis of retroactivity. Nebraska's enactments in recent years of the Nebraska Trustees' Powers Act,⁵⁵ Nebraska Uniform Prudent Investor Act,⁵⁶ Uniform Principal and Income Act,⁵⁷ and the provisions on

50. There are no references to other authorities on this issue in the Comments to UTC sections 1106 or 112.

51. UTC § 103(11); NEB. REV. STAT. § 30-3803(11) (Supp. 2003). The term "property right" does not appear elsewhere in the UTC or Comments.

52. UTC § 103(7); NEB. REV. STAT. § 30-3803(7) (Supp. 2003).

53. UTC § 103(2)(A); NEB. REV. STAT. § 30-3803(2)(A) (Supp. 2003).

54. UTC § 105(a); NEB. REV. STAT. § 30-3805(a) (Supp. 2003).

55. NEB. REV. STAT. § 30-2825 (Reissue 1995) ("except as specifically provided in the trust instrument").

56. NEB. REV. STAT. § 8-2212 (Reissue 1997) ("the act governs only decisions or actions occurring after that date"). For older cases from other jurisdictions, see V. Woerner, Annotation, *Retrospective Application of Statutes Relating to Trust Investments*, 35 A.L.R.2d 991 (1954).

57. NEB. REV. STAT. § 30-3149 (Cum. Supp. 2002) ("except as otherwise expressly provided in the will or terms of the trust or in the act"). An earlier enactment in 1980 also applied to previously established trusts. See NEB. REV. STAT. § 30-3114 (Reissue 1995). For older cases from other jurisdictions, see E. H. Schopler, Annotation, *Constitutionality of Retrospective Application of Uniform Principal and Income Act or Other Statutes Relating to Ascertainment of Principal and Income and Apportionment of Receipts and Expenses Among Life Tenants and Remaindermen*, 69 A.L.R.2d 1137 (1960).

trust administration in the Nebraska Uniform Probate Code⁵⁸ have been applied to previously established trusts without apparent difficulty.

In Nebraska, legislation affecting beneficial interests in trusts has been applied prospectively. The substantive provisions of the Nebraska Uniform Probate Code enacted in 1974 applied only to wills of decedents dying after its operative date, January 1, 1977.⁵⁹ The Uniform Statutory Rule Against Perpetuities Act applies prospectively to "a nonvested property interest or a power of appointment that is created on or after" the effective date of the statute.⁶⁰ Further, a court "may reform the disposition [of a trust created before the effective date] in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created."⁶¹ Nebraska's "dynasty trust" provisions also apply prospectively.⁶² The Uniform Testamentary Additions to Trusts Act (1991),⁶³ as well as its predecessor which was part of the Nebraska Uniform Probate Code,⁶⁴ applies only to a will of a testator who dies after the operative date of the statute.

C. Evolution of UTC Section 1106 and its Comment

The evolution of UTC section 1106 and its explanatory Comment illustrates that its drafters were concerned with the constitutional implications of the retroactive effects on beneficial interests under irrevocable trusts. The final version of the Comment was written only after the UTC was approved at the 2000 Annual Conference Meeting of NCCUSL.⁶⁵

Early drafts of the transitional provisions contained an effective date, language that "on and after the effective date, this [Act] applies to all trusts regardless of whether they were created before, on, or after its effective date," and subsections on judicial proceedings com-

58. See NEB. REV. STAT. §§ 30-2801 to 30-2818 (Reissue 1995) ("Article 28, Trust Administration").

59. NEB. REV. STAT. § 30-2901(b)(1) (Reissue 1995). Further, the Nebraska adoption omitted a subsection relating to retroactive application of rules of construction which might have had an effect on beneficial trust interests. See discussion in text following note 129, *infra*.

60. NEB. REV. STAT. § 76-2006(a) (Reissue 1996) ("For the purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.").

61. NEB. REV. STAT. § 77-2006(b) (Reissue 1996).

62. NEB. REV. STAT. § 76-2005(9) (Cum. Supp. 2002).

63. NEB. REV. STAT. § 30-3603 (Cum. Supp. 2002).

64. See NEB. REV. STAT. § 30-2336 (Reissue 1995).

65. See text beginning *infra* at note 77.

menced before and after the effective date.⁶⁶ The Comment stated: "This section provides the general rule governing application of this Act to administration of existing trusts and pending proceedings involving trusts. For a comparable provision, see Section 8-101 of the Uniform Probate Code."⁶⁷

The next draft version added what became UTC section 1106(a)(4) on rules of construction and presumptions, language that "an act done before the effective date in any proceeding and any accrued right is not impaired by this [Act]," and language which became UTC section 1106(b) on statutes of limitations.⁶⁸ The language on "an act done before the effective date" was the same as the Uniform Probate Code section 8-101:⁶⁹ "an act done before the operative date in any proceeding and any accrued right is not impaired by this code." The Comment to the UTC draft stated:⁷⁰

This section addresses the applicability of the Act, including application to pending judicial proceedings and the administration of existing trusts. The Act is intended to receive the widest possible application. The Act applies to all trusts subject to the jurisdiction of the enacting state, whether created before or after the date of enactment. But recognizing constitutional concerns, excluded from coverage are trusts created prior to the Act's effective date if such application would impair a vested right. For such an impairment to occur, however, the trust would have to be irrevocable as of the effective date and the particular provision of the Act would have to actually reduce or otherwise threaten a beneficial interest.

The text of the drafts and supporting Comment remained the same through the next three published versions of the UTC.⁷¹ A November 1999 Meeting Memo of the UTC Committee Reporter, dated October 21, 1999, states:⁷²

The ABA Task Force concludes that the effective date provisions need clarification. The key issue is the retroactive application of rules of construction. Currently, under this section the sole limitation on retroactive application of rules of construction is the statement that "any accrued right" is not affected by this Act. The comment then explains that this means that rules of construction apply to all trusts except for trusts which were irrevocable on effective date and where particular provision of Act would reduce or threaten a beneficial interest. Should this statement in the comment be made more precise and then moved into the statute? Also, to what extent should rules of

66. Drafts of June 6, 1996, § 6-101; October 21, 1996, § 7-101; and January 24, 1997, § 7-101.

67. *Id.*

68. Draft of October 13, 1997, § 7-101.

69. See NEB. REV. STAT. § 30-2901(b)(4) (Reissue 1995).

70. Draft of October 13, 1997, Comment on § 7-101.

71. Drafts of January 12, 1998, § 7-101; 1999 Annual Meeting Draft, § 1105; October 1999 Draft, § 1105.

72. Memo from David English, Reporter, to Commissioners, Advisors, Observers, Drafting Committee on Uniform Trust Act, October 21, 1999, Re: November Meeting, Section 1105, Application to Existing Relationship, NCCUSL Official Site of Uniform and Model Acts, University of Pennsylvania Law School.

construction apply to settlors of revocable trusts and wills who were incapacitated on the effective date of the Act and at all times thereafter?⁷³

Two draft versions in the Spring of 2000⁷⁴ and the 2000 Annual Meeting Draft⁷⁵ omitted the words "in any proceeding and any accrued right is not affected by this [Act]" in what became UTC section 1106(a)(5). The provision stated "an act done before [the effective date of the [Code]] is not affected by this [Code]."⁷⁶ There are a few variations between the language of the Comment in the 2000 Annual Meeting Draft and the Comment which now appears in the final version. The 2000 Annual Meeting Draft stated:⁷⁷

This Code is intended to have the widest possible effect within constitutional limitations. Specifically, this Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and to already existing judicial proceedings unless the court otherwise orders. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. *By giving the Code the widest possible retroactive effect, the need to know two bodies of law will quickly lessen.*

The Code is and cannot be fully retroactive, however. *Constitutional limitations preclude retroactive application to disturb settled property rights.* Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an Act done before the effective date of the Code affected by the Code's enactment. Finally the Code itself provides that certain of its provisions do not apply to trust instruments executed before the effective date of the Code. These include Sections 602(a) (presumption that a trust is revocable) and 813 (f) (*provision limiting ability of settlor to waive trustee's duty to report to beneficiaries and keep them informed*).

Following the Summer 2000 meeting of NCCUSL at which the UTC was approved, the section was renumbered as UTC section 1106.⁷⁸ The Final Act (2000) With Prefatory Note and Comments, issued April 25, 2001, contains the final version of UTC section 1106 and Comment. The final Comment to UTC section 1106 is different than the 2000 annual meeting version in several respects. The intro-

73. Neither the Code nor its commentary responds directly to the question "to what extent should rules of construction apply to settlors of revocable trusts and wills who were incapacitated on the effective date of the Act and at all times thereafter?" UTC section 103(17), Neb. Rev. Stat. § 30-3803(18) (Supp. 2003), allows a settlor's (which includes a testator's) intent to be "established by other evidence that would be admissible in a judicial proceeding." The rules of presumptions, interpretation and construction when the document was drawn should be primary, both despite and within the provisions of UTC section 1106(a)(4), Neb. Rev. Stat. § 30-38,110(a)(4) (Supp. 2003). And, better yet, section 1106(a)(4) should be removed from the Nebraska UTC as its ancestral model was removed from the enactment of the Nebraska Uniform Probate Code in 1974.

74. Drafts of March 10, 2000, § 1101; April 14, 2000, § 1101.

75. 2000 Annual Meeting Draft, § 1105.

76. *Id.*

77. *Id.* (emphasis added).

78. 2000 Annual Meeting Act of October 9, 2000, Pre Final Style Version, § 1106.

ductory words "By giving the Code the widest possible retroactive effect" were changed to "By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen." The sentence "Constitutional limitations preclude retroactive application to disturb settled property rights" was significantly changed to "Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date." The sentence "Finally, the Code itself provides that certain of its provisions do not apply to trust instruments executed before the effective date of the Code" was deleted. Instead, there is a single reference to the presumption of revocability in UTC section 602(a).

The UTC drafters were aware of the general rules pertaining to retroactive legislation affecting "vested interests." It is also clear that there was a concern for provisions which might "reduce or otherwise threaten a beneficial interest." Although there was a primary concern for "the retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date," there were also other constitutional implications knowingly left for the parties or the courts to resolve in specific situations.

D. Administrative Provisions

There are a variety of administrative provisions which the legislative study committee characterized as changes in Nebraska law. These provisions can be applied after the operative date of the UTC to irrevocable trusts created before the operative date. Changes in trust administration by the Nebraska UTC which, in effect, will operate prospectively with respect to preexisting irrevocable trusts include UTC section 104(b) on notice "only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence";⁷⁹ UTC section 108(c) allowing transfers of the principal place of administration to a jurisdiction outside of the United States;⁸⁰ UTC section 109(c) allowing "a properly directed electronic message" as a permissible method of notice;⁸¹ UTC section 110(b) and (c) extending "the rights of qualified beneficiaries" to certain "other" beneficiaries;⁸² UTC section 202(b) providing in personam Nebraska jurisdiction of recipients of trust distributions;⁸³ UTC Article 3 providing rules of representation

79. NEB. REV. STAT. § 30-3804(b) (Supp. 2003).

80. *Id.* § 30-3808(c).

81. *Id.* § 30-3809(a). The Report, *supra* note 3 at 44, also notes other changes in the methods and waivers of notices.

82. *Id.* § 30-3810(b) and (c).

83. *Id.* § 30-3813(b).

in nonjudicial situations;⁸⁴ UTC section 405(c) allowing the settlor of a charitable trust to maintain a proceeding to enforce the trust;⁸⁵ UTC section 410(b) allowing the settlor of a noncharitable irrevocable trust to commence a proceeding to approve or disapprove a proposed modification or termination under UTC section 411;⁸⁶ UTC section 410(b) allowing the settlor of a charitable trust to maintain a proceeding to modify the trust under UTC section 413;⁸⁷ UTC section 414(a) authorizing a trustee to terminate an uneconomic trust;⁸⁸ UTC section 417 authorizing a trustee to combine or divide two or more separate trusts;⁸⁹ UTC Article 7 in its entirety providing rules for the "office of trustee";⁹⁰ UTC section 802 defining the trustee's duty of loyalty which generally specifies a higher standard;⁹¹ UTC section 804 which broadens the prudent investor standard to cover other trust administration activities of a trustee;⁹² UTC section 807 which has been incorporated into the prudent investor statutes to allow for the delegation of "duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances" and is not limited to investment and management functions;⁹³ UTC section 808 allowing persons other than the settlor to direct certain actions of the trustee, including a power to direct the modification or termination of the trust, and imposing a fiduciary responsibility upon such person;⁹⁴ UTC section 810(d) allowing a trustee to "invest as a whole the property of two or more separate trusts" without regard to whether the trusts contain substantially similar provisions;⁹⁵ UTC section 812 requiring, rather than permitting, a successor trustee to compel a former trustee or other person to deliver trust property or to redress a breach of trust;⁹⁶ UTC section 813 specifying the trustee's duties to inform and report to qualified beneficiaries and beneficiaries;⁹⁷ UTC section 816 replacing the former Nebraska Trustees' Powers Act;⁹⁸ UTC section 817 providing procedures for trust termination or partial termination;⁹⁹ amendments to the Nebraska Prudent Investor Act in-

84. *Id.* §§ 30-3822 to 30-3826.

