

University of Missouri School of Law Scholarship Repository

Faculty Publications

2002

The Uniform Trust Code (2000) and its Application to Ohio

David M. English

University of Missouri School of Law, englishda@missouri.edu

Follow this and additional works at: <http://scholarship.law.missouri.edu/facpubs>



Part of the [Estates and Trusts Commons](#), and the [Legislation Commons](#)

Recommended Citation

The Uniform Trust Code (2000) and Its Application to Ohio, 30 Cap. U. L. Rev. 1 (2002)

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

THE UNIFORM TRUST CODE (2000) AND ITS APPLICATION TO OHIO*

DAVID M. ENGLISH**

I. INTRODUCTION

The Uniform Trust Code (2000) ("U.T.C."), which was approved by the National Conference of Commissioners on Uniform State Laws on August 3, 2000, is the Commissioners' first effort to provide the states with a comprehensive model for codifying their law on trusts.¹ The Estate Planning, Trust and Probate Law Section of the Ohio State Bar Association is currently studying the U.T.C. for possible enactment in Ohio.² This article provides an overview of the U.T.C., focusing on how its enactment would change existing Ohio law.

The drafting of the U.T.C. was prompted by the much greater use of trusts in recent years. This greater use of the trust and consequent rise in the number of day-to-day questions involving trusts led to a recognition by the Commissioners that the trust law in most states is thin, leaving many gaps between the often few statutes and reported cases.³ It also led to recognition that previous uniform acts relating to trusts, while numerous, are fragmentary.⁴ For example, the primary source of trust law in Ohio and in most other states is the Restatement of Trusts and the multi-volume treatises by Scott⁵ and Bogert,⁶ sources that fail to address numerous practical issues and fail to provide sufficient guidance on others.

Copyright © 2002 David M. English

* Reprinted from *Probate Law Journal of Ohio*, September/October 2001, with the permission of the publisher and copyright owner, West Group.

** W.F. Fratcher Missouri Endowed Professor of Law, University of Missouri-Columbia; Reporter, Uniform Trust Code (2000); Executive Director, Joint editorial Board for Uniform Trust and Estates Acts; B.A., Duke University; J.D., Northwestern University. Special thanks to Robert Brucken, of Baker & Hostetler in Cleveland, for his comments on an earlier draft of this article. A condensed version of this article appeared as David M. English, *The Uniform Trust Code and Its Application to Ohio*, 12 PROB. L.J. OF OHIO 1 (2001).

1 A copy of the Uniform Trust Code with complete comments can be accessed through the Commissioners' website, available at <http://www.nccsl.org>.

2 Susan S. Locke et al., *Uniform Trust Code*, 11 PROB. L.J. OF OHIO 49 (2001).

3 UNIF. TRUST CODE (2000) [hereinafter U.T.C.] prefatory note.

4 *Id.*

5 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* (4th ed. 1987-1991).

6 George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* (rev. 2d ed. 1977-1984).

While the U.T.C. is the first comprehensive *uniform* act on the subject of trusts, comprehensive trust statutes are already in effect in several states, with the statutes in California⁷ and Texas⁸ being the most widely known. The U.T.C. is not directed principally at these states, but at states like Ohio whose statutes on trusts are scattered and incomplete. The trust statutes that do exist in Ohio are found scattered amongst the probate statutes codified in title 21 of the Ohio Revised Code, in chapters 1339 and 1340 of the Revised Code. Because title 21 is limited to fiduciaries appointed by a court,⁹ the title 21 trust statutes apply only to testamentary trusts. The statutes in chapters 1339 and 1340 apply to both inter vivos and testamentary trusts, but are limited in number. Enactment of the U.T.C. would enable Ohio to update its existing statutes, address issues not now addressed, and codify all its trust law in one place.

II. RELATED UNIFORM ACTS

There are numerous other uniform acts relating to trusts, but all deal with discrete topics. Superseded and replaced by the U.T.C. are article 7 of the Uniform Probate Code and the Uniform Trustee Powers Act, neither of which has been enacted in Ohio. Not superseded by the U.T.C. is the Uniform Prudent Investor Act, enacted by Ohio in 1999.¹⁰ The U.T.C. instead provides a place in article 9 for an enacting jurisdiction to codify its version of the Uniform Prudent Investor Act. There are numerous other uniform acts addressing trust-related topics that are not affected by the U.T.C. Of these other acts, Ohio has enacted the Uniform Management of Institutional Funds Act,¹¹ the 1962 version of the Uniform Principal and Income Act,¹² and the 1991 version of the Uniform Testamentary Additions to Trusts Act.¹³

III. RESTATEMENT OF TRUSTS

The U.T.C. was drafted in close coordination with the revision of the

7 CAL. PROB. CODE §§ 15000-18201 (West 1991 & Supp. 2001).

8 TEX. PROP. CODE ANN. §§ 111.001-115.017 (Vernon 1995 & Supp. 2001).

9 Title 21 applies to actions by a "fiduciary," which is limited to persons appointed by a court. OHIO REV. CODE ANN. § 2109.01 (Anderson 1994).

10 OHIO REV. CODE ANN. §§ 1339.52-1339.61 (Anderson Supp. 2000).

11 *Id.* §§ 1715.51-1715.59 (Anderson 1997).

12 *Id.* §§ 1340.01-1340.13 (Anderson 1993 & Supp. 2000).

13 *Id.* § 2107.63 (Anderson 1994). Other uniform acts not affected by enactment of the U.T.C. include the Uniform Common Trust Fund, in effect in thirty-four jurisdictions; Uniform Custodial Trust Act, enacted in fourteen jurisdictions; Uniform Statutory Rule Against Perpetuities, enacted in twenty-seven jurisdictions; and Uniform Supervision of Trustees for Charitable Purposes Act, enacted in four jurisdictions. U.T.C. prefatory note. These acts are published on the Commissioner's website, *available at* <http://www.nccusl.org>.

Restatement of Trusts.¹⁴ This coordination has hopefully made both into better products. The U.T.C. offers the benefit of certain rules. The Restatement provides a wealth of background materials for interpreting the language of the Code. The Restatement (Second) of Trusts was approved by the American Law Institute in 1957.¹⁵ Beginning in the late 1980s, work on the Restatement (Third) began. The portion of Restatement (Third) relating to the prudent investor rule and other investment topics was completed and approved in 1990.¹⁶ A tentative draft of the portion of Restatement (Third) relating to the rules on the creation and validity of trusts was approved in 1996;¹⁷ the portion relating to the office of trustee, trust purposes, spendthrift provisions, and the rights of creditors was approved in 1999;¹⁸ the portion on termination and modification of trusts was approved in 2001.¹⁹

Restatements serve a proactive role close to that of uniform acts. A Restatement is more than a document that collects and summarizes in one place the law of a particular subject. Rather, a Restatement strives to delineate the better rule where the decisions of the courts conflict. It also strives to fill in gaps in the law. That is, it attempts to promote the rule that courts should apply when they encounter an issue for the first time. The hope is that the courts of the different states, by relying on the Restatement as a primary guide, will adopt uniform rules of decision.

The Restatement of Trusts has been cited frequently by the Ohio courts.²⁰ However, this reliance is not consistent and the Restatement addresses numerous topics on which there are yet no Ohio cases. Moreover, many of the Ohio cases cited in the law encyclopedias as establishing basic trust principles are obscure trial court opinions not included in the electronic databases.²¹ By contrast, the U.T.C., when enacted, will become a mandatory rule of law that can be relied on and will be easily accessible. The U.T.C. will thus serve an important educational function. Legal practitioners in Ohio will, for the first time, actually be able to determine their state's law on trusts.

14 U.T.C. prefatory note.

15 *Id.*; see also RESTATEMENT (SECOND) OF TRUSTS (1959).

16 U.T.C. prefatory note; see also RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE (1992).

17 U.T.C. prefatory note; see also RESTATEMENT (THIRD) OF TRUSTS (Tentative Draft No. 1, 1996).

18 U.T.C. prefatory note; see also RESTATEMENT (THIRD) OF TRUSTS (Tentative Draft No. 2, 1999).

19 RESTATEMENT (THIRD) OF TRUSTS (Tentative Draft No. 3, 2001).

20 Ohio cases citing the Restatement are listed in RESTATEMENT (SECOND) OF TRUSTS app. (1959), which is updated annually.

21 See generally OHIO JUR. 3D *Trusts* (1989).

IV. SCOPE OF COVERAGE

The U.T.C. states the law relating to express trusts.²² These are trusts created by settlors who during life or at death transfer property to a trustee or who during their lifetime declare themselves trustee of their own property.²³ Following its creation, the trustee will then hold the property for the benefit of beneficiaries.²⁴ This is to be distinguished from what are known as resulting or constructive trusts which are remedial devices imposed by the courts.²⁵

Trusts are best known as a device for planning an individual's personal estate. But trusts are increasingly being used as tools for facilitating commercial transactions. Examples of commercial transactions where the use of trusts is prevalent, if not predominant, include pension funds, mutual funds for pooling investment assets, and trusts to secure repayment of corporate debt.²⁶ The U.T.C. is not directed specifically at commercial trusts, but it does not exclude them. The extent to which commercial trusts are subject to the U.T.C. depends on the type of trust and the laws, other than the U.T.C., under which the trust was created. Even if the commercial trust is governed exclusively by another body of law, the courts are free to look to the U.T.C. for guidance in interpreting this other law.

