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## The Kansas Uniform Trust Code

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# The Kansas Uniform Trust Code

David M. English\*

## I. INTRODUCTION

Senate Bill 297, which was enacted by the Kansas legislature in 2002 and which became effective on January 1, 2003, is a substantial adoption of the Uniform Trust Code (2000) ("UTC"). The Kansas UTC is codified in a new chapter, Kansas Statutes Annotated chapter 58a.<sup>1</sup> The UTC is the Uniform Law Commissioners' first effort to provide the states with a comprehensive model for codifying their law on trusts.<sup>2</sup> Kansas is the first state to enact the UTC, although bar committees and other groups in over thirty states are currently studying the Code for enactment. Several enactments are expected in 2003. Kansas became the first state to enact the UTC because Kansas was the first state to appoint a committee to study the UTC. Shortly after drafting began at the national level in 1994, the Kansas Judicial Council began studying the various drafts and considering modifications necessary for enactment in Kansas. This article provides an overview of the Kansas UTC, with some attention to how its enactment changes existing Kansas law.<sup>3</sup>

The UTC was officially drafted by a committee consisting of Uniform Law Commissioners. The Commissioners were assisted by a Reporter whose duties included drafting the committee's decisions on a day-to-day level and preparing the various drafts. The committee was assisted by numerous advisors and observers, representing an array of organizations, who attended and participated fully at drafting sessions.

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1. Section 101 of the UTC will become Kansas Statutes Annotated § 58a-101, and so forth. The UTC will be published in the Kansas Statutes Annotated 2002 supplement.

2. A copy of the UTC with complete comments can be accessed through the Commissioners' website, at [www.nccusl.org](http://www.nccusl.org). A copy of the UTC, with both official and Kansas comments, can be accessed through the website of the Kansas Judicial Council, at [www.kscourts.org/council/kutc.pdf](http://www.kscourts.org/council/kutc.pdf).

3. For a more detailed analysis of the topics discussed in this article but without comparison to a particular state's law, see David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143 (2002). For a comparison of the UTC to the existing trust law of Ohio, see David M. English, *The Uniform Trust Code (2000) and Its Application to Ohio*, 30 CAP. U. L. REV. 1 (2002). For a detailed analysis of the UTC, on a section-by-section basis, see ROBERT WHITMAN & DAVID M. ENGLISH, *FIDUCIARY ACCOUNTING AND TRUST ADMINISTRATION GUIDE* pt. 2 (2002).

Among the Commissioner members of the drafting committee was Glee Smith of Kansas.<sup>4</sup>

The much increased use of trusts in recent years prompted the drafting of the UTC. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, led to the Commissioners' recognition that the trust law in most states is thin, with many gaps between the often few statutes and reported cases. It also led to recognition that previous uniform acts relating to trusts, "while numerous, are fragmentary."<sup>5</sup> The primary source of trust law in Kansas and in most other states is the *Restatement of Trusts* and the multivolume treatises by Scott<sup>6</sup> and Bogert,<sup>7</sup> sources that fail to address numerous practical issues and which on others sometimes provide insufficient guidance.

While the UTC 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 California<sup>8</sup> and Texas<sup>9</sup> being the most widely known. The UTC is not directed principally at these states but at states like Kansas, which formerly had relatively few trust statutes. Such trust statutes as did exist in Kansas were found scattered amongst the property and probate provisions codified in Chapters 58 and 59 of the Kansas statutes. With the exception of provisions in Chapter 59 governing "fiduciaries" of all types, including trustees, most of these scattered statutes are now repealed.<sup>10</sup> By enacting the UTC, Kansas now addresses numerous trust issues not previously covered and codifies nearly all of its trust law in one place.

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4. UTC introductory material.

5. UTC prefatory note.

6. AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* (4th ed. 1987).

7. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* (2d ed. rev. 1977).

8. CAL. PROB. CODE §§ 15000–18201 (West 1991 & Supp. 2002).

9. TEX. PROP. CODE ANN. §§ 111.001–115.017 (Vernon 1995 & Supp. 2002).

10. S.B. 297, 2001 Leg., § 93 (Kan. 2002), repealed the following statutes: KAN. STAT. ANN. §§ 58-1201 to -1203; 58-1205 to -1211; 58-2404 to -2405; 58-2409 to -2413; 58-2415; 58-2417; 58-2420; and 59-2295 to -2296 (1994); *id.* §§ 58-1204 and 58-12a01 to -12a06 (Supp. 2001). Not repealed were numerous provisions of Chapter 59 directed at "fiduciaries," a term which is defined to include not only personal representatives but also trustees. KAN. STAT. ANN. §§ 59-102(3) (1994). Also not repealed were Kansas Statutes sections 59-1601 to -1611, relating to accountings by testamentary trustees. To the extent still relevant, the Kansas UTC provides that testamentary trusts remain subject to Chapter 59. KAN. STAT. ANN. § 58a-105(c) (Supp. 2002).

## II. OTHER UNIFORM ACTS THAT ADDRESS TRUSTS

### A. *Related Uniform Acts*

There are numerous other Uniform Acts relating to trusts, but all deal with discrete topics. Superseded and replaced by the UTC are Article VII of the Uniform Probate Code and the Uniform Trustee Powers Act, of which only the Trustee Powers Act had been enacted in Kansas.<sup>11</sup> Not superseded by the UTC is the Uniform Prudent Investor Act, enacted by Kansas in 2000.<sup>12</sup> There are several other uniform acts addressing trust-related topics that are not affected by the UTC, of which Kansas has enacted the Uniform Management of Institutional Funds Act,<sup>13</sup> the 1997 version of the Uniform Principal and Income Act,<sup>14</sup> the Uniform Statutory Rule Against Perpetuities,<sup>15</sup> and the 1960 version of the Uniform Testamentary Additions to Trusts Act.<sup>16</sup>

### B. *Restatement of Trusts*

The Uniform Trust Code was drafted in close coordination with the revision of the *Restatement of Trusts*. This coordination has hopefully made both into better products. The *Restatement* provides a wealth of background materials for interpreting the language of the Code. In 1957, the American Law Institute approved the *Restatement (Second) of Trusts*.<sup>17</sup>

Beginning in the late 1980s, work on the *Restatement (Third)* began. The portion of the *Restatement (Third)* relating to the prudent investor rule and other investment topics was completed and approved in 1990.<sup>18</sup> A tentative draft of the portion of the *Restatement (Third)* relating to the rules on the creation and validity of trusts was approved in 1996;<sup>19</sup> the portion relating to the office of trustee, trust purposes, spendthrift provi-

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11. KAN. STAT. ANN. §§ 58-1201 to -1211 (repealed 1994).

12. *Id.* §§ 58-24a01 to -24a14 (Supp. 2001).

13. *Id.* §§ 58-3601 to -3610 (1994).

14. *Id.* §§ 58-9-101 to -603 (Supp. 2001).

15. *Id.* §§ 59-3401 to -3408 (1994).

16. *Id.* §§ 59-3101 to -3105. Other uniform acts not affected by enactment of the UTC include the Uniform Custodial Trust Act, enacted in fourteen jurisdictions, and the Uniform Supervision of Trustees for Charitable Purposes Act, enacted in four jurisdictions. UTC prefatory note.

17. RESTATEMENT (SECOND) OF TRUSTS (1959).

18. RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE (1992).

19. RESTATEMENT (THIRD) OF TRUSTS (Tentative Draft No. 1, 1996).

sions, and the rights of creditors was approved in 1999;<sup>20</sup> and the portion on termination and modification of trusts was approved in 2001.<sup>21</sup>

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, where the decisions of the courts conflict, a Restatement strives to delineate the better rule. It also strives to fill in gaps in the law and 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.

Kansas courts have frequently cited the *Restatement of Trusts*, and the Kansas Supreme Court has frequently stated that the *Restatement* is persuasive authority when Kansas law is otherwise silent. But there are numerous Kansas cases that do not cite the *Restatement* and there are numerous trust-law topics on which there are yet no Kansas cases. Enactment of the UTC by Kansas closes many of these gaps and in their place presents readily accessible law. The Kansas UTC will thus serve an important educational function. Legal practitioners in Kansas will have easy access to their state's law on trusts.

### III. THE UTC AND THE KANSAS UTC

#### A. *Scope of Coverage*

The UTC establishes the law relating to express trusts, whether charitable or noncharitable.<sup>22</sup> This is to be distinguished from what are known as resulting or constructive trusts, which are remedial devices imposed by the courts.<sup>23</sup> Express trusts 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.<sup>24</sup> The UTC also applies to trusts to be administered in the manner of an express trust but that is created pursuant to a statute, judgment, or decree.<sup>25</sup>

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20. *Id.* (Tentative Draft No. 2, 1999).

21. *Id.* (Tentative Draft No. 3, 2001).

22. UTC § 102; KAN. STAT. ANN. § 58a-102 (Supp. 2002).

23. UTC § 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 V AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* §§ 461-529 (4th ed. 1989); and VA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* §§ 530-552 (4th ed. 1987).

24. UTC § 401; KAN. STAT. ANN. § 58a-401 (Supp. 2002).

25. UTC § 102; KAN. STAT. ANN. § 58a-102 (Supp. 2002). A trust created pursuant to a judgment or decree would include a trust ordered by the court to enable a ward under guardianship or

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.<sup>26</sup> The UTC is not directed specifically at commercial trusts but neither does it exclude them. The extent to which commercial trusts are subject to the UTC depends on the type of trust and the laws, other than the UTC, under which the trust was created.

### B. Overview of Provisions

The organizational structure of the UTC reveals its breadth. The UTC is organized into eleven articles. Article 1, in addition to providing definitions,<sup>27</sup> addresses topics such as the ability of a trust instrument to override the UTC's provisions,<sup>28</sup> the validity of choice-of-law provisions and the law to govern in the absence of such a provision,<sup>29</sup> and the procedure for transferring the principal place of administration to another jurisdiction.<sup>30</sup> Article 2 addresses selected topics involving judicial proceedings concerning trusts.<sup>31</sup> Included is the conferring of jurisdiction on the court to intervene in a trust's administration,<sup>32</sup> specification of the court's jurisdiction over trustees and beneficiaries,<sup>33</sup> and provisions on subject matter jurisdiction<sup>34</sup> and venue.<sup>35</sup> This minimal coverage was deliberate; the drafting committee concluded that most issues relating to jurisdiction and procedure before the courts were best left to other bodies of law, such as the rules of civil procedure.<sup>36</sup> The provision on subject

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conservatorship to qualify for government assistance. KAN. STAT. ANN. § 59-3019c (Supp. 2002).