85. *Id.* § 30-3831(c).

86. *Id.* § 30-3836(b).

87. *Id.*

88. *Id.* § 30-3840(a).

89. *Id.* § 30-3843.

90. *Id.* §§ 30-3857 to 30-3865.

91. *Id.* § 30-3867.

92. *Id.* § 30-3869.

93. *Id.* §§ 30-3872 and 30-3888.

94. *Id.* § 30-3873.

95. *Id.* § 30-3875(d).

96. *Id.* § 30-3877.

97. *Id.* § 30-3878.

98. *Id.* § 30-3881.

99. *Id.* § 30-3882.

corporated as Article 9 of the Uniform Trust Code;¹⁰⁰ UTC section 1001 providing remedies for a breach of trust by a trustee (but the fiduciary duty owed should be determined under the law at the time of the alleged breach);¹⁰¹ and UTC section 1102 authorizing electronic records and signatures.¹⁰²

III. JUDICIAL PROCEEDINGS

The UTC “applies to all judicial proceedings concerning trusts commenced on or after [its effective date]”¹⁰³ and to “judicial proceedings concerning trusts commenced before [its effective date] unless the court finds that application of a particular provision of this [Code] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties.”¹⁰⁴ These rules are essentially the same rules the court would apply in the absence of statutory directions on retroactivity.¹⁰⁵ Substantive legislative changes are generally not applicable to pending cases. Procedural legislative changes are generally applicable to pending cases. Substantive changes relate to “duties, rights and obligations.” Procedural changes relate to “the means and methods through and by which substantive laws are enforced and applied.”¹⁰⁶ The transitional rules concerning judicial proceedings should raise no unusual issues under Nebraska law. Legislation relating to county court jurisdiction of trustees not specifically named in a will was procedural and applied to trustees appointed before or after the enactment.¹⁰⁷

100. *Id.* §§ 30-3883 to 30-3889.

101. *Id.* § 30-3890. Recovery of the greater of the expectancy interest or the trustee profits as damages under UTC section 1002 should also apply only to events after the operative date of the UTC.

102. *Id.* § 30-38,109.

103. UTC § 1106(a)(2); NEB. REV. STAT. § 30-38,110(a)(2) (Supp. 2003).

104. UTC § 1106(a)(3); NEB. REV. STAT. § 30-38,110(a)(3) (Supp. 2003). The Kansas Supreme Court has applied the Kansas Uniform Trust Code to a judicial proceeding commenced in 2002 involving a testamentary trust created in 1969. The Kansas UTC became effective January 1, 2003. In the Matter of the John P. Harris Testamentary Trust, 69 P.3d 1109, 1113 (Kan. 2003). Concluding that application of the Kansas UTC “would not substantially interfere with the effective conduct of the judicial proceedings before this court or prejudice the rights of the parties,” *id.*, the court explained that “[t]he facts are not in dispute, and all parties have entered their appearances before the district court and requested that the proposed changes be adopted and confirmed by this court.” *Id.*

105. See *In re Interest of Clifford M.*, 261 Neb. 862, 868, 626 N.W.2d 549, 556 (2001); *Kratochvil v. Motor Club Insurance*, 255 Neb. 977, 983, 588 N.W.2d 565, 571 (1999); *Cheloha v. Cheloha*, 255 Neb. 32, 42-43, 582 N.W.2d 291, 300 (1998).

106. See *In re Interest of Clifford M.*, 261 Neb. at 868, 626 N.W.2d at 556 (citing *Kratochvil* and *Cheloha*).

107. *In re Greenamyre's Estate*, 133 Neb. 693, 276 N.W. 686 (1937).

Nebraska added language patterned upon the Nebraska Uniform Probate Code¹⁰⁸ that each proceeding before the court is independent of any other proceeding involving the same trust.¹⁰⁹ The main purpose of this amendment was “to make clear when there is a ‘final order’ for purposes of an appeal.”¹¹⁰

IV. Rules of Construction and Presumptions

UTC section 1106(a)(4)¹¹¹ provides that “any *rule of construction*¹¹² or *presumption*¹¹³ provided in this [Code] applies to *trust instruments*¹¹⁴ *executed*¹¹⁵ before [the effective date of the [Code]] unless there is a clear indication of a contrary intent *in the terms of the trust.*”¹¹⁶ This provision raises several important questions: (1) What constitutes a “clear indication of a contrary intent”; (2) What are the “rules of construction” to which this provision refers; (3) What are the “presumptions” to which this provision refers; and (4) Are there constitutional limitations on the retroactive application of these rules to trusts created before the UTC became effective?

A. Clear indication of a Contrary Intent.

The phrase “clear indication of a contrary intent” should be given an expansive interpretation, which includes consideration of the legal rules and interpretations in effect at the time the instrument was prepared, in its application to trusts created before the UTC’s operative

108. NEB. REV. STAT. §§ 30-2407 (Reissue 1995) and 30-2209(35) (Cum. Supp. 2002).

109. NEB. REV. STAT. § 30-3814(c)-(f) (Supp. 2003).

110. See Memo of William A. Marienau, *supra* note 3.

111. NEB. REV. STAT. § 30-38,110(a)(4) (Supp. 2003) (emphasis added).

112. UTC section 112 provides that “[t]he rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.” The Nebraska UTC does not include this provision.

113. See NEB. REV. STAT. § 27-301 (Reissue 1995) (“In all cases not otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.”).

114. The phrase “trust instrument” means “an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.” UTC § 103(18), NEB. REV. STAT. § 30-3803(19) (Supp. 2003).

115. Note that UTC section 112 refers to trust instruments “executed” before the effective date in contrast to the language of UTC section 1106(a)(1) which applies to “all trusts created” before the effective date.

116. UTC section 103(17), which defines the phrase “terms of a trust,” answers a threshold question by making it clear that we can look beyond the language of the trust instrument to determine the settlor’s intent: “‘terms of a trust’ means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.” NEB. REV. STAT. § 30-3803(18) (Supp. 2003) (emphasis added).

date. Ordinarily, the rules in effect at the inception of the trust are utilized in the determination of the settlor's intent and the interpretation and application of the trust instrument. The definition of the phrase "terms of a trust" allows a court to look to evidence of the settlor's intent outside of the trust document "as may be established by other evidence that could be admissible in a judicial proceeding."¹¹⁷ In the absence of direct statements by or to the settlor, the best evidence of the settlor's intent may come from the rules of construction and presumptions in place at the time of the creation of the trust. For that reason, a court should look primarily to the rules which applied when the settlor created the trust rather than to different rules contained in subsequent legislation.

Suppose a settlor created an irrevocable trust in 1990 which included a spendthrift provision applicable to all beneficiaries. In 2006, after the settlor's death, the beneficiaries seek to terminate the trust under UTC section 411(b)¹¹⁸ which allows a court to approve termination if "continuance of the trust is not necessary to achieve any material purpose of the trust." In 1990, the well established rule was that spendthrift protection was a material purpose of a trust.¹¹⁹ However, UTC section 411(c) provides that "[a] spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust." Should the negative presumption of UTC section 411(c) apply rather than the clear rules in effect in 1990 when the trust was created? Based on the language of UTC section 1106(a)(4), the answer depends on whether there is a "clear indication of a contrary intent." In making that determination, a court should give significant weight to the fact that when the settlor created the trust spendthrift protection was considered a material purpose of the trust.¹²⁰

To give any real meaning to the words "unless there is a clear indication of a contrary intent in the terms of the trust" (which by definition "means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding"), we have to place ourselves in the context in which the trust was created. It may be proper policy for legislation prospectively to consider that spendthrift clauses are routinely included by attorneys without significant consultations with their clients.¹²¹ Concern-

117. UTC § 103(17), NEB. REV. STAT. § 30-3803(18) (Supp. 2003).

118. NEB. REV. STAT. § 30-3837(b) (Supp. 2003).

119. See discussion in Section VII.A, *infra*.

120. For that matter, shouldn't the same approach be taken in interpreting the provisions of a revocable trust created prior to the UTC but which has not been amended and becomes irrevocable after the UTC takes effect?

121. See Comment to UTC § 411(c) ("Spendthrift terms have sometimes been construed to constitute a material purpose without inquiry into the intention of the particular settlor. . . . This result is troublesome because spendthrift provisions

ing spendthrift provisions in irrevocable trusts created before the effective date of the legislation, however, we should assume that the settlors and their attorneys understood the legal consequences then in effect and acted with respect to those well established legal principles on the effects of the spendthrift provisions.

The commentary does not explain the standard of "a clear indication" as used in UTC section 1106(a)(4). The term appears to connote something between a standard of "clear and convincing evidence" and a standard of "an indication."

The Uniform Trust Code uses the terms "clear" and "indication" in various contexts. "Clear indication of a contrary intent" in UTC section 1106(a)(4) appears to be a higher standard of proof than "the settlor indicates an intention to create the trust,"¹²² "the terms of the charitable trust do not indicate a particular charitable purpose or beneficiary,"¹²³ "an indication of the date of the writing or signing,"¹²⁴ and "indicating acceptance of the trusteeship."¹²⁵ The phrase seems comparable to the UTC language that "[i]f the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts."¹²⁶ It is a lower standard than "unless the terms of the trust expressly indicate that a rule in this subsection does not apply" in connection with certain discretionary powers of a trustee¹²⁷ and requirements of "clear and convincing evidence" for the creation, terms, amendment or revo-

are often added to instruments with little thought. . . . The question of whether that was the intent of a particular settlor is instead a matter of fact to be determined on the totality of the circumstances."

122. UTC § 402(a)(2); NEB. REV. STAT. § 30-3828(a)(2) (Supp. 2003). UTC section 412(a) allows a court to modify the terms of a trust for unanticipated circumstances "in accordance with the settlor's probable intention." NEB. REV. STAT. § 30-3838(a) (Supp. 2003). UTC section 416 allows a court to modify the terms of a trust to achieve the settlor's tax objectives "in a manner that is not contrary to the settlor's probable intention." NEB. REV. STAT. § 30-3842 (Supp. 2003).
123. UTC § 405(b); NEB. REV. STAT. § 30-3831(b) (Supp. 2003). The selection of charitable purposes or beneficiaries under this subsection "must be consistent with the settlor's intention to the extent it can be ascertained."
124. NEB. REV. STAT. §§ 30-3844 (written statement or list to dispose of items of tangible personal property), 30-3854(c)(2)(B) (instrument to amend or revoke a written revocable trust) (Supp. 2003). These are Nebraska deviations from the official Uniform Trust Code and use language contained in the Nebraska Uniform Probate Code applicable to "laundry lists" of tangible personal property and holographic wills. See NEB. REV. STAT. §§ 30-2338 ("laundry lists"), 30-2328 (holographic wills) (Reissue 1995). See also *In re Estate of Wells*, 243 Neb. 152, 497 N.W.2d 683 (1993) (5-2 decision) (holographic will containing only month and year substantially complied with statute).
125. UTC § 701(a)(2); NEB. REV. STAT. § 30-3857(a)(2) (Supp. 2003).
126. UTC § 810(d); NEB. REV. STAT. § 30-3875(d) (Supp. 2003).
127. UTC § 814(b); NEB. REV. STAT. § 30-3879(b) (Supp. 2003).

cation of an oral trust¹²⁸ and for reformation to correct mistakes to establish “that both the settlor’s intent and the terms of the trust were affected by a mistake or fact or law.”¹²⁹

The Uniform Probate Code as introduced in the Nebraska Unicameral in 1973 contained a provision that “any rule of construction or presumption provided in this code applies to instruments executed and multiple-party accounts opened before the effective date unless there is a clear indication of a contrary intent.”¹³⁰ After an interim legislative study, public hearings, and study by the Nebraska State Bar Association of the proposed Uniform Probate Code in its entirety, the Judiciary Committee recommended that this language be omitted “to avoid a potentially harsh rule of construction with respect to instruments in effect on the operative date of the act.”¹³¹ It reasoned:

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 with respect to codicils or amendments.¹³²

The Bill as amended by the Committee in 1974 and reprinted did not contain the subsection on rules of construction and presumptions applicable to instruments executed before the effective date of the Uniform Probate Code¹³³ and it was enacted in this form.¹³⁴ The

128. UTC § 407 (“creation of an oral trust and its terms”); NEB. REV. STAT. § 30-3833 (adding “or an amendment or revocation of an oral trust”) (Supp. 2003).

129. UTC § 415; NEB. REV. STAT. § 30-3841 (Supp. 2003). Nebraska changed the requirement in UTC section 602(c)(2)(B) allowing a settlor to revoke or amend a revocable trust by “any other method manifesting clear and convincing evidence of the settlor’s intent” to require “an instrument evidencing an intent to amend or revoke the trust.” NEB. REV. STAT. § 30-3854(c)(2)(B) (Supp. 2003).