V. OVERVIEW OF PROVISIONS

The breadth of the U.T.C. is indicated by its organization. The U.T.C. is organized into eleven articles. Article 1, in addition to providing definitions,²⁷ addresses topics such as the ability of a trust instrument to override the U.T.C.'s provisions,²⁸ the validity of choice of law provisions and the law to govern in the absence of such a provision,²⁹ and the procedure for transferring the principal place of administration to another jurisdiction.³⁰

22 U.T.C. § 102.

23 *See Id.* § 401.

24 *Id.* §§ 402(a), 404.

25 *Id.* §102 cmt. For the law on resulting trusts, see RESTATEMENT (THIRD) OF TRUSTS §7-9 (Tentative Draft No. 1, 1996). For the law on constructive trusts, see 5 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS §§ 461-529 (4th ed. 1989) and 5A AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS §§ 530-552 (4th ed. 1989).

26 John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997).

27 U.T.C. §103.

28 *Id.* § 105.

29 *Id.* § 107.

30 *Id.* § 108.

Article 2 addresses selected topics involving judicial proceedings concerning trusts.³¹ Included is the conferring of jurisdiction on the court to intervene in a trust's administration,³² specification of the court's jurisdiction over trustees and beneficiaries,³³ and optional provisions on subject-matter jurisdiction³⁴ and venue.³⁵ This minimal coverage was deliberate; the drafting committee concluded that most issues relating to jurisdiction and procedure before the courts are best left to other bodies of law such as the rules of civil procedure.³⁶ Even among those provisions that remain, local conditions may dictate modification.³⁷ The optional provision on venue³⁸ may conflict with the local jurisdiction's general venue rules. The provision on subject-matter jurisdiction³⁹ was designed for a jurisdiction in which one category of court, such as a chancery court, has exclusive jurisdiction over proceedings concerning administration of any type of trust, whether *inter vivos* or testamentary. In Ohio, the probate court has exclusive jurisdiction over testamentary trusts, but concurrent jurisdiction with the general division of the court of common pleas with respect to *inter vivos* trusts.⁴⁰

Most of the topics addressed in articles 3 through 7 are discussed in detail below. Article 3 deals with the important topic of representation of beneficiaries, including virtual representation and representation by fiduciaries, specifying when a representative may receive notice or give a consent on behalf of the beneficiary or other person represented.⁴¹ Article 4, which begins the heart of the Code, prescribes the requirements for creating, modifying, and terminating trusts. The provisions on the creation of trusts largely track traditional doctrine;⁴² those relating to modification and termination liberalize the prevailing law.⁴³ Article 5 covers spendthrift provisions and rights of creditors, both of the settlor and beneficiaries.⁴⁴ Article 6 collects the special rules relating to revocable trusts, including the

31 *Id.* §§ 201-204.

32 *Id.* § 201.

33 *Id.* § 202.

34 *Id.* § 203.

35 *Id.* § 204.

36 *Id.* art. 2 gen. cmt.

37 *See id.* §§ 203-204 cmt.

38 *Id.* § 204.

39 *Id.* § 203.

40 OHIO REV. CODE ANN. § 2101.24 (Anderson Supp. 2000).

41 *See infra* text accompanying notes 109-25.

42 *See infra* text accompanying notes 126-44.

43 *See infra* text accompanying notes 145-57 (rules applicable to both charitable and noncharitable trusts) and notes 165-70 (*cy pres*, applicable to both charitable and noncharitable trusts only).

44 *See infra* text accompanying notes 171-95.

standard of capacity, the procedure for revocation or modification, and the statute of limitations on contests.⁴⁵ Article 7 turns to the office of trustee, specifying numerous procedural rules that apply absent special provision in the trust. Included are the rules on trustee acceptance, the rights and obligations of cotrustees, the procedure for resignation, the grounds for removal, the methods for appointing successors, and trustee compensation.⁴⁶

Article 8 details the duties and powers of the trustee. The powers listed in section 816 are an updated version of the Uniform Trustee Powers Act, including coverage of such current topics as the power to deal with environmental hazards. Ohio is one of the few states that has yet to enact a trustee's powers list. Statutory powers allay concerns by third parties as to whether the trustee has the authority to engage in a particular transaction. The trustee duties contained in article 8, such as the duty of loyalty,⁴⁷ were drafted where relevant to conform to the Uniform Prudent Investor Act.⁴⁸ The Uniform Prudent Investor Act prescribes a trustee's responsibilities with regard to the management and investment of trust property.⁴⁹ The U.T.C. expands on this by also specifying the trustee's duties regarding distributions to beneficiaries.⁵⁰ By enacting article 8, Ohio will have a consistent set of duties whether the issue is investment, management, or distribution.

Article 9 provides a place for the jurisdiction enacting the larger U.T.C. to codify its version of the Uniform Prudent Investor Act.⁵¹ Article 10 addresses the liability of trustees and rights of beneficiaries.⁵² With respect to the rights of beneficiaries, the article lists the remedies for breach of trust;⁵³ specifies how money damages are to be determined;⁵⁴ provides that the court, in judicial proceedings relating to the administration of the trust, may award attorney's fees against the trustee, the trust, or even a beneficiary as justice and equity require;⁵⁵ and specifies certain trustee defenses, including the addition of a statute of limitations for claims alleging breach of trust⁵⁶ and a provision on enforcing exculpatory clauses.⁵⁷

45 *See infra* text accompanying notes 196-210.

46 *See infra* text accompanying notes 211-37 (discussing portions of article 7 relating to change of trustee.).

47 U.T.C. § 802.

48 *See generally* UNIF. PRUDENT INVESTOR ACT (1994), available at <http://www.nccusl.org>.

49 *Id.*

50 U.T.C. art. 8 gen. cmt.

51 *Id.* art. 9.

52 *Id.* §§ 1001-1009.

53 *Id.* § 1001.

54 *Id.* §§ 1002-1003.

55 *Id.* § 1004.

56 *Id.* § 1005.

With respect to transactions by trustees with third persons, article 10 treats trustees as if they were managers of entities and encourages trustees and third persons to engage in commercial transactions to the same extent as if no trust was involved.⁵⁸ A trustee is not personally liable on contracts entered into in the trustee's fiduciary capacity as long as the trustee disclosed the fiduciary capacity.⁵⁹ A trustee is personally liable for torts committed in administering the trust only if the trustee is personally at fault.⁶⁰ Copying a provision of Ohio law, the U.T.C. protects trustees from personal liability for contract and tort liability of partnerships of which the trustee is a general partner.⁶¹ Persons dealing with a trustee in good faith and for value need not inquire into the extent of the trustee's powers and are protected as if the trustee was acting properly.⁶² To protect the privacy of the trust, a trustee may provide and a third person may rely on a written certification by the trustee as to the trustee's authority.⁶³ The trustee need not provide the third person with a complete copy of the trust instrument.⁶⁴

Article 11 deals with the application of the Code to existing trusts.⁶⁵ The intent is to give the Code the widest possible application, consistent with limitations placed on it by the United States Constitution.⁶⁶ Consequently, the Code generally applies not only to trusts created on or after the effective date, but also to trusts already in existence.⁶⁷

VI. STUDY PROCESS

States normally enact major uniform laws only following a lengthy study process. The following are some of the issues Ohio should consider:

A. *Prepare State Law Study.*

The first step is to determine how enactment of the U.T.C. would change existing law. This article, which compares the U.T.C. to both Ohio statutes and case law, is a start.

B. *Decide on Drafting Model.*

One approach is to begin with the U.T.C. as a base and then make

57 *Id.* § 1008.

58 *Id.* §§ 1010-1013.

59 *Id.* § 1010(a).

60 *Id.* § 1010(b).

61 *Compare* U.T.C. § 1011 *with* OHIO REV. CODE ANN. § 1339.65 (Anderson 1993).

62 U.T.C. § 1012(a).

63 *Id.* § 1013.

64 *Id.* § 1013(a).

65 *Id.* § 1106.

66 *Id.* § 1106 cmt.

67 *Id.* § 1106(a)(1).

necessary modifications. The other approach is to begin with existing law and to then add selected provisions of the uniform act. Because of the scattered state of current Ohio trust law, it is recommended that the Ohio drafters begin with the U.T.C.

