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## The Uniform Trust Code (2000): Significant Provisions and Policy Issues

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# The Uniform Trust Code (2000): Significant Provisions and Policy Issues

*David M. English\**

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## I. INTRODUCTION

The Uniform Trust Code (2000) ("UTC") is the first effort by the National Conference of Commissioners on Uniform State Laws to provide the states with a comprehensive model for codifying their law on trusts. This Article provides an overview of the UTC, describes how it responds to recent developments in American trust practice, and describes how its enactment would change the trust law prevailing in most American states.<sup>1</sup> The final text of the UTC was approved by the Commissioners in August 2000, and by the American Bar Association's House of Delegates at its mid-year meeting in February 2001. The detailed interpretive comments were completed in April 2001, and minor cleanup amendments were approved in August 2001.<sup>2</sup> Enactment by the American states is expected to begin in 2002.

The drafting of the UTC was prompted by the much greater use of trusts in recent years. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, led to a recognition by the Commissioners that the trust law in most states is thin, with many gaps between the often few statutes and reported cases. It also led to a recognition that previous uniform acts relating to trusts, while numerous, are fragmentary. The primary source of trust law in most other states is the *Restatement of Trusts* and the multivolume treatises by Scott<sup>3</sup> and Bogert,<sup>4</sup> sources that fail to address numerous practical issues and that on others sometimes provide insufficient guidance. The purpose of the UTC is to update, fill out, and systematize the American law of trusts. The UTC will enable states that enact it to specify their rules on trust law with precision and in a readily-available source. Finally, while much of the UTC codifies the common law, the UTC makes some significant changes.<sup>5</sup> 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>6</sup> and Texas<sup>7</sup> being the most widely known.

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1. For another perspective, emphasizing somewhat different issues, see John H. Langbein, *The Uniform Trust Code: Codification of the Law of Trusts in the United States*, 13 TR. L. INT'L 66 (2001).

2. The complete text of the Uniform Trust Code (2000) [hereinafter UTC] with comments can be accessed through the Commissioners' website, <http://www.nccusl.org>.

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

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

5. See *supra* note 2.

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

7. TEX. PROP. CODE ANN. chs. 111-115 (Vernon 1995 & Supp. 2002).

The UTC was drafted by a committee chaired by Maurice Hartnett, a Justice on the Delaware Supreme Court and former Judge of the Delaware Chancery Court with long experience with trust cases. This Author served as Reporter with responsibility for carrying out the drafting committee's decisions on a day-to-day basis and for preparing the various drafts. The drafting committee was assisted by numerous advisors, most of whom attended a majority of the twice-annual drafting committee meetings. Groups represented included the American Bar Association and its Section of Real Property Probate and Trust Law (three advisors), the American College of Trust and Estate Counsel ("ACTEC"), the American Bankers Association, and the California and Colorado State Bars. Key advice was also provided by the Joint Editorial Board for Uniform Trusts and Estates Acts and the ACTEC Committee on State Laws.

The drafting of the UTC was a seven-year process. A study committee, chaired by Judge Hartnett, was initially appointed in 1993. The function of the study committee was to decide whether the Commissioners should undertake the drafting of a comprehensive uniform law on trusts. The study committee recommended the appointment of a drafting committee, which was appointed in 1994. To gather as much input as possible, the drafting of the UTC was deliberately not placed on the fast track, but spanned a period of six years.

## II. RELATED UNIFORM ACTS

There are numerous existing uniform acts on trusts and related subjects, but none provide comprehensive coverage on trust law issues. Certain of these smaller acts are incorporated into the UTC; others should be repealed upon enactment of the UTC. Still others, addressing specialized topics, will continue to be available for enactment in free-standing form. Certain of these smaller acts are incorporated into the larger UTC. The most important of these other uniform acts is the 1994 Uniform Prudent Investor Act, enacted in thirty-six states.<sup>8</sup> That Act codifies the *Restatement (Third) of Trusts: Prudent Investor Rule* (1992). 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. Given its importance and already widespread acceptance, the UTC does not modify the smaller Uniform Prudent Investor Act but incorporates it without change.<sup>9</sup>

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8. For the text of the act and citations for the enacting jurisdictions, see UNIF. PRUDENT INVESTOR ACT, 7B U.L.A. 280 (2000 & Supp. 2001).

9. UTC art. 9 general cmt.

Uniform acts superseded by the UTC are Article VII of the Uniform Probate Code ("UPC"),<sup>10</sup> the Uniform Trustee Powers Act (1964),<sup>11</sup> and the Uniform Trusts Act (1937).<sup>12</sup> Uniform acts on trust-related topics that are not superseded by the UTC and are still available for enactment include the Uniform Common Trust Fund Act,<sup>13</sup> Uniform Custodial Trust Act (1987),<sup>14</sup> Uniform Management of Institutional Funds Act (1972),<sup>15</sup> Uniform Principal and Income

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10. 8 U.L.A. pts. I & II (1998). Article VII, although titled *Trust Administration*, is a modest statute, addressing only a limited number of topics. Its provisions on jurisdiction are incorporated into Article 2 of the UTC, and its provision on trustee liability to persons other than beneficiaries is replaced by Section 1010. Its provisions on trust registration are not supplanted by the UTC. Registration is a method for recording a trust in the county records. The UTC drafters concluded that it was best not to address trust registration.

11. For the text of this Act and citations for the sixteen states that have enacted it, see UNIF. TRUSTEE POWERS ACT (1964), 7C U.L.A. 388 (2000). This Act contains a list of specific trustee powers and deals with other selected issues, particularly relations of a trustee with persons other than beneficiaries. The Uniform Trustee Powers Act is outdated and is entirely superseded by the UTC, principally at Sections 815, 816, and 1012.

12. Despite its name, this much earlier Act addressed only a limited number of topics, including the duty of loyalty, registration and voting of securities, and trustee liability to persons other than beneficiaries. For the text of this earlier Act and citations for the seven states that have enacted it, see UNIF. TRUSTS ACT, 7C U.L.A. 436 (2000).

13. Originally approved in 1938, this Act has been enacted in thirty-four jurisdictions. The UTC does not address the subject of common trust funds. In recent years, many banks have replaced their common trust funds with mutual funds that also may be available to non-trust customers. The UTC addresses investment in mutual funds at Section 802(f). For the text of the Uniform Common Trust Fund Act and citations for the jurisdictions that have enacted it, see UNIF. COMMON TRUST FUND ACT, 7 U.L.A. pt. II, at 181 (1997).

14. This Act allows standard trust provisions to be automatically incorporated into the terms of a trust simply by referring to the Act in the instrument. This Act is not displaced by the UTC but complements it. For the text of the Uniform Custodial Trust Act and citations for the fifteen jurisdictions that have enacted it, see UNIF. CUSTODIAL TRUST ACT, 7A U.L.A. pt. 1, at 239 (1999 & Supp. 2001).

15. This Act governs the administration of endowment funds held by charitable, religious, educational, or other eleemosynary institutions. It establishes a standard of prudence for use of appreciation on assets, provides specific authority for the making of investments, authorizes the delegation of this authority, and specifies a procedure, through either donor consent or court approval, for removing restrictions on the use of donated funds. For the text of the Uniform Management of Institutional Funds Act and citations for the forty-seven jurisdictions that have enacted it, see UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT, 7A U.L.A. pt. 2, at 475 (1999 & Supp. 2001).

Act (1997),<sup>16</sup> Uniform Statutory Rule Against Perpetuities,<sup>17</sup> and the Uniform Testamentary Additions to Trusts Act.<sup>18</sup>

### III. RELATIONSHIP TO THE *RESTATEMENT*

*Restatements*, which are written and approved by a national body of lawyers comprising the members of the American Law Institute (“ALI”), 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 common law on a particular subject. Rather, where the decisions of the courts conflict, a *Restatement* strives to delineate the better rule. It also tries to fill in gaps in the law, to promote the rule the courts should apply when it encounters 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 for decision, will adopt uniform rules of decision over time.