130. LB 354, 83rd Leg., 1st Sess., § 314(b)(5) at 223-24 (Neb. 1973).

131. Technical Memorandum on Amendments Proposed by the Judiciary Committee to LB 354, at 17 (December 21, 1973). The recommendation may have been prompted by the Report of the Special Probate Reform Committee of the Nebraska State Bar Association, comment on LB 354, § 314 (pages unnumbered) (report delivered to the House of Delegates of the Nebraska State Bar Association on October 31, 1973) which proposed a modification of the language applicable to any rule of construction or presumption to instruments executed “before” the effective date by limiting the multiple-party accounts language to ones “opened after the effective date,” and did not change the language “unless there is a clear indication of a contrary intent.” The Special Probate Reform Committee Report added: “Comment: This amendment is because of Art. I, §16 [impairment of the obligation of contracts], Constitution of the State of Nebraska.”

132. *Id.* But cf. *In re Estate of Florey*, 212 Neb. 665, 325 N.W.2d 643 (1982) (“patent ambiguity” rules precluded examination of surrounding circumstances).

133. LB 354, 83rd Leg., 1st Sess., at 233 (Neb. 1974); see 1974 NEB. LEGIS. J. 513, 660.

134. 1974 Neb. Laws at 262-63, LB 354 § 314, at 133-34.

Nebraska Uniform Probate Code enacted in 1974 became operative January 1, 1977, and applied to wills of decedents dying thereafter.¹³⁵

Application of the rules of construction and presumptions to preexisting trusts may not lessen "the need to know [those] two bodies of law."¹³⁶ It will continue to be necessary to consider the circumstances in which the trust was created in order to interpret the "terms of a trust"—"the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding." Stated differently, it is necessary to consider the application of the former rules of construction in order to determine whether or not the new rules of the UTC are applicable. As a matter of sound policy, the former rules of construction and presumptions should be applied to carry out a preexisting trust unless there is a "clear indication" that the provisions of the Uniform Trust Code are not contrary to the "manifestation of the settlor's intent" under the rules in effect when the trust instrument was executed.

The provisions of UTC section 1106(a)(4) may tend to defeat, rather than carry out, the probable intentions of settlors of irrevocable trusts created before enactment of the UTC. It will certainly have that effect upon spendthrift provisions.¹³⁷ It would have been preferable for the Nebraska legislature to have omitted UTC section 1106(a)(4) just as the legislature omitted a similar provision from the Nebraska Uniform Probate Code. Omission of UTC section 1106(a)(4) would have left the question of a particular settlor's intent as "a matter of fact to be determined on the totality of the circumstances."¹³⁸

B. Rules of Construction

1. Scope of "Rules of Construction"

Neither the text of UTC section 1106 nor its explanatory Comment supplies further definition of the term "rule of construction." The brief

135. See NEB. REV. STAT. § 30-2901(b)(1) (Reissue 1995). This section is Nebraska's enactment of Uniform Probate Code section 8-101 to which the UTC Comment to section 1106 refers as a "comparable uniform law effective date provision." Although there are several "comparable" provisions, Section 30-2901 applies only to "any wills of decedents dying thereafter" and contains no express language concerning its applicability to inter vivos or testamentary trusts created before the operative date. With respect to preexisting trusts, the Nebraska Uniform Probate Code would appear to have provided only administrative and procedural rules which did not alter preexisting beneficial interests in the trusts.

136. See Comment to UTC § 1106: "In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen."

137. See the discussion in the text starting *supra* note 117.

138. See the discussion in the text following *supra* note 129.

UTC commentary on "rules of construction" appears following optional UTC section 112 (Rules of Construction), which Nebraska omitted.¹³⁹ The text of UTC section 112 states: "The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of trust property."

The UTC takes a broad view that the rules applicable to trusts and estates should be the same, but because of wide variations in the rules of construction among the states, no uniform statutory rules of construction should be a part of the UTC.¹⁴⁰ Other than UTC section 112, however, the UTC does not identify which of its provisions are intended to be rules of construction.

Nebraska adopted the Uniform Probate Code "rules of construction"¹⁴¹ as part of the 1974 enactment. However, it omitted a provision of the proposed Uniform Probate Code that the rules of construction apply to previously executed instruments "unless there is a clear indication of a contrary intent."¹⁴² Nebraska has not adopted the recommended revisions to the Uniform Probate Code containing rules of construction applicable to both wills and trusts, approved by the NCCUSL in 1990, as amended in 1991 and 1993.¹⁴³

The Nebraska legislative study group recommended that UTC section 112 be omitted from the Nebraska enactment and that detailed statutory rules of construction for trusts be developed by a separate study.¹⁴⁴ Some of the Nebraska Uniform Probate Code rules of construction seem to be much more substantive in nature than what is commonly understood to be a rule of construction. For example, the first section in Intestate Succession and Wills, Part 6, Rules of Construction, of Nebraska's Uniform Probate Code contains a requirement that a devisee survive the testator by 120 hours unless the will contains "language dealing explicitly" with survival.¹⁴⁵ There is a similar 120 hour condition of survival in the anti-lapse "rules of construction" applicable to devises and class gifts.¹⁴⁶ Some of the items characterized as rules of construction in the Comment to UTC section 112¹⁴⁷ do not appear under the heading Rules of Construction in the

139. The Comment to UTC section 112 appears, in pertinent part, *infra* in the text associated with note 152.

140. See Comment to UTC § 112 and General Comment to UTC Article I. The General Comment to UTC Article I is reproduced in Report, *supra* note 3 at 7-8.

141. NEB. REV. STAT. §§ 30-2339 to 30-2350 (Reissue 1995).

142. See the discussion in the text following *supra* at note 129.

143. Uniform Probate Code Article II, Part 7, §§ 2-701 through 2-711, 8 U.L.A. pt. 1 at 181-205.

144. See Nebraska Comments on UTC § 112, Report, *supra* note 3 at 53-54.

145. NEB. REV. STAT. § 30-2339 (Reissue 1995).

146. *Id.* § 30-2343.

147. See text starting *infra* at note 151.

Nebraska Uniform Probate Code.¹⁴⁸ Additionally, it is not clear whether the rules of "patent ambiguity" and "latent ambiguity," sometimes used by courts in interpreting wills, would be applied in the same manner to trust instruments.¹⁴⁹

The Nebraska Uniform Probate Code rules of construction state that the intention of a testator is controlling and that the "rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will."¹⁵⁰ Enactment of the Nebraska Uniform Probate Code in 1974 applied only to the wills of decedents dying after January 1, 1977,¹⁵¹ so there was a reasonable period of time for the transition to any new rules. The burden of factual proof under the Probate Code language "unless a contrary intention is indicated by the will" appears to be a lower standard than the language in UTC section 1106(a)(4), "unless there is a clear indication of a contrary intent in the terms of the trust."

The Comment to UTC section 112 explains that rules of construction are not simply rules of interpretation of trust instruments:¹⁵²

Rules of construction are not the same as constructional preferences. A constructional preference is general in nature, providing general guidance for resolving a wide variety of ambiguities. An example is a preference for a construction that results in a complete disposition and avoid illegality. Rules of construction, on the other hand, are specific in nature providing guidance for resolving specific situations or construing specific terms. Unlike a constructional preference, a rule of construction, when applicable, can lead to only one result.

Rules of construction attribute intentions to individual donors based on assumptions of common intention. Rules of construction are found both in enacted statutes and in judicial decisions. Rules of construction can involve the meaning to be given to a particular language in the document, such as the meaning to be given to "heirs" or "issue." Rules of construction also address situations the donor failed to anticipate. These include the failure to anticipate the predecease of a beneficiary or to specify the source from which expenses are to be paid. Rules of construction can also concern assumptions as to how a donor would have revised donative documents in light of certain events occurring after execution. These include rules dealing with the effect of a divorce and whether a specific devisee will receive a substitute gift if the subject matter of the devise is disposed of during the testator's lifetime.

The decision to omit optional UTC section 112 creates a question about what are considered rules of construction for the purposes of

148. See, e.g., NEB. REV. STAT. §§ 30-2209(23) (definition of "issue" for purposes of application of the Nebraska Uniform Probate Code), 30-2333 (revocation of will by divorce and nonrevocation by other circumstances) (Reissue 1995).

149. Cf. *In re Estate of Florey*, 212 Neb. 665, 325 N.W.2d 643 (1982) ("patent ambiguity" doctrine precluded examination outside the four corners of a will, executed before the Nebraska Uniform Probate Code, of a decedent who died after the enactment).

150. NEB. REV. STAT. § 30-2341 (Reissue 1995).

151. See NEB. REV. STAT. § 30-2901(b)(1) (Reissue 1995).

152. Comment, UTC § 112.

UTC section 1106(a)(4). One probable example of a rule of construction is UTC section 814(b)(1), which provides: "unless the terms of the trust expressly indicate that a rule in this subsection does not apply: (1) a person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee's individual health, education, support or maintenance within the meaning of" the Internal Revenue Code.¹⁵³ Another probable example is the provision added to the Nebraska UTC section 1106 that: "Any reference to the powers authorized under the Nebraska Trustees' Powers Act as such act existed prior to the operative date of this act is deemed to be a reference to the powers authorized under the Nebraska Uniform Trust Code."¹⁵⁴ Some of the presumptions contained in the UTC operate in a similar manner to rules of construction as described in the UTC Comment to optional UTC section 112.¹⁵⁵ UTC section 602(a) provides that "[u]nless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust," but that rule "does not apply to a trust created under an instrument executed before [the effective date of this [Code]]."¹⁵⁶ The result is largely guesswork on which provisions of the UTC, other than optional UTC section 112, are rules of construction within the meaning of UTC section 1106(a)(4).

2. Constitutional Limitations

The Comment to UTC section 1106 observes without additional explanation or reference to other sources: "Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date."¹⁵⁷ This explanation was added following approval of the UTC by NCCUSL at its 2000 summer meeting.¹⁵⁸

Nebraska's omission of optional UTC section 112 narrows the likelihood that there will be constitutional issues from rules of construc-

153. NEB. REV. STAT. § 30-3879(b)(1) (Supp. 2003). See Comment to UTC § 814(b)(1) ("Unless the terms of the trust expressly indicate that the rule in this subsection is not to apply, the power to make discretionary distributions to a beneficiary-trustee is automatically limited by the requisite ascertainable standard necessary to avoid inclusion of the trust in the trustee's gross estate or result in a taxable gift upon the trustee's release or exercise of the power.").

154. LB 130, 98th Leg., 1st Sess., § 110(c), at 69 (Neb. 2003); NEB. REV. STAT. § 30-38,110(c) (Supp. 2003).

155. See discussion in section IV.C of this article, *infra*.

156. NEB. REV. STAT. § 30-3854(a) (Supp. 2003).

157. There are no references to other authorities on this issue in the Comments to UTC sections 1106 or 112.

158. See discussion in section II.C of this article, *supra*.

tion in the Nebraska UTC. Those issues will be much more significant if, or when, there is an adoption of detailed rules of construction for trusts as recommended in the legislative study report.¹⁵⁹ The concern with the application of rules of construction to preexisting irrevocable trusts under Nebraska UTC section 1106(a)(4) is not primarily constitutional but, rather, with distortions in the application of rules relating to ascertaining the intention of the settlor.

There will be situations, such as the authority under UTC section 111(d)(1) for nonjudicial settlement agreements of "the interpretation or construction of the terms of the trust," which will need to take constitutional issues relating to beneficial interests into account. Insofar as the nonjudicial settlement agreement relates to a bona fide compromise of an existing controversy, UTC section 111(d)(1) seems properly applicable to preexisting trusts.¹⁶⁰ To the extent that a nonjudicial settlement agreement might affect beneficial interests in preexisting trusts apart from an existing controversy concerning "the interpretation or construction of the terms of the trust," UTC section 111(d)(1) may be constitutionally suspect. The apparent "rule of construction" in UTC section 814(b)(1)¹⁶¹ that authorizations of discretionary distributions to a beneficiary-trustee are automatically limited by an ascertainable standard also seems constitutionally suspect in its retroactive application. This type of analysis illustrates that provisions of the UTC having an effect on beneficial interests in preexisting trusts cannot avoid constitutional scrutiny by being identified as "rules of construction" under UTC section 1106(a)(4).