26. See John H. Langbein, *The Secret Life of the Trust: The Trust As an Instrument of Commerce*, 107 YALE L.J. 165, 167-78 (1997) (discussing the principal forms of commercial trusts used in the United States).

27. UTC § 103; KAN. STAT. ANN. § 58a-103 (Supp. 2002).

28. UTC § 105; KAN. STAT. ANN. § 58a-105 (Supp. 2002).

29. UTC § 107; KAN. STAT. ANN. § 58a-107 (Supp. 2002). For an article on the UTC's choice of law provisions, see Eugene F. Scoles, *Choice of Law in Trusts: Uniform Trust Code, Sections 107 and 403*, 67 MO. L. REV. 213 (2002).

30. UTC § 108; KAN. STAT. ANN. § 58a-108 (Supp. 2002).

31. UTC art. 2, general cmt.

32. *Id.* § 201; KAN. STAT. ANN. § 58a-201 (Supp. 2002). Even absent special statute, the power of a Kansas court to intervene in a trust's administration is an established principle. See *Coolbaugh v. Gage*, 182 Kan. 145, 150-51, 319 P.2d 146, 150 (1957) (discussing the general jurisdiction of courts over trusts).

33. UTC § 202; KAN. STAT. ANN. § 58a-202 (Supp. 2002).

34. UTC § 203; KAN. STAT. ANN. § 58a-203 (Supp. 2002).

35. UTC § 204; KAN. STAT. ANN. § 58a-204 (Supp. 2002).

36. See UTC § 203 cmt. (explaining that the enacting jurisdiction may address jurisdiction by

matter jurisdiction 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.<sup>37</sup> The Kansas UTC provides that the district court has exclusive jurisdiction over proceedings concerning administration of trusts.<sup>38</sup> Venue for an inter vivos or testamentary trust is ordinarily in the county in which the trust's principal place of administration is located.<sup>39</sup>

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 consent on behalf of the beneficiary or other persons represented.<sup>40</sup> Article 4, which begins the heart of the Code, prescribes the requirements for creating, modifying, and terminating trusts.<sup>41</sup> The provisions on the creation of trusts largely track traditional doctrine;<sup>42</sup> those relating to modification and termination liberalize the prevailing law.<sup>43</sup> Article 5 covers spendthrift provisions and rights of creditors, both of the settlor and beneficiaries.<sup>44</sup> Article 6 collects the special rules relating to revocable trusts, including the standard of capacity, the procedure for revocation or modification, and the statute of limitations on contests.<sup>45</sup> Article 7 turns to the office of trustee, specifying numerous procedural rules that apply absent a special provision in the trust.<sup>46</sup> Included are the rules on trustee acceptance, the rights and obligations of cotrustees, the procedure for

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another statute or court rule).

37. *See id.* (stating “[t]his section provides a means for distinguishing the jurisdiction of the court having primary jurisdiction over trust matters . . . from other courts in a state that may on occasion resolve disputes concerning trusts”).

38. KAN. STAT. ANN. § 58a-203 (Supp. 2002).

39. *Id.* § 58a-204(a). For a discussion of principal place of administration, see *infra* text accompanying notes 92–94. Venue is also in the county in which any real property is located, and if the trust is created by will and the estate is not yet closed, in the county in which the decedent's estate is being administered. KAN. STAT. ANN. § 58a-204(a) (Supp. 2002).

40. UTC art. 3; KAN. STAT. ANN. §§ 58a-301 to -305 (Supp. 2002). For a discussion, see *infra* text accompanying notes 100–19.

41. UTC art. 4, general cmt.

42. *Id.* §§ 401–409; KAN. STAT. ANN. §§ 58a-401 to -409 (Supp. 2002). For a discussion, see *infra* text accompanying notes 120–34.

43. UTC §§ 410–417; KAN. STAT. ANN. §§ 58a-410 to -417 (Supp. 2002). For a discussion of the rules applicable to both charitable and noncharitable trusts, see *infra* text accompanying notes 135–68.

44. UTC §§ 501–507; KAN. STAT. ANN. §§ 58a-501 to -507 (Supp. 2002). For a discussion, see *infra* text accompanying notes 169–82.

45. UTC §§ 601–604; KAN. STAT. ANN. §§ 58a-601 to -604 (Supp. 2002). For a discussion, see *infra* text accompanying notes 183–202.

46. UTC §§ 701–709; KAN. STAT. ANN. §§ 58a-701 to -709 (Supp. 2002).

resignation, the grounds for removal, the methods for appointing successors, and trustee compensation.<sup>47</sup>

Article 8 details the duties and powers of the trustee.<sup>48</sup> 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.<sup>49</sup> The trustee duties contained in Article 8, such as the duty of loyalty,<sup>50</sup> were drafted where relevant to conform to the Uniform Prudent Investor Act. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with regard to the management and investment of trust property. The UTC expands on this by also specifying the trustee's duties regarding distributions to beneficiaries. By enacting Article 8, Kansas now has a consistent set of duties whether the issue is investment, management, or distribution.

Article 9 provides a place for the jurisdiction enacting the larger UTC to codify its version of the Uniform Prudent Investor Act, if it is so inclined.<sup>51</sup> Because Kansas expanded the Prudent Investor Act to also apply to investment decisions by personal representatives, the drafters of the Kansas UTC chose not to recodify the Prudent Investor Act.<sup>52</sup>

Article 10 addresses the liability of trustees and rights of beneficiaries.<sup>53</sup> With respect to the rights of beneficiaries, the Article lists the remedies for breach of trust; specifies how money damages are to be determined; 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 may require; and specifies certain trustee defenses, including the addition of a statute of limitations for claims alleging breach of trust and a provision on enforcing exculpatory clauses.<sup>54</sup>

With respect to transactions by trustees with third persons, Article 10 treats trustees as if they were managers of entities and encourages trus-

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47. UTC §§ 701-709; KAN. STAT. ANN. §§ 58a-701 to -709 (Supp. 2002). For a discussion of the portions of Article 7 relating to change of trustee, see *infra* text accompanying notes 203-18.

48. UTC §§ 801-817; KAN. STAT. ANN. §§ 58a-801 to -817 (Supp. 2002).

49. UTC § 816; KAN. STAT. ANN. § 58a-816 (Supp. 2002). The former trustee powers list was codified at KAN. STAT. ANN. § 58-1203 (1994).

50. UTC § 802; KAN. STAT. ANN. § 58a-802 (Supp. 2002). For an article on this provision, see Karen E. Boxx, *Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code*, 67 MO. L. REV. 279 (2002).

51. UTC art. 9, general cmt.

52. The Kansas Uniform Prudent Investor Act is codified at KAN. STAT. ANN. §§ 58-24a01 to -24a14 (Supp. 2001). The scope of the Act as enacted in Kansas is specified in KAN. STAT. ANN. § 58-24a01 (Supp. 2001).

53. UTC §§ 1001-1009; KAN. STAT. ANN. §§ 58a-1001 to -1009 (Supp. 2002).

54. UTC §§ 1001-1009; KAN. STAT. ANN. §§ 58a-1001 to -1009 (Supp. 2002). For a discussion, see *infra* text accompanying notes 234-51.



tees and third persons to engage in commercial transactions to the same extent as if no trust was involved. A trustee is not personally liable for contracts entered into in the trustee's fiduciary capacity, as long as the trustee disclosed the fiduciary capacity.<sup>55</sup> A trustee is personally liable for torts committed in administering the trust only if the trustee is personally at fault.<sup>56</sup> Copying a provision of Ohio law, the UTC protects trustees from personal liability for contract and tort liability arising from partnerships of which the trustee is a general partner.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> The trustee need not provide the third person with a complete copy of the trust instrument.<sup>60</sup>

Article 11 deals with the application of the Code to existing trusts. The intent is to give the Code the widest possible application, consistent with limitations placed on it by the United States Constitution.<sup>61</sup> Consequently, the Code generally applies not only to trusts created on or after the effective date of the Code's implementation, but also to trusts already in existence.<sup>62</sup>

### C. *Kansas Modifications*

Uniform Acts are rarely enacted without change. Cross-references to other laws of the state need to be added. Acts often need to be conformed to other areas of local law, such as rules on jurisdiction, venue, or statutes of limitation. Local drafting committees sometimes clarify particular language. Sometimes, provisions of former law are carried for-

55. UTC § 1010(a); KAN. STAT. ANN. § 58a-1010(a) (Supp. 2002). Previously, a trustee was personally liable on contracts unless liability was expressly negated in the contract. *Austin v. Prudential Trust Co.*, 112 Kan. 545, 547, 212 P. 77, 79 (1923).

56. UTC § 1010(b); KAN. STAT. ANN. § 58a-1010(b) (Supp. 2002).

57. Compare UTC § 1011 and KAN. STAT. ANN. § 58a-1011 (Supp. 2002), with OHIO REV. CODE ANN. § 1339.65 (Anderson 2002).

58. UTC § 1012(a); KAN. STAT. ANN. § 58a-1012(a) (Supp. 2002). Section 1012 supersedes a provision of the Uniform Trustees Powers Act which was codified at KAN. STAT. ANN. § 58-1207 (1994). For still relevant case law on relations with third persons, see *Wetherill v. Bank IV Kansas, N.A.*, 145 F.3d 1187, 1191-94 (10th Cir. 1998) and *Mark Twain Kansas City Bank v. Kroh Brothers Development Co.*, 250 Kan. 754, 763-67, 863 P.2d 355, 361-64 (1992).

59. UTC § 1013; KAN. STAT. ANN. § 58a-1013 (Supp. 2002). This section supersedes KAN. STAT. ANN. § 58-12a01 to -12a06 (Supp. 2001), which was enacted in 2001.

60. UTC § 1013(d); KAN. STAT. ANN. § 58a-1013(d) (Supp. 2002).

61. UTC § 1106 cmt.

62. *Id.*; KAN. STAT. ANN. § 58a-1106 (Supp. 2002).

ward because of familiarity or because they address a topic not covered in the uniform act. Policy issues debated at the national level frequently spill over to the states with a majority on the local committee adopting a position that commanded only a minority at the national level.