C. Decide What to do About Optional Provisions.

Certain sections of the U.T.C. are placed in brackets to signal that modification may be appropriate. Sections of the U.T.C. containing bracketed language include section 112 on rules of construction,⁶⁸ Sections 203 and 204 on subject-matter jurisdiction and venue,⁶⁹ and section 604 on contest of revocable trusts.⁷⁰

D. Decide What to do About "Fiduciary" Statutes.

Chapter 2109 of the Ohio Revised Code governs actions by a "fiduciary."⁷¹ A "fiduciary," defined as a person appointed by a probate court,⁷² includes not only executors and administrators, but also trustees of testamentary trusts.⁷³ The U.T.C. addresses only acts of trustees.⁷⁴ Enactment of the U.T.C. will require extensive revision of chapter 2109 and other provisions of title 21 in order to exclude trustees from their scope.

E. Identify Other Policy and Political Issues.

These will vary by jurisdiction and by who controls the drafting process. Issues on which the Commissioners had divided votes will often result in split votes when the debate moves to the states. To encourage uniformity, the Commissioners request that state drafting committees start from the assumption that the uniform law approach is correct.

VII. SIGNIFICANT ISSUES

This article does not describe and contrast all provisions of the U.T.C. to existing Ohio law, but only those of most significance. The following are the issues addressed: default rules (section 105); principal place of administration (section 108); representation and settlements (section 110 and article 3); rules of construction (section 112); creation of trusts (sections 401-09); trust modification and termination (sections 410-17); charitable trusts (sections

68 For a discussion, see *infra* text accompanying notes 96-108.

69 For a discussion, see *supra* text accompanying notes 34-40.

70 For a discussion, see *infra* text accompanying notes 205-10.

71 OHIO REV. CODE ANN. ch. 2109 (Anderson 1998).

72 *Id.* § 2109.01 (Anderson 1994).

73 *Id.*

74 See U.T.C. § 102 ("This [Code] applies to express trusts, charitable or noncharitable, and trusts created pursuant to statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.").

405, 413); spendthrift provisions and rights of beneficiary's creditors (article 5); revocable trusts (Article 6); change in trustees (Article 7); duty to keep the beneficiaries informed (section 813).

A. *Default Rules (Section 105)*

Much of American trust law consists of rules subject to override by the terms of the trust. But prior to the U.T.C., neither the Restatement, treatise writers, nor state legislatures had attempted to describe the principles of law that are *not* subject to the settlor's control. The U.T.C. collects these principles in Section 105. Included are the requirements for creating a trust;⁷⁵ the rights of third parties in their dealings with the trustee;⁷⁶ the power of the court to take certain actions, such as to remove a trustee;⁷⁷ a trustee's obligation to act in good faith and in accordance with the purposes of the trust and to administer the trust in the interests of the beneficiaries;⁷⁸ and the trustee's duty to keep the beneficiaries age 25 and over generally informed of matters relating to the trust's administration.⁷⁹ The limits on the settlor's ability to waive the duty to keep the beneficiaries informed, which is described in detail below,⁸⁰ is the most discussed provision in the U.T.C.

B. *Principal Place of Administration (Section 108)*

Determining a trust's principal place of administration is important for a variety of reasons. It may determine which state's income tax applies to the trust,⁸¹ and it will establish which court has primary jurisdiction concerning trust administrative matters.⁸² Locating a principal place of administration in a particular jurisdiction also makes it more likely that the particular jurisdiction's law will govern the trust. Locating a trust's principal place of administration in Ohio is particularly attractive. Ohio does not tax undistributed trust income.⁸³ With Ohio's repeal of the rule against perpetuities,⁸⁴ concerns about limits on trust duration are also eliminated.⁸⁵

75 *Id.* § 105(b)(1).

76 *Id.* § 105(b)(11).

77 *Id.* § 105(b)(13).

78 *Id.* § 105(b)(2)-(3).

79 *Id.* § 105(b)(8)-(9).

80 *See infra* text accompanying notes 247-51.

81 U.T.C. § 108 cmt.

82 *Id.*

83 *See* OHIO REVISED CODE ANN. §§ 5747.02, 5747.23 (Anderson 1999).

84 *Id.* § 2131.09(B) (Anderson Supp. 2000).

85 For a discussion of Ohio's repeal of the rule against perpetuities and other reasons why Ohio is an attractive place to locate a trust, see Merwin (Trey) Grayson III, *A Comparison of Dynasty Trusts in Alaska, Delaware and Ohio From the Perspective of the Ohio Practitioner*, 27 N. KY. L. REV. 669 (2000). For a discussion of the relevant conflict of laws

continued

As trust administration has become more complex, determining a trust's principal place of administration has become more difficult. Cotrustees may be located in different states or a corporate trustee's personal trust officers may be located in one state, its investment division in another, and its operations facilities yet somewhere else. Also, a variety of nontrustees, such as advisors and trust protectors, may play a role in the trust's administration.⁸⁶

Concluding that it was impossible to devise a rule that would address all of these situations, the drafters of the U.T.C. did not attempt to define principal place of administration. However, the U.T.C. otherwise facilitates the locating of a trust in Ohio. First, a provision in the trust terms designating the principal place of administration is valid and controlling "if a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction, or all or part of the [trust's] administration occurs in the designated jurisdiction."⁸⁷ Second, for trust instruments failing to address the subject, the U.T.C. specifies a procedure for transferring the principal place of administration.⁸⁸ The transfer must facilitate the trust's administration and the trustee must inform the qualified beneficiaries of the transfer at least sixty days in advance.⁸⁹ The transfer may proceed as long as no qualified beneficiary objects by the date specified in the notice.⁹⁰ If the transfer involves the appointment of a new trustee, the requirements for the appointment of a successor trustee, either under the trust instrument or otherwise, must first be satisfied before the transfer can occur.⁹¹ "Qualified beneficiary," a term used with some frequency in the U.T.C., excludes a beneficiary with a remote remainder interest.⁹²

C. Rules of Construction (Section 112)

Rules of construction attribute intention to individual donors based on assumptions of common intention. Rules of construction are found both in

principles, see Karen M. Moore, *Applicability of Common Law Conflicts of Interest Principles to the Non-Ohio Grantor Who Seems to Create an Ohio Dynasty Trust*, 10 PROB. L. J. OF OHIO 33 (1999).

⁸⁶ U.T.C. § 108 cmt.

⁸⁷ *Id.* § 108(a).

⁸⁸ *Id.* § 108(b)-(f).

⁸⁹ *Id.* § 108 (b)-(d).

⁹⁰ *Id.* § 108(e).

⁹¹ *Id.* § 108(f) & cmt.

⁹² For the definition, see *id.* § 103(12). "Qualified beneficiary" is also defined in OHIO REV. CODE ANN. § 1340.01 (Anderson Supp. 2000) to exclude beneficiaries with remote remainder interests. Pursuant to *id.* § 1340.031 (Anderson Supp. 2000), the trustee of an inter vivos trust must on demand provide a qualified beneficiary with a report on the trustee's management.

enacted statutes and in judicial decisions. Rules of construction can involve the meaning to be given to particular language in a document, such as the meaning to be given to “heirs” or “issue.” Rules of construction can also address situations the donor failed to anticipate, such as the predecease of a beneficiary or the source from which expenses are to be paid. Rules of construction can make 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 the effect on a specific devisee if the devised property is disposed of during the donor’s lifetime.

Most states have enacted numerous statutes on the construction of wills, but have not enacted rules of construction applicable to revocable trusts and other nonprobate devices. Ohio is a partial exception, having enacted one rule of construction applicable to trusts, presuming that provisions in a revocable trust favoring an ex-spouse are revoked upon a divorce.⁹³ The Ohio Supreme Court in 1988 also judicially extended to revocable trusts Ohio’s antilapse statute for wills.⁹⁴ This judicial extension, however, was reversed by the Ohio General Assembly in 1992,⁹⁵ suggesting that any additional rules of construction for trusts will be created only by enactment of specific statute.

The U.T.C. contains several provisions specifically addressing revocable trusts.⁹⁶ Not included in the Code, however, are rules of construction. While the Code’s drafters concluded that the rules of construction for revocable trusts and, to a lesser extent, irrevocable trusts ought to be the same as the rules for wills, the drafters realized that any effort on their part to draft detailed rules for trusts would not succeed. Because the rules on construction for wills vary radically among the states, any detailed rules on trusts that the drafters might have developed would have matched the rules for wills in only a limited number of states.

Instead of including detailed rules of construction for revocable trusts, section 112 of the U.T.C. is a general provision providing that the enacting jurisdiction’s rules of construction for wills apply, as appropriate, to the construction of trusts. This section of the U.T.C., however, was placed in brackets with the suggestion made in the comment that an enacting jurisdiction might be better served by enacting specific rules of construction

93 OHIO REV. CODE ANN. § 1339.62 (Anderson 1993).

94 Dollar Sav. & Trust Co. v. Turner, 529 N.E.2d 1261 (Ohio 1988) (interpreting OHIO REV. CODE § 2107.52).

95 “In amending sections 2107.01 and 2107.52 of the Revised Code, the General Assembly hereby declares its intent to supersede the effect of the holding of the Ohio Supreme Court on October 26, 1988, in Dollar Sav. & Trust Co. of Youngstown v. Turner (1988), 39 Ohio St. 3d 182.” Act of July 8, 1992, § 3, 1992 Ohio Laws File 212.