C. Presumptions

1. Scope of Presumptions

The Uniform Trust Code contains a variety of express and implicit presumptions. Presumptions provide a tentative rule of construction and assign the burden of factual proof in the circumstances. The Nebraska Evidence Rules provide that: "In all cases not otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the non-existence of the presumed fact is more probable than its existence."¹⁶²

UTC section 413(a) "modifies the doctrine of *cy pres* by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to

159. See Report, *supra* note 3 at 54.

160. See discussion in section VII.B of this article, *infra*.

161. NEB. REV. STAT. § 30-3879(b)(1) (Supp. 2003).

162. NEB. REV. STAT. § 27-301 (Reissue 1995).

achieve.¹⁶³ UTC section 802(c) states that a transaction between the trustee and the trustee's spouse, other family members, an attorney or agent of the trustee, or a corporation or other person or enterprise in which the trustee or another person has a significant interest which might affect the trustee's best judgment, "is presumed to be affected by a conflict between personal and fiduciary interests."¹⁶⁴ The presumption does not apply to an investment by a trustee in securities of an investment company or investment trust in which the trustee or an affiliate participates.¹⁶⁵ UTC section 808(d) states that a person, other than a beneficiary, who holds a power to direct the modification or termination of the trust "is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries."¹⁶⁶ UTC section 602 reverses the current general rule "that a trust is presumed irrevocable absent evidence of a contrary intent,"¹⁶⁷ but the new rule does not apply to a "trust created under an instrument executed before [the effective date of this [Code]]."¹⁶⁸ With respect to modification or termination of a noncharitable irrevocable trust by consent, UTC section 411(c) provides that a spendthrift provision "is not presumed to constitute a material purpose of the trust,"¹⁶⁹ which changes what apparently would have been the rule prior to the UTC in view of Nebraska's traditional enforcement of spendthrift provisions.¹⁷⁰ The commentary characterizes as a "presumption of abuse" the rule that an exculpatory term drafted by a trustee is invalid unless the trustee proves that the term is fair under the circumstances, although the text of the section does

163. Comment, UTC § 413 ("Traditional doctrine did not supply that presumption, leaving it to the courts to determine whether the settlor had a general charitable intent."). See NEB. REV. STAT. § 30-3839 (Supp. 2003); Report, *supra* note 3 at 131 (citing *In re Last Will and Testament of Teeters*, 205 Neb. 735, 288 N.W.2d 735 (1980) ("a general charitable intent is a precondition to the exercise of the court's *cy pres* power").

164. NEB. REV. STAT. § 30-3867(c) (Supp. 2003). The Comment to UTC section 802 characterizes these transactions as "presumptively voidable, not void." NEB. REV. STAT. § 30-3867 (Supp. 2003) omits UTC section 802(d), which provides that a transaction between a trustee and a beneficiary not involving trust property and in which the trustee obtains an advantage "is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary."

165. UTC § 802(f); NEB. REV. STAT. § 30-3867(e) (Supp. 2003). The Comment to UTC section 802 characterizes the general rule in UTC section 802(b) relating to transactions "for the trustee's own personal account" as "irrebuttably presumed to be affected by a conflict between personal and fiduciary interests."

166. NEB. REV. STAT. § 30-3873(d) (Supp. 2003).

167. Comment, UTC § 602.

168. UTC § 602(a); NEB. REV. STAT. § 30-3854(a) (Supp. 2003).

169. NEB. REV. STAT. § 30-3837(c) (Supp. 2003).

170. See Nebraska Comment (3) on UTC § 411(c), Report, *supra* note 3, at 124.

not use the word "presumption."¹⁷¹ In a similar sense, the UTC, itself, operates as a presumption inasmuch as it provides default rules which apply "except as otherwise provided in the terms of the trust."¹⁷²

2. *Constitutional Limitations*

The Comment to UTC section 1106 does not express the same concern for constitutional limitations on the retroactive application of presumptions in the UTC as for rules of construction. It states merely: "Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date."¹⁷³ Nevertheless, the same constitutional limitations would apply if the presumption operates in a manner similar to that of a rule of construction in its effect on a beneficial interest in an irrevocable trust created before the operative date of the statute.

Two of the presumptions of the UTC should not be applied to pre-existing trusts, at least on the basis of effectuating the settlor's intentions. The presumption that spendthrift provisions are not a material purpose of the trust, a significant change in Nebraska law, should not be applied to the modification or termination of a preexisting noncharitable irrevocable trust by consent under UTC section 411(c). The presumption of a general charitable intent should not be applied to trusts established before the operative date of the UTC for the same reasons, or alternatively by the exercise of judicial discretion under UTC section 413(a)(3) or the court's constitutional equity powers. The other presumptions of the UTC do not appear to affect retroactively the beneficial interests under preexisting trusts.

V. ACT DONE BEFORE THE EFFECTIVE DATE

UTC section 1106(a)(5) provides that "an act done before [the effective date of the [Code]] is not affected by this [Code]."¹⁷⁴ The evolution of UTC section 1106 and its Comment suggests that this language may apply to the establishment of beneficial interests in irrevocable trusts created before the operative date of the UTC.¹⁷⁵ If so, UTC sec-

171. Comment, UTC § 1008; NEB. REV. STAT. § 30-3897 (Supp. 2003). The effect of an exculpatory term under UTC section 1008 cannot be overridden by the terms of the trust. UTC § 105(b)(10); NEB. REV. STAT. § 30-3805(b)(10) (Supp. 2003).

172. UTC § 105(a); NEB. REV. STAT. § 30-3805(a) (Supp. 2003).

173. Comment, UTC § 1106.

174. NEB. REV. STAT. § 30-38,110(a)(5) (Supp. 2003). The Comment to UTC section 1106 states only: "Nor is an act done before the effective date of the Code affected by the Code's enactment." UTC section 103(1) provides: "'Action,' with respect to an act of a trustee, includes a failure to act." NEB. REV. STAT. § 30-3803(1) (Supp. 2003).

175. See discussion of the evolution of UTC section 1106 and its Comment in Section II.C of this article, *supra*.

tion 1106(a)(5) will become very important in defining the retroactivity of the UTC to preexisting irrevocable trusts so as to avoid constitutional issues. In any event, UTC section 1106(a)(5) insures the finality of administrative and procedural acts "done" before the new provisions come into play.

When first included in the drafts of the UTC, the provision followed that of the Uniform Probate Code:¹⁷⁶ "an act done before the effective date in any proceeding and any accrued right is not impaired by this code." The draft Comment noted:¹⁷⁷

But recognizing constitutional concerns, excluded from coverage are trusts created prior to the Act's effective date if such application would impair a vested right. For such an impairment to occur, however, the trust would have to be irrevocable as of the effective date and the particular provision of the Act would have to actually reduce or otherwise threaten a beneficial interest.

In the course of further drafts during the later stages of the Committee activity, the language "in any proceeding and any accrued right" was deleted. The language "an act done before the effective date" was retained. The phrase "is not impaired by this code" was changed to "is not affected by this code." The Comment was reworded in the months before the UTC's adoption by NCCUSL and again following its adoption. But other than the sentence on the retroactive application of rules of construction, the final Comment does not define the potential constitutional limitations on retroactivity of the UTC.

Both the text and the background of UTC section 1106(a)(5) suggest its application to all acts done before the effective date of the UTC, whether the act is administrative, procedural, or one establishing beneficial interests in an irrevocable trust. That interpretation of UTC section 1106(a)(5) can facilitate implementation of the UTC and avoid potential constitutional issues concerning retroactivity of the enactment.

VI. STATUTES OF LIMITATIONS

The UTC has a simple transitional rule concerning statutes of limitations which, in practical effect, means that events occurring before the operative date of the UTC are measured by timelines then applicable and events after the operative date are measured by the new timelines. UTC section 1106(b) states: "If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of the [Code]], that statute continues to apply to the right even if

176. See NEB. REV. STAT. § 30-2901(b)(4) (Reissue 1995) (UPC § 8-101(b)(4)). The UTC draft stated: "an act done before the effective date in any proceeding and any accrued right is not impaired by this [Act]." Draft of October 13, 1997, § 7-107(b)(5).

177. See discussion in section II.C of this article, *supra*.

it has been repealed or superseded.”¹⁷⁸ This language avoids constitutional issues involved in retroactive changes of time limits.¹⁷⁹ The time periods for commencing judicial proceedings cannot be altered by the terms of a trust.¹⁸⁰

The Nebraska Uniform Probate Code was enacted with identical language:¹⁸¹ “If a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the operative date, the provisions shall remain in force with respect to that right.” The Nebraska Supreme Court applied this language in *Jacobson v. Nemesio*.¹⁸² J. Herbert Jacobson’s wife died before the operative date of the Nebraska Uniform Probate Code but her will was not filed for probate until after the operative date. Herbert sought to waive his rights under the will and take a statutory share of his wife’s estate under the former statute allowing an election within one year “after the issuance of letters testamentary.” The applicable time limit for an election under the Uniform Probate Code was “within six months after the first publication of notice to creditors.” Focusing on the language in the transitional rule “right . . . has commenced to run by the provisions of any statute before the operative date,” the court held that since no letters testamentary had been issued when the Uniform Probate Code became operative, the six month statute of limitations of the Uniform Probate Code was controlling and Herbert’s election was too late.¹⁸³

UTC section 1005 provides new time periods for commencing a proceeding against a trustee for breach of trust.¹⁸⁴ The section also changes rules pertaining to the form of disclosure and the standards for measuring time (when the report is sent rather than received).¹⁸⁵ UTC section 604 establishes new time limits for commencing a judicial proceeding to contest the validity of a revocable trust and distributions of trust property from a revocable trust which becomes irrevoca-

178. NEB. REV. STAT. § 30-38,110(b) (Supp. 2003). The Comment to UTC section 1106 states: “Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code.”

179. See *Kratochvil v. Motor Club Ins. Ass’n*, 255 Neb. 977, 987, 588 N.W.2d 565, 573 (1999) (“The Legislature’s power to change limitation periods is subject to two restrictions. First, the Legislature may not deprive a defendant of a bar which has already become complete. Second, the Legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action.”).

180. UTC § 105(b)(12), NEB. REV. STAT. § 30-3805(b)(12) (Supp. 2003).

181. NEB. REV. STAT. § 30-2901(b)(4) (Reissue 1995).

182. 204 Neb. 180, 281 N.W.2d 552 (1979).

183. *Id.* at 185, 281 N.W.2d at 555.

184. NEB. REV. STAT. § 30-3894 (Supp. 2003).

185. See Report, *supra* note 3, at 314-15.

ble by reason of the settlor's death.¹⁸⁶ These new time periods will apply prospectively to actions initiating a limitation period on and after the operative date of the Nebraska UTC.

VII. SUBSTANTIVE TRUST RULES WARRANTING SPECIAL CONSIDERATION

A. Claims of Certain Judgment Creditors Against Spendthrift and Discretionary Trusts

The UTC contains substantive provisions allowing some creditors' claims against spendthrift and discretionary trusts. UTC section 503(b) states:¹⁸⁷ "Even if a trust contains a spendthrift provision, a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary." UTC section 504(c)(1) states:¹⁸⁸ "To the extent a trustee has not complied with a standard of distribution or has abused a discretion: (1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse." The effect of a spendthrift provision and the rights of creditors in these situations cannot be overridden by the terms of a trust.¹⁸⁹

Under prior Nebraska judicial decisions, the assets of spendthrift trusts could be reached by a judgment creditor of a trust beneficiary only to the extent the trust beneficiary could enforce payment of that amount from the trust.¹⁹⁰ UTC section 503(b) broadens the rules for

186. NEB. REV. STAT. § 30-3856 (Supp. 2003). The Nebraska statute changes the UTC times applicable to contesting the validity of the revocable trust from the earlier of three years after death or 120 days after sending notice to the earlier of one year after death or 120 days after sending notice.

187. NEB. REV. STAT. § 30-3848(b) (Supp. 2003).

188. NEB. REV. STAT. § 30-3849(c)(1) (Supp. 2003). UTC section 502(c)(2) states that: "the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion." NEB. REV. STAT. § 30-3849(c)(2) (Supp. 2003).

189. UTC § 105(b)(5); NEB. REV. STAT. § 30-3805(b)(5) (Supp. 2003).

190. See *O'Shea v. O'Shea*, 191 Neb. 217, 222, 214 N.W.2d 486, 489 (1974). UTC section 506 allows a creditor or assignee of a spendthrift trust to reach a mandatory distribution of income or principal if the trustee has not made distribution within a reasonable time. NEB. REV. STAT. § 30-3851 (Supp. 2003). So does current Nebraska law. See Report, note 3, *supra*, at 164-65.

specified judgment creditors to include discretionary distributions by the trustee.¹⁹¹

The property of discretionary trusts has not previously been subject to the claims of judgment creditors.¹⁹² UTC section 504(c)(1) changes the prior Nebraska judicial rules¹⁹³ to allow “the court to satisfy a judgment or court order against the beneficiary [of a discretionary trust] for support or maintenance of the beneficiary’s child, spouse or former spouse” to the extent a trustee has abused its discretion.

These changes amount to more than merely new rules of construction. They alter the previously existing interests of the trust beneficiaries when applied to trusts created before the operative date of the UTC. It should make no difference analytically concerning the retroactive effects of the legislation that the previously existing interests were secured in accordance with judicial decisions rather than by virtue of statutory provisions.¹⁹⁴

With respect to potential constitutional issues concerning the retroactive effects of UTC sections 503(b) and 504(c),¹⁹⁵ there is an ap-

191. See Report, *supra* note 3 at 154. Similarly, UTC section 505(a)(2) allows a creditor or assignee of the settlor to reach the maximum amount of an irrevocable trust that can be distributed to or for the settlor’s benefit. NEB. REV. STAT. § 30-3850(a)(2) (Supp. 2003).