The Kansas Judicial Council made numerous and mostly minor changes during the several years it studied the Code prior to its introduction as Senate Bill 297. After introduction of Senate Bill 297, more changes were made following objection of the Kansas Bar Association. Several of these later changes are problematical, not because of the particular issue to which the Bar disagreed but because last minute changes to a complex legislative proposal often have unintended effects. The following are some modifications to note:

1. The Kansas UTC restricts the definition of “qualified beneficiary” to “distributees” and to those who would receive the trust property if the trust were to terminate on the date the beneficiary’s qualification is determined.<sup>63</sup> The unmodified UTC also includes “permissible” distributees within the definition.<sup>64</sup> The apparent intent of this Kansas change is to eliminate discretionary beneficiaries from the class of qualified beneficiaries, thereby reducing the number of persons entitled to various notices under the Code<sup>65</sup> or required to concur in certain actions, such as appointment of a successor trustee.<sup>66</sup> Because the term “qualified beneficiary” is used throughout the Code, this change impacts numerous sections.
2. Under the Kansas UTC, but not the pure UTC, a settlor may waive any and all notices or reports otherwise required to be provided to beneficiaries.<sup>67</sup>
3. If both the settlor’s spouse and spouse’s children are beneficiaries of the trust, under the Kansas UTC only the spouse is entitled to the information normally provided to beneficiaries.<sup>68</sup>

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63. KAN. STAT. ANN. § 58a-103(12) (Supp. 2002).

64. UTC § 103(12).

65. For a list of the actions requiring notice to the qualified beneficiaries, see *infra* notes 100–02, 104 and accompanying text.

66. UTC § 704; KAN. STAT. ANN. § 58a-704 (Supp. 2002). Under the Kansas UTC, the qualified beneficiaries can also consent to the termination of a trust that no longer serves a material purpose. Under the pure UTC, the consent of all beneficiaries is required. For a discussion, see *infra* notes 137–38, 147 and accompanying text.

67. For a discussion, see *infra* text accompanying notes 230–31.

68. KAN. STAT. ANN. § 58a-813(e) (Supp. 2002), discussed *infra* text accompanying note 229.

4. The Kansas UTC limits the issues that can be resolved by a non-judicial settlement.<sup>69</sup>
5. The Kansas UTC eliminates all public-policy exceptions to the enforceability of a spendthrift provision.<sup>70</sup>
6. The Kansas UTC addresses several issues not addressed in the pure UTC, including scrutiny of trust instruments in which the scrivener and/or scrivener's family are named as beneficiaries,<sup>71</sup> validation of deeds in which the trust and not the trustee is named as donee,<sup>72</sup> and validation of transfers of tangible personal property made by a document outside the trust.<sup>73</sup>
7. The Kansas UTC subjects a trustee who embezzles or unlawfully converts trust property to double damages.<sup>74</sup>
8. The Kansas UTC carries over former law on the application of *cy pres* to charitable trusts, rejecting the approach taken in the pure UTC.<sup>75</sup>
9. The provision of the Kansas UTC on consolidation and division of trusts combines the procedure under former law with the comparable provision from the pure UTC.<sup>76</sup>
10. The Kansas UTC allows the "qualified beneficiaries" to terminate a trust that no longer serves a material purpose.<sup>77</sup> Under the

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69. For a discussion, see *infra* text accompanying notes 112–15.

70. For a discussion, see *infra* text accompanying notes 171–73.

71. KAN. STAT. ANN. § 58a-406(b) (Supp. 2002). For a discussion, see *infra* text accompanying note 248.

72. KAN. STAT. ANN. § 58a-810(e) (Supp. 2002).

73. *Id.* § 58a-418. This provision, which was carried over from prior law, was formerly codified at *id.* § 59-2296 (1994). For the comparable provision for wills, see *id.* § 59-623 (1994).

74. *Id.* § 58a-1002(a)(3) (Supp. 2002). For a discussion of damages for breach of trust, see *infra* text accompanying notes 234–37.

75. KAN. STAT. ANN. § 58a-413 (Supp. 2002). For the former Kansas *cy pres* provision, see *id.* § 59-22a01 (repealed 1994). For a discussion of Kansas law on *cy pres*, see *In re Estate of Crawshaw*, 15 Kan. App. 2d 273, 806 P.2d 1014 (1991). For a discussion of the UTC's provisions on *cy pres*, see David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, *supra* note 3, at 177–80.

76. KAN. STAT. ANN. § 58a-417 (Supp. 2002). For a discussion, see *infra* notes 167–68 and accompanying text.

77. KAN. STAT. ANN. § 58a-411(b) (Supp. 2002).

pure UTC and former Kansas law, all of the beneficiaries had to concur in the termination.<sup>78</sup>

11. The pure UTC lists a request by the qualified beneficiaries as a factor for the court to consider in deciding whether to remove a trustee. The Kansas UTC eliminates this language.<sup>79</sup>
12. The pure UTC contains a tax-curative provision that imposes an ascertainable standard on language that might otherwise constitute a general power of appointment. The Kansas UTC omits this provision.<sup>80</sup>
13. The Kansas UTC changes the time limits for bringing an action to contest a revocable trustee<sup>81</sup> and to surcharge a trustee for breach of trust.<sup>82</sup>
14. The Kansas UTC requires that a trustee furnish bond unless waived in the terms of the trust. Under the pure UTC, bond is required only if ordered by the court.<sup>83</sup>

#### D. Significant Issues

This article does not describe and contrast all provisions of the UTC to existing Kansas law, only those of most significance. The following are the issues addressed:

1. Default Rules (Section 105);
2. Principal Place of Administration (Section 108);
3. Rules of Construction (Section 112);
4. Representation and Settlements (Section 111 and Article 3);
5. Creation of Trusts (Sections 401–409);

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78. For a discussion, see *infra* notes 136–37 and accompanying text.

79. Compare KAN. STAT. ANN. § 58a-706 (Supp. 2002), with UTC § 706. For a discussion of standards on removing a trustee, see *infra* text accompanying notes 208–18.

80. Compare KAN. STAT. ANN. § 58a-814 (Supp. 2002), with UTC § 814.

81. For the respective time limits on contest of revocable trusts, see *infra* notes 195–200 and accompanying text.

82. For the respective time limits on an action for breach of trust, see *infra* notes 240–43 and accompanying text.

83. Compare KAN. STAT. ANN. § 58a-702 (Supp. 2002), with UTC § 702. The bonding provisions in the Kansas UTC are consistent with the bonding requirements for fiduciaries under Chapter 59. Kansas requires that all fiduciaries, including trustees, furnish bond unless bond is waived in the instrument. KAN. STAT. ANN. §§ 59-1101 to -1104 (1994).

6. Trust Modification and Termination (Sections 410–417);
7. Spendthrift Provisions and Rights of Beneficiary's Creditors (Article 5);
8. Revocable Trusts (Article 6);
9. Change in Trustees (Article 7);
10. Duty to Keep the Beneficiaries Informed (Section 813);
11. Remedies for Breach of Trust (Sections 1001–1009).

## 1. 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 UTC, 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 UTC collects these principles in section 105. Included are the requirements for creating a trust;<sup>84</sup> the rights of third parties in their dealings with the trustee;<sup>85</sup> the power of the court to take certain actions, such as to remove a trustee;<sup>86</sup> and a trustee's obligation "to act in good faith . . . in accordance with the purposes of the trust,"<sup>87</sup> and to administer the trust in the interests of the beneficiaries.<sup>88</sup>

The Kansas legislature chose not to enact the portions of section 105 restricting a settlor's ability to waive the provisions of the UTC on the rights of creditors<sup>89</sup> and the duty to keep the beneficiaries informed of administration.<sup>90</sup> The implications of these deletions, which were perhaps not fully understood, are discussed below in connection to the UTC provisions to which they relate.<sup>91</sup>

## 2. 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. It will establish which court has primary jurisdiction concerning trust administrative matters. Locating a principal place of

84. UTC § 105(b)(1); KAN. STAT. ANN. § 58a-105(b)(1) (Supp. 2002).

85. UTC § 105(b)(11); KAN. STAT. ANN. § 58a-105(b)(8) (Supp. 2002).

86. UTC § 105(b)(13); KAN. STAT. ANN. § 58a-105(b)(10) (Supp. 2002).

87. UTC § 105(b)(2); KAN. STAT. ANN. § 58a-105(b)(2) (Supp. 2002).

88. UTC § 105(b)(3); KAN. STAT. ANN. § 58a-105(b)(3) (Supp. 2002).

89. UTC § 105(b)(5).

90. *Id.* § 105(b)(8)–(9).

91. For a discussion of the rights of the creditor of either the settlor or beneficiaries, see *infra* text accompanying notes 169–82. For a discussion of the duty to keep the beneficiaries informed, see *infra* text accompanying notes 219–33.

administration in a particular jurisdiction also makes it more likely that the particular jurisdiction's law will govern the trust.

As trust administration has become more complex, determining a trust's principal place of administration has become more difficult. Co-trustees 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. Concluding that it was impossible to devise a rule that would address all of these situations, the drafters of the UTC did not attempt to define principal place of administration.

Nevertheless, the UTC otherwise facilitates the locating of a trust in Kansas. 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,<sup>92</sup> or all or part of the trust's administration occurs in the designated place.<sup>93</sup> If the trust instrument fails to address the subject, the UTC specifies a procedure for transferring the principal place of administration.<sup>94</sup> 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. The transfer may proceed as long as no qualified beneficiary objects by the date specified in the notice. 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.

### 3. Rules of Construction (Section 112)

Rules of construction attribute intent to individual donors based on assumptions of common intention. Rules of construction are found both in enacted statutes and in judicial decisions and can involve the meaning to be given to particular language in a document, such as the words "heirs" or "issue." These rules can address situations the donor did not plan for, such as failure to anticipate the predecease of a beneficiary or to specify the source from which expenses are to be paid. They can also make assumptions about how a donor would have revised donative documents in light of events occurring after execution. These include rules dealing with the effects of a divorce, and the effect on a specific

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92. UTC § 108(a)(1); KAN. STAT. ANN. § 58a-108(a)(1) (Supp. 2002).

93. UTC § 108(a)(2); KAN. STAT. ANN. § 58a-108(a)(2) (Supp. 2002).

94. UTC § 108(b)-(f); KAN. STAT. ANN. § 58a-108(b)-(f) (Supp. 2002).

devisee if the devised property is disposed of during the donor's lifetime.<sup>95</sup>

Most states have enacted numerous statutes on the construction of wills. But most states, including Kansas, have not enacted rules of construction applicable to revocable trusts and other nonprobate devices.

The UTC contains several provisions specifically addressed to revocable trusts.<sup>96</sup> 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 UTC is a general provision providing that the enacting jurisdiction's rules of construction for wills apply, as appropriate, to the construction of trusts.<sup>97</sup> But this section of the UTC 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 for trusts. The key is the language in section 112 stating that the rules on wills apply to trusts "as appropriate."<sup>98</sup> 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 has been determined, what they should say. Section 112, however, is consistent with prior Kansas law. The Kansas Supreme Court has held that the rules on construction of wills are also applicable to the construction of trusts and other written statements.<sup>99</sup>

#### 4. Representation and Settlements (Section 111 and Article 3)

The UTC strives to keep administration of trusts outside of the courts. Numerous actions are allowed solely upon notice to variously

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95. UTC § 112 cmt.