96 For a detailed discussion, see *infra* text accompanying notes 196-210.

for trusts. The key is the language in section 112 stating that the rules on wills apply to trusts “as appropriate.” This phrase masks some very difficult questions. Not all will construction rules should necessarily be applied to trusts. Also, even those that should apply may require modification due to the legal distinctions between wills and trusts. There is a need for a consensus on which rules should apply, and once that issue has been determined, what they should say.

The most significant efforts to enact specific rules of construction for trusts are the 1990 revision of article II of the Uniform Probate Code (“U.P.C.”) and the 1994 California legislation. California extended to revocable trusts all of its rules on construction of wills, accomplishing this feat by defining a “testamentary gift” to include any transfer in possession or enjoyment taking effect at or after death.⁹⁷ The result was that all existing rules on construction of wills automatically applied to trusts without the need to substantially revise the statutory language.⁹⁸ But because this simplistic approach ignores the distinctions between wills and trusts, the California statute has been only a partial success. The California Law Revision Commission is currently drafting major revisions.⁹⁹

The 1990 revision of the U.P.C. revision is more selective and also more successful, extending only selected rules of will construction to trusts by way of a newly drafted section. Topics covered include requirement of survival by 120 hours;¹⁰⁰ the meaning of a specific reference requirement in a power of appointment;¹⁰¹ construction of class gifts;¹⁰² survivorship with respect to future interests;¹⁰³ abolition of the doctrine of worthier title;¹⁰⁴ and the meaning of specific words including “descendants,”¹⁰⁵ “by representation,”¹⁰⁶ and “heirs.”¹⁰⁷ The 1990 U.P.C. revisions have been enacted to date in nine states¹⁰⁸ and are recommended as a model for Ohio.

97 CAL. PROB. CODE § 21104 (West Supp. 2001).

98 The rules are codified at *id.* §§ 21101-21630.

99 Copies of the Commission’s reports, *available at* <http://www.clrc.ca.gov>.

100 UNIF. PROBATE CODE § 2-702 (1997) [hereinafter U.P.C.].

101 *Id.* § 2-704.

102 *Id.* § 2-705.

103 *Id.* § 2-707.

104 *Id.* § 2-710.

105 *Id.* § 2-708.

106 *Id.* § 2-709.

107 *Id.* § 2-711.

108 Arizona, Colorado, Hawaii, Michigan, Minnesota, Montana, New Mexico, North Dakota, and South Dakota. *See* ARIZ. REV. STAT. ANN. §§ 14-2701 to -2711 (West 1995); COLO. REV. STAT. §§ 15-11-701 to -711 (2000); HAW. REV. STAT. §§ 560:2-701 to -711 (Supp. 2000); MICH. COMP. LAWS §§ 700.2701 to 2720 (West Supp. 2001); MINN. STAT. §§ 524.2-701 to -711 (West Supp. 2001); MONT. CODE ANN. §§ 72-2-711 to -721 (1999); N.M. STAT.

continued

D. Representation and Settlements (Section 111 and Article 3)

The U.T.C. strives to keep administration of trusts outside of the courts. Numerous actions are allowed solely upon notice to the beneficiaries. These actions include transfer of a trust's principal place of administration to or from another country or American state;¹⁰⁹ combination of separate trusts into one or the division of a single trust into two or more separate trusts;¹¹⁰ resignation of a trustee;¹¹¹ submission of a trustee's report;¹¹² and a trustee's notice of proposed plans of distribution.¹¹³ Other actions can be accomplished upon consent of the beneficiaries. These include selection of a successor trustee;¹¹⁴ and release of a trustee from potential liability.¹¹⁵

Achieving notice to or the consent of all of the beneficiaries, however, is frequently difficult. Trusts commonly last for decades. In Ohio and in an increasing number of other American jurisdictions, trusts can in theory last in perpetuity. The current beneficiaries of the trust are often minors or adults who lack capacity, and future beneficiaries may not yet be born. To achieve notice to or the consent of beneficiaries incapable of representing themselves, others must be empowered to act on their behalf. This is the function of rules on representation. Concepts of representation are not new, but the U.T.C. addresses the subject in more detail than previous efforts. The U.T.C. provides not only for representation by fiduciaries (guardians, conservators, personal representatives),¹¹⁶ but also by what is known as virtual representation, under which an otherwise underrepresented person (such as a child who may not yet be born) may be represented by another beneficiary with a similar beneficial interest.¹¹⁷ In addition, the Code authorizes the holder of a general testamentary power of appointment to represent and bind those whose interests are subject to the power¹¹⁸ and a parent to represent and bind a minor or unborn child.¹¹⁹

The representation provisions of the U.T.C. can be utilized for any notice required to be given to the beneficiaries. The representation provisions apply

ANN. §§ 45-2-701 to -711 (Michie 1995); N.D. CENT. CODE §§ 30.1-09.1-01 to 30.1-09.1-11 (1996); S.D. CODIFIED LAWS §§ 29A-2-701 to -711 (1997).

¹⁰⁹ U.T.C. § 108.

¹¹⁰ *Id.* § 417.

¹¹¹ *Id.* § 705.

¹¹² *Id.* § 813.

¹¹³ *Id.* § 817.

¹¹⁴ *Id.* § 704.

¹¹⁵ *Id.* § 1009.

¹¹⁶ *Id.* § 303.

¹¹⁷ *Id.* § 304.

¹¹⁸ *Id.* § 302.

¹¹⁹ *Id.* § 303(6).

not only to the matters detailed above, but can also be applied to settle any dispute whether in or out of court. The nonjudicial settlement provision is broad. The parties may enter into a nonjudicial settlement agreement with respect to any matter involving a trust.¹²⁰ The settlement agreement can contain any term or condition that a court could properly approve.¹²¹ Among the issues that can be resolved by a nonjudicial settlement agreement are the interpretation or construction of the terms of the trust; approval of a trustee's report or accounting; direction to a trustee to refrain from performing a particular act or to grant a trustee any necessary or desirable power; resignation or appointment of a trustee and determination of a trustee's compensation; transfer of a trust's principal place of administration; and liability of a trustee for an action relating to the trust.¹²²

Although the representation provisions provide legal practitioners with an added tool that will solve many practical problems, they should not be used without thought. Notice to and the consent of a representative is not binding if there is a conflict of interest between the representative and those ostensibly represented.¹²³ If a conflict of interest is a possibility, the practitioner should consider requesting the court to appoint a guardian ad litem (termed a representative under the Code) to represent the otherwise unrepresented beneficiary. Under the Code, the appointment of a representative is available whether the matter is to be resolved in or out of court.¹²⁴

Enactment of the U.T.C.'s representation and nonjudicial settlement provisions would represent a major improvement in Ohio law. Although Ohio recognizes virtual representation, it is available only in judicial proceedings.¹²⁵ Enactment of the U.T.C. would extend virtual representation to nonjudicial settlements and also make nonjudicial settlements for more matters than presently available. In addition, it would for the first time make accessible a variety of rules, such as representation of beneficiaries by fiduciaries, which are well accepted but have not previously been codified in one place.

120 *Id.* § 111(b).

121 *Id.* § 111(c).

122 *Id.* § 111(d).

123 *Id.* §§ 302-304.

124 *Id.* § 305.

125 *In re Trust of Spindler*, No. 1327, 1987 Ohio App. LEXIS 6044, at *8-9 (Ohio Ct. App., Feb. 26, 1987); *Cushman v. Cushman*, No. CA83-04-033, 1984 Ohio App. LEXIS 10990, at *4-5 (Ohio Ct. App., Sept. 28, 1984). For application of the doctrine of virtual representation to interests in real property, see generally *Bennett v. Fleming*, 137 N.E. 900 (Ohio 1922).

E. Creation of Trusts (Sections 401-409)

U.T.C. sections 401 through 409 describe the basic requirements for the creation of express trusts, most of which are straightforward and fairly conventional. The U.T.C. divides trusts into three categories-private, charitable, and honorary. Private trusts require an ascertainable beneficiary. Charitable trusts, on the other hand, by their very nature are created for the public at large. Honorary trusts, alternatively, include trusts for animals and other trusts for a noncharitable purpose such as maintenance of a cemetery lot.

Trusts may be created by transfer of property, self-declaration, or exercise of a power of appointment.¹²⁶ Whatever method may have been employed, other requirements, including intention, capacity and, for certain types of trusts, an ascertainable beneficiary, also must be satisfied before a trust is created.¹²⁷ A trust not created by will is validly created if its creation complied with the law of specified jurisdictions in which the settlor or trustee had a significant contact.¹²⁸ A trust must have a purpose that is of benefit to its beneficiaries and that is not illegal or impossible to achieve.¹²⁹ The creation of a trust may be contested on grounds of fraud, undue influence, or duress.¹³⁰ An oral trust is valid if its creation is evidenced by clear and convincing evidence or unless its creation is forbidden by some other statute such as a Statute of Frauds.¹³¹ A trust for the care of an animal is valid for the life of the animal.¹³² A trust for another noncharitable purpose without an ascertainable beneficiary may be created, but is enforceable for only twenty-one years.¹³³

Ohio law on creation of trusts is generally similar to the U.T.C. Except for statutes validating revocable trusts¹³⁴ and clarifying application of the doctrine of merger,¹³⁵ Ohio law on trust creation is derived entirely from case law. Even with enactment of the U.T.C., this case law will continue to be valuable. Enactment of the U.T.C. does not eliminate the common law of trusts. Except to the extent inconsistent, the provisions of the U.T.C. are supplemented by the common law of trusts and principles of equity.¹³⁶ Ohio

126 U.T.C. § 401.

127 *Id.* § 402.