192. See *Doksansky v. Norwest Bank*, 260 Neb. 100, 615 N.W.2d 104 (2000); *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994).

193. See Report, *supra* note 3 at 158.

194. The “state action” concept inherent in the Due Process Clauses in federal and state constitutions is applicable to both the legislative and judicial branches of state government. See discussion in *State v. Redmond*, 262 Neb. 411, 418, 631 N.W.2d 501, 507 (2001) (one of the saga of Nebraska decisions involving “malice” as an element of the crime of second degree murder) (“If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.”) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 353-354 (1964)). As the basis for its decision in *State v. Redmond*, the Nebraska Supreme Court stated: “a judicial decision interpreting a statute may be applied retroactively unless the decision denies due process by being both unexpected *and* indefensible by reference to the law which had been expressed prior to the conduct in issue.” 262 Neb. at 420, 631 N.W.2d at 508 (emphasis in original text); see also *Karrer v. Karrer*, 190 Neb. 610, 613-614, 211 N.W.2d 116, 118-19 (1973) (“The power of the courts to vacate or modify their own judgments is limited. [citations omitted] The underlying basis of our holdings . . . is that rights have vested and are not therefore subject of modification. The Legislature is subject to similar limitations and the foundation is constitutional and lies in the due process clause of the Fourteenth Amendment to the Constitution of the United States. Statutes may not operate retroactively so as to impair vested rights. . . . Private rights of parties which have vested by the judgment of a court cannot be taken away by subsequent legislation, but must be enforced by the courts regardless of such legislation.”).

195. For a discussion of decisions in other states concerning retroactive legislative diminution of spendthrift provisions, see IIA WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 152.1, at 105-08 (4th ed. 1987). UTC section 503(c), Neb. Rev. Stat.

peeling analogy to Nebraska decisions on the retroactive effects of changes in land zoning requirements. The zoning decisions constitute a significant body of Nebraska law on the constitutional limitations of retroactive legislation. The crux of these decisions is that although landowners have no property right to a continuation of the statutory provisions, amendments cannot be applied retroactively to diminish the uses which were lawfully established before the legislative changes.¹⁹⁶ The spendthrift and discretionary trust changes do not affect fully "vested" rights in a property law sense, since under present Nebraska law, judgment creditors have at least nominally the same rights as a trust beneficiary to enforce payment from the trust. The significant expansion by UTC sections 503(b) and 504(c) of the rights of certain judgment creditors, however, diminishes the property and value of the trust. At best, the changes may be of benefit to the trust beneficiary whose adverse judgment is satisfied and to the specified judgment creditors, but at the expense of the remaining trust beneficiaries and of the trust edifice previously created by the settlor.

It is entirely appropriate for the State to exercise its legislative powers to reflect the public policies contained in UTC sections 503(b) and 504(c).¹⁹⁷ However, the application to trusts created before the enactment seems constitutionally suspect.

One response to spendthrift provisions in trusts created before enactment of the UTC is to consider them as "an act done before [the effective date of the UTC]" and not affected by the new rules by virtue of UTC section 1106(a)(5).¹⁹⁸ A better approach would be to limit their applicability statutorily to trusts which become irrevocable after the operative date of the UTC.

B. Nonjudicial Settlements

The drafters of the UTC favor nonjudicial resolution of disputes relating to trusts.¹⁹⁹ UTC section 111(b) provides that "[e]xcept as

§ 30-3848(c) (Supp. 2003), does not have retroactive effect, but recognizes only that "[a] spendthrift provision is unenforceable against a claim of this state or the United States to the extent a statute of this state or federal law so provides." (emphasis added).

196. See cases cited *supra* note 45.

197. It would also seem constitutionally permissible for courts to do the same thing prospectively within their constitutional equity jurisdiction in the absence of legislation. If, or to the extent that, the UTC spendthrift provisions retroactively overrule prior Nebraska Supreme Court decisions, the provisions would appear to violate the constitutional equity jurisdiction of the courts. See discussion in Part VIII of this article, *infra*.

198. See discussion in Part V of this article, *infra*.

199. "While the Uniform Trust Code recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law (see Section 201(a)), resolution of disputes by nonjudicial means is encouraged." Comment to UTC § 111.

otherwise provided in [UTC section 111(c)], interested persons²⁰⁰ may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.²⁰¹ Although UTC section 111(b) appears to give broad nonjudicial settlement authority, UTC section 111(c) imposes a significant limitation on such authority: “(c) A nonjudicial settlement agreement is valid only to the extent it *does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court* under this [Code] or other applicable law.”²⁰² The Comment adds: “Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner.”²⁰³ To protect against possible abuse, UTC section 111(e) allows any “interested person” to “request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in [Article] 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.”²⁰⁴

The limitation in UTC section 111(c) that a nonjudicial settlement agreement must not violate a “material purpose” of the trust is consistent with existing law in most United States jurisdictions limiting the rights of beneficiaries to terminate a trust.²⁰⁵ Although there is no published decision by a Nebraska appellate court expressly adopting

200. UTC section 111(a) defines the term “interested persons” as “persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.” NEB. REV. STAT. § 30-3811 (Supp. 2003).

201. NEB. REV. STAT. § 30-3811(b) (Supp. 2003). UTC section 111(d) provides a nonexclusive list of matters that may be resolved by a nonjudicial settlement agreement:

- (1) the interpretation or construction of the terms of the trust;
- (2) the approval of a trustee’s report or accounting;
- (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
- (4) the resignation or appointment of a trustee and the determination of a trustee’s compensation;
- (5) transfer of a trust’s principal place of administration; and
- (6) liability of a trustee for an action relating to a trust.

NEB. REV. STAT. § 30-3811(d) (Supp. 2003). UTC section 111(e) provides that “[a]ny interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in [Article] 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.” NEB. REV. STAT. § 30-3811(e) (Supp. 2003).

202. NEB. REV. STAT. § 30-3811(c) (Supp. 2003) (emphasis added).

203. Comment, UTC § 111.

204. NEB. REV. STAT. § 30-3811(e) (Supp. 2003).

205. The leading case usually cited as establishing this rule is *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889). The RESTATEMENT (SECOND) OF TRUSTS § 337(2) (1959) adopts this rule: “(2) If the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination.” A few United States jurisdictions do not follow this rule. See, e.g., *Fisher v. Ladd*,

the “material purpose” rule, it appears reasonable to assume that Nebraska would follow Section 337 of the Restatement (Second) of Trusts, which adopts the “material purpose” rule.²⁰⁶

Although the use in UTC section 111(c) of the “material purpose” rule appears consistent with existing Nebraska law, UTC section 111 does change Nebraska law in two ways. First, UTC section 111 expressly allows binding nonjudicial settlements. In *Rohlf v. German Old People’s Home*,²⁰⁷ a case involving a testamentary charitable trust,²⁰⁸ the Nebraska Supreme Court addressed, among other issues, the question of whether a settlement agreement between the charitable beneficiary and the heirs of the decedent changed the rights of the parties. The court concluded that the settlement agreement could not do so:

The trust itself is not and cannot be affected by any compromise as neither the court nor the litigants have power and authority to change its nature and purpose. Neither can the use be diverted by the beneficiaries for the time being through an agreement or arbitration. They cannot alien it, for the property is not theirs to sell. They cannot donate it, for the title is not in them. They cannot misapply it, for the use for which it was created cannot be changed.²⁰⁹

The court recognized that, under certain circumstances, parties could enter into a binding compromise.²¹⁰ Nevertheless, the general rule prohibiting nonjudicial compromises is clear. Thus, UTC section 111

268 S.E.2d 20 (N.C. Ct. App. 1980). A few states have modified the rule by statute. See, e.g., Mo. Rev. Stat. § 456.590.2 (1992).

206. UTC section 411(b) expressly adopts the “material purpose” rule for judicial proceedings: “(b) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.” NEB. REV. STAT. § 30-3837(b) (Supp. 2003). However, note that UTC section 411(c) provides that “[a] spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.” NEB. REV. STAT. § 30-3837(c) (Supp. 2003). UTC section 111 contains no special rule for spendthrift provisions. For a further discussion of this difference between UTC sections 111 and 411, see *infra* section VII.C.

207. 143 Neb. 636, 10 N.W.2d 686 (1943)

208. The testamentary gift was to a charitable corporation. The Nebraska Supreme Court treated the gift as equivalent to a charitable trust:

The general rule is that a bequest in the form of a trust to a charitable corporation organized for the same charitable purpose as that shown in the purported trust is not technically a trust. It is a gift to the charitable corporation to accomplish the purposes of the corporation, but is equivalent to a bequest upon a charitable trust.

Id. at 641, 10 N.W.2d at 690.

209. 143 Neb. at 649, 10 N.W.2d at 690.

210. “[T]he right to compromise a controversy in a proper case is undeniable. Where, therefore, a charitable gift is contingent on certain events, the trust is not perverted by a compromise agreement through which the trustees receive a certain definite amount of property impressed with the same trust in lieu of the contingent interest.” *Id.*

changes the general rule in *Rohlf* relating to binding nonjudicial settlements.

Second, UTC section 111 authorizes use of virtual representation in nonjudicial settlements. Although Nebraska has recognized the concept of virtual representation before adoption of the Uniform Probate Code,²¹¹ the UPC provides statutory authority for virtual representation only in formal judicial proceedings involving the administration of the estates of decedents, minors, protected persons, or incapacitated persons and in judicially supervised settlements.²¹² In contrast, UTC sections 111 and 304 authorize use of virtual representation in the context of nonjudicial settlement agreements.

One final point deserves attention. The nonjudicial settlement authority created by UTC section 111 is significantly narrower than the authority for private agreements created by the Nebraska Probate Code. Section 30-24,110 of the Nebraska Revised Statutes provides that competent "successors"²¹³ to a decedent

may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties.²¹⁴

In contrast to the wide ranging private agreement power created by the Nebraska Probate Code, UTC section 111 allows nonjudicial settlements only to the extent they do not violate a "material purpose" of the trust. Further, such settlements must include only terms and conditions that a court could approve under the UTC or other applicable law.²¹⁵

Although UTC section 111 recognizes nonjudicial settlement agreements and use of virtual representation in connection with such

211. See JUDICIARY COMM. OF 83RD NEBR. LEG., WORKING PAPERS AND PRELIMINARY INTERIM STUDY REPORT ON A REVISED NEBRASKA PROBATE CODE 36-37 (1973).

212. NEB. REV. STAT. § 30-2222 (Reissue 1995).

213. The Nebraska Probate Code defines the term "successors" as "those persons, other than creditors, who are entitled to property of a decedent under his or her will or the Nebraska Probate Code." NEB. REV. STAT. § 30-2209(46) (Reissue 1995).

214. NEB. REV. STAT. § 30-24,110 (Reissue 1995). Section 30-24,110 further provides: Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts.

215. "Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner." Comment, UTC § 111.

agreements, UTC section 111 does not represent an enormous change in Nebraska law. The ability to use nonjudicial settlements is carefully restricted, in particular by the requirement that any such settlement not violate a "material purpose" of the trust. UTC section 111 is narrower than the private agreements provision in the Nebraska Probate Code. In short, although UTC section 111 should facilitate nonjudicial resolution of disputes relating to trusts, it will not significantly enhance the abilities of beneficiaries to depart from the intentions of the settlor.²¹⁶

C. Modification or Termination of a Noncharitable Irrevocable Trust by Consent

UTC Section 411 provides for judicial modification or termination of a noncharitable irrevocable trust by consent. If the settlor joins with all²¹⁷ beneficiaries, UTC Section 411(a) permits modification or termination of the trust, "even if the modification or termination is inconsistent with a material purpose of the trust."²¹⁸ In general, UTC section 411(a) appears to codify existing Nebraska law.²¹⁹

216. Arizona's version of UTC section 111 applies prospectively only, suggesting that the Arizona legislature had concerns about enhancing the abilities of beneficiaries of existing trusts to depart from the intentions of the settlor.

217. The Comment to UTC Section 411 explains:

The provisions of Article 3 on representation, virtual representation and the appointment and approval of representatives appointed by the court apply to the determination of whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include authority to consent over the other person's objection. See Section 301(b). Regarding the persons who may consent on behalf of a beneficiary, see Sections 302 through 305. A consent given by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented. Given this limitation, virtual representation of a beneficiary's interest by another beneficiary pursuant to Section 304 will rarely be available in a trust termination case, although it should be routinely available in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual or other form of representation is unavailable, Section 305 of the Code permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms of representation to consent on a beneficiary's behalf to a trust termination or modification has not traditionally been part of the law, although there are some notable exceptions. Compare Restatement (Second) Section 337(1) (1959) (beneficiary must not be under incapacity), with *Hatch v. Riggs National Bank*, 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on beneficiary's behalf).