96. For a detailed discussion, see *infra* text accompanying notes 183–202.

97. UTC § 112; KAN. STAT. ANN. § 58a-112 (Supp. 2002).

98. UTC § 112; KAN. STAT. ANN. § 58a-112 (Supp. 2002).

99. *In re Estate of Sanders*, 261 Kan. 176, 182, 929 P.2d 153, 158 (1996); *In re Living Trust of Huxtable*, 243 Kan. 531, 534, 757 P.2d 1262, 1265 (1988).

defined groups of beneficiaries. These actions include transfer of a trust's principal place of administration to or from another country or American state;<sup>100</sup> combination of separate trusts into one or the division of a single trust into two or more separate trusts;<sup>101</sup> resignation of a trustee;<sup>102</sup> submission of a trustee's report;<sup>103</sup> and a trustee's notice of proposed plans of distribution.<sup>104</sup> Other actions can be accomplished upon consent of the beneficiaries. These include selection of a successor trustee<sup>105</sup> and release of a trustee from potential liability.<sup>106</sup> The UTC also contains a comprehensive provision generally authorizing the use of non-judicial settlement agreements to resolve disputes.<sup>107</sup>

But providing notice to, or obtaining the consent of, all the beneficiaries is frequently difficult. Trusts commonly last for decades. In an increasing number of American jurisdictions trusts can in theory last in perpetuity. The current beneficiaries of the trust are often minors or adults who lack capacity. Future beneficiaries may not yet be born. To satisfy notice and consent requirements for 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 UTC addresses the subject in more detail than previous efforts. The UTC provides not only for representation by fiduciaries (guardians, conservators, personal representatives),<sup>108</sup> but also for what is known as virtual representation, under which an unrepresented person (such as a child who may not yet be born) may be represented by another beneficiary with a similar beneficial interest.<sup>109</sup> In addition, the UTC authorizes the holder of a general testamentary power of appointment to represent and bind those whose interests are subject to

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100. UTC § 108; KAN. STAT. ANN. § 58a-108 (Supp. 2002) (qualified beneficiaries).

101. UTC § 417; KAN. STAT. ANN. § 58a-417 (Supp. 2002) (qualified beneficiaries).

102. UTC § 705; KAN. STAT. ANN. § 58a-705 (Supp. 2002) (qualified beneficiaries).

103. UTC § 813; KAN. STAT. ANN. § 58a-813 (Supp. 2002) (distributees and permissible distributees).

104. UTC § 817; KAN. STAT. ANN. § 58a-817 (Supp. 2002) (qualified beneficiaries).

105. UTC § 704; KAN. STAT. ANN. § 58a-704 (Supp. 2002) (qualified beneficiaries).

106. UTC § 1009; KAN. STAT. ANN. § 58a-1009 (Supp. 2002) (any beneficiary).

107. UTC § 111; KAN. STAT. ANN. § 58a-111 (Supp. 2002). Kansas also authorizes the use of family settlement agreements to settle disputes in decedents' estate. KAN. STAT. ANN. § 59-102(8) (1994).

108. UTC § 303; KAN. STAT. ANN. § 58a-303 (Supp. 2002).

109. UTC § 304; KAN. STAT. ANN. § 58a-304 (Supp. 2002). This section of the UTC is similar to but broader than KAN. STAT. ANN. § 59-2254 (1994), not repealed by enactment of the UTC, which authorizes a competent member of a class or guardian ad litem to represent trust beneficiaries who are under a legal disability or who are unborn or unascertained.



the power,<sup>110</sup> and a parent to represent and bind a minor or unborn child.<sup>111</sup>

The representation provisions of the UTC can be utilized for any notice requirement to be given to the beneficiaries; not only for the matters detailed above, but also 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.<sup>112</sup> The settlement agreement can contain any term or condition that a court could properly approve.<sup>113</sup> Among the issues that can be resolved by a nonjudicial settlement agreement are approval of a trustee's report or accounting; 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.<sup>114</sup> Kansas chose not to enact the provisions that also authorize nonjudicial agreements to resolve disputes concerning the interpretation or construction of the terms of the trust, and the directive to a trustee to refrain from performing a particular act or to grant a trustee any necessary or desirable power.<sup>115</sup>

Although the representation provisions provide legal practitioners with an added tool that will solve many practical problems, they should not be used without thought. Even with proper notice, the consent of a representative is not binding if there is a conflict of interest between the representative and those ostensibly represented.<sup>116</sup> If conflict of interest is a possibility, the practitioner should consider requesting the court to appoint a guardian ad litem (termed a representative under the UTC) to represent the otherwise unrepresented beneficiary. Under the UTC, the appointment of a representative is available whether the matter to be resolved is in or out of court.<sup>117</sup> The Kansas UTC also curiously adds that a trustee may "retain" a representative,<sup>118</sup> whatever that may mean.

Enactment of the UTC's representation and nonjudicial settlement provisions represents a major improvement in Kansas law. The Kansas

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110. UTC § 302; KAN. STAT. ANN. § 58a-302 (Supp. 2002).

111. UTC § 303(6); KAN. STAT. ANN. § 58a-303(6) (Supp. 2002).

112. UTC § 111(b); KAN. STAT. ANN. § 58a-111(b) (Supp. 2002).

113. UTC § 111(c); KAN. STAT. ANN. § 58a-111(c) (Supp. 2002).

114. UTC § 111(d); KAN. STAT. ANN. § 58a-111(d) (Supp. 2002).

115. Compare UTC § 111(d), with KAN. STAT. ANN. § 58a-111(d) (Supp. 2002).

116. UTC §§ 302-304; KAN. STAT. ANN. §§ 58a-302 to -304.

117. UTC § 305(b); KAN. STAT. ANN. § 58a-305(b) (Supp. 2002). Appointment of guardians ad litem is also authorized by KAN. STAT. ANN. § 59-2254 (1994), which was not repealed upon enactment of the UTC.

118. Compare UTC § 305, with KAN. STAT. ANN. § 58a-305 (Supp. 2002) (adding language of "retaining" a representative).

courts have not specifically approved the use of virtual representation in trust matters. Enactment of the UTC not only adds virtual representation to Kansas law but also extends it to nonjudicial settlements. 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 which have not previously been codified in one place.<sup>119</sup>

## 5. Creation of Trusts (Sections 401–409)

UTC sections 401–409 describe the basic requirements for the creation of express trusts, most of which are straightforward and fairly conventional. The UTC divides trusts into three categories—private, charitable, and honorary. Private trusts require an ascertainable beneficiary; charitable trusts by their very nature are created for the public at large. Honorary trusts 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.<sup>120</sup> 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.<sup>121</sup> 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 significant contact.<sup>122</sup> A trust must have a purpose that is of benefit to its beneficiaries and that is not illegal or impossible to achieve.<sup>123</sup> The creation of a trust may be contested on grounds of lack of capacity, undue influence, or duress.<sup>124</sup> 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.<sup>125</sup> A trust for the care of an animal is valid for the life of the animal.<sup>126</sup> A trust for another noncharitable purpose and without an ascertainable beneficiary may be created but is enforceable for only twenty-one years.<sup>127</sup>

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119. See KAN. STAT. ANN. § 59-2254 (1994) (authorizing representation by guardian ad litem); *id.* § 59-3018b (Supp. 2002) (specifying powers of a guardian); *id.* § 59-3019a (specifying powers of a conservator).

120. UTC § 401; KAN. STAT. ANN. § 58a-401 (Supp. 2002).

121. UTC § 402; KAN. STAT. ANN. § 58a-402 (Supp. 2002).

122. UTC § 403; KAN. STAT. ANN. § 58a-403 (Supp. 2002).

123. UTC § 404; KAN. STAT. ANN. § 58a-404 (Supp. 2002).

124. UTC § 406; KAN. STAT. ANN. § 58a-406(a) (Supp. 2002).

125. UTC § 407; KAN. STAT. ANN. § 58a-407 (Supp. 2002). Pursuant to KAN. STAT. ANN. § 58-2401 (1994), not repealed by enactment of the UTC, a trust of lands must be in writing.

126. UTC § 408(a); KAN. STAT. ANN. § 58a-408(a) (Supp. 2002).

127. UTC § 409(1); KAN. STAT. ANN. § 58a-409(1) (Supp. 2002). The twenty-one-year limit

Kansas case law on creation of trusts is sparse but is consistent with the UTC. Even with enactment of the UTC, this case law will continue to be relevant. Enactment of the UTC does not eliminate the common law of trusts. Except to the extent inconsistent, the provisions of the UTC are supplemented by the common law of trusts and principles of equity.<sup>128</sup> Among the topics addressed by the Kansas courts are the doctrine of merger,<sup>129</sup> requirements of trust property,<sup>130</sup> a proper trust purpose,<sup>131</sup> intent to create a trust,<sup>132</sup> ascertaining beneficiaries,<sup>133</sup> and requirements for creating an oral trust.<sup>134</sup>

## 6. Trust Modification and Termination (Sections 410–417)

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 UTC provides for this increased flexibility but without disturbing the principle that the primary objective of trust law is to carry out the settlor's intent.<sup>135</sup> The result is a liberalizing nudge, but one founded in traditional doctrine. The Kansas UTC adopts these liberalizing provisions although with several mostly minor amendments.

### a. Modification or Termination by Beneficiaries

Section 411 follows traditional doctrine in allowing for termination or modification of an irrevocable trust by unanimous agreement of the settlor and beneficiaries.<sup>136</sup> The UTC also follows traditional doctrine in

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does not apply to the extent overridden by other statute, such as a statute authorizing perpetual cemetery funds. UTC § 409 cmt.

128. UTC § 106; KAN. STAT. ANN. § 58a-106 (Supp. 2002).

129. *Matthews v. Salvage*, 195 Kan. 501, 407 P.2d 559 (1965); *Fry v. McCormick*, 170 Kan. 741, 228 P.2d 727 (1951); *Johnson v. Muller*, 149 Kan. 128, 86 P.2d 569 (1939).

130. *Taliaferro v. Taliaferro*, 260 Kan. 573, 921 P.2d 803 (1996).

131. *Lafferty v. Sheets*, 175 Kan. 741, 267 P.2d 962 (1954).

132. *Taliaferro v. Taliaferro*, 260 Kan. 573, 921 P.2d 803 (1996); *Truax v. Southwestern College*, 214 Kan. 873, 522 P.2d 412 (1974); *Pizel v. Pizel*, 7 Kan. App. 2d 388, 643 P.2d 1094 (1982).

133. *In re Estate of Freshour*, 185 Kan. 434, 345 P.2d 689 (1959).