The *Restatement (Second) of Trusts* was approved by the ALI in 1957.<sup>19</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>20</sup> A tentative draft of the portion of the *Restatement Third* relating to the rules on the creation and

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16. This is a major revision of the widely enacted uniform act of the same name that was last revised in 1962. Because the Uniform Principal and Income Act addresses issues with respect both to decedents’ estates and trusts, a jurisdiction enacting the revised act may wish to codify it either as part of the UTC or as part of its probate laws.

17. Originally approved in 1986, this Act reforms the durational limit on when property interests, including interests created under trusts, must vest or fail. The UTC does not limit the duration of trusts or alter the time when interests otherwise must vest, but leaves this issue to other state law. The UTC may be enacted without change regardless of the status of the perpetuities law in the enacting jurisdiction. For the text of the Uniform Statutory Rule Against Perpetuities and citations for the twenty-six jurisdictions that have enacted it, see UNIF. STATUTORY RULE AGAINST PERPETUITIES, 8B U.L.A. 223 (2001).

18. This Act is available in two versions: the 1960 Act, with twenty-five enactments; and the 1991 Act, with twenty-one enactments. As its name suggests, the Uniform Testamentary Additions to Trusts Act validates pourover devises to trusts. Because it validates provisions in wills, it is incorporated into the Uniform Probate Code (“UPC”), not into the UTC. For the text of the two versions of the Uniform Testamentary Additions to Trusts Act and citations for the jurisdictions that have enacted it, see UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT (1960), 8B U.L.A. 367 (2001); UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT (1991), 8B U.L.A. 355 (2001).

19. See *RESTATEMENT (SECOND) OF TRUSTS* (1959).

20. See *RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE* (1992).

validity of trusts was approved in 1996;<sup>21</sup> the portion relating to the office of trustee, trust purposes, spendthrift provisions, and the rights of creditors was approved in 1999;<sup>22</sup> and the portion on termination and modification of trusts was approved in 2001.<sup>23</sup>

The UTC was drafted in close coordination with this revision of the *Restatement of Trusts* to the extent that a significant minority, if not majority, of the UTC provisions could be described as a codification of the *Restatement*. Less important but still influential was coordination with the revision of the *Restatement (Third) of Property: Wills and Other Donative Transfers*, in which much of the law on voluntary transfer of property, both during life and at death, is collected and on which several sections of the UTC are based.<sup>24</sup> The portions of this other *Restatement* dealing with interpretation of documents are relevant whether the document in question is a will, inter vivos trust, or other form of nonprobate transfer.

*Restatements* are not statutes. Until accepted by the courts of a particular state, the courts are free to, and often do, adopt a different rule. By contrast, uniform acts, when enacted, become mandatory rules of law that can be relied on and are easily accessible to all of a state's citizens, whether or not they are in front of the courts. The UTC thus will serve an important educational function. For the first time, legal practitioners in many states actually will be able to determine their state's law on trusts. Furthermore, there are numerous practical issues that are best addressed by specific legislation, such as the UTC, instead of by a more discretionary guideline, such as a *Restatement*.

#### IV. RELATIONSHIP TO THE COMMON LAW

The UTC is supplemented by the common law of trusts, including principles of equity.<sup>25</sup> The *Restatement of Trusts* is the most complete and readily-available reference in which to locate this common law. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in the exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and

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

22. See RESTATEMENT (THIRD) OF TRUSTS (Tentative Draft No. 2, 1999).

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

24. See UTC § 414 (titled reformation to correct mistakes and based on RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 12.1 (Tentative Draft No. 1, 1995)); UTC § 415 (titled modification to achieve settlor's tax objectives and based on RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 12.2 (Tentative Draft No. 1, 1995)).

25. UTC § 106.

broad equitable jurisdiction of the court, which the UTC in no way restricts.<sup>26</sup> The statutory text of the UTC is also supplemented by its comments, which, like the comments to any uniform act, may be relied on as a guide for interpretation.<sup>27</sup>

## V. SCOPE OF COVERAGE

The UTC states the law relating to express trusts.<sup>28</sup> These are trusts created by settlors who during life or at death transfer property to a trustee or who during their lifetime declare themselves trustee of their own property.<sup>29</sup> Following its creation, the trustee then will hold the property for the benefit of beneficiaries. This is to be distinguished from what are known as resulting or constructive trusts, which are remedial devices imposed by the courts.<sup>30</sup>

Trusts are best known in the United States as a device for planning an individual's personal estate. Trusts are created as a way to reduce estate and gift taxes. They are used to hold property for the benefit of minors and for adults with disabilities. They are used to provide benefits to a spouse for life, with the assurance that upon the spouse's death the property held in trust will pass to children of a prior marriage. But trusts also are increasingly being used as tools for facilitating commercial transactions. In fact, in the United States, wealth held in commercial trusts far exceeds that transmitted through trusts created to manage family gifts. 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>31</sup> The UTC is not directed specifically at commercial trusts but neither does it exclude them. The extent to which commercial trusts will be subject to the Code will depend on the type of trust and the laws, other than the UTC, under which the trust was created. Even if the commercial trust is governed exclusively by

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26. UTC § 106 cmt.

27. See *Yale Univ. v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting the Uniform Management of Institutional Funds Act); *Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting the Uniform Commercial Code); JACK DAVIES, *LEGISLATIVE LAW AND PROCESS IN A NUTSHELL* § 55-4 (2d ed. 1986); 2 NORMAN SINGER, *STATUTORY CONSTRUCTION* § 52.05 (6th ed. 2000).

28. See UTC § 102.

29. See UTC § 401.

30. See 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 5 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* §§ 461-529 (4th ed. 1989), and 5A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* §§ 530-552 (4th ed. 1987).

31. John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 *YALE L.J.* 165, 168-74 (1997).



another body of law, the courts are free to look to the UTC for interpretive guidance.

## VI. OVERVIEW OF PROVISIONS

The breadth of the UTC is indicated by its organization. The UTC is organized into eleven articles. Article 1, in addition to providing definitions, addresses topics such as the ability of a trust instrument to override the UTC's provisions,<sup>32</sup> the validity of choice of law provisions and the law to govern in the absence of such a provision,<sup>33</sup> and the procedure for transferring the principal place of administration to another jurisdiction.<sup>34</sup> Article 2 addresses selected topics involving judicial proceedings concerning trusts. Included is the conferring of jurisdiction on the court to intervene in a trust's administration,<sup>35</sup> specification of the court's jurisdiction over trustees and beneficiaries,<sup>36</sup> and optional provisions on subject-matter jurisdiction<sup>37</sup> and venue.<sup>38</sup> This minimal coverage was deliberate; the drafting committee concluded that most issues relating to jurisdiction and procedure before the courts are best left to other bodies of law, such as the rules of civil procedure. Even among those provisions that remain, local conditions may dictate modification. The optional provision on venue may conflict with the local jurisdiction's general venue rules. The provision on subject-matter jurisdiction was designed for a jurisdiction in which one category of court, such as a chancery court, has exclusive jurisdiction over proceedings concerning the administration of any type of trust, whether *inter vivos* or testamentary.

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 circumstances when another person, such as a guardian, may receive notice or give a consent on behalf of the beneficiary or other person represented. Article 4, which is the first article of the UTC devoted to the substantive law of trusts, prescribes the requirements for creating, modifying, and terminating

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32. UTC § 105.

33. UTC § 107. For an analysis of this provision, see Eugene F. Scoles, *Choice of Law in Trusts: Uniform Trust Code, Sections 107 and 403*, 67 MO. L. REV. 213 (2002).