128 *Id.* § 403.

129 *Id.* § 404.

130 *Id.* § 406.

131 *Id.* § 407.

132 *Id.* § 408.

133 *Id.* § 409.

134 OHIO REV. CODE ANN. § 1335.01(A) (Anderson 1993).

135 *Id.* § 1335.01(C).

136 U.T.C. § 106.

has a rich case law tradition on trust creation. There are numerous cases addressing such issues as the doctrine of merger,¹³⁷ the distinction between a trust and a debt,¹³⁸ the requirement of trust property,¹³⁹ intent to create a trust,¹⁴⁰ the ascertainable beneficiary requirement,¹⁴¹ the doctrine of secret¹⁴² and semi-secret¹⁴³ trusts, and the requirements for creating an oral trust.¹⁴⁴

F. Trust Modification and Termination (Sections 410-17)

Due to the increasing use in recent years of long-term trusts, there is a need for greater flexibility in the restrictive rules that apply concerning when a trust may be terminated or modified other than as provided in the instrument. The U.T.C. provides for this increased flexibility without disturbing the principle that the primary objective of trust law is to carry out the settlor's intent. Among the provisions enhancing the ability to modify or terminate a trust:

- It is no longer automatically presumed that a spendthrift provision is a material purpose barring the beneficiaries from compelling termination of a trust;¹⁴⁵

137 See, e.g., *In re Estate of Bicknell*, 160 N.E.2d 550, 552-53 (Ohio Ct. App. 1958).

138 See, e.g., *Squire v. American Express Co.*, 2 N.E. 2d 766, 772 (Ohio 1936); *Fulton v. Escanaba Paper Co.*, 193 N.E. 758, 762-63 (Ohio 1934); *Lippy v. Soc'y Nat'l Bank*, 651 N.E.2d 1364, 1368-69 (Ohio Ct. App. 1995); *Morris v. Investment Life Ins. Co.*, 248 N.E. 2d 216, 225-27 (Ohio Ct. App. 1969), *aff'd*, 272 N.E.2d 105 (Ohio 1971).

139 See, e.g., *Braun v. Central Trust Co.*, 109 N.E.2d 476 (Ohio Ct. App. 1952); *Patterson v. Pollock*, 84 N.E.2d 606, 611 (Ohio Ct. App. 1948); *Central Trust Co. v. McCarthy*, 57 N.E.2d 126, 129-30 (Ohio Ct. App. 1943); *Whitehead v. Bishop*, 155 N.E. 565, 565-66 (Ohio Ct. App. 1925); *Knowles v. Knowles*, 212 N.E.2d 88, 91-94 (Ohio Prob. Ct. 1965).

140 See, e.g., *Ohio Soc'y Crippled Children & Adults v. McElroy*, 191 N.E.2d 543, 545-46 (Ohio 1965); *Thomas v. Dye*, 127 N.E.2d 228, 231 (Ohio Ct. App. 1954); *Keifer v. Schuneman*, 78 N.E.2d 780, 783-84 (Ohio Ct. App. 1948); *In re Estate of Koval*, 221 N.E.2d 490, 492 (Ohio Prob. Ct. 1966).

141 See, e.g., *Moskovitz v. Federman*, 51 N.E.2d 48, 52 (Ohio Ct. App. 1943).

142 See, e.g., *Winder v. Scholey*, 93 N.E. 1098, 1099-1103 (Ohio 1910).

143 See, e.g., *Linney v. Cleveland Trust Co.*, 165 N.E. 101, 106-07 (Ohio Ct. App. 1928).

144 See, e.g., *Otto v. Keegan*, No. 13-82-26, 1983 Ohio App. LEXIS 13003 (Ohio Ct. App., May 18, 1983); *Hoffman v. Vetter*, 192 N.E.2d 249, 251-53 (Ohio Ct. App. 1962); *Thomas v. Thomas*, 161 N.E.2d 416, 419-20 (Ohio Ct. App. 1958); *Morrison v. Morrison*, 132 N.E.2d 233, 236-38 (Ohio Ct. App. 1955); *Thomas v. Dye*, 127 N.E.2d 228, 231-34 (Ohio Ct. App. 1954).

145 U.T.C. § 411(c).

- A court may not only modify a trust because of circumstances not anticipated by the settlor, but may also modify the trust's dispositive terms or even terminate the trust;¹⁴⁶
- A trust may be reformed due to the settlor's mistake of fact or law even if the original terms of the trust, as originally but mistakenly created, are unambiguous;¹⁴⁷
- To achieve the settlor's tax objectives, the court may modify the terms of the trust as long as the modification does not violate the settlor's probable intention. The court may also give the modification retroactive effect.¹⁴⁸

Although recognized at common law, the power of a trustee to combine or divide a trust without court approval is recognized in the U.T.C. and in the statutes of numerous American states.¹⁴⁹ The Code also authorizes the court to terminate an uneconomical trust and allows a trustee, without approval of court, to terminate a trust with a value of \$50,000 or less.¹⁵⁰ Ohio similarly authorizes a trustee to consolidate trusts or to divide a trust without order of court¹⁵¹ and provides for the termination of trusts under \$50,000, but only with court approval.¹⁵²

Ohio's rules on trust termination and modification are otherwise found solely in case law and without the liberalizing nudges in the U.T.C. Similar to U.T.C. section 411, an irrevocable trust may be terminated upon joint consent of the settlor and beneficiaries¹⁵³ or by the beneficiaries alone if the trust no longer serves a material purpose.¹⁵⁴ Similarly, there are numerous cases allowing modification of the administrative terms of a private trust due to unanticipated circumstances,¹⁵⁵ but none allowing modification of a trust's dispositive provisions. Finally, while a trust is to be construed to

146 *Id.* § 412.

147 *Id.* § 415.

148 *Id.* § 416.

149 *Id.* § 417.

150 *Id.* § 414.

151 OHIO REV. CODE ANN. § 1339.67 (Anderson 1993). The consolidation must be the best interests of the beneficiaries, be equitable and practicable, and not defeat or substantially impair the purposes of the trust or the interests of the beneficiaries. *Id.*

152 *Id.* §§ 1339.66 (Anderson 1993) and 2109.62 (Anderson 1993).

153 *Jordan v. Price*, 49 N.E.2d 769, 771 (Ohio Ct. App. 1942).

154 *Brown v. Moss*, No.19422, 1999 Ohio App. LEXIS 5285, at *3-5 (Ohio Ct. App., Nov. 10, 1999); *Carnahan v. Johnson*, 711 N.E.2d 1093, 1097 (Ohio Ct. App. 1998); *Nat'l City Bank v. Ford*, 299 N.E.2d 310, 314 (Ohio Ct. Com. Pl. 1973).

155 *See, e.g., Carnahan v. Johnson*, 711 N.E.2d 1093, 1097-98 (Ohio Ct. App. 1998); *Harter Holding Co. v. Perkins*, 43 N.E.2d 365, 375-76 (Ohio Ct. App. 1942).

achieve favorable tax results,¹⁵⁶ reformation of the trust for the same reason has been refused.¹⁵⁷

G. Charitable Trusts (Sections 405, 413)

Charitable gifts may be made in numerous ways. The donor may create and transfer property to a non-profit corporation. The donor may make an outright gift to charity in the donor's will. The donor may transfer property directly to a charity, but subject its use to various restrictions. Finally, the donor may create a charitable trust.

Charitable trusts must have a charitable purpose, a concept which has evolved over the centuries as society has changed. Doctrine has also evolved regarding what is to be done upon failure of a charitable purpose. The court will apply what is known as *cy pres* to reform the gift to better carry out the settlor's charitable purposes.¹⁵⁸ Under traditional doctrine, if the settlor's charitable purpose is deemed specific rather than general, the charitable gift fails and the property is returned to the settlor or settlor's successors in interest.¹⁵⁹

Under the U.T.C., a charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.¹⁶⁰ This standard, which is copied from the Restatement of Trusts,¹⁶¹ has been applied in hundreds of cases in Ohio and elsewhere.¹⁶²

Breaking ranks with the past, the U.T.C. grants a settlor standing to enforce or to seek modification of a charitable trust.¹⁶³ Enactment of this provision will represent a major change in Ohio law which denies standing both to the settlor and settlor's successors in interest.¹⁶⁴

The U.T.C. liberalizes the doctrine of *cy pres* in a way believed more likely to carry out the average settlor's intent. First, the Code expands the ability of the court to apply *cy pres*, allowing the court to apply *cy pres* not

156 *Sawyer v. Sawyer*, 374 N.E.2d 166, 168-69 (Ohio Ct. App. 1977).