134. *In re Dieter's Estate*, 172 Kan. 359, 239 P.2d 954 (1952); *Hampson v. Stanfield*, 152 Kan. 333, 103 P.2d 910 (1940); *Diller v. Kilgore*, 135 Kan. 200, 9 P.2d 643 (1932); *Kampschroeder v. Kampschroeder*, 20 Kan. App. 2d 361, 887 P.2d 1152 (1995).

135. For further background on the American law on trust modification and termination, together with a discussion of the relevant provisions of the UTC, see Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697 (2001).

136. UTC section 411(a) is similar to RESTATEMENT (THIRD) OF TRUSTS § 65(2) (Tentative Draft No. 3, 2001), and RESTATEMENT (SECOND) OF TRUSTS § 338(2) (1959), both of which permit

allowing for termination of an irrevocable trust by unanimous agreement of the beneficiaries. The beneficiaries alone may terminate a trust if it no longer serves a material purpose, or they alone may modify a trust if such modification is not inconsistent with a material purpose.<sup>137</sup> Provision is made for partial termination or modification if obtaining the consent of all beneficiaries is impracticable.<sup>138</sup> Similar to other sections of the UTC, but not consistent with traditional doctrine, the representation principles of Article 3 may be employed to obtain the necessary consents to termination.<sup>139</sup> Also, the UTC provides that it is not presumed that a spendthrift provision is a material purpose barring the beneficiaries from compelling termination of a trust.<sup>140</sup> The trustee's consent is not required to modify or terminate a trust under section 411. Nevertheless, a trustee who concludes that the beneficiaries' action is not justified has standing to object to a proposed termination or modification.<sup>141</sup> Furthermore, while the beneficiaries can terminate an irrevocable trust without the concurrence of the settlor, the settlor also has standing to challenge the proposed action.<sup>142</sup> Upon termination of a trust by the beneficiaries, whether with or without the settlor's consent, the trust property is to be distributed as the beneficiaries agree.<sup>143</sup>

Kansas modified the provisions on beneficiary termination in three respects, two of which may lead to unexpected results. First and least problematical is the treatment of spendthrift provisions. Unlike the pure UTC, the Kansas UTC presumes that a spendthrift provision is a material purpose.<sup>144</sup> The important point is that the Kansas UTC avoids the rule, applicable in some states, that a spendthrift provision is always a material purpose no matter how routinely it is inserted in trust instruments.<sup>145</sup>

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termination or modification upon unanimous agreement of the beneficiaries and settlor. For the Kansas statement of this rule, see *Diller v. Kilgore*, 135 Kan. 200, 205, 9 P.2d 643, 646 (1932); and *Neeley v. Neeley*, 26 Kan. App. 2d 924, 925-26, 996 P.2d 346, 348 (2000).

137. UTC section 411(b) is based on RESTATEMENT (THIRD) OF TRUSTS § 65(1) (Tentative Draft No. 3, 2001), which is itself ultimately derived from *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889). For the Kansas statement of this rule, see *McClary v. Harbaugh*, 231 Kan. 564, 566-67, 646 P.2d 498, 501 (1982).

138. UTC § 411(e); KAN. STAT. ANN. § 58a-411(e) (Supp. 2002). To qualify, the court first must find that the trust could have been terminated or modified under section 411(a) or (b) had all beneficiaries consented. Second, the court must be assured that the interests of a nonconsenting beneficiary will be adequately protected.

139. For a discussion of the provisions of Article 3 on representation, see *supra* notes 108-19 and accompanying text.

140. UTC § 411(c).

141. *Id.* § 410(b); KAN. STAT. ANN. § 58a-410(b) (Supp. 2002).

142. UTC § 410(b); KAN. STAT. ANN. § 58a-410(b) (Supp. 2002).

143. UTC § 411(d).

144. KAN. STAT. ANN. § 58a-411(c) (Supp. 2002).

145. Spendthrift terms sometimes have been construed to constitute a material purpose without

The Kansas UTC also limits the class that can participate in a decision to terminate a trust to the “qualified beneficiaries.” Only the qualified beneficiaries can join with a living settlor in terminating an irrevocable trust.<sup>146</sup> And only the qualified beneficiaries can compel the termination of a trust that no longer serves a material purpose,<sup>147</sup> as well as decide how the terminated trust is to be distributed.<sup>148</sup> Under the UTC and former Kansas law, all beneficiaries had to join together.<sup>149</sup> The danger here is that the qualified beneficiaries could join together to terminate a trust, with or without the concurrence of the settlor, and thereby eliminate the interests of other beneficiaries (those holding interests subject to the discretion of the trustee and those who hold remote remainder interests).<sup>150</sup> Should these other beneficiaries object, they are presented with the final hurdle. Under the Kansas but not pure UTC, only a qualified beneficiary has standing to object to a proposed trust termination or modification.<sup>151</sup>

b. Modification or Termination Because of Unanticipated Circumstances

Section 412 of the UTC confirms, but at the same time expands, the traditional doctrine of equitable deviation. The court may apply the doctrine to modify not only administrative terms but also dispositive provisions. Before ordering a modification or termination, the court must find that there are “circumstances not anticipated by the settlor” and that “modification or termination will further the purposes of the trust.”<sup>152</sup> “To the extent practicable, the modification must be made in accordance with the settlor’s probable intention.”<sup>153</sup> Without regard to unanticipated

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inquiry into the intention of the particular settlor. For citations to cases, see RESTATEMENT (SECOND) OF TRUSTS § 337 (1959); GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1008 (2d. ed. rev. 1983); and IV AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 337 (4th ed. 1989).

146. KAN. STAT. ANN. § 58a-411(a) (Supp. 2002).

147. *Id.* § 58a-411(b).

148. *Id.* § 58a-411(d).

149. See UTC § 411(a), (b), (d) (requiring consent of all beneficiaries); see generally *McClary v. Harbaugh*, 231 Kan. 564, 646 P.2d 498 (1982) (requiring consent of all beneficiaries to terminate a trust that no longer carries out a material purpose); *Neeley v. Neeley*, 26 Kan. App. 2d 924, 996 P.2d 346 (2000) (same).

150. For a discussion of the definition of “qualified beneficiary” in the Kansas UTC, see *supra* text accompanying notes 63–66 and *infra* text accompanying notes 232–33.

151. Under the pure UTC, any beneficiary has standing. Compare KAN. STAT. ANN. § 58a-410(b) (Supp. 2002), with UTC § 410(b).

152. UTC § 412(a); KAN. STAT. ANN. § 58a-412(a) (Supp. 2002).

153. UTC § 412(a); KAN. STAT. ANN. § 58a-412(a) (Supp. 2002). Subsection (a) is similar to RESTATEMENT (THIRD) OF TRUSTS § 66(1) (Tentative Draft No. 3, 2001).

circumstances, the court also may modify an administrative term “if continuation of the trust on its existing terms would be impracticable, wasteful, or impair the trust’s administration.”<sup>154</sup> Upon termination of a trust, the trustee must distribute the “trust property in a manner consistent with the purposes of the trust.”<sup>155</sup>

#### c. Uneconomical Trust

Section 414 of the UTC authorizes the court to terminate an uneconomical trust of any size<sup>156</sup> and allows a trustee, without approval of court, to terminate those with a value of \$50,000 or less.<sup>157</sup> Before terminating the trust, the court or trustee must conclude that the value of the trust property is insufficient to justify the cost of administration.<sup>158</sup> Upon termination of the trust, the trustee is to distribute the trust property in a manner consistent with the purposes of the trust.<sup>159</sup> The figure \$50,000 was placed in brackets to signal that states are free to change the amount.<sup>160</sup> Initial indications are that many states will increase the amount to \$100,000. Kansas quite appropriately chose to bump the limit to \$100,000.<sup>161</sup>

#### d. Reformation

Consistent with the *Restatement (Third) of Property: Donative Transfers*,<sup>162</sup> section 415 of the UTC clarifies that the doctrine of reformation may be applied to testamentary, as well as inter vivos, trusts.

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154. UTC § 412(b); KAN. STAT. ANN. § 58a-412(b) (Supp. 2002). Prior Kansas law, now repealed, authorized the court to relieve the trustee from any restriction placed on the trustee under the instrument but did not specify a standard for exercise of the court’s power. KAN. STAT. ANN. § 58-1205(a) (repealed 1994).

155. UTC § 412(c); KAN. STAT. ANN. § 58a-412(c) (Supp. 2002).

156. UTC § 414(b); KAN. STAT. ANN. § 58a-414(b) (Supp. 2002).

157. UTC § 414(a).

158. *Id.* § 414(b); KAN. STAT. ANN. § 58a-414(b) (Supp. 2002). Prior Kansas law, now repealed by enactment of the UTC, authorized the court to terminate the trust only if the costs of administration would impair or defeat the purposes of the trust. KAN. STAT. ANN. § 59-2295(a) (repealed 1994).

159. In addition to outright distribution to the beneficiaries, section 816(21) authorizes payment to be made by a variety of alternate payees. Distribution upon termination under section 414 typically will be made to the qualified beneficiaries in proportion to the actuarial value of their interests. UTC § 414 cmt. The prior small trust termination statute mandated distribution in accordance with the probable intent of the settlor, which would normally also require an actuarial computation. KAN. STAT. ANN. § 59-2295(a) (repealed 1994).

160. UTC § 414 cmt.

161. KAN. STAT. ANN. § 58a-414(a) (Supp. 2002).

162. RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 12.1 (Tentative Draft No. 1, 1995).

Also, the doctrine may be applied to correct a mistake of fact or law even if the original terms of the trust, as originally but mistakenly created, are unambiguous. The mistake may be one either of expression or inducement, but, in any event, it must be established by clear and convincing evidence.<sup>163</sup> The doctrine of reformation is an established doctrine in Kansas.<sup>164</sup>

e. Modification to Achieve Settlor's Tax Objectives

In another provision derived from the *Restatement (Third) of Property: Donative Transfers*,<sup>165</sup> section 416 expands the court's ability to modify a trust to achieve the settlor's tax objectives. The court may modify the trust in any manner not contrary to the settlor's probable intention. The court also may give the modification retroactive effect.<sup>166</sup> Such broad authority is appropriate because the settlor's objective—to achieve tax savings of a particular type—is usually abundantly clear. The other sections of Article 4, where applicable, also can be used to secure modifications for tax reasons.

f. Combination and Division of Trusts

Consistent with many state statutes, section 417 authorizes a trustee to divide a trust or combine trusts without approval of the court. While the trust or trusts that result need not have identical provisions, the consolidation or division cannot impair the rights of any beneficiary or adversely affect achievement of the trust purposes. Before combining trusts or dividing a trust, the trustee must send notice of the proposed

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163. UTC § 415; KAN. STAT. ANN. § 58a-415 (Supp. 2002). A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 12.1 cmt. i (Tentative Draft No. 1, 1995). Mistakes of expression are frequently caused by scrivener's errors while mistakes of inducement often trace to errors of the settlor.