34. UTC § 108.

35. UTC § 201.

36. UTC § 202.

37. UTC § 203.

38. UTC § 204.

trusts. The provisions on the creation of trusts<sup>39</sup> largely track traditional doctrine; those relating to modification and termination<sup>40</sup> liberalize the prevailing law. Article 5 covers spendthrift provisions and rights of creditors, both of the settlor and beneficiaries. Article 6 collects the special rules relating to revocable trusts, including the standard of capacity,<sup>41</sup> the procedure for revocation or modification,<sup>42</sup> and the statute of limitations on contests.<sup>43</sup> Article 7 turns to the office of trustee, specifying numerous procedural rules that apply absent contrary provision in the trust. Included are the rules on trustee acceptance,<sup>44</sup> the rights and obligations of cotrustees,<sup>45</sup> the procedure for resignation,<sup>46</sup> the grounds for removal,<sup>47</sup> the methods for appointing successors,<sup>48</sup> and trustee compensation.<sup>49</sup>

Article 8 details the duties and powers of the trustee. The trustee's administrative powers<sup>50</sup> are an updated version of the Uniform Trustee Powers Act, including coverage of such current topics as the power to deal with environmental hazards. Statutory powers allay concerns by third parties as to whether the trustee has the authority to engage in a particular transaction. The trustee duties contained in Article 8, such as the duty of loyalty,<sup>51</sup> largely codify the common law and were drafted where relevant to conform to the Uniform Prudent Investor Act.<sup>52</sup> The Uniform Prudent Investor Act prescribes a trustee's

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39. UTC §§ 401-409.

40. UTC §§ 410-417.

41. UTC § 601.

42. UTC § 602.

43. UTC § 604.

44. UTC § 701.

45. UTC § 703.

46. UTC § 705.

47. UTC § 706.

48. UTC § 704.

49. UTC § 708.

50. UTC §§ 815-816.

51. UTC § 802. For an analysis of this provision and the duty of loyalty more generally, see Karen E. Boxx, *Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code*, 67 MO. L. REV. 279 (2002).

52. UTC prefatory note. Other duties addressed in Article 8 are the duty to administer the trust (Section 801), the duty of impartiality (Section 803), the duty to act with prudence (Section 804), the duty to minimize costs (Section 805), the duty to exercise skills (Section 806), duties with respect to delegation (Section 807), duties with respect to powers to direct (Section 808), the duty to control and protect trust property (Section 809), the duty to earmark (Section 810), the duty to enforce and defend claims (Section 811), the duty to collect trust property (Section 812), the duty to inform and report (discussed *infra* notes 234-43 and accompanying text), and duties with respect to discretionary powers over distributions (Section 814). Sections 804, 806, and 807 are drawn from and are similar to comparable sections of the Uniform Prudent Investor Act.

responsibilities with regard to the management and investment of trust property.<sup>53</sup> The UTC expands on this by also specifying the trustee's duties regarding distributions to beneficiaries.<sup>54</sup>

Article 9 provides a place for the jurisdiction enacting the larger UTC to codify its version of the Uniform Prudent Investor Act. Article 10 addresses liability of trustees and trustee dealings with persons other than beneficiaries. With respect to the liability of a trustee for breach of trust, the Article lists the remedies for breach of trust;<sup>55</sup> specifies how money damages are to be determined;<sup>56</sup> 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;<sup>57</sup> and specifies certain trustee defenses, including the addition of a statute of limitations for claims alleging breach of trust<sup>58</sup> and a provision on enforcing exculpatory clauses.<sup>59</sup> With respect to transactions by trustees with third persons, Article 10 treats trustees as if they were managers of entities, and encourages trustees and third persons to engage in commercial transactions to the same extent as if no trust were involved.<sup>60</sup> Addressed are personal liability of the trustee for contract or tort and the rights of bona fide purchasers.<sup>61</sup> To protect the privacy of the trust, a procedure is provided whereby a trustee may verify authority by means of a certificate instead of by providing the third person with a copy of the trust instrument.<sup>62</sup>

Article 11 deals with the application of the UTC 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>63</sup> Consequently, the UTC generally applies not only to trusts created on or after the effective date, but also to trusts already in existence.<sup>64</sup>

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53. See UNIF. PRUDENT INVESTOR ACT, 7B U.L.A. 280 (2000).

54. UTC art. 8 general cmt.

55. UTC § 1001.

56. UTC § 1002.

57. UTC § 1004.

58. UTC § 1005.

59. UTC § 1008.

60. UTC prefatory note.

61. UTC §§ 1010-1012.

62. UTC § 1013.

63. UTC prefatory note.

64. UTC § 1106 & cmt.

## VII. STUDY PROCESS

States normally enact major uniform laws only following a lengthy study process. The following are issues for states to consider:

1. *Prepare State Law Study.* The first step is to determine how enactment of the UTC would change existing law, both statutes and case law. With respect to case law, most courts rely heavily on the *Restatement of Trusts*, on which the UTC also places major reliance.
2. *Decide on Drafting Model.* One approach is to start with the UTC as a base and then to make necessary modifications. The other approach is to begin with existing law and then to add selected provisions of the Code. Relying on the UTC as the starting point will result in greater consistency with other states. Such reliance also will reduce the risk of gaps and inconsistencies.
3. *Decide What to Do About Optional Provisions.* Certain sections of the UTC are placed in brackets to signal that modification may be appropriate. The reasons why modification of a section may be appropriate are then discussed in the comments to the bracketed sections. Sections of the UTC containing bracketed language include the provisions on rules of construction,<sup>65</sup> subject-matter jurisdiction and venue,<sup>66</sup> and contest of revocable trusts.<sup>67</sup>
4. *Decide What to Do About the Uniform Prudent Investor Act.* Article 9 of the UTC provides a place for an enacting jurisdiction to insert its version of the Uniform Prudent Investor Act. The comment to that Article provides instructions on how to eliminate overlap between the Uniform Prudent Investor Act and the provisions of UTC Article 8 describing the fiduciary duties of a trustee. An enacting jurisdiction will need to determine whether to leave its version of the Prudent Investor Act where it is or to codify it as part of the UTC.
5. *Accommodate Variations in Local Court Systems.* In many states, testamentary trusts are within the jurisdiction of the probate court, with one set of rules and procedures, while inter vivos trusts are within the jurisdiction of a court of equity, with yet another set of rules and

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65. UTC § 112. For a discussion, see *infra* note 114 and accompanying text.

66. UTC §§ 203-204.

67. UTC § 604. For a discussion, see *infra* notes 198-202 and accompanying text.

procedures. The UTC, being a *uniform* act, cannot accommodate all local variations.

6. *Decide on Other Key Local Law Issues.* Certain existing local law provisions or practices may be so well established that change may be unwise.<sup>68</sup>
7. *Identify Other Policy and Political Issues.* These will vary by jurisdiction and by who controls the drafting process. Issues on which the Commissioners had divided votes often will result in split votes when the debate moves to the states. To encourage uniformity, the Commissioners request that state drafting committees start from the assumption that the uniform law approach is correct. Many of these significant policy issues are discussed below.

### VIII. POLICY ISSUES

The UTC does not make sweeping changes in the common law of trusts, but neither does it woodenly copy the previous judge-made law. The UTC makes significant strides. What follows is a description of the more important changes made by the UTC in the rules prevailing in most states. These are also the issues likely to receive the most discussion when the UTC is considered by the states. The following are the issues addressed:

1. Default Rules (Section 105);
2. Principal Place of Administration (Section 108);
3. Representation and Settlements (Section 111 and Article 3);
4. Rules of Construction (Section 112);
5. Creation of Trusts (Sections 401-409);
6. Trust Modification and Termination (Sections 410-417);
7. Charitable Trusts (Sections 405, 413);
8. Spendthrift Provisions and Rights of Beneficiary's Creditors (Article 5);
9. Revocable Trusts (Article 6);
10. Cotrustees (Section 703);
11. Trustee Removal (Section 706);
12. Duty to Keep the Beneficiaries Informed (Section 813);
13. Remedies for Breach of Trust (Sections 1001-1009); and

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68. For an analysis of the Missouri trust law provisions most likely to be carried forward into Missouri's enactment of the UTC, see Scot Boulton, *How Uniform Will the Uniform Trust Code Be: Vagaries of Missouri Trust Law Versus Desires for Conformity*, 67 MO. L. REV. 361 (2002).