157 *Fifth Third Bank v. Simpson*, 730 N.E.2d 406, 407-09 (Ohio Ct. App. 1999).

158 RESTATEMENT (THIRD) OF TRUSTS § 67 (Tentative draft No. 3, 2001); RESTATEMENT (SECOND) OF TRUSTS §§ 395-401 (1959).

159 U.T.C. § 413 cmt.

160 *Id.* § 405(a).

161 RESTATEMENT (THIRD) OF TRUSTS § 28 (Tentative Draft No. 3, 2001); RESTATEMENT (SECOND) OF TRUSTS § 368 (1959).

162 Representative Ohio cases include *Martin v. North Hill Christian Church*, 412 N.E.2d 413, 414 (Ohio Ct. App. 1979); *Heinlein v. Elyria Sav. & Trust Co.*, 62 N.E.2d 284 (Ohio Ct. App. 1945).

163 U.T.C. § 405(c) (enforcement); *id.* § 410(b) (modification).

164 *Three Bills, Inc. v. Parma*, 676 N.E.2d 1273, 1276 (Ohio Ct. App. 1996).

only if the original scheme becomes impossible or unlawful, but also if it becomes impracticable or wasteful.¹⁶⁵ Ohio applies *cy pres* only if the original charitable means have failed.¹⁶⁶ However, there are numerous Ohio cases where inefficient charitable dispositions have been modified on account of unanticipated circumstances.¹⁶⁷ Given this, there may be little or no difference between the U.T.C. and current Ohio law in practical effect.

More significant is the creation in the U.T.C. of a presumption in favor of general charitable intent. In applying *cy pres*, the court cannot decree a reversion to the settlor unless the terms of the trust expressly so provide.¹⁶⁸ This will change existing Ohio law. While the cases are rare, the courts will occasionally find that the settlor lacked a general charitable intent and decree a reversion to the settlor's heirs upon failure of the original charitable means.¹⁶⁹

The U.T.C. also changes the doctrine of *cy pres* to eliminate a severe administrative inefficiency. The U.T.C. recognizes that provisions diverting property to a noncharity that take effect far in the future often cause more mischief than help, necessitating detailed searches for heirs and the running of property through numerous estates. To limit this difficulty, under the U.T.C., a gift over to a noncharity upon failure or impracticality of the original charitable purpose overrides the court's ability to apply *cy pres* only if, when the provision is to take effect, the trust property is to revert to the settlor or, whether or not the trust property is to revert to the settlor, fewer than twenty-one years have elapsed since the date of the trust's creation.¹⁷⁰

H. *Spendthrift Provisions & Rights of Beneficiary's Creditors (Article 5)*

Spendthrift provisions, when effective, prohibit a creditor or assignee of a beneficiary from attaching the beneficiary's interest.¹⁷¹ Spendthrift provisions are not recognized in England, where trust law originated, and

¹⁶⁵ U.T.C. § 413(a).

¹⁶⁶ *City of Springfield v. Patterson*, 270 N.E.2d 683, 688 (Ohio Com. Pl. 1970); *Fenn College v. Nance*, 210 N.E.2d 418, 423 (Ohio Ct. Com. Pl. 1965).

¹⁶⁷ *Daloia v. Franciscan Health System*, 679 N.E.2d 1084, 1090-93 (Ohio 1997); *Board of Educ. v. Unknown Heirs of Aughinbaugh*, 134 N.E.2d 872, 878 (Ohio Ct. App. 1955); *First Nat'l Bank v. Unknown Heirs of Donnelly*, 122 N.E.2d 672, 675-77 (Ohio Ct. App. 1954); *City of Springfield*, 270 N.E.2d at 687-90 (Ohio Ct. Com. Pl. 1970); *Fenn College*, 210 N.E.2d at 422-24.

¹⁶⁸ U.T.C. § 413(a).

¹⁶⁹ *Craft v. Schroyer*, 74 N.E.2d 589 (Ohio Ct. App. 1947); *Muir v. Youse*, 80 N.E.2d 788 (Ohio Prob. Ct. 1946).

¹⁷⁰ U.T.C. § 413(b).

¹⁷¹ *Id.* § 502(c); RESTATEMENT (THIRD) OF TRUSTS § 58 (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS § 152 (1959).

they are of limited utility in the United States. A spendthrift provision provides only limited protection to the beneficiary. The creditor or assignee may pounce upon the trust funds as soon as distribution is made. But even funds retained in trust are not always protected. Numerous exceptions to spendthrift protection are recognized, depending on the type of creditor, the category of beneficiary, or the time when the claim is made.¹⁷²

The provisions of the U.T.C. relating to spendthrift provisions and the rights of a beneficiary's creditors was the most widely debated article of the Code. The result, however, largely tracks standard American doctrine. A trust is not spendthrift unless the instrument specifically so states.¹⁷³ In coming to this conclusion, the drafters rejected the approach that all trusts are spendthrift unless the instrument says otherwise. In addition, a restraint against claims by the creditors of a beneficiary is effective only if the beneficiary is also restrained from assigning the beneficiary's interest.¹⁷⁴ The drafting committee concluded that it was undesirable as a matter of policy for a beneficiary to be able to transfer the beneficiary's interest while at the same time denying the beneficiary's creditors the right to reach the trust in payment of their claims.

The drafting committee also concluded that it was undesirable as a matter of policy to allow a settlor to create a trust, retain a beneficial interest, but yet deny the settlor's creditors the right to reach the trust. Consequently, the U.T.C. rejects the approach taken in the legislation enacted in Alaska and Delaware, and, more recently, Rhode Island and Nevada, which allows a settlor to retain a beneficial interest immune from creditor claims.¹⁷⁵ Consistent with current Ohio law,¹⁷⁶ the U.T.C. allows a creditor of the settlor to fully reach the settlor's beneficial interest.¹⁷⁷

A key policy issue in drafting the Code was determining which classes of creditors should be exempt from the spendthrift bar. In determining the exceptions, the drafting committee did not start from scratch but paid particular attention to the exceptions listed in Restatement (Second) of Trusts § 157 and Restatement (Third) of Trusts § 59. Both Restatements, the trust

172 See RESTATEMENT (THIRD) OF TRUSTS § 59 (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS § 157 (1959); U.T.C. §§ 503-507.

173 *Id.* § 502(a).

174 *Id.*

175 For a discussion of the Alaska, Delaware, Nevada, and Rhode Island statutes, see generally Karen E. Boxx, *Gray's Ghost - A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195 (2000); Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479 (2000).

176 See *Miller v. Ohio Dep't Human Servs.*, 664 N.E.2d 619, 620-22 (Ohio Ct. App. 1995); *In re Myers*, 200 B.R. 155, 158 (Bankr. N.D. Ohio 1996); *In re Frangos*, 135 B.R. 272, 274 (Bankr. N.D. Ohio 1992).

177 U.T.C. § 505(a)(2).

statutes in many states, and other relevant statutes such as the Federal Bankruptcy Code¹⁷⁸ and E.R.I.S.A.,¹⁷⁹ grant special deference to collection of court orders for support of a beneficiary's child, spouse, or former spouse. Given this background and the important public policy concerns in making certain that those to whom legal obligations of support are owed actually receive such payment, the U.T.C. allows a child, spouse, or former spouse to attach the trust to collect on a court order for support.¹⁸⁰

The U.T.C. also creates an exception for claims by governmental units to the extent a state statute or federal law provides,¹⁸¹ thereby leaving to other law of the state the extent to which a state can pierce a trust to collect for the costs of institutionalized care. The U.T.C. allows a judgment creditor who has provided services to the beneficiary to reach the beneficiary's interest,¹⁸² but does not create a specific exception for the providers of necessities.

Ohio did not recognize spendthrift trusts until 1991.¹⁸³ Given Ohio's recent recognition, Ohio's spendthrift law is less developed than the spendthrift law of many other states. Subsequent case law, however, has established that a spendthrift provision is enforceable against a trustee in a bankruptcy proceeding¹⁸⁴ and against a claim for reimbursement for public assistance,¹⁸⁵ but not against a claim for child support¹⁸⁶ or unpaid federal taxes.¹⁸⁷

Exemption from a spendthrift bar does not necessarily mean that a beneficiary's creditor will collect. If the trust is discretionary or for support, the creditor cannot generally attach the beneficiary's interest. The U.T.C. abolishes the often evasive distinction between discretionary and support trusts. The beneficiary's creditor cannot collect whether the discretion is expressed in the form of a standard of distribution or not. This is the case

178 11 U.S.C.A. § 523(a)(5) (West Supp. 2001).

179 29 U.S.C.A. § 1056(d)(3) (West 1999).

180 U.T.C. § 503(b).

181 *Id.* § 503(c).