164. See generally *Taliaferro v. Taliaferro*, 260 Kan. 573, 921 P.2d 803 (1996); *Collins v. Richardson*, 168 Kan. 203, 212 P.2d 302 (1949).

165. RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 12.2 (Tentative Draft No. 1, 1995).

166. UTC § 416; KAN. STAT. ANN. § 58a-416 (Supp. 2002). Whether a modification made by the court will be recognized under federal tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in the case of the federal estate tax. See Rev. Rul. 73-142, 1973-1 C.B. 405.

action to the qualified beneficiaries. Prior notice to the qualified beneficiaries of a proposed combination or division is required.<sup>167</sup> The Kansas UTC enacts this provision but then adds many of the features of the former Kansas statute.<sup>168</sup>

#### 7. Spendthrift Provisions and 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. Spendthrift provisions are not recognized in England, where trust law originated, and 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 in most American states, depending on the type of creditor or category of beneficiary.

The most widely debated Article of the UTC was the provisions relating to spendthrift provisions and the rights of a beneficiary's creditors. The result, however, largely tracks standard American doctrine. A trust is not spendthrift unless the instrument specifically so states; 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.<sup>169</sup> The Commissioners 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 Kansas legislature disagreed with this determination, however. Under the Kansas UTC, a spendthrift provision is valid if it restrains *either* the beneficiary from assigning or the creditors from reaching the beneficiary's interest.<sup>170</sup>

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167. UTC § 417.

168. See KAN. STAT. ANN. § 58a-417 (Supp. 2002), which incorporates features of KAN. STAT. ANN. § 58-2420 (1994), which was repealed upon enactment of the UTC. The trustee must send a written notice to the qualified beneficiaries at least thirty days in advance. The trustee must sign an acknowledgment before a notary public that the combination or division has been accomplished in accordance with the statutory requirements. In dividing a trust, the trustee must divide the assets on a fractional or some other reasonable basis. *Id.* § 58a-417 (Supp. 2002).

169. UTC § 502(a).

170. KAN. STAT. ANN. § 58a-103(15) (Supp. 2002).



Consistent with the *Restatement of Trusts*,<sup>171</sup> the UTC recognizes several public-policy exceptions to the enforceability of a spendthrift provision, including judgments for child support and alimony, claims of the state, and claims of judgment creditors who have provided services to a beneficiary.<sup>172</sup> The Kansas Judicial Council agreed with this list of exceptions, but following introduction of the UTC, the Kansas Bar objected. The Kansas UTC as finally enacted eliminates these exceptions. This likely represents a change in Kansas law. While the Kansas courts have not ruled specifically on whether exceptions to a spendthrift provision exist,<sup>173</sup> such exceptions are well-established in the *Restatement*, on which the Kansas courts have traditionally relied.

The omission of a spendthrift provision from a trust does not necessarily mean that a beneficiary's creditor can reach the beneficiary's interest. If the trust is discretionary or for support, the creditor cannot generally attach the beneficiary's interest unless the trust is for support and the creditor has provided such assistance. The UTC abolishes the often evasive distinction between discretionary and support trusts. The beneficiary's creditor cannot collect regardless of whether the discretion is expressed in the form of a standard of distribution or not, or even if the discretion was abused.<sup>174</sup> The drafters of the Kansas UTC, however, missed the opportunity to abolish the distinction between support and discretionary interests. In its rush to pare back the provisions on creditor rights, the Kansas legislature deleted the relevant UTC section.<sup>175</sup>

While Article 5 of the UTC grants broad recognition to the enforceability of a spendthrift provision, creditors of the settlor do retain significant rights. The drafting committee concluded that it was undesirable as a matter of policy to allow a settlor to create a trust and retain a beneficial interest, but yet deny the settlor's creditors the right to reach the trust. Consequently, the UTC rejects the approach taken in the legislation enacted in Alaska and Delaware and, more recently, Rhode Island and Nevada, each of which allow a settlor to retain a beneficial interest immune from creditor claims.<sup>176</sup> Consistent with former Kansas law, the

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171. RESTATEMENT (THIRD) OF TRUSTS § 59 (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS § 157 (1959).

172. UTC § 503.

173. See *State ex rel. Secretary, Soc. & Rehab. Servs. v. Jackson*, 249 Kan. 635, 640-41, 822 P.2d 1033, 1037 (1991) (listing the exceptions under RESTATEMENT (SECOND) OF TRUSTS § 157 (1959), but because the trust was discretionary, the court did not reach the issue of whether any of them were applicable).

174. UTC § 504(b).

175. Both KAN. STAT. ANN. §§ 58a-503 and 58a-504 are marked "reserved."

176. For a discussion of the Alaska, Delaware, Nevada, and Rhode Island statutes, see Karen E. Boxx, *Gray's Ghost—A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195 (2000).

UTC allows a creditor of the settlor to fully reach the settlor's beneficial interest.<sup>177</sup> With respect to a revocable trust, the UTC clarifies that a revocable trust is fully subject to the settlor's creditors while the settlor is living.<sup>178</sup> 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.<sup>179</sup> These provisions allowing a settlor's creditors to reach the trust are by their very nature mandatory and not subject to override in the terms of the trust.<sup>180</sup> Yet, in its rush to solidify the effectiveness of a spendthrift provision, the Kansas legislature deleted the provision providing that rights of creditors, to the extent protected in the UTC, are not subject to waiver in the terms of the trust.<sup>181</sup> Because all provisions of the UTC not made mandatory are subject to override in the terms of the trust,<sup>182</sup> under the Kansas UTC, a settlor in theory can provide that the settlor's creditors cannot reach the settlor's retained interest in an irrevocable trust. Also, a settlor can in theory provide that a revocable trust is totally exempt from creditor claims, whether the claim is made before or after the settlor's death. This result, which was surely unintended, should be corrected by technical amendment.

## 8. Revocable Trusts (Article 6)

The revocable trust is the most common trust created today in the United States. This 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 UTC 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

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177. UTC § 505(a)(2); KAN. STAT. ANN. § 58a-505(a)(2) (Supp. 2002). Kansas law has long prohibited a settlor from creating a trust and at the same time retaining a beneficial interest immune from creditor claims. See *Herd v. Chambers*, 158 Kan. 614, 628, 149 P.2d 583, 592 (1944) (holding that a person is prohibited from creating a trust for his own benefit that is unavailable to creditors, even if no fraud is intended); *In re Sowers' Estate*, 1 Kan. App. 2d 675, 681, 574 P.2d 224, 229 (1977) (holding that a person may not create a spendthrift trust for his own benefit). See also KAN. STAT. ANN. § 33-101 (2000), originally enacted in 1868, which provides that gifts and conveyances of goods and chattels, made in trust for the use of the person making the transfer are void as to all past, present or future creditors.

178. UTC § 505(a)(1); KAN. STAT. ANN. § 58a-505(a)(1) (Supp. 2002). To the extent that the settlor retains a beneficial interest in a revocable trust, as is typical, the settlor's creditors can also reach the trust pursuant to KAN. STAT. ANN. § 58-505(a)(2) (Supp. 2002), discussed *supra* note 177 and accompanying text.

179. UTC § 505(a)(3); KAN. STAT. ANN. § 58a-505(a)(3) (Supp. 2002).

180. UTC § 105(b)(5).

181. SB 297, as introduced into the legislature and as proposed by the Kansas Judicial Council, provided that the rights of creditors were not subject to waiver by the settlor.

182. UTC § 105(a); KAN. STAT. ANN. § 58a-105(a) (Supp. 2002).

common-law presumption that trusts are irrevocable. Reflecting the increasing if not predominant use of the revocable trust in the United States, the UTC provides that a trust is revocable absent clarifying language in the terms of the trust.<sup>183</sup> 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 UTC's presumption will reverse the rule in most jurisdictions, including Kansas,<sup>184</sup> the presumption of revocability applies only to trust instruments executed on or after the UTC's effective date.<sup>185</sup>

The revocable trust is used today largely as a substitute for a will. The UTC 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.<sup>186</sup> Also, while the settlor has capacity, the settlor exclusively controls all of the rights of the beneficiaries.<sup>187</sup> Notices that would otherwise be given to the beneficiaries must instead be given to the settlor, and the settlor is authorized to give binding consent 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.<sup>188</sup>

Unless the terms of the trust make a specified method of revocation exclusive, the UTC 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.<sup>189</sup> The UTC also authorizes revocation by will if the trust does not provide an exclusive method of revocation, and the will expressly refers to the trust or specifically devises property that would otherwise pass under the trust.<sup>190</sup> The ability to use a method of revocation alternate to that specified in the terms of the trust appears consistent with Kansas case law.<sup>191</sup>

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183. UTC § 602(a); KAN. STAT. ANN. § 58a-602(a) (Supp. 2002).

184. KAN. STAT. ANN. § 58-2417 (1994), repealed by enactment of the UTC, provided that every power, whether beneficial or in trust, is irrevocable unless an authority to revoke is retained in the instrument.

185. UTC § 602(a); KAN. STAT. ANN. § 58a-602(a) (Supp. 2002).

186. UTC § 601; KAN. STAT. ANN. § 58a-601 (Supp. 2002).

187. UTC § 603(a); KAN. STAT. ANN. § 58a-603 (Supp. 2002).

188. UTC §§ 105, 603; KAN. STAT. ANN. §§ 58a-105, -603 (Supp. 2002).

189. UTC §§ 602(c)(1), (c)(2)(B); KAN. STAT. ANN. § 58a-602(c) (Supp. 2002).

190. UTC § 602(c)(2)(A); KAN. STAT. ANN. § 58a-602(c)(2)(A) (Supp. 2002).

191. In *In re Estate of Sanders*, 261 Kan. 176, 929 P.2d 153 (1996), the court rejected an argument that the settlor's revocable trust was revoked by a later will. But, in *Estate of Sanders*, the will

The UTC also addresses the authority of an agent, conservator, or guardian to revoke or amend a trust on the settlor's behalf. An agent may participate in a decision to modify or terminate a trust only to the extent expressly authorized in the power of attorney or terms of the trust.<sup>192</sup> A conservator may consent to a proposed modification or termination only upon approval of the court supervising the conservatorship.<sup>193</sup> If no conservator has been appointed, the UTC, but not its Kansas version, also authorizes a guardian to revoke or amend the trust with the approval of the court supervising the guardianship.<sup>194</sup> Contest of a will is typically barred under one of two alternative statutes. In most states, a contest is barred after some period of time following notice of probate. In Kansas, the contest must be brought no later than the hearing on admission of the will to probate.<sup>195</sup> 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 following the testator's death.<sup>196</sup> Kansas takes a different approach. It limits the period in which a will may be probated to six months following the testator's death.<sup>197</sup> Most states currently have no limitation period on contest of a revocable trust. The UTC 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.<sup>198</sup> These time limits have been placed in brackets, however. States are encouraged to substitute the periods under their comparable will-contest statutes.<sup>199</sup> But given that the time limits to contest Kansas wills are not easily transferable to a revocable-trust context, the Kansas UTC could not achieve an exact conformity. Under the Kansas UTC, a contest must be brought within the earlier of one year after the settlor's death or four months after the potential contestant was sent a notice.<sup>200</sup>

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did not refer to the trust nor did it contain a specific devise inconsistent with the trust disposition.