#### 14. Trustee Dealings with Third Persons (Sections 1010-1013).

##### *A. Default Rules (Section 105)*

Most of American trust law consists of rules subject to override by the terms of the trust. The UTC is no exception. Nearly all of the Code's provisions are subject to override by the terms of the trust. But prior to the UTC, neither the *Restatement*, nor 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>69</sup> the rights of third parties in their dealings with the trustee;<sup>70</sup> the power of the court to take certain actions with respect to a trust's administration such as to remove a trustee;<sup>71</sup> the power of the court to modify or terminate a trust on specified grounds;<sup>72</sup> a trustee's obligation to act in good faith and in accordance with the purposes of the trust;<sup>73</sup> the requirement that a trust and its terms be for the benefit of its beneficiaries;<sup>74</sup> and the trustee's duty to keep the adult beneficiaries age twenty-five and older informed of certain matters relating to the trust's administration.<sup>75</sup> The limits on the settlor's ability to waive the duty to keep the beneficiaries informed, which is described in detail below,<sup>76</sup> is the most discussed provision of the UTC.

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

Determining a trust's principal place of administration is important for a variety of reasons. It may determine which state's income tax applies to the trust.<sup>77</sup> It will establish which court has primary jurisdiction concerning trust administrative matters<sup>78</sup> or venue for bringing a proceeding.<sup>79</sup> Locating a

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69. UTC § 105(b)(1).

70. UTC § 105(b)(11).

71. UTC § 105(b)(13).

72. UTC § 105(b)(4). For the provisions on trust modification and termination, see UTC §§ 410-417 (discussed *infra* notes 140-59 and accompanying text).

73. UTC § 105(b)(2).

74. UTC § 105(b)(3).

75. UTC § 105(b)(8)-(9).

76. See UTC § 105 (b)(8)-(b)(9); see also *infra* notes 244-46 and accompanying text.

77. For the effect of place of administration on the state's authority to tax a trust, see Bradley E.S. Fogel, *What Have You Done for Me Lately? Constitutional Limitations on State Taxation of Trusts*, 32 U. RICH. L. REV. 165 (1998).

78. See UTC § 202(a) ("By accepting the trusteeship of a trust having its principal place of administration in this State or by moving the principal place of administration

principal place of administration in a particular jurisdiction also makes it more likely that the particular jurisdiction's law will govern the trust.<sup>80</sup>

As trust administration has become more complex, determining a trust's principal place of administration has become more difficult. Cotrustees may be located in different states, or a corporate trustee's personal trust officers may be located in one state, its investment division in another, and its operations facilities yet somewhere else. Also, a variety of nontrustees, such as advisors and trust protectors, may play a role in the trust's administration. Concluding that the fact situations were simply too diverse to allow the development of a straightforward statutory test, the drafters of the UTC did not attempt to define principal place of administration.<sup>81</sup> Nevertheless, the UTC otherwise facilitates the locating of a trust in a particular jurisdiction. First, a provision in the trust terms designating the principal place of administration is valid and controlling if a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction, or all or part of the trust's administration occurs in the designated place.<sup>82</sup> Second, for trust instruments failing to address the

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to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.”).

79. Under UTC Section 204, which is one of the Code's optional provisions, venue for bringing a proceeding is in the county of the trust's principal place of administration unless the trust has no trustee or the trust was created by will and the decedent's estate is not yet closed.

80. For a discussion of the legal background behind principal place of administration and the issues addressed in Section 108, see 5A SCOTT & FRATCHER, *supra* note 30, §§ 611-615. For trust instruments without choice of law provisions, UTC Section 107(2) provides that the meaning and effects of the terms of the trust will be determined by the law of the jurisdiction having the most significant relationship to the matter at issue. Among the factors to take into account in locating the jurisdiction having the most significant relationship to a particular issue is the place of the trust's creation and the place of current administration. See RESTATEMENT (SECOND) OF CONFLICTS OF LAW §§ 270 cmt. c & 272 cmt. d (1971). Usually, the law of the trust's principal place of administration will govern administrative matters, and the law of the place of the trust's creation will govern interpretation of the trust's dispositive provisions.

81. For such an attempt, see CAL. PROB. CODE § 17002 (West 1991), which provides that the principal place of administration is the usual place where the day-to-day activity of the trust is carried on by the trustee or its representative primarily responsible for its administration. If there is no such usual place, the principal place of administration in the case of a trust with a single trustee is the trustee's residence or usual place of business. In the case of a trust having more than one trustee, the principal place of administration is the residence or usual place of business of any of the trustees as agreed upon by them. In the absence of an agreement, the principal place of administration is the residence or usual place of business of any of the cotrustees.

82. UTC § 108(a). In addition to selecting the trust's principal place of administration, the settlor also may select the law to govern the trust. Under UTC

subject, the UTC specifies a procedure for transferring the principal place of administration, whether to another state or country.<sup>83</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.<sup>84</sup> If a qualified beneficiary objects, the trustee must obtain a court order. "Qualified beneficiary," a defined term in the Code, excludes a beneficiary with a remote remainder interest.<sup>85</sup>

Moving a trust to another state may offer the advantage of a lower income tax rate, or it may become a necessity if the trustee or beneficiaries have changed their residence. But movement of trusts are also triggered by merger of financial institutions. Such mergers are sometimes followed by the elimination of local trust operations, and at least in the perception of some beneficiaries, by less personal and attentive service. Given these mixed views on the benefits of transferring a trust, the appropriate default rule for transferring a trust's principal place of administration was a major topic of debate at the Commissioners' 2000 Annual Meeting at which the Code was approved. The draft, as presented to the Commissioners, allowed the trustee to transfer the principal place of administration upon giving sixty days' advance notice to the qualified beneficiaries.<sup>86</sup> Unlike the provision as finally approved, the draft did not grant the beneficiaries a right to block the transfer. During the floor debate, the suggestion was made that a transfer should be allowed only if all qualified

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Section 107(1), the meaning and effect of the terms of the trust are to be determined by the law of the jurisdiction designated in those terms. Such a governing law provision is enforceable unless it is contrary to a strong public policy of a jurisdiction having the most significant relationship to the matter at issue.

83. UTC § 108(b)-(f).

84. UTC § 108(d)(5). 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, also must be satisfied before the transfer can be accomplished. *See* UTC § 108(f).

85. UTC Section 103(12) defines a qualified beneficiary as follows:

"Qualified beneficiary," means a beneficiary who, on the date the beneficiary's qualification is determined:

- (A) is a distributee or permissible distributee of trust income or principal;
- (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date; or
- (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

For an analysis of this definition and the contexts in which it is used, see UTC § 103 cmt.

86. *See* UTC § 108(d) (Annual Meeting Draft 2000).



beneficiaries consented or a court order had been obtained.<sup>87</sup> The provision as finally approved, allowing a qualified beneficiary to block the transfer by filing an objection with the trustee, was a compromise solution.