218. UTC § 411(a), NEB. REV. STAT. § 30-3837(a) (Supp. 2003).

219. "Nebraska law appears to be consistent with Restatement (Second) of Trusts § 338(1) (1959) which permits termination upon joint action of the settlor and beneficiaries." Report, *supra* note 3, at 122. However, the Report notes that UTC section 411(a) is

As a codification of the “common law of trusts,” UTC section 411(a) should not present adverse federal tax consequences for a settlor. *Helvering v. Helmholtz*²²⁰ held that a power of “all of the then beneficiaries, other than testamentary appointees” (which included the settlor as a trust beneficiary) to terminate the trust was not a taxable power to revoke, alter or amend the trust under provisions of the existing federal estate tax law.²²¹ Relying on the Restatement of the Law of Trusts,²²² the Court stated:²²³

The general rule is that all parties in interest may terminate the trust. The clause in question added nothing to the rights which the law conferred. Congress cannot tax as a transfer intended to take effect in possession or enjoyment at the death of the settlor a trust created in a state whose law permits all the beneficiaries to terminate the trust.

In contrast to UTC § 411(a), UTC sections 411(b) and 411(c) significantly change Nebraska law. UTC section 411(b) provides:²²⁴

(b) A noncharitable irrevocable trust may be *terminated* upon consent of all of the beneficiaries if the court concludes that *continuance of the trust is not necessary to achieve any material purpose* of the trust. A noncharitable irrevocable trust may be *modified* upon consent of all of the beneficiaries if the court concludes that *modification is not inconsistent with a material purpose of the trust*.

UTC section 411(c)²²⁵ provides that “[a] spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.” Although UTC section 411(b) codifies the so-called *Clafin* rule²²⁶ that trust beneficiaries cannot modify or terminate an irrevocable trust if continuance of the trust is necessary to achieve a material purpose²²⁷ of the trust, UTC section 411(c) changes Nebraska law

[n]ot consistent with Nebraska law as it relates to guardian’s authority to amend or terminate a trust. Also UTC § 411(a) is inconsistent with NPC § 30-2637(3) to the extent that the Nebraska Probate Code requires a showing of clear and convincing evidence before the court can exercise or release a power of the ward as trustee or create a revocable or irrevocable trust which may last beyond the ward’s disability or life time.

Report, *supra* note 3, at 124.

220. 296 U.S. 93 (1935).

221. The decision involved what is current Internal Revenue Code section 2038. See Treas. Reg. § 20.2038-1(a)(2). As a characterization of state property law for federal tax purposes, the decision should be equally applicable to Internal Revenue Code section 2036(a)(2). Otherwise, all irrevocable trusts might be subject to inclusion as a retained income “right” unless the trust expressly negated application of the “general rule” applied in *Helvering v. Helmholtz*.

222. 296 U.S. at 97 n.3 (citing sections 337 and 338).

223. 296 U.S. at 97.

224. NEB. REV. STAT. § 30-3837(b) (Supp. 2003) (emphasis added).

225. NEB. REV. STAT. § 30-3837(c) (Supp. 2003).

226. *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889).

227. The drafters of the UTC rely on the Restatement (Third) of Trusts to define the term “material purpose”:

The requirement that the trust no longer serve a material purpose before it can be terminated by the beneficiaries does not mean that the

by ending the existing presumption that a spendthrift provision reflects a material purpose of a trust.²²⁸ The drafters of the UTC argue that²²⁹

[s]pendthrift terms have sometimes been construed to constitute a material purpose without inquiry into the intention of the particular settlor. For examples, see Restatement (Second) of Trusts Section 337 (1959); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 1008 (Rev. 2d ed. 1983); and 4 Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 337 (4th ed. 1989). This result is troublesome because spendthrift provisions are often added to instruments with little thought.

Although UTC section 411(c) changes the existing Nebraska presumption relating to spendthrift provisions, UTC section 411(c) “does not negate the possibility that continuation of a trust to assure spendthrift protection might have been a material purpose of the particular settlor. The question of whether that was the intent of a particular settlor is instead a matter of fact to be determined on the totality of the circumstances.”²³⁰

There is a peculiar discontinuity between UTC section 111(c) and UTC sections 411(b) and (c). UTC section 111(c) provides that “[a] nonjudicial settlement agreement is valid only to the extent it does not violate a *material purpose of the trust*”²³¹ UTC section 411(b) also refers to a “material purpose” of a trust, but UTC section 411(c) provides that a court is not to presume that a spendthrift provision reflects a “material purpose” of the settlor. UTC section 111 does not include this special rule for spendthrift provisions. Does the failure to include the special spendthrift rule in UTC section 111 mean that the current Nebraska presumption that a spendthrift provision reflects a material purpose of the trust will continue for purposes of UTC section 111? Although UTC section 111 deals with nonjudicial settlement

trust has no remaining function. In order to be material, the purpose remaining to be performed must be of some significance:

Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary’s management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.

Comment, UTC § 411 (quoting Restatement (Third) of Trusts Section 65 cmt. d (Tentative Draft No. 3, approved 2001).

228. “Section 411(c) represents a departure from current Nebraska law by removing the presumption that a spendthrift provision qualifies as a material provision of a trust.” Report, *supra* note 3, at 124.

229. Comment, UTC § 411.

230. *Id.*

231. NEB. REV. STAT. § 30-3811(b) (Supp. 2003) (emphasis added).

agreements and UTC section 411 deals with judicial modifications or terminations, that difference does not explain why only UTC section 411 makes a specific reference to spendthrift provisions. If the argument in support of UTC section 411(c) (presuming a spendthrift provision reflects a material purpose of the settlor "is troublesome because spendthrift provisions are often added to instruments with little thought") is persuasive in the context of UTC section 411, the argument is equally persuasive in the context of UTC section 111. Alternatively, if the argument in support of UTC section 411(c) is not persuasive, neither UTC section 411 nor UTC section 111 should have a special rule for spendthrift provisions.²³² It would be helpful to re-examine the question of whether UTC sections 111 and 411 should treat spendthrift provisions consistently, and if so, whether the proper treatment is that reflected in UTC section 411(c).

D. Modification or Termination Because of Unanticipated Circumstances

UTC section 412(a) represents a significant change in Nebraska law because it provides statutory authority for use of the doctrine of equitable deviation to modify the dispositive terms of a private express trust:²³³

(a) The court may modify the *administrative* or *dispositive* terms of a trust or *terminate* the trust if, *because of circumstances not anticipated by the settlor*, modification or termination *will further the purposes of the trust*. To the extent practicable, the modification must be made *in accordance with the settlor's probable intention*.

Historically, courts have most often applied the equitable deviation doctrine in the context of charitable trusts.²³⁴ The Restatement (Second) of Trusts took the position that the deviation doctrine allowed a court to make changes in the administration of a charitable trust.²³⁵ According to the Restatement, courts would utilize the *cy pres* doctrine to determine "the extent to which the court will permit or direct the trustee to apply the trust property to charitable purposes other than

232. Arizona omitted UTC section 411(c) from its version of the UTC, suggesting that Arizona was not persuaded by the UTC drafters' argument in support of UTC section 411(c).

233. NEB. REV. STAT. § 30-3838(a) (Supp. 2003) (emphasis added).

234. In that context courts have sometimes shown confusion about the relation of the equitable deviation doctrine and the *cy pres* doctrine. Report of Committee on Charitable Trusts and Foundations, *Cy Pres and Deviation: Current Trends in Application*, 8 REAL PROP. PROB. & TR. J. 391, 399 (1973) (pointing out the confusion and noting that the line between *cy pres* and deviation is "sometimes difficult to perceive and that there is a gray area in which application of either doctrine is justifiable").

235. RESTATEMENT (SECOND) OF TRUSTS § 381, cmt. a (1959).

the particular charitable purpose designated by the settlor”²³⁶ In the context of noncharitable private express trusts, the Restatement (Second) of Trusts adopted the position that the doctrine of equitable deviation applied only to administrative provisions of a trust.²³⁷ Prior to the enactment of UTC section 412(a), Nebraska recognized the availability of the doctrine of equitable deviation to make changes to administrative provisions in charitable trusts.²³⁸ Although there is no reported Nebraska case law applying the doctrine of equitable deviation to modify administrative provisions of a noncharitable private express trust, it seems likely Nebraska would have followed the position of the Restatement (Second) of Trusts. However, prior to the enactment of UTC section 412(a), there was neither case law nor statutory authority for a Nebraska court to modify a dispositive provision of a private express trust.

In contrast to the position taken in the Restatement (Second) of Trusts, the Restatement (Third) of Trusts extends the doctrine of equitable deviation to matters affecting the dispositive as well as the administrative provisions of a trust.²³⁹ UTC section 412(a) reflects the position taken by the Restatement (Third) of Trusts. Although the Comment to UTC section 412 states that Section 412 “*broadens* the court’s ability to apply equitable deviation to terminate or modify a trust,”²⁴⁰ in fact UTC section 412(a) clearly changes Nebraska law.

Should UTC section 412(a) apply retroactively? To the extent that UTC section 412(a) authorizes application of the doctrine of equitable deviation to administrative provisions of a trust, the section does no more than codify what was already Nebraska law, so retroactive appli-

236. *Id.*; see also Report of Committee on Charitable Trusts and Foundations, *supra* note 234, at 398-99 (“It has been broadly stated that the deviation doctrine is applicable to make changes in the manner in which a charitable trust is administered while *cy pres* is used in cases where a change of the settlor’s specific charitable purpose is involved”) (citing RESTATEMENT (SECOND) OF TRUSTS § 381, cmt. a (1959)).

237. See RESTATEMENT (SECOND) OF TRUSTS § 167(1) cmt., illus. 1-16 (1959). “The commentary to Restatement Second, Trusts § 167 . . . and its Illustrations, as well as the distinct weight of case authorities . . . , make clear that this prior section applies only to *administrative* provisions.” RESTATEMENT (THIRD) OF TRUSTS § 66, at 177 (Tentative Draft. No. 3 2001) (emphasis in original) (Reporters Notes on § 66, cmt. a).

238. See, e.g., *In re R. B. Plummer Memorial Loan Fund Trust*, 266 Neb. 1, 661 N.W.2d 307 (2003); *In re Last Will and Testament of Teeters*, 205 Neb. 576, 288 N.W.2d 735 (1980).

239. RESTATEMENT (THIRD) OF TRUSTS § 66(1) (Tentative Draft. No. 3 2001) provides: “(1) The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.”

240. Comment, UTC § 412 (emphasis added).

cation in that context raises no constitutional or policy issues.²⁴¹ To the extent that UTC section 412(a) authorizes application of the doctrine of equitable deviation to dispositive provisions of a trust, the section changes Nebraska law and should not be applied to trusts that were or became irrevocable prior to the operative date of the Nebraska UTC. Such a position finds support in the fact that the settlor presumably would have understood that, under the law applicable at the time the trust became irrevocable, a court could not change dispositive provisions in the manner authorized by UTC section 412(a).

Admittedly, applying UTC section 412(a) retroactively has some appeal. UTC section 412(a) allows modification of dispositive terms only if modification is required "because of circumstances not anticipated by the settlor" and then only if the "modification . . . will further the purposes of the trust." UTC section 412(a) also provides that "[t]o the extent practicable, the modification must be made in accordance with the settlor's probable intention." With these safeguards, objections to retroactive application of UTC section 412(a) might seem to diminish because UTC section 412(a), especially if application of that provision would provide a solution to an otherwise difficult problem. Consider the following Illustration from the Restatement (Third) of Trusts:²⁴²

H and W executed revocable trusts at the same time pursuant to a common (although not contractual) plan under which the trust of the first of them to die would continue for the other; under that common plan, both trust remainders would eventually pass to the issue of H and W. Accordingly, upon W's death a number of years ago, T became her successor trustee, with instructions to pay H all of the income plus such amounts of trust principal as T deems necessary to enable H to maintain his accustomed standard of living; upon H's death, the trust remainder is to pass (as are H's own probate and trust assets) by right of representation to the issue of H and W. Subsequent to W's death, H has become legally incapacitated and is unable to enjoy or manage the substantial amount of unneeded income that is being distributed to him; he is, however, expected to survive for a considerable period of time. The income from W's trust and from H's personal estate, together with his substantial pension, are more than sufficient to provide for H's foreseeable needs and comfort over the rest of his lifetime. There is no evidence that W anticipated the present situation, and there are no estate-planning objectives (such as the federal estate tax marital deduction) that would require continued payment of the trust income to H. The court may direct T to cease paying the trust income to H and to accumulate it for eventual distribution to the remainder beneficiaries, unless and until H's circumstances again change. The re-

241. The Kansas Supreme Court has applied UTC section 412(a) [K.S.A. § 58a-412 (Supp. 2002)] retroactively to modify an administrative provision of a testamentary trust established in 1969, in a proceeding commenced on May 23, 2002. The Kansas UTC became effective January 1, 2003. In the Matter of John P. Harris Testamentary Trust, 69 P.3d 1109, 1117-1118 (Kan. 2003).