192. UTC § 602(e); KAN. STAT. ANN. § 58a-602(e) (Supp. 2002). This provision is consistent with the holding in *Muller v. Bank of America*, 28 Kan. App. 2d 136, 12 P.3d 899 (2000).

193. UTC § 602(f); KAN. STAT. ANN. § 58a-602(f) (Supp. 2002).

194. Compare UTC § 602(f), with KAN. STAT. ANN. § 58a-602(f) (Supp. 2002).

195. KAN. STAT. ANN. § 59-2224 (1994). See generally Dennis M. Feeney & Jeffrey L. Carmichael, *Will Contests in Kansas*, 64 J. KAN. BAR ASS'N. No. 7, Sept. 1995, at 22 (analyzing will contest litigation and the defenses of undue influence and failure to follow testamentary formalities).

196. See, e.g., UNIF. PROB. CODE § 3-108 (1990) (providing three-year limit with some exceptions).

197. KAN. STAT. ANN. §§ 59-617, -618 (1994). See Feeney & Carmichael, *supra* note 195, at 23 (stating "[n]ormally . . . the petition must be filed within six months of the date of death").

198. UTC § 604(a).

199. *Id.* § 604 cmt.

200. KAN. STAT. ANN. § 58a-604(a) (Supp. 2002).

The UTC also encourages a trustee to expeditiously distribute revocable trust assets following the settlor's death. 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.<sup>201</sup> Liability in such cases is solely on the distributees.<sup>202</sup>

## 9. Change in Trustee (Article 7)

A vacancy in a trusteeship can occur for numerous reasons. The trustee may resign, be removed, or die. 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 UTC specifies numerous rules relating to a change in trustee. Kansas also had several statutory rules on changes of trustee that are now repealed by enactment of the Kansas UTC.

### a. Appointing successors

Absent a provision for the appointment of a successor in the terms of the trust, the UTC provides that a successor trustee may be appointed by unanimous agreement of the qualified beneficiaries or by the court, with the appointment by the beneficiaries given priority.<sup>203</sup> Kansas formerly provided for appointment of a successor trustee only by the court.<sup>204</sup> Under both the UTC<sup>205</sup> and presumably under former Kansas law, 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.

### b. Resignation of trustee

The UTC copies a provision commonly found in trust instruments that allows a trustee to resign by giving notice to the qualified beneficiar-

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201. UTC § 604(b); KAN. STAT. ANN. § 58a-604(b) (Supp. 2002).

202. UTC § 604(c); KAN. STAT. ANN. § 58a-604(c) (Supp. 2002).

203. UTC § 704(c); KAN. STAT. ANN. § 58a-704(c) (Supp. 2002).

204. KAN. STAT. ANN. §§ 58-2410, -2412 (repealed 1994).

205. UTC § 703(b); KAN. STAT. ANN. § 58a-703(b) (Supp. 2002).

ies.<sup>206</sup> Under former Kansas law, absent a provision in the terms of the trust, a trustee could resign only with permission of the court.<sup>207</sup>

c. 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. 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, a term which should not easily be changed. The UTC follows traditional doctrine by authorizing a trustee to be removed for acts of misconduct or other disqualification.<sup>208</sup> 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.<sup>209</sup> A trustee may also be removed due to lack of cooperation among cotrustees.<sup>210</sup> Removal for serious breach of trust or lack of cooperation among the cotrustees requires no additional findings.<sup>211</sup> 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.<sup>212</sup> "Interests of the beneficiaries," as defined means the "beneficial interests provided in the terms of the trust."<sup>213</sup>

But the drafters of the UTC also concluded that in situations where the personal link between the settlor and trustee has been broken, the emphasis should turn on whether the particular trustee is appropriate to the trust, not whether the trustee has committed particular acts of misconduct or is totally unfit. Consequently, the UTC also allows the court to consider whether there has been a substantial change of circumstances

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206. UTC § 705(a); KAN. STAT. ANN. § 58a-705(a) (Supp. 2002).

207. KAN. STAT. ANN. § 58-2411 (repealed 1994). See KAN. STAT. ANN. § 59-1709 (1994), not repealed by enactment of the UTC, which provides that a "fiduciary" may resign only with court approval. For the definition of "fiduciary" and the continued applicability of this provision to testamentary trusts, see *supra* note 10.

208. For a detailed discussion of the removal standards under the UTC, see Ronald Chester & Sarah Reid Ziomek, *Removal of Corporate Trustees Under the Uniform Trust Code and Other Current Law: Does a Contractual Lense Help Clarify the Rights of Beneficiaries?*, 67 MO. L. REV. 241 (2002).

209. UTC § 706(b)(1), (3); KAN. STAT. ANN. § 58a-706(b)(1), (3) (Supp. 2002).

210. UTC § 706(b)(2); KAN. STAT. ANN. § 58a-706(b)(2) (Supp. 2002).

211. UTC § 706(b)(1)-(2); KAN. STAT. ANN. § 58a-706(b)(1)-(2) (Supp. 2002).

212. UTC § 706(b)(3); KAN. STAT. ANN. § 58a-706(b)(3) (Supp. 2002).

213. UTC § 103(7); KAN. STAT. ANN. § 58a-103(7) (Supp. 2002).

or if the qualified beneficiaries unanimously requested removal.<sup>214</sup> In neither case, however, 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.<sup>215</sup> The Kansas UTC recognizes substantial change of circumstances as a factor for the court to consider, but omits a request by the qualified beneficiaries.<sup>216</sup> Despite this omission, the Kansas UTC lists the grounds for removal with much greater specificity than did the former statute, which only mentioned violation of express trust and insolvency as express grounds, leaving most cases to the vague standard of "other cause."<sup>217</sup> Kansas also has little case law on removal of trustees.<sup>218</sup>

#### 10. Duty to Keep the Beneficiaries Informed (Section 813)

The UTC fills out and adds detail to the trustee's duty to keep the beneficiaries informed of administration. When doubt exists, the UTC favors disclosure to beneficiaries as being the better policy. The UTC imposes both a general obligation on the trustee to keep the qualified beneficiaries reasonably informed of administration as well as several specific notice requirements.<sup>219</sup> These requirements, however, do not generally apply to revocable trusts. While a trust is revocable and the settlor has capacity, the rights of the beneficiaries, including rights to information, are exclusively within the settlor's control.<sup>220</sup>

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

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214. UTC § 706(b)(4).

215. *Id.*

216. KAN. STAT. ANN. § 58a-706(b)(4) (Supp. 2002).

217. *See id.* § 58-2412 (repealed 1994) (allowing removal for violation of express trust, insolvency, or other cause). *See also id.* § 59-1711 (1994) (allowing a "fiduciary" to be removed by the court if the fiduciary becomes incapacitated or incapable of performing duties). For the definition of "fiduciary" and the continued applicability of this provision to testamentary trusts, *see supra* note 10.

218. *See Jennings v. Murdock*, 220 Kan. 182, 211, 553 P.2d 846, 870 (1976) (stating that removal is a drastic action and should only be taken when the estate is actually endangered and intervention is necessary to save trust property); *In re Rutherford's Estate*, 154 Kan. 361, 118 P.2d 553 (1941) (upholding removal of trustee for negligent conduct); *Achenbach v. Baker*, 151 Kan. 827, 838, 101 P.2d 937, 944 (1940) (stating that "[i]ncidental to the court's paramount duty to see that trusts are properly executed is its power to remove trustees for cause"); *In re Brecklein's Estate*, 6 Kan. App. 2d 1001, 1011, 637 P.2d 444, 451 (1981) (stating that whether a trustee should be removed is a question within the sound discretion of the trial court).

219. UTC § 813; KAN. STAT. ANN. § 58a-813 (Supp. 2002).

220. UTC § 603(a); KAN. STAT. ANN. § 58a-603(a) (Supp. 2002).

trustee's compensation.<sup>221</sup> Regular reporting by the trustee is required. The trustee must furnish the distributees and permissible distributees at least annually with a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation,<sup>222</sup> although the beneficiaries may waive this requirement.<sup>223</sup> The trustee must also promptly respond to any beneficiary's request for information, unless unreasonable under the circumstances.<sup>224</sup> This includes a requirement that the trustee provide a beneficiary upon request with a copy of the trust instrument.<sup>225</sup> 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. Requiring disclosure of the entire instrument upon demand is consistent with recent case law.<sup>226</sup>

Kansas made extensive changes in the provisions relating to keeping the beneficiaries informed of administration, but relatively few changes to section 813. Under the Kansas UTC, a trustee need respond only to the request of a "qualified" beneficiary for information,<sup>227</sup> and need provide only a "qualified" beneficiary upon request with a copy of the trust instrument.<sup>228</sup> More importantly, the Kansas UTC also provides that only the settlor's spouse is entitled to information during any period that the spouse is eligible to receive distributions or holds a power of appointment over the trust, and one or more of the spouse's descendants is a qualified beneficiary.<sup>229</sup>

The more significant changes are due to modifications of other UTC sections. First, the Kansas UTC eliminates the language in section 105 that restricts a settlor's ability to waive reporting to beneficiaries,<sup>230</sup> al-

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221. UTC § 813(b)(2), (4); KAN. STAT. ANN. § 58a-813(b)(2), (4) (Supp. 2002).

222. UTC § 813(c); KAN. STAT. ANN. § 58a-813(c) (Supp. 2002). Trustees of testamentary trusts remain subject to the inventory and accounting requirements specified in KAN. STAT. ANN. §§ 59-1601 to -1611 (1994). KAN. STAT. ANN. § 58a-105(c) (Supp. 2002) provides that the provisions of Chapter 59 continue to apply to testamentary trusts. Although not repealed upon enactment of the UTC, nontestamentary trustees are presumably no longer subject to the inventory and accounting requirements specified in KAN. STAT. ANN. §§ 59-1605 to -1606 (1994).