### C. 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 the beneficiaries. These actions include: transfer of a trust's principal place of administration to or from another country or American state;<sup>88</sup> combination of separate trusts into one, or the division of a single trust into two or more separate trusts;<sup>89</sup> resignation of a trustee;<sup>90</sup> submission of a trustee's report;<sup>91</sup> and a trustee's notice of proposed plans of distribution.<sup>92</sup> Other actions can be accomplished upon consent of the beneficiaries. These include selection of a successor trustee<sup>93</sup> and release of a trustee from potential liability.<sup>94</sup>

But achieving notice to or the consent of all of the beneficiaries is frequently difficult. Trusts commonly last for decades. In an increasing number of American jurisdictions, trusts, in theory, can last in perpetuity.<sup>95</sup> The current beneficiaries of the trust are frequently minors or adults who lack capacity. Future beneficiaries may not yet be born. To achieve notice to or the consent of beneficiaries incapable of representing themselves, others must be empowered to act on their behalf. This is the function of rules on representation. Concepts of representation are not new,<sup>96</sup> but the UTC addresses the subject in more detail

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87. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROCEEDINGS IN THE COMMITTEE OF THE WHOLE ON UNIFORM TRUST CODE, 2000 ANNUAL MEETING 51-83 (on file with National Conference of Commissioners on Uniform State Laws, 211 East Ontario Street, Chicago, Illinois 60611).

88. UTC § 108. For a discussion, see *supra* notes 77-87 and accompanying text.

89. UTC § 417. For a discussion, see *infra* note 159 and accompanying text.

90. UTC § 705. For a discussion, see *infra* note 210 and accompanying text.

91. UTC § 813. For a discussion, see *infra* notes 234-43 and accompanying text.

92. UTC § 817. Upon termination or partial termination of a trust, Section 817(a) provides that a beneficiary who is furnished with a proposed plan of distribution is bound by the proposal unless the beneficiary objects to the trustee within thirty days.

93. UTC § 704. For a discussion, see *infra* note 209 and accompanying text.

94. UTC § 1009. For a discussion, see *infra* note 252 and accompanying text.

95. For a discussion of the motivations for creating so-called dynasty trusts, which has led to the abolition of the rule against perpetuities in numerous American states, see John G. Shively, *The Death of the Life in Being—The Required Federal Response to State Abolition of the Rule Against Perpetuities*, 78 WASH. U. L.Q. 371 (2000).

96. Representation is addressed in the RESTATEMENT (SECOND) OF JUDGMENTS §§ 41-42 (1982), and in the RESTATEMENT (FIRST) OF PROPERTY §§ 180-186 (1936). Much

than previous efforts and also makes representation available for actions taken outside of court. The Code provides not only for representation by fiduciaries (guardians, conservators, personal representatives, trustees of another trust, or agents under a durable power of attorney),<sup>97</sup> but also for what is known as virtual representation, under which an otherwise unrepresented person (such as a child who may not yet be born) may be represented and bound by another beneficiary with a substantially identical interest with respect to the particular matter or dispute.<sup>98</sup> In addition, the Code authorizes the holder of a general testamentary power of appointment to represent and bind permissible appointees, takers in default, and others whose interests are subject to the power,<sup>99</sup> and a parent to represent and bind a minor or unborn child.<sup>100</sup> These last two categories deserve

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of the language of Article 3 of the UTC can be traced to Section 1-403 of the UPC, which was approved in 1969. However, the UPC provision applies only to representation in a judicial proceeding.

97. UTC § 303. Representation by a guardian is allowed only if a conservator for the ward has not been appointed. *See* UTC § 303(2). Representation by an agent is permitted only if the agent has authority to act with respect to the particular matter or dispute. *See* UTC § 303(3).

98. UTC § 304. In addition to unborns, under the Code, virtual representation may be used to bind beneficiaries who are minors, incapacitated, or whose identity or location is unknown and is not reasonably ascertainable.

The Code does not specifically require that the representation be adequate, the drafters preferring to leave that issue to the courts. Under the *Restatement of Property*, representation is deemed sufficiently protective as long as it does not appear that the representative acted in hostility to the interest of the person represented. *RESTATEMENT (FIRST) OF PROPERTY* § 185 (1936). Evidence of inactivity or lack of skill is material only to the extent it establishes hostility. *RESTATEMENT (FIRST) OF PROPERTY* § 185 cmt. b (1936).

Typically, the interests of the representative and the person represented will be identical. A common example is a trust providing for distribution to the settlor's children as a class, with an adult child being able to represent the interests of children who are either minors or unborn. Under the Code, however, exact identity of interests is not required, only substantial identity with respect to the particular matter or dispute. Whether such identity is present may vary depending on the purpose of the representation. For example, a presumptive remainderman may be able to represent alternative remaindermen with respect to approval of a trustee's report but not with regard to interpretation of the remainder provision or the termination of the trust. Even if the beneficial interests of the representative and person represented are identical, representation is not allowed in the event of conflict of interest. The representative may have interests outside of the trust that are adverse to the interest of the person represented, such as a prior relationship with the trustee or other beneficiaries. *See* *RESTATEMENT (FIRST) OF PROPERTY* § 185 cmt. d (1936).

99. UTC § 302.

100. UTC § 303(6). Under this provision, a parent may act only if a guardian or

comment. Allowing a parent to represent and bind the parent's minor or unborn child will be a novel concept for many states. However, the UPC has long contained a similar provision that has not generated controversy, although the UPC provision was limited to representation of living children.<sup>101</sup> With respect to representation by the holders of powers of appointment, a broader approach rejected by the drafting committee would have provided for binding representation whether or not the holder had a conflict of interest.<sup>102</sup>

The representation provisions of the UTC can be utilized not only for purposes of achieving notice<sup>103</sup> to or the consent<sup>104</sup> of the beneficiaries<sup>105</sup> for the matters detailed above, but also to settle any dispute, whether in or out of court. Section 111, the Code's nonjudicial settlement provision, is broad. The parties

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conservator has not been appointed for the child.

101. See UNIF. PROBATE CODE § 1-403(2)(ii) (amended 1998).

102. To achieve eligibility for the federal estate tax marital deduction, a general testamentary power of appointment is frequently coupled with a lifetime interest in the trust's income. See I.R.C. § 2056(b)(5) (2000). The drafters were concerned, without the exception for conflict of interest, that the holder of a power could act in a way that would enhance the holder's income interests to the detriment of the appointees or takers in default. While the holder of a general testamentary power of appointment may appoint the trust to anyone, including the holder's own estate, such holders are not entitled to a benefit while living.

103. UTC Section 301(a) provides that notice to a person who may represent and bind another person under Article 3 has the same effect as if it were given directly to the person represented.

104. UTC Section 301(b) provides that the consent of a person who may represent and bind another person under Article 3 is binding on the person represented. The consent of the representative is not binding, however, if the person represented objects to the representation before the consent otherwise would have become effective. The representation principles of Article 3 sometimes will apply to adult and competent beneficiaries, particularly if the beneficiary is being represented by a personal representative or the trustee of another trust. Allowing such a beneficiary to effectively register an objection implements cases such as *Barber v. Barber*, 837 P.2d 714 (Alaska 1992), which held that the refusal to consider the beneficiary's objection to representation violated due process.

105. Because Article 3 applies to representation of any person, the provisions of the Article also apply to representation of an incapacitated settlor. However, pursuant to Section 301(c), an agent, guardian, or conservator may act on behalf of an incapacitated settlor in connection with the termination or revocation of the trust only if the additional requirements of Sections 411 or 602 are satisfied. For a discussion of Section 411, see *infra* notes 141-48 and accompanying text. For a discussion of Section 602, see *infra* notes 192-97 and accompanying text. Under these other Sections, a conservator or guardian may represent a settlor only with the approval of the court supervising the conservatorship or guardianship. An agent may represent the settlor only if expressly so authorized in the power of attorney.

may enter into a nonjudicial settlement agreement with respect to any matter involving a trust.<sup>106</sup> The settlement agreement can contain any term or condition that a *court* properly could approve.<sup>107</sup> This standard is less stringent than one requiring that the nonjudicial settlement contain terms and conditions that the court *would* have approved, but it still opens the possibility that the parties may achieve more nonjudicially than had they gone to court. On the other hand, in Washington State, there is no limitation on the matters to which the parties to a nonjudicial settlement can agree.<sup>108</sup> Among the issues under the Code that can be resolved by a nonjudicial settlement agreement are the interpretation or construction of the terms of the trust; approval of a trustee's report or accounting; direction to a trustee to refrain from performing a particular act, or to grant a trustee any necessary or desirable power; resignation or appointment of a trustee; determination of a trustee's compensation; transfer of a trust's principal place of administration to another jurisdiction; and liability of a trustee for an action relating to the trust.<sup>109</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. Notice to and the consent of a representative is not binding if there is a conflict of interest between the representative and those ostensibly represented.<sup>110</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 Code) 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. In making decisions, a representative may consider general family benefit accruing to living members of the individual's family.<sup>111</sup>

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106. UTC § 111(b).