182 *Id.* § 503(b).

183 *Scott v. Bank One Trust Co.*, 577 N.E.2d 1077, 1081-84 (Ohio 1991). *See also Domo v. McCarthy*, 612 N.E.2d 706, 709-11 (Ohio 1993). For background on Ohio's rejection and then later adoption of spendthrift doctrine, see generally Gerald P. Moran, *A Radical Theory of Jurisprudence: The "Decisonmaker" as the Source of Law-The Ohio Supreme Court's Adoption of the Spendthrift Trust Doctrine as a Model*, 30 AKRON L. REV. 393 (1997).

184 *In re Abbott*, 123 B.R. 784 (Bankr. S.D. Ohio 1991).

185 *Society Bank Nat'l Ass'n v. Cayuga Co. Dep't Social Servs.*, No. 283409-72, 1993 Ohio App. LEXIS 1374, at *5-11 (Ohio Ct. App., Mar. 10, 1993).

186 *Albertson v. Ryder*, 621 N.E.2d 480, 483 (Ohio Ct. App. 1993)

187 *Bank One Ohio Trust Co. v. United States*, 80 F.3d 173, 176-77 (6th Cir. 1996).

even if the discretion was abused.¹⁸⁸ The only exception pertains to claims for child support or alimony. To the extent a trustee has failed to comply with a standard of distribution or has abused a discretion, the court may direct that the shortfall be paid to satisfy a judgment or court order for support or alimony.¹⁸⁹ Ohio similarly provides that a beneficiary's creditor cannot reach an interest in a discretionary trust,¹⁹⁰ but has not yet created an exception for child support or alimony claims.

The U.T.C. addresses several miscellaneous creditor issues. To protect a trust from an immediate attachment as soon as a payment becomes due, whether the payment is periodic or upon termination of the trust, the U.T.C. provides that spendthrift protection is lost only after the trustee has had a reasonable time in which to make the distribution.¹⁹¹ The U.T.C. clarifies that a revocable trust is fully subject to the settlor's creditors while the settlor is living.¹⁹² In addition, following the settlor's death, a revocable trust is liable for the settlor's debts to the extent the settlor's probate estate is insufficient.¹⁹³ Although the U.T.C. treats the holder of a power of withdrawal the same as the settlor of a revocable trust,¹⁹⁴ an exception is created for "Crummey" and "five and five" powers. Upon the release or lapse of a power of withdrawal, assets falling within the [annual exclusion or "five and five"] limit are exempt from claims of the holder's creditors.¹⁹⁵

I. Revocable Trusts (Article 6)

The revocable trust is the most common trust created today in the United States. The heavy use of the revocable trust is a recent phenomenon, beginning decades if not centuries after most traditional trust law was formulated. The provisions of the U.T.C. on revocable trusts are among its most important and most innovative, dealing largely with issues unaddressed at common law. The biggest change is a reversal of the common law presumption that trusts are irrevocable. Reflecting the increasing if not predominant use of the revocable trust in the United States, the U.T.C. provides that a trust is revocable absent clarifying language in the terms of the trust.¹⁹⁶ Providing a presumption in the statute is most relevant for homegrown trusts. Professional drafters routinely state whether the trust is revocable or irrevocable. Because the Code's presumption will reverse the

188 U.T.C. § 504(b).

189 *Id.* at § 504(c).

190 *Morris v. Daiker*, 172 N.E. 540, 542-43 (Ohio Ct. App. 1929).

191 U.T.C. § 506.

192 *Id.* § 505(a)(1).

193 *Id.* § 505(a)(3).

194 *Id.* § 505(b)(1).

195 *Id.* § 505(b)(2).

196 *Id.* § 602(a).

rule in most jurisdictions, including Ohio,¹⁹⁷ the presumption of revocability applies only to trust instruments executed on or after the date of enactment.¹⁹⁸

The revocable trust is used today largely as a substitute for a will. The U.T.C. in general reflects this usage, treating the revocable trust in most respects as the functional equivalent of a will, at least while the settlor is alive. The capacity requirement for creating a trust is the same as that for a will.¹⁹⁹ Also, while the settlor has capacity, all of the rights of the beneficiaries are controlled exclusively by the settlor.²⁰⁰ Notices that would otherwise be given to the beneficiaries must instead be given to the settlor and the settlor is authorized to give binding consents on a beneficiary's behalf. Access to the trust document is also within the settlor's control. Upon a settlor's loss of capacity, however, the beneficiaries may exercise their rights as beneficiaries absent contrary intent in the terms of the trust.²⁰¹

Unless the terms of the trust make a specified method of revocation exclusive, the U.T.C. provides that a trust may be revoked by substantially complying with the method specified in the trust's terms or by any other method manifesting clear and convincing evidence of the settlor's intent.²⁰² The ability to bypass a method specified in the terms of the trust unless that method has been made exclusive may represent a change in Ohio law.²⁰³ Ohio, like the U.T.C., also authorizes revocation by will.²⁰⁴

Contest of a will is typically barred under one of two alternative statutes. Normally, a contest is barred following some period of time following notice of probate. In Ohio, the contest must be brought within four months after the filing of the affidavit certifying that notice of probate has been given.²⁰⁵

In addition, many states bar a contest after a specified period of time following the settlor's death, whether or not the will was probated or notice of probate given. The most commonly enacted time limit is three years

197 *In re* Guardianship of Lombardo, 716 N.E.2d 189, 195 (Ohio 1999); *Mumma v. Huntington Nat'l Bank*, 223 N.E.2d 621, 623-24 (Ohio Ct. App. 1967). A trust is presumed revocable only in California, Iowa, Montana, Oklahoma, Texas. See CAL. PROB. CODE §15400 (West 1991); IOWA CODE ANN. §633.3102(1) (West Supp. 2001); MONT. CODE ANN. §72-33-401 (1999); OKLA. STAT. ANN. tit. 60, §175.41 (West 1994); TEX. PROP. CODE §112.051 (Vernon 1995).

198 U.T.C. § 602(a).

199 *Id.* § 601.

200 *Id.* § 603.

201 *Id.* §§ 105, 603.

202 *Id.* § 602(c).

203 See, e.g., *Magoon v. Cleveland Trust Co.*, 134 N.E.2d 879, 882-84 (Ohio Ct. App. 1956) (will did not alter trust providing for amendment by notice to the trustee).

204 U.T.C. § 602(c)(2); *In re* Estate of Davis, 671 N.E.2d 1302 (Ohio Ct. App. 1996).

205 OHIO REV. CODE ANN. § 2107.76 (Anderson 1994).

following the testator's death.²⁰⁶ Most states currently have no limitation period on contest of a revocable trust. The U.T.C. corrects this omission by providing that a potential contestant must file a contest within the earlier of 120 days following receipt of a notice or three years following the settlor's death.²⁰⁷ These time limits have been placed in brackets because states are encouraged to substitute the periods under their comparable will contest statutes.²⁰⁸ In addition, to encourage expeditious distribution of trust assets, a trustee who has not been notified that a contest has or will be filed is absolved from liability for making distributions before the contest period has expired.²⁰⁹ Liability in such cases is solely on the distributees.²¹⁰

J. *Change in Trustee (Article 7)*

A vacancy in a trusteeship can occur for numerous reasons. The trustee may resign, be removed, or die.²¹¹ In the event of a vacancy, a procedure is needed for getting a successor into office. Most of these issues can and should be addressed in the trust instrument, but it is difficult to anticipate all questions. Even if the drafter does anticipate every issue, the drafter will frequently rely on the local trust statute for guidance on the language to employ. On occasion, the drafter will choose to let the statute control. The U.T.C. specifies numerous rules relating to a change in trustee.²¹² Ohio also has numerous statutory rules on changes of trustee although only for testamentary, not inter vivos, trusts.²¹³

1. *Appointing successors*

Absent a provision for the appointment of a successor in the terms of the trust, the U.T.C. provides that a successor trustee of a noncharitable trust may be appointed by unanimous agreement of the qualified beneficiaries or by the court, with the appointment by the beneficiaries given priority.²¹⁴ Ohio provides for appointment of a successor trustee by the court.²¹⁵ A trustee may be appointed by the beneficiaries only if the terms of the trust so

206 U.P.C. § 3-108 (1997).

207 U.T.C. § 604(a).

208 *Id.* § 604 cmt.

209 *Id.* § 604(b).

210 *Id.* § 604(c).

211 *Id.* § 704(a). A vacancy can also occur if a guardian or conservator is appointed for an individual serving as trustee, or if a person designated as trustee rejects the trusteeship, cannot be identified, or does not exist. *Id.*

212 *Id.* §§ 704-706.

213 *See infra* notes 215-37 and accompanying text.