242. RESTATEMENT (THIRD) OF TRUSTS § 66, illus. 3 (Tentative Draft. No. 3 2001). The Comment to UTC section 412 specifically refers to the Illustrations under Section 66 of the Restatement (Third) of Trusts (Tent. Draft No. 3 March 5, 2001).

sult of such a modification will be to avoid conservatorship expenses and will be consistent with and advantageous to W's (and also H's) underlying plan eventually to benefit the remainder beneficiaries.

If we assume that the trust described in this Illustration had become irrevocable before the operative date of the UTC, retroactive application of UTC section 412(a) might seem appropriate even though a beneficial interest shifts from H to the remainder beneficiaries. And a court might reach this result under its constitutional equity jurisdiction, relying on the Restatement (Third) of Trusts.

Of course, the preceding Illustration represents a relatively easy case. Suppose Settlor created an irrevocable trust in 1985 and died in 1990. The trust provides that the two children of Settlor are to receive income from the trust for life, with the remainder to pass to Settlor's grandchildren after the death of the second child. In 2006, after the operative date of the Nebraska UTC, one child is involved in a serious automobile accident that leaves the child totally disabled and without any significant assets. The other child is healthy, employed, and has sufficient assets to and income to live comfortably. There is no evidence that Settlor ever anticipated such a problem. If the trustee sought a court order authorizing diversion of all of the trust income to the injured child and authorizing invasion of trust corpus for the benefit of the injured child, should the court apply UTC section 412(a) to issue such an order? Such an order would change beneficial interests in the trust, taking both from one income beneficiary and from the remainder beneficiaries. This example, not the Illustration from the Restatement, demonstrates the need to refuse to apply UTC section 412(a) retroactively.

Finally, note that UTC section 412(b) "broadens the court's ability to modify the administrative terms of a trust."²⁴³ UTC section 412(b) provides: "The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impractical or wasteful or impair the trust's administration." Although this provision changes Nebraska law, it does so in connection with administrative provisions, which are currently subject to the equitable deviation doctrine. Thus there should be no constitutional or policy objection to retroactive application of UTC section 412(b).

E. *Cy Pres*

UTC section 413²⁴⁴ introduces two new rules in Nebraska law which should not be applied retroactively to charitable trusts created before the operative date of the Nebraska UTC. UTC 413(a) "modifies the doctrine of *cy pres* by presuming that the settlor had a general

243. Comment, UTC § 412.

244. NEB. REV. STAT. § 30-3839 (Supp. 2003).

charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve.²⁴⁵ Nebraska law has previously required a general charitable intent as a precondition to the exercise of the court's *cy pres* power.²⁴⁶ The new rule of UTC section 413(a) should not be applied retroactively to establish different beneficial interests in the trust than existed prior to enactment of the UTC.

UTC section 413(b) limits the power of the court to enforce a gift over to a noncharitable beneficiary pursuant to a provision in the terms of a charitable trust unless the property is to revert to a living settlor or fewer than 21 years have elapsed since the trust was created.²⁴⁷ UTC section 413(b)'s application seems constitutionally suspect (1) to the extent it may retroactively establish different beneficial interests in the trust than existed prior to enactment of the UTC,²⁴⁸ and (2) to the extent it may encroach on the constitutional equity jurisdiction of Nebraska courts.

F. Discretionary Distributions of a Trustee-Beneficiary

UTC section 814(b)(1) establishes a "rule of construction" that "re-write[s] the terms of a trust that might otherwise result in adverse

245. Comment, UTC § 413 ("Courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor.").

246. Report, *supra* note 3, at 131 (quoting *In re Last Will and Testament of Teeters*, 205 Neb. 735, 288 N.W.2d 735 (1980)); *see also In re Plummer Memorial Loan Fund Trust*, 266 Neb. 1, 7, 661 NW2d 307, 312 (2003) ("The doctrine of *cy pres* is a principle of construction based on a judicial finding of the donor's intention as applied to new conditions. The doctrine will not be applied if the donor indicates the gift shall be used for a narrow specific purpose because that would defeat the purpose of the donor. But where the specific purpose recited cannot be accomplished because of changed conditions, and a more general charitable purpose is shown by the will, the *cy pres* doctrine may be resorted to, not to defeat the donor's intention, but to effectuate it.") (citations omitted).

247. NEB. REV. STAT. § 30-3839(b) (Supp. 2003). The rationale of this provision is:

Responding to concerns about the clogging of title and other administrative problems caused by remote default provisions upon the failure of a charitable purpose, subsection (b) invalidates a gift over to a noncharitable beneficiary upon a failure of a particular charitable purpose unless the property is to revert to a living settlor or fewer than 21 years have elapsed since the trust's creation.

Comment, UTC § 413. This provision does not affect a charitable lead trust since *cy pres* does not apply ("the settlor's particular purpose has instead been fulfilled").

248. The current draft of the Restatement (Third) of Trusts also expresses apparent concern as to the retroactive implications. *See* RESTATEMENT (THIRD) OF TRUSTS, § 67 (2003) (Reporter's Notes on § 67, cmt. b: "On the possibility of retrospective application of the 21-year rule to pre-existing future interests, see UTC § 1106, together with its Comment that, except as otherwise restricted, the Code 'is intended to have the widest possible effect within constitutional limitations.'").

estate and gift tax consequences to a beneficiary-trustee²⁴⁹ by transforming what would otherwise be a general power of appointment for federal estate and gift tax purposes into a special power of appointment.²⁵⁰ UTC section 814(b) provides that “[s]ubject to subsection (d), and unless the terms of the trust expressly indicate that a rule in this subsection does not apply.”²⁵¹

(1) a person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee’s personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee’s individual health, education, support or maintenance within the meaning of Section 2041(b)(1)(A)²⁵² or 2514(c)(1)²⁵³ of the Internal Revenue Code

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249. Comment, UTC § 814 (“[T]he unintended inclusion of the trust in the beneficiary-trustee’s gross estate is a frequent enough occurrence that the drafters concluded that it is a topic that this Code should address. It is also a topic on which numerous States have enacted corrective statutes.”).
250. Kansas, the first state to adopt the UTC, did not include this curative provision in the Kansas UTC. KAN. STAT. ANN. § 58a-814 (Supp. 2002). The Kansas UTC became effective on January 1, 2003. In a case commenced before that date, *In re John P. Harris Testamentary Trust*, 69 P.3d 1109 (Kan. 2003), the Kansas Supreme Court, after concluding under UTC section 1106(a)(3) [KAN. STAT. ANN. § 58a-1106(a)(3) (Supp. 2002)] that the Kansas UTC applied to case, noted that the curative provision omitted from KAN. STAT. ANN. § 58a-814 would have eliminated one of the problems that the trustees of the trust sought to remedy. 69 P.3d at 1117. Fortunately, the Kansas Supreme Court also concluded that UTC § 415 [KAN. STAT. ANN. § 58a-415 (Supp. 2002)] authorized reformation of the trust to impose an ascertainable standard on all holders of a power of appointment over the corpus of the trust, thus making all such powers special (non-general) powers of appointment for estate and gift tax purposes. 69 P.2d at 1117. The Kansas Supreme Court opined in dicta that the power to modify in UTC § 416 [KAN. STAT. ANN. § 58a-416 (Supp. 2002)] would support this same result. 69 P.3d at 1117.
251. NEB. REV. STAT. § 30-3879(b) (Supp. 2003). Subsection (d) excludes marital deduction trusts, trusts revocable by the settlor, and present interest annual exclusion trusts under I.R.C. § 2503(c). Subsection (a) codifies current Nebraska law that grants of “absolute,” “sole,” or “uncontrolled” discretion to a trustee require the power to be exercised for the purposes of the trust and the interests of the beneficiaries. *See, e.g., In re Sullivan’s Will*, 144 Neb. 36, 12 N.W.2d 148 (1943).
252. I.R.C. Section 2041(b)(1)(A) provides:
- (1) GENERAL POWER OF APPOINTMENT. The term “general power of appointment” means a power that is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate, except that –
- (A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.
253. I.R.C. Section 2514(c)(1) provides:
- (c) DEFINITION OF GENERAL POWER OF APPOINTMENT. For purposes of this section, the term “general power of appointment” means a power that is exercisable in favor of the person possessing the power (hereafter in this subsection referred to as the “possessor”), his estate, his creditors, or the creditors of his estate; except that –

The Comment to UTC section 814 explains that “the power to make discretionary distributions to a beneficiary-trustee is automatically limited by the requisite ascertainable standard necessary to avoid inclusion of the trust in the trustee’s gross estate or result in a taxable gift upon the trustee’s release or exercise of the power.”²⁵⁴ The “rule of construction” in UTC section 814(b)(1) is in addition to UTC section 416, which authorizes a court to modify the terms of a trust to “achieve the settlor’s tax objectives.”²⁵⁵

Elimination of a “presently exercisable general power of appointment” also has significant consequences in the administration of the trust. The power is no longer within the UTC definition of “power of withdrawal,”²⁵⁶ which means that the trustee-beneficiary does not have the rights of a settlor of a revocable trust²⁵⁷ and other rights with respect to the trust.²⁵⁸ It also means that creditors of the trustee-beneficiary will not have recourse to some or all of the trust property.²⁵⁹ Standing alone, it additionally reduces the power of the trustee-beneficiary more than is necessary to achieve the estate and gift tax results. A trustee-beneficiary could have a power to appoint to others than himself, his creditors, his estate, or creditors of his estate without adverse tax consequences.²⁶⁰ UTC section 814(c) gives some potential relief to the beneficial interest of a trustee-beneficiary by providing that a power whose exercise is limited by UTC section 814(b) may be exercised by a majority of the remaining unaffected trustees or a court may appoint a special fiduciary to exercise the power.²⁶¹

It is doubtful whether UTC section 814(b)(1) would achieve its intended tax consequences with respect to preexisting irrevocable trusts. The state property interests to which federal estate and gift tax consequences attach would previously have been established

(1) A power to consume, invade, or appropriate property for the benefit of the possessor which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the possessor shall not be deemed a general power of appointment.

254. Comment, UTC § 814(b)(1). Additionally, there might be income tax consequences to the extent that the trust property exceeds the portion of the trust attributable to the ascertainable standard. See I.R.C. § 678(a)(1) (“A person other than the grantor shall be treated as the owner of any portion of a trust with respect to which: (1) such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself.”).

255. NEB. REV. STAT. § 30-3842 (Supp. 2003). The court order may have “retroactive effect” and must modify the terms of the trust “in a manner that it not contrary to the settlor’s probable intent.”

256. UTC § 103(10); NEB. REV. STAT. § 30-2803(10) (Supp. 2003).

257. UTC § 603(c); NEB. REV. STAT. § 30-3855(c) (Supp. 2003).

258. See Comment, UTC § 401; and Report, *supra* note 3, at 20.

259. See UTC § 505(b); NEB. REV. STAT. § 30-3850(b) (Supp. 2003).

260. Treas. Reg. §§ 20.2041-1(c)(1)(b), 25.2514-1(c)(1)(b).

261. NEB. REV. STAT. § 30-3879(c) (Supp. 2003).

under then applicable state law. While the savings provisions of UTC section 814(b)(1) can apply from the outset to interests established after the enactment of the UTC, they are probably ineffective to rescue powers of a trustee-beneficiary previously existing under an irrevocable trust. If UTC section 814(b)(1) does apply to a previously existing power that was a general power of appointment under the Internal Revenue Code, the federal tax effect probably would be characterized as a lapse, exercise or release of the power with gift and estate tax consequences.²⁶²

UTC section 814(b)(1) should not be applied to preexisting irrevocable trusts. In changing beneficial interests in the trust, it falls within the constitutional limitations which "preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date."²⁶³

The change in beneficial interests under UTC section 814(b)(1) occurs "unless the terms of the trust expressly indicate" that the rule should not apply. "Terms of a trust" include both the "trust instrument" and "other evidence that would be admissible in a judicial proceeding."²⁶⁴ The language "expressly indicate" is impossible to define with precision.²⁶⁵ But certainly beneficial interests which have been irrevocably created and have existed for a period of time before enactment of the UTC would constitute "terms of the trust which indicate" that the rule of UTC section 814(b)(1) does not apply.

VIII. NEBRASKA CONSTITUTIONAL EQUITY JURISDICTION

UTC section 106 states that "[t]he common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State."²⁶⁶ In Nebraska, however, the reverse may be true in some situations. The judicial constitutional equity jurisdiction exists independently of statutes. The Nebraska UTC may supplement the broad Nebraska constitutional equity jurisdiction of district courts.