107. UTC § 111(c).

108. For the Washington statute on nonjudicial settlements of estates and trusts matters, see WASH. REV. CODE ANN. §§ 11.96A.210 to 11.96A.250 (West Supp. 2002). For background on the Washington statute, see Bruce P. Flynn et al., *Nonjudicial Dispute Resolution Agreements in Trusts and Estates—The Washington Experience and Proposed Act*, 20 ACTEC NOTES 138 (1994).

109. UTC § 111(d).

110. See UTC §§ 302-304.

111. UTC § 305. This Section authorizes the court to appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of otherwise unrepresented persons or persons for whom the court concludes that the available representation is inadequate. A representative may be appointed either to represent a single individual or interest or several persons or interests.

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

Rules of construction attribute intention to individual donors based on assumptions of common intention. Rules of construction are found both in enacted statutes and in judicial decisions. Rules of construction can involve the meaning to be given to particular language in a document, such as the words “heirs” or “issue.” Rules of construction can address situations the donor failed to anticipate, such as failure to anticipate the predecease of a beneficiary or to specify the source from which expenses are to be paid. Rules of construction also can make assumptions about how a donor would have revised donative documents in light of events occurring after execution. These include rules dealing with the effect of a divorce and the effect on a specific devisee if the devised property is disposed of during the donor’s lifetime.<sup>112</sup>

While most states have enacted numerous statutes on the construction of wills, most 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>113</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 of construction of 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. 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.” This phrase masks some very difficult questions. Not all will construction rules should necessarily be applied to trusts. Even those that should apply may require modification due to the legal distinctions between wills and

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112. See UTC § 112 cmt.

113. For a detailed discussion, see *infra* notes 186-203 and accompanying text.

trusts.<sup>114</sup> There is a need for a consensus on which rules should apply, and once that has been determined, what they should say.

The most significant efforts to enact specific rules of construction for trusts are the 1990 revision of Article II of the UPC and the 1994 California legislation. In 1994, California extended to revocable trusts all of its rules on construction of wills. California accomplished this feat by defining a “testamentary gift” to include any transfer in possession or enjoyment taking effect at or after death.<sup>115</sup> The result was that all existing rules on construction of wills automatically applied to trusts.<sup>116</sup> But, because this simplistic approach ignores the distinctions between wills and trusts, the California statute has been only a partial success. The California Law Revision Commission is currently drafting major revisions.<sup>117</sup>

The 1990 revision of the UPC revision is more selective and also more successful, extending only selected rules of will construction to trusts and, in each case, by a newly drafted section. Topics covered include: a 120-hour requirement of survival;<sup>118</sup> the meaning of a specific reference requirement in a power of appointment;<sup>119</sup> construction of class gifts;<sup>120</sup> survivorship with respect to future interests;<sup>121</sup> abolition of the doctrine of worthier title;<sup>122</sup> and the meaning of specific words, including “descendants,”<sup>123</sup> “by representation,”<sup>124</sup> and

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114. Examples of rules requiring modification include the rules of construction on abatement and the disposition of the share of a predeceased devisee, or so-called antilapse statute. Abatement applies when the assets of the estate are insufficient to pay all devises. Under a typical abatement statute, the residue abates first, followed by the general devises, and lastly the specific devises. *See, e.g.*, UNIF. PROBATE CODE § 3-902 (amended 1998). While abatement logically should apply to a revocable trust used as a substitute for a will, a trust does not contain “devises” or “residue.” Special definitions would be needed.

Applying the antilapse statute for wills to revocable trusts runs into property classification issues. Devises under a will, because not effective until death, are classified as present interests. On the other hand, because a revocable trust is created at the moment it receives property, dispositions at the death of the settlor are classified as future interests. Most existing antilapse statutes apply only to present interests.

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

116. The rules are codified at CAL. PROB. CODE §§ 21101-21630 (West Supp. 2001).

117. Copies of the Commission’s reports can be found at <http://www.clrc.ca.gov>.

118. UNIF. PROBATE CODE § 2-702 (amended 1998).

119. UNIF. PROBATE CODE § 2-704 (amended 1998).

120. UNIF. PROBATE CODE § 2-705 (amended 1998).

121. UNIF. PROBATE CODE § 2-707 (amended 1998).

122. UNIF. PROBATE CODE § 2-710 (amended 1998).

123. UNIF. PROBATE CODE § 2-708 (amended 1998).

124. UNIF. PROBATE CODE § 2-709 (amended 1998).

"heirs."<sup>125</sup> The 1990 UPC revisions have been enacted to date in nine states<sup>126</sup> and are recommended as a model.

### *E. Creation of Trusts (Sections 401-409)*

Most of the Code's provisions on the requirements for creating an express trust 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>127</sup> Whatever method may have been employed, to

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125. UNIF. PROBATE CODE § 2-711 (amended 1998).

126. These states are Arizona, Colorado, Hawaii, Michigan, Minnesota, Montana, New Mexico, North Dakota, and South Dakota. *See* ARIZ. REV. STAT. ANN. §§ 14-2701 to 14-2711 (West 1995); COLO. REV. STAT. §§ 15-11-701 to 15-11-711 (2000); HAW. REV. STAT. §§ 560:2-701 to 560:2-711 (Supp. 2000); MICH. COMP. LAWS §§ 700.2701 to 700.2720 (West Supp. 2001); MINN. STAT. ANN. §§ 524.2-701 to 524.2-711 (West Supp. 2001); MONT. CODE ANN. §§ 72-2-711 to 72-2-721 (2001); N.M. STAT. ANN. §§ 45-2-701 to 45-2-711 (Michie 1995); N.D. CENT. CODE §§ 30.1-09.1-01 to 30.1-09.1-11 (1996 & Supp. 2001); S.D. CODIFIED LAWS §§ 29A-2-701 to 29A-2-711 (Michie 1997).

127. UTC § 401. This Section is based on RESTATEMENT (THIRD) OF TRUSTS § 10 (Tentative Draft No. 1, 1996), and RESTATEMENT (SECOND) OF TRUSTS § 17 (1959). The methods specified are not exclusive. Section 102 of the UTC recognizes that trusts also can be created by special statute or court order. *See also* RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. a (Tentative Draft No. 1, 1996); UNIF. PROBATE CODE § 2-212 (amended 1998) (elective share of incapacitated surviving spouse to be held in trust on terms specified in statute); UNIF. PROBATE CODE § 5-411(a)(4) (amended 1998) (conservator may create trust with court approval); RESTATEMENT (SECOND) OF TRUSTS § 17 cmt. i (1959) (trusts created by statutory right to bring a wrongful death action). At common law, a trust also can be created by a promise that creates enforceable rights in a person who immediately or later holds these rights as trustee. *See* RESTATEMENT (THIRD) OF TRUSTS § 10(e) (Tentative Draft No. 1, 1996). Because the Code is supplemented by the common law, such trusts are valid even though they are not specifically recognized in the Code.