223. See UTC § 813(c) (requiring annual reporting); see also *id.* § 813(d) (allowing a beneficiary to waive the right to a trustee's report).

224. *Id.* § 813(a).

225. *Id.* § 813(b)(1).

226. See *Taylor v. Nationsbank Corp.*, 481 S.E.2d 358 (N.C. Ct. App. 1997) (holding that absent provisions to the contrary, trust beneficiaries are entitled to view the trust instrument); *Fletcher v. Fletcher*, 480 S.E.2d 488 (Va. 1997) (same).

227. KAN. STAT. ANN. § 58a-813(a) (Supp. 2002).

228. *Id.* § 58a-813(b)(1).

229. *Id.* § 58a-813(e).

230. UTC § 105(b)(8), (9).



lowing a settlor who is so inclined to prohibit disclosure to any beneficiary. This result is contrary to the *Restatement*.<sup>231</sup> Second, the Kansas UTC revised the definition of “qualified beneficiary” to eliminate beneficiaries eligible to receive distributions in the discretion of the trustee.<sup>232</sup> This revision leads to the ironic result that beneficiaries holding discretionary interests, as “permissible” distributees, are entitled to copies of the trustee’s annual report,<sup>233</sup> but because they are not “qualified” beneficiaries, they are not otherwise entitled to information concerning the trust.

## 11. Remedies for Breach of Trust (Sections 1001–1009)

The UTC contains comprehensive provisions both specifying and, at the same time, limiting a trustee’s liability for breach of trust. The measure of damages for breach of trust is designed to restore the trust property and distributions to what they would have been had the breach not occurred. But it also serves another purpose—to prevent the trustee from profiting from the breach. Consequently, under the UTC, the trustee is liable for the higher of the two amounts: the profit made by the trustee or the loss to the trust.<sup>234</sup> The Kansas courts have also required a fiduciary to disgorge profits made by a fiduciary in connection with transactions involving trust property.<sup>235</sup> The Kansas UTC adds an additional penalty, subjecting to double damages a trustee who embezzles or unlawfully converts trust property.<sup>236</sup> The UTC does not mention punitive damages, but the Kansas UTC clarifies that the failure to specifically authorize them in the UTC does not mean that their award is specifically excluded.<sup>237</sup>

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231. RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (1959) provides:

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.

232. KAN. STAT. ANN. § 58a-103(12) (Supp. 2002).

233. *Id.* § 58a-813(c).

234. UTC § 1002(a); KAN. STAT. ANN. § 58a-1002(a)(1)–(2) (Supp. 2002). This provision is based on RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 205 (1992). UTC § 1002 cmt. For purposes of sections 1002 and 1003, “profit” does not include the trustee’s compensation. UTC § 1002 cmt. For a still relevant discussion of computing damages under Kansas law, see *Gillespie v. Seymour*, 250 Kan. 123, 823 P.2d 782 (1991).

235. See *Vincent v. Werner*, 140 Kan. 599, 38 P.2d 687 (1934) (imposing a surcharge on the executor for commissions received on sales of loans and insurance to estate).

236. KAN. STAT. ANN. § 58a-1002(a)(3) (Supp. 2002).

237. *Id.* § 58a-1002(c). Punitive damages for breach of trust were awarded in *Gillespie v. Seymour*, 250 Kan. 123, 145–46, 823 P.2d 782, 798–99 (1991).

The UTC also provides a series of non-monetary remedies, including such actions as recovery of trust assets misappropriated by a trustee.<sup>238</sup> Finally, similar to any other action sounding in equity, the UTC authorizes the court, in any proceeding involving the trust's administration, to award counsel fees to any party, to be paid by another party or directly from the trust as justice and equity may require.<sup>239</sup>

The UTC contains a series of provisions limiting a trustee's exposure to liability. Following the sending of a trustee's annual or other report, under the UTC a beneficiary must commence an action for breach of trust within one year but only if the report adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time limit.<sup>240</sup> The Kansas UTC increases this period to two years.<sup>241</sup> Should the trustee not report or inadequately disclose, the beneficiary must commence an action within five years after the first to occur of: termination of the trust, the termination of the beneficiary's interest, or the date the particular trustee complained of leaves office.<sup>242</sup> A beneficiary who has consented to a trustee's action is also precluded from suing for breach of trust.<sup>243</sup>

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238. UTC § 1001(b); KAN. STAT. ANN. § 58a-1001(b) (Supp. 2002). To remedy a breach of trust that has occurred or may occur, the court may compel the trustee to perform the trustee's duties; enjoin the trustee from committing a breach of trust; compel the trustee to redress a breach of trust by paying money, restoring property, or other means; order a trustee to account; appoint a special fiduciary to take possession of the trust property and administer the trust; suspend the trustee; remove the trustee; reduce or deny compensation to the trustee; void an act of the trustee; impose a lien or a constructive trust on trust property; or trace trust property wrongfully disposed of and recover the property or its proceeds. UTC § 1001(b)(1)-(8); KAN. STAT. ANN. § 58a-1001(b)(1)-(8) (Supp. 2002). The remedies identified in section 1001 were derived from RESTATEMENT (SECOND) OF TRUSTS § 199 (1959). UTC § 1001 cmt.

239. UTC § 1004; KAN. STAT. ANN. § 58a-1004 (Supp. 2002). This section, which is based on Massachusetts General Laws chapter 215, section 45, codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. UTC § 1004 cmt. Kansas cases awarding attorney's fees in trust cases include *Morrison v. Watkins*, 20 Kan. App. 2d 411, 889 P.2d 140 (1995) (awarding attorney's fees for defending a trust); *Burch v. Dodge*, 4 Kan. App. 2d 503, 608 P.2d 1032 (1980) (authorizing award of attorney's fees to plaintiff's counsel if action of benefit to trust); and *Moore v. Adkins*, 2 Kan. App. 2d 139, 576 P.2d 245 (1978) (same).

240. UTC § 1005(a). Pursuant to section 1005(b), a report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

241. KAN. STAT. ANN. § 58a-1005(a) (Supp. 2002).

242. UTC § 1005(c); KAN. STAT. ANN. § 58a-1005(c) (Supp. 2002).

243. UTC § 1009; KAN. STAT. ANN. § 58a-1009 (Supp. 2002). The immunity provided by this section does not apply if the beneficiary's consent, release, or ratification was induced by improper conduct of the trustee, or, if at the time of the consent, release, or ratification, "the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach." UTC § 1009; KAN. STAT. ANN. § 58a-1009 (Supp. 2002).

Even if the terms of the trust attempt to exculpate a trustee completely for the trustee's acts, the trustee always must comply with a certain minimum standard. An exculpatory term cannot be used to immunize a trustee for breach of trust if the breach was "committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries."<sup>244</sup> Even absent bad faith or reckless indifference, the term is unenforceable if it was inserted as a result of the abuse of a confidential or fiduciary relationship between the trustee and settlor.<sup>245</sup> Because of the serious risk of abuse present when a trustee/scrivener inserts an exculpatory provision into the instrument, the drafting of such a provision is presumed to be an abuse of a fiduciary or confidential relationship. To overcome the presumption of abuse, the trustee must establish that the clause was fair "and that its existence and contents were adequately communicated to the settlor."<sup>246</sup> The presumption of abuse does not apply if the settlor was represented by independent counsel.<sup>247</sup>

The Kansas UTC adds an additional provision addressing abuse by scriveners. A disposition in a trust to a scrivener who is unrelated to the settlor or a disposition to a member of the scrivener's family is invalid, unless it appears that the settlor knew the contents of the trust and had independent legal advice.<sup>248</sup>

A trustee is entitled to rely on the trust instrument. While the entire terms of a trust are normally contained in the trust instrument, extrinsic evidence may be admissible to clarify ambiguities, many of which may not be apparent from a reading of the instrument. Also, grounds may exist, such as reformation due to a mistake of fact or law, resulting in the reformation of apparently unambiguous terms.<sup>249</sup> To enable a trustee to administer a trust with some dispatch and without concern that reliance

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244. UTC § 1008(a)(1); KAN. STAT. ANN. § 58a-1008(a)(1) (Supp. 2002).

245. UTC § 1008(a)(2); KAN. STAT. ANN. § 58a-1008(a)(2) (Supp. 2002).

246. UTC § 1008(b); KAN. STAT. ANN. § 58a-1008(b) (Supp. 2002). The drafters of the UTC disapprove of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991), which upheld an exculpatory clause in a trust instrument drafted by the trustee because the beneficiary could not prove that the clause was inserted as a result of an abuse of a fiduciary relationship. UTC § 1008 cmt. Section 1008(b) responds to the risk that the insertion of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood by the settlor. UTC § 1008 cmt.

247. If the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's form. Because the settlor's attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor's attorney is disclosure to the settlor. UTC § 1008 cmt.

248. KAN. STAT. ANN. § 58a-406(b) (Supp. 2002). For a less sophisticated version of the same provision, directed at scriveners of wills, see *id.* § 59-605 (1994).

249. UTC § 415 (providing that the court may reform a trust's terms to correct mistakes); KAN. STAT. ANN. § 58a-415 (Supp. 2002) (discussed *supra* notes 163-64 and accompanying text).

on the language of the trust instrument is misplaced, the UTC provides that a trustee is not liable for a breach of trust to the extent the breach resulted from reasonable reliance on the trust instrument.<sup>250</sup>

A trustee is also entitled to rely on reasonable inferences as to a beneficiary's family or other status. Whenever an event (including marriage, divorce, performance of education requirements, or death) affects the administration or distribution of the trust, a trustee who exercised reasonable care to determine that the event occurred is not liable for any loss attributable to lack of knowledge.<sup>251</sup>

#### IV. CONCLUSION

This article has reviewed the significant provisions of the UTC and the effect of its enactment in Kansas. Kansas's former trust statutes were few in number and the number of reported trust cases is similarly sparse. The Kansas UTC addresses numerous issues on which there is currently little or no Kansas law. Despite some of the glitches in the Kansas UTC noted in this article, enactment of the UTC has resulted in a Kansas law of trusts that is far more complete, accessible, and, as a consequence, more useful than former law.

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250. UTC § 1006; KAN. STAT. ANN. § 58a-1006 (Supp. 2002).

251. UTC § 1007; KAN. STAT. ANN. § 58a-1007 (Supp. 2002). Kansas formerly followed the common law rule imposing absolute liability against a trustee for misdelivering trust property. *See Moore v. Adkins*, 2 Kan. App. 2d 139, 576 P.2d 245 (1978) (adhering to the common law rule). For a discussion of the common law rule, see *RESTATEMENT (SECOND) OF TRUSTS* § 226 (1959).