214 U.T.C. § 704(c).

215 OHIO REV. CODE ANN. § 2109.26 (Anderson 1994); *N. Shaker Boulevard Co. v. Harriman Nat'l Bank of New York*, 153 N.E. 909, 910 (Ohio Ct. App. 1924).

authorize.²¹⁶ If so, the court must give the beneficiaries a reasonable time in which to make the selection before intervening to make its own appointment.²¹⁷ Under both the U.T.C.²¹⁸ and Ohio law,²¹⁹ a vacancy is not created by the resignation or removal of a cotrustee. The remaining trustee or cotrustees may continue to act for the trust without appointment of a successor.²²⁰

2. Resignation of trustee

The U.T.C. copies a provision commonly found in trust instruments that allow a trustee to resign by giving notice to the qualified beneficiaries.²²¹ In Ohio, absent permission to resign in the terms of the trust, the trustee of a testamentary trust must seek permission of the court.²²²

3. Removal of trustee

Trustees in many states may be removed only for breach of trust or other untoward act. This standard gives great weight to the settlor's particular selection of trustee.²²³ Because trust instruments typically place weight on a trustee's judgment and exercise of discretion, the particular trustee selected becomes an important term of the trust, and a term which should not easily be changed.²²⁴ The U.T.C. follows traditional doctrine by authorizing the removal of a trustee for acts of misconduct or other disqualification. Acts of misconduct or other disqualification justifying removal of the trustee include serious breach of trust, unfitness, and unwillingness or persistent failure to effectively perform the function.²²⁵ A trustee may also be removed due to lack of cooperation among cotrustees.²²⁶ Removal for serious breach of trust or lack of cooperation among the cotrustees requires no additional findings.²²⁷ Removal for unfitness, unwillingness, or persistent failure to effectively administer the trust requires an additional finding by the court that removal would best serve the interests of the beneficiaries.²²⁸ "Interests of

216 Galbreath v. del Valle, 633 N.E.2d 1185, 1190-91 (Ohio Ct. App. 1993).

217 *Id.*

218 U.T.C. § 703(b).

219 OHIO REV. CODE ANN. § 2109.27 (Anderson 1994); *In re Trust Created by Will of Labold*, 74 N.E.2d 251, 254-55 (Ohio 1947).

220 OHIO REV. CODE ANN. § 2109.27 (Anderson 1994).

221 U.T.C. § 705(a).

222 OHIO REV. CODE ANN. § 2109.24 (Anderson 1994).

223 U.T.C. § 706 cmt.

224 *Id.*

225 *Id.* § 706(b)(1) & (3).

226 *Id.* § 706(b)(2).

227 *Id.* § 706(b)(1)-(2).

228 *Id.* § 706(b)(3).

the beneficiaries,” a defined term, means the beneficial interests provided in the terms of the trust.²²⁹

But the drafters of the U.T.C. also concluded that in situations where the personal link between the settlor and trustee has been broken, the emphasis should turn to whether the particular trustee is appropriate to the trust, not whether the trustee has committed particular acts of misconduct or is totally unfit.²³⁰ Consequently, the U.T.C. also allows the court to consider whether there has been a substantial change of circumstances or whether removal is unanimously requested by the qualified beneficiaries.²³¹ However, in neither case may the trustee be removed unless the court also concludes that the selection of the particular trustee was not a material purpose of the trust, that removal of the trustee would best serve the interests of the beneficiaries, and that a suitable cotrustee or successor trustee is available.²³²

Similar to the U.T.C., Ohio’s removal statute for testamentary trustees also mixes older and newer grounds.²³³ Traditional grounds for removal include failure to account, habitual drunkenness, neglect of duty, incompetency, and fraudulent conduct.²³⁴ But the Ohio statute, like the U.T.C., also looks to the best interests of the trust and the views of the beneficiaries. A trustee may be removed by the court if the interest of the trust demands it or if removal is requested by more than one half of the persons having an interest in the estate controlled by the trustee.²³⁵ The standard for removing trustees of inter vivos trusts is established by case law.²³⁶ Removal of the trustee is regarded as an extraordinary remedy that a court should exercise only when necessary to protect trust assets.²³⁷

K. Duty to Keep the Beneficiaries Informed (Section 813)

The U.T.C. fills out and adds detail to the trustee’s duty to keep the beneficiaries informed of administration. When in doubt, the U.T.C. favors disclosure to beneficiaries as being the better policy. The U.T.C. imposes both a general obligation on the trustee to keep the qualified beneficiaries reasonably informed of administration²³⁸ as well as several specific notice requirements.²³⁹

229 *Id.* § 103(7).

230 *Id.* § 706 cmt.

231 *Id.* § 706(b)(4).

232 *Id.*

233 *See* OHIO REV. CODE ANN. § 2109.24 (Anderson 2000).

234 *Id.*

235 *Id.*

236 *Whiting v. Bryant*, 131 N.E.2d 425, 430-31 (Ohio Ct. App. 1956).

237 *Id.*

238 U.T.C. § 813(a).

239 *Id.* § 813(b)-(c).

A trustee is required to notify the qualified beneficiaries of the trustee's acceptance of office and of any change in the method or rate of the trustee's compensation.²⁴⁰ Regular reporting by the trustee is required.²⁴¹ The trustee must annually furnish the qualified beneficiaries with a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation.²⁴² The trustee must also promptly respond to any beneficiary's request for information unless unreasonable under the circumstances.²⁴³ This includes a requirement that the trustee provide a beneficiary upon request with a copy of the trust instrument.²⁴⁴ The drafting committee rejected the more limited approach of letting the trustee decide which provisions are material to the beneficiary's interest; the trustee's version of what is material may differ markedly from what the beneficiary might find relevant.²⁴⁵ Requiring disclosure of the entire instrument upon demand is consistent with recent case law.²⁴⁶

The most discussed issue concerning the U.T.C. is the extent to which a settlor may waive the above disclosure requirements. Most of the specific disclosure requirements are waivable.²⁴⁷ Not waivable is the trustee's obligation to notify the qualified beneficiaries age twenty-five or older of the existence of the trust.²⁴⁸ With respect to any beneficiary regardless of age, the trustee also may not waive the trustee's obligation to respond to a request for a trustee's report and other information reasonably related to the trust's administration.²⁴⁹ In other words, if a beneficiary finds out about the trust and makes a request for information, the trustee must respond to the request even if the trustee was not obligated to inform the beneficiary about the trust in the first instance.²⁵⁰

Early indications are that some of the states that will enact the U.T.C. will modify the waiver provision. One alternative being discussed is to eliminate or lower the age twenty-five limit, making the obligation to inform the beneficiaries of the trust's existence applicable to all beneficiaries or all adult beneficiaries. Another alternative is to allow a settlor to waive notice to remainder beneficiaries regardless of age. Yet another response is to permit a

240 *Id.* § 813(b)(2), (b)(4).

241 *Id.* § 813(c).

242 *Id.*

243 *Id.* § 813(a).

244 *Id.* § 813(b)(1).

245 *Id.* § 813 cmt.

246 *Taylor v. Nationsbank Corp.*, 481 S.E.2d 358 (N.C. App. 1997); *Fletcher v. Fletcher*, 480 S.E.2d 488, 492 (Va. 1997).

247 *Compare* U.T.C. § 105(b)(8)-(9) *with* § 813(b)-(c).

248 *Id.* § 105(b)(8).

249 *Id.* § 105(b)(9).

250 *Id.* § 105 cmt.

settlor to direct a trustee to keep silent about the trust even in the face of a specific request by a beneficiary for information.

The waiver issue brings into direct conflict the goal of effectuating settlor intent with the goal of making certain the beneficiaries have sufficient information to enforce their interests. The result is a compromise of which some on both sides of the issue will not be satisfied. Restricting a settlor's ability to limit disclosure is not a new concept,²⁵¹ but reducing the matter to the form of a statute brings the issue into much sharper relief.

Ohio has addressed only a couple of the issues covered in the U.T.C. reporting provision. While the trustee of a testamentary trust must file a final accounting,²⁵² reports by trustees of inter vivos trusts are normally required only upon a beneficiary's demand.²⁵³ Under the U.T.C., annual reporting is required by all types of trustees²⁵⁴ although the beneficiaries may waive this requirement.²⁵⁵

VIII. CONCLUSION

This article has reviewed the significant provisions of the U.T.C. and, assuming it is enacted in Ohio, its effect on Ohio law. Ohio's current trust statutes are few in number and are largely limited to testamentary trusts. The Ohio courts have decided numerous trust cases, but, despite this volume of decisions, the U.T.C. manages to address numerous issues on which there is currently little or no Ohio law. Enactment of the U.T.C. would enable Ohio to update its existing statutes, address issues not now addressed, and codify all of its trust law in one place. This article has focused on the changes the U.T.C. would make in Ohio's substantive law of trusts, but a far more important reason for enacting the Code is to make Ohio's trust statutes more complete, accessible, and, as a consequence, more useful.

251 Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust. RESTATEMENT (SECOND) OF TRUSTS: DUTY TO FURNISH INFORMATION § 173 cmt. c (1959).

252 OHIO REV. CODE ANN. § 2109.26 (Anderson 1994).

253 *Id.* (Anderson Supp. 2000).

254 U.T.C. § 813(c)-(d).

255 *Id.* § 813(d)