Under the methods specified for creating a trust, a trust is not created until it receives property. For what constitutes an adequate property interest, see RESTATEMENT (THIRD) OF TRUSTS §§ 40-41 (Tentative Draft No. 2, 1999), RESTATEMENT (SECOND) OF TRUSTS §§ 74-86 (1959), and UTC § 103(11). A trust also can be created without notice to or acceptance by a trustee or beneficiary. *See* RESTATEMENT (THIRD) OF TRUSTS § 14 (Tentative Draft No. 1, 1996); RESTATEMENT (SECOND) OF TRUSTS §§ 35-36 (1959).

A trust created by self-declaration is best created by reregistering each of the assets that comprise the trust into the settlor's name as trustee. Such reregistration, however,

create a trust, the settlor must have the requisite capacity<sup>128</sup> and must indicate an intention to create a trust,<sup>129</sup> the trustee must have duties to perform,<sup>130</sup> the trust must have a definite beneficiary,<sup>131</sup> and the same person cannot be the sole

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is not necessary to create the trust. *See, e.g., In re Estate of Heggstad*, 20 Cal. Rptr. 2d 433 (Ct. App. 1993); RESTATEMENT (THIRD) OF TRUSTS § 10 cmt. e (Tentative Draft No. 1, 1996); RESTATEMENT (SECOND) OF TRUSTS § 17 cmt. a (1959). A declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer.

While Section 401 confirms the familiar principle that a trust may be created by means of the exercise of a power of appointment (paragraph (3)), the Code does not legislate comprehensively on the subject of powers of appointment but addresses only selected issues. For the law on powers of appointment generally, see RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §§ 11.1-24.4 (1986).

128. UTC § 402(a)(1). To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have capacity to transfer the property free of trust. *See* UTC § 601 (capacity of settlor to create revocable trust, discussed *infra* note 189 and accompanying text). *See generally* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 (Tentative Draft No. 3, 2001); RESTATEMENT (THIRD) OF TRUSTS § 11 (Tentative Draft No. 1, 1996); RESTATEMENT (SECOND) OF TRUSTS §§ 18-22 (1959).

129. UTC § 402(a)(2). For the intention requirement, see generally RESTATEMENT (THIRD) OF TRUSTS § 13 (Tentative Draft No. 1, 1996); RESTATEMENT (SECOND) OF TRUSTS § 23 (1959). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. *See* UTC § 103(17) & cmt. (definition of “terms of a trust”). No particular manner of expression is necessary to manifest the intention to create a trust. GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 45 (rev. 2d ed. 1984). It is “immaterial whether or not the settlor knows that the intended relationship is called a trust, and whether or not the settlor knows the precise characteristics of the trust relationship.” RESTATEMENT (THIRD) OF TRUSTS § 13 (Tentative Draft No. 1, 1996).

130. UTC § 402(a)(4); *see* RESTATEMENT (THIRD) OF TRUSTS § 2 (Tentative Draft No. 1, 1996); RESTATEMENT (SECOND) OF TRUSTS § 2 (1959). Trustee duties are usually active, but a validating duty also may be passive, implying only that the trustee has an obligation not to interfere with the trustee’s enjoyment of the trust property. Such passive trusts, while valid under this Code, may be terminable under the enacting jurisdiction’s Statute of Uses. *See* RESTATEMENT (THIRD) OF TRUSTS § 6 (Tentative Draft No. 1, 1996); RESTATEMENT (SECOND) OF TRUSTS §§ 67-72 (1959).

131. UTC § 402(a)(3). A trust must have a definite beneficiary unless it is a charitable trust, a trust for the care of an animal, or a trust for another valid noncharitable purpose. The purpose of this requirement is to assure that there is someone capable of enforcing the trust. There is no need to apply the requirement to charitable trusts. The attorney general is capable of enforcing a charitable trust. With respect to a trust for an animal or other valid noncharitable purpose, the Code provides a method of enforcement. *See* UTC §§ 408, 409 (discussed *infra* notes 138-39 and accompanying text).

While some beneficiaries will be definitely ascertained as of the trust’s creation,



beneficiary and sole trustee.<sup>132</sup> A trust not created by will is validly created if its creation complied with the law of specified jurisdictions with which the settlor or trustee had a significant contact.<sup>133</sup> A trust must have a purpose that is of

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pursuant to Section 402(b), a beneficiary is definite as long as the beneficiary can be ascertained within the applicable perpetuities period. The definite beneficiary requirement does not prevent a settlor from making a disposition in favor of a class of persons. Class designations are valid as long as the membership of the class will be finally determined within the applicable perpetuities period. For background on the definite beneficiary requirement, see RESTATEMENT (THIRD) OF TRUSTS §§ 44-46 (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS §§ 112-122 (1959).

Under traditional doctrine, a trust was not created if the trustee was required to select from among an indefinite class. Such a provision was an imperative power that failed because there was no beneficiary capable of enforcement. *See, e.g., Clark v. Campbell*, 133 A. 166 (N.H. 1926). Such a power is valid under the Code, however. Section 402(c) allows a settlor to empower the trustee to select the beneficiaries even if the class from whom the selection may be made cannot be ascertained. The provision is valid under both the Code and the *Restatement* if there is at least one person who can meet the description. If the trustee does not exercise the power within a reasonable time, the power fails and the property passes by resulting trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 46 (Tentative Draft No. 2, 1999); *see also* RESTATEMENT (SECOND) OF TRUSTS § 122 (1959); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 12.1 cmt. e (1986).

132. UTC Section 402(a)(5), which codifies the doctrine of merger, prevents the creation of a trust whenever the settlor is the sole trustee and sole beneficiary of *all* beneficial interests. An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor's probate estate. On the doctrine of merger generally, see RESTATEMENT (THIRD) OF TRUSTS § 69 (Tentative Draft No. 3, 2001); RESTATEMENT (SECOND) OF TRUSTS § 341 (1959).

133. UTC § 403. For a detailed analysis of this Section, see Scoles, *supra* note 33. The validity of a trust created by will is ordinarily determined by the law of the decedent's domicile. No such certainty exists with respect to determining the law governing the validity of inter vivos trusts. Generally, at common law a trust was created if it complied with the law of the state having the most significant contacts to the trust. Contacts for making this determination include the domicile of the trustee, the domicile of the settlor at the time of trust creation, the location of the trust property, the place where the trust instrument was executed, and the domicile of the beneficiary. *See* 5A SCOTT & FRATCHER, *supra* note 30, §§ 597, 599. Furthermore, if the trust has contacts with two or more states, one of which would validate the trust's creation and the other of which would deny the trust's validity, the tendency is to select the law upholding the validity of the trust. *See* 5A SCOTT & FRATCHER, *supra* note 30, § 600.

Section 403 extends the common law rule by recognizing a trust if its creation complies with the law of any of a variety of states in which the settlor or trustee had significant contacts. Pursuant to Section 403, a trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was

benefit to its beneficiaries and that is not illegal or impossible to achieve,<sup>134</sup> and the trust and its terms must be of benefit to the trust's beneficiaries.<sup>135</sup> The

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executed, or the law of the jurisdiction in which, at the time of creation the settlor was domiciled, had a place of abode, or was a national; the trustee was domiciled or had a place of business; or any trust property was located.

Section 403 is comparable to Section 2-506 of the UPC, which validates wills executed in compliance with the law of a variety of places where the testator had a significant contact. Unlike the UPC, however, Section 403 is not limited to execution of the instrument but applies to the entire process of a trust's creation, including compliance with the requirement that there be trust property. In addition, unlike the UPC, Section 403 recognizes a trust if valid under the law of the domicile or place of business of the designated trustee, or, if valid under the law of the place where any of the trust property is located.