The Comment to UTC section 106 states: "The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts." UTC section 105(b)(13) provides: "The terms of a trust prevail over any provision of this [Code] except . . . the

262. See I.R.C. § § 2041(a)(2) & (b)(2), 2514(b) & (e).

263. Comment, UTC § 1106.

264. UTC § 103(17); NEB. REV. STAT. § 30-3803(18).

265. See text *supra* accompanying notes 122 through 129.

266. NEB. REV. STAT. § 30-3806 (Supp. 2003).

power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.”²⁶⁷

Article V, Section 9, of the Nebraska Constitution provides that “[t]he district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide”²⁶⁸ There is a body of law that the Nebraska constitutional equity jurisdiction of district courts “cannot be legislatively limited or controlled.”²⁶⁹ This jurisdiction extends to private²⁷⁰ and charitable²⁷¹ trusts. The Legislature can provide county courts with equity powers,²⁷² but it cannot limit the equity jurisdiction of district courts. Provisions of the UTC which may limit the constitutional equity jurisdiction of Nebraska district courts or legislatively overrule decisions defining beneficial rights and interests in trusts may conflict with Article V, Section 9. The UTC provisions on claims of certain judgment creditors against spendthrift and discretionary trusts, for example,

267. NEB. REV. STAT. § 30-3805(b)(13) (Supp. 2003). UTC section 105(b)(14) adds that the terms of the trust do not prevail over “the subject matter jurisdiction of the court.” NEB. REV. STAT. § 30-3805(b)(14) (Supp. 2003).

268. Neb. Const. art. V, § 9.

269. *See, e.g.*, *Stoneman v. United Neb. Bank*, 254 Neb. 477, 487, 577 N.W.2d 271, 279 (1998); *K N Energy, Inc. v. City of Scottsbluff*, 233 Neb. 644, 653, 447 N.W.2d 227, 234 (1989); *In re Estate of Steppuhn*, 221 Neb. 329, 332, 377 N.W.2d 83, 85 (1985); *Omaha Fish and Wildlife Club v. Cmty Refuse*, 208 Neb. 110, 112, 302 N.W.2d 379, 380 (1981); *Village of Springfield v. Hevelone*, 195 Neb. 37, 39, 236 N.W.2d 811, 813-14 (1975).

270. *See, e.g.*, *Burnham v. Bennison*:

It may be said that, by the terms of the Constitution, district courts in Nebraska are vested with “chancery and common law jurisdiction.” Const. art. 5, § 9. This we have construed as vesting district courts with equity jurisdiction which they may exercise without legislative enactment. Indeed, this court is committed to the view that, not only is equity jurisdiction conferred by the terms of the Constitution, but as thus conferred it is beyond the power of the legislature to limit or control. That, while the legislature may grant such other jurisdiction as it may deem proper, it cannot limit or take away from such courts their broad and general jurisdiction which the Constitution has conferred upon them. One of the well-recognized grounds of equity jurisdiction thus conferred on, and available in, courts of this state, by virtue of this constitutional provision, is the supervision of the administration of trusts.

121 Neb. 291, 298, 236 N.W. 745, 748 (1931) (citations omitted).

271. *See, e.g.*, *John A. Creighton Home for Poor Working Girls' Trust v. Waltman*, 140 Neb. 3, 9-10, 299 N.W. 261, 265-66 (1941) (after quoting the language from *Burnham v. Bennison* set out in the immediately preceding footnote, the Court stated: “It necessarily follows that the district court for Douglas County has jurisdiction of the subject matter and of the property in this trust. It has for years been exercising that jurisdiction in the administration of this trust. It has the power and the duty to continue to do so. The statutes cited are not controlling.”).

272. *See, e.g.*, *Kentopp v. Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980) (recognizing that Nebraska county courts have equity jurisdiction in matters relating to the administration and settlement of decedents' estates under the Nebraska Uniform Probate Code).

may be subject to this constitutional limitation as applied retroactively.²⁷³

County courts and district courts have concurrent original jurisdiction under the Nebraska UTC.²⁷⁴ The Nebraska UTC also states that “[t]o the full extent permitted by the Constitution of Nebraska, the county court has jurisdiction over all subject matter relating to trusts.”²⁷⁵ County courts, however, do not have general equitable jurisdiction under the Nebraska Constitution. They possess equity jurisdiction only by virtue of legislative authority.²⁷⁶ In view of the clear unlimited constitutional equity jurisdiction of district courts, district courts may provide a more advantageous venue than county courts to litigate issues involving the inherent judicial authority of Article V, Section 9, with respect to trusts.

UTC section 413, for example, contains limitations on court enforcement of the terms of a charitable trust for distribution to non-charitable beneficiaries upon a failure of a charitable purpose which change prior Nebraska Supreme Court holdings.²⁷⁷ It seems likely that district courts continue to have general equity jurisdiction under the Nebraska Constitution to decide the litigation apart from the provisions of the Nebraska UTC, which a county court probably does not have. A district court might thereby avoid ruling on the applicability of UTC section 413 to preexisting charitable trusts and base its decision upon independent constitutional equity jurisdiction.²⁷⁸

IX. NEBRASKA SUPREME COURT JURISDICTION OF CONSTITUTIONAL ISSUES

Article V, Section 2 of the Nebraska Constitution requires that “[t]he judges of the Supreme Court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute” and that “[n]o legislative act shall be held unconstitutional except by the concurrence of five judges.”²⁷⁹ The statutes provide that “cases

273. For a further discussion of the spendthrift provisions, see discussion *supra* section VII.A.

274. NEB. REV. STAT. § 24-517(8) (Supp. 2003).

275. *Id.* § 30-3814(a). This Nebraska section replaced UTC section 203. See Nebraska Comments on UTC § 203, Report, *supra* note 3, at 61-62.

276. See *In re Adoption of Hemmer*, 260 Neb. 827, 619 N.W.2d 848 (2000); *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994); *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991); *Miller v. Janecek*, 210 Neb. 316, 314 N.W.2d 250 (1982); *In re Estate of Layton*, 207 Neb. 646, 300 N.W.2d 802 (1981); *Kentopp v. Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980).

277. See NEB. REV. STAT. § 30-3839 (Supp. 2003).

278. Similarly, the applicability of equitable deviation rules to a preexisting private irrevocable trust might be resolved under the court’s independent equity jurisdiction rather than under UTC section 412(a). See text beginning *supra* at note 233.

279. Neb. Const. art. V, § 2.

involving the constitutionality of a statute” are appealable directly to the Supreme Court.²⁸⁰ Additionally, the statutes allow the Supreme Court to grant direct review when “the case involves a question of state or federal constitutional interpretation,”²⁸¹ and when “the case raises a question of law regarding the validity of a statute.”²⁸²

County courts have concurrent jurisdiction with district courts in matters arising under the Nebraska UTC.²⁸³ Appeals from county court decisions under the Nebraska UTC are taken in the same manner as an appeal from a district court decision.²⁸⁴ The Rules of Practice state that a notice of appeal “shall be deemed made to the Court of Appeals unless the notice contains language specifically requesting appeal to the Supreme Court along with the citation to the statutory authority allowing such appeal to the Supreme Court.”²⁸⁵ If the appeal is to the Supreme Court, the clerk of a district or county court is required to send a certificate containing, among other things, a statement that “the appeal involves . . . constitutionality of a statute.”²⁸⁶ The Rules of Practice also require that a party presenting “a case involving the federal or state constitutionality of a statute” must file and serve a separate written notice thereof with the Supreme Court Clerk at the time of filing its brief and, if the Attorney General is not a party to the litigation, serve a copy of the brief on the Attorney General.²⁸⁷ It is essential that the constitutional issue be raised in the trial court and that the Rules of Practice relating to constitutional issues be strictly complied with.²⁸⁸ The Court of Appeals does not have jurisdiction to hold a statute unconstitutional.²⁸⁹

UTC section 1106(a)(1) applies the UTC categorically to “all trusts created before . . . [its effective date].”²⁹⁰ The UTC leaves to interpretation, application, and potential litigation whether its provisions can constitutionally be applied to each preexisting trust. There are no Ne-

280. NEB. REV. STAT. § 24-1106(1) (Reissue 1995).

281. NEB. REV. STAT. § 24-1106(2)(b) (Reissue 1995).

282. NEB. REV. STAT. § 24-1106(2)(c) (Reissue 1995).

283. NEB. REV. STAT. § 24-517(8) (Supp. 2003).

284. NEB. REV. STAT. § 30-1601(1) (Supp. 2003). District courts do not have appellate jurisdiction with respect to county court matters arising under the Nebraska UTC. See NEB. REV. STAT. §§ 25-1901, 25-2728(2)(d) (Supp. 2003).

285. NEBR. CT. R. OF PRAC. 1B(1) (June 2003).

286. NEBR. CT. R. OF PRAC. Rule 1(B)(5)d (June 2003). The sample Clerk’s Certificates contain “check the box” spaces for the court to which the appeal is directed and, if the appeal is to the Supreme Court, that the constitutionality of a statute is involved. *Id.* App. 2 and App. 5.

287. NEBR. CT. R. OF PRAC. Rule 9E (June 2003).

288. See *Zoucha v. Henn*, 258 Neb. 611, 614-615, 604 N.W.2d 828, 831 (2000).

289. See *Metro Renovation, Inc. v. State*, 249 Neb. 337, 345, 543 N.W.2d 715, 721 (1996) (“Since the Court of Appeals lacks the authority to declare a statute unconstitutional, any discussion by that court of the constitutionality of a statute would be dicta at best.”).

290. NEB. REV. STAT. § 30-38,110(a)(1) (Supp. 2003).

braska Supreme Court decisions interpreting the Nebraska constitutional language “involving the constitutionality of a statute” and “held unconstitutional” as those provisions may affect litigation involving the applicability of the UTC to preexisting trusts. Article V, Section 2, may apply only to issues concerning the underlying constitutionality of the UTC, such as whether a statutory provision is unconstitutional “on its face.” Article V, Section 2, can also be interpreted to cover a broader category of cases alleging an unconstitutional application of the UTC in a particular case or a category of circumstances. For example, the Supreme Court treated an argument that if the other side’s statutory interpretation was correct, the statute would violate the Nebraska and United States Constitutions, “as a challenge to the constitutionality of these statutes.”²⁹¹

Even if the constitutional concern is merely a peripheral issue in the matter, counsel for parties claiming a potential unconstitutional application of a UTC provision to a preexisting trust would be well advised to take a cautious procedural approach in order to preserve the issue for an appeal to the Nebraska Supreme Court. The ongoing legislative study of the UTC²⁹² prior to its operative date of January 1, 2005, should reconsider whether situations in which the applicability of the UTC to preexisting trusts is likely to be determined by litigation should be made applicable only to trusts which become irrevocable on or after the operative date.²⁹³

X. CONCLUSION

NCCUSL faced a difficult task in aligning the “first national codification of the law of trusts” with preexisting trusts and preexisting trust law throughout the nation. It wisely chose to have one complete trust code rather than two complete trust codes in existence in each enacting state for a considerable period of time. The policy that the UTC should “have the widest possible application, consistent with constitutional limitations” was a reasonable general approach in fashioning rules for the application of the new uniform law to existing re-

291. See *Mid City Bank v. Douglas County Bd. of Equalization*, 260 Neb. 282, 291, 616 N.W.2d 341, 348 (2000) (deciding the case without reaching the constitutional issue because there had not been compliance with Rule 9(E) requiring filing and serving notice of the constitutional issue).

292. See L.R. 84, 98th Legis., 1st Sess. (Neb. 2003), Neb. Legis. J. 1537 (April 30, 2003).

293. For example, the pending Connecticut legislative bill contains special effective date provisions for UTC section 505(a)(3) relating to claims by creditors of the settlor of a revocable trust after the death of the settlor and of UTC sections 503(b) and 504(c) for support or maintenance judgment claims of a spouse or former spouse (but not child) against revocable and irrevocable spendthrift and discretionary trusts. 2003 Conn. Senate Bill No. 977, § 85(7)&(8) (introduced February 25, 2003).

relationships. But that concept, alone, is extremely vague and does not give sufficient importance to the purposes and intentions of those who established prior trusts and to the substantive legal principles then in existence.

The drafters fell short in dealing with the potential lines to be drawn with respect to beneficial interests in preexisting trusts. In the development of the UTC over many years, the effect of UTC section 1106 on other provisions throughout the UTC does not appear to have been given the intensive analysis that it deserved. Additional study is warranted by states considering adoption of the UTC to determine whether there should be further legislative refinement. Nebraska omitted UTC section 112 changing the rules of construction for trusts and would do well to repeal UTC section 1106(a)(4) on rules of construction and presumptions prior to the Nebraska UTC becoming operative on January 1, 2005. Nebraska should also reexamine the question of whether UTC sections 411(c), 412(a), 413(a) and (b), 503(b), 504(c), and 814(b)(1) should apply to preexisting trusts. Although they may turn out to be few in number, important issues concerning constitutional and other limitations on the application of the UTC rules to preexisting trusts have been left to the parties, practitioners and the courts. Finally, it would be helpful to reexamine the question of whether the special spendthrift provision rule in UTC section 411(c) is appropriate and if so whether that rule should also appear in UTC section 111.