134. UTC § 404. Generally, a trust has a purpose that is illegal if: (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor's purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal. UTC § 404 cmt. A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or it may become invalid at a later date. The invalidity also may effect only particular provisions. Trust purposes violative of public policy include those that tend to encourage criminal or tortious conduct, interfere with freedom to marry or encourage divorce, limit religious freedom, or are frivolous or capricious. For an explication of the requirement that a trust must not have a purpose that is unlawful or against public policy, see RESTATEMENT (THIRD) OF TRUSTS §§ 27-30 (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS §§ 59-65 (1959).

135. UTC § 404. Pursuant to Section 402(a), a trust must have an identifiable beneficiary unless the trust is of a type that does not have beneficiaries in the usual sense, such as a charitable trust or, as provided in Sections 408 and 409, trusts for the care of an animal or other valid noncharitable purpose. The general purpose of trusts having identifiable beneficiaries is to benefit those beneficiaries in accordance with their interests as defined in the trust's terms. The requirement of Section 404 that a trust and its terms be for the benefit of its beneficiaries, which is derived from RESTATEMENT (THIRD) OF TRUSTS § 27(2) (Tentative Draft No. 2, 1999), implements this general purpose. While a settlor has considerable latitude in specifying how a particular trust purpose is to be pursued, the administrative and other nondispositive trust terms reasonably must relate to this purpose and not divert the trust property to achieve a trust purpose that is invalid, such as one that is frivolous or capricious. See RESTATEMENT (THIRD) OF TRUSTS § 27 cmt. b (Tentative Draft No. 2, 1999).

Section 412(b), which allows the court to modify administrative terms that are impracticable, wasteful, or impair the trust's administration, is a specific application of the requirement that a trust and its terms be for the benefit of the beneficiaries. The fact that a settlor suggests or directs an unlawful or other inappropriate means for performing a trust does not invalidate the trust if the trust has a substantial purpose that can be achieved by other methods. See RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. e (Tentative

creation of a trust may be contested on grounds of lack of capacity, undue influence, or duress.<sup>136</sup> There are no formal execution requirements for a written trust. Furthermore, 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>137</sup> Honorary trusts are recognized. A trust for the care of an animal is valid for the life of the animal, and a trust for another noncharitable purpose without an ascertainable beneficiary may be created but is valid for only twenty-one years.<sup>138</sup> The drafters of the UTC specifically

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Draft No. 2, 1999).

136. UTC § 406. This Section is similar to RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 (Tentative Draft No. 3, 2001). Similar to a will, a trust may be invalidated, in whole or in part, on grounds of undue influence, duress, or fraud. A trust also may be contested on grounds that the settlor lacked capacity. That a settlor have capacity is one of the essential elements for the creation of a trust. *See supra* note 128 and accompanying text.

Section 406 does not specify the factors for invalidating a trust on account of fraud, duress, or undue influence. The rules for invalidating a trust for wrongful conduct are not peculiar to the law of trusts but are also found under other law. The factors will vary depending on whether the trust was created by will or inter vivos. For trusts created inter vivos, the factors will vary depending on whether the trust was created pursuant to a donative transfer or as part of a bargained for exchange. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 12 (Tentative Draft No. 1, 1996).

137. UTC § 407. The Statute of Frauds, as enacted in nearly all or all states, requires that a trust of real property or transfer of real property to a trust be evidenced by a writing. For a list of the statutes, see GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* §§ 62-64 (rev. 2d ed. 1989). For cases upholding a clear and convincing evidence standard for creating an oral trust, see RESTATEMENT (THIRD) OF TRUSTS § 20 reporter's notes (Tentative Draft No. 1, 1996). For the law of oral trusts generally, see RESTATEMENT (THIRD) OF TRUSTS § 20 (Tentative Draft No. 1, 1996); RESTATEMENT (SECOND) OF TRUSTS §§ 43-45 (1959).

138. UTC §§ 408 (trust for an animal), 409 (trust for another noncharitable purpose). Honorary trusts are noncharitable trusts created for a proper trust purpose but without an ascertainable beneficiary. Because there was no beneficiary capable of enforcing the trust, such trusts failed at common law. The trustee had power to carry out the terms of the trust but was free to ignore the settlor's wishes. Hence, the trust was no more than an unenforceable power of appointment and was honorary only, binding only on the trustee's conscience. For a discussion of the common law doctrine, see RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS § 124 (1959); Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33 (1999).

Trusts for the care of an animal are usually created by will, but the Code does not so restrict. Pursuant to Section 408(a), the trust also may be created during the settlor's lifetime. A trust authorized by this Section may be created to benefit one designated animal or several designated animals.

Noncharitable trusts ordinarily may be enforced by their beneficiaries. Charitable

elected not to follow the offshore islands in their liberal authorization of the noncharitable purpose (“NCP”) trust. The NCP trust contemplated in the Code is one created for a benevolent but noncharitable purpose, and, even then, it is enforceable for only a limited duration.<sup>139</sup>

### *F. 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>140</sup> The result is a liberalizing nudge, but one founded in traditional doctrine.

#### 1. 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

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trusts may be enforced by the state’s attorney general or by a person deemed to have a special interest. See RESTATEMENT (SECOND) OF TRUSTS § 391 (1959). But at common law, a trust for the care of an animal or a trust without an ascertainable beneficiary created for another noncharitable purpose was unenforceable because there was no person authorized to enforce the trustee’s obligations. Sections 408(b) and 409(2) close this gap. The intended use of a trust authorized by either Section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court.

Because honorary trusts are often funded with far more property than needed to carry out the intended purpose, disposition of excess funds is a frequent issue. If the court determines that the trust property exceeds the amount needed for the intended purpose and that the terms of the trust do not direct the disposition, a resulting trust is ordinarily created in the settlor or settlor’s successors in interest. See RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS § 124 (1959). Sections 408(c) and 409(3) codify this rule. Absent a provision disposing of excess funds in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor’s successors in interest. Successors in interest include the beneficiaries under the settlor’s will, if the settlor has a will, or in the absence of an effective will provision, the settlor’s heirs.

139. For further explication on the limited recognition of purpose trusts in the United States, see RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No. 2, 1999).

140. 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).

beneficiaries.<sup>141</sup> The UTC also follows traditional doctrine in allowing for termination of an irrevocable trust by unanimous agreement of the beneficiaries. A trust may be terminated by the beneficiaries alone if it no longer serves a material purpose, or it may be modified by the beneficiaries alone if such modification is not inconsistent with a material purpose.<sup>142</sup> Provision is made for partial termination or modification if obtaining the consent of all beneficiaries is impracticable.<sup>143</sup> Similar to other sections of the UTC but not

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141. 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 termination or modification upon unanimous agreement of the beneficiaries and settlor. Unlike termination or modification by the beneficiaries alone under Section 411(b), termination or modification with the concurrence of the settlor does not require a finding that the trust or the provision to be modified no longer serve a material purpose. No finding of failure of material purpose is required because all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, agree there is no further need for the trust.

UTC Section 411(a) also addresses the authority of an agent, conservator, or guardian to act on a settlor's behalf. Consistent with Section 602 on revocation or modification of a revocable trust, discussed *infra* notes 192-97 and accompanying text, Section 411(a) provides that 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. A guardian or conservator may consent to a proposed modification or termination only upon approval of the court supervising the guardianship or conservatorship.

142. UTC Section 411(b) carries forward the *Claflin* rule, first stated in the famous case of *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889). Similar to RESTATEMENT (THIRD) OF TRUSTS § 65(1) (Tentative Draft No. 3, 2001), the beneficiaries may terminate a trust if the trust no longer carries out a material purpose and may modify the trust if the modification is not inconsistent with a material purpose. *Restatement Third*, though, goes further than the Code by also allowing the beneficiaries to use trust modification as a basis for removing the trustee if removal would not be inconsistent with a material purpose of the trust. Under the Code, while the unanimous request of the qualified beneficiaries to remove the trustee is a factor for the court to consider, before removing the trustee the court also must find that such action best serves the interests of all the beneficiaries, that removal is not inconsistent with a material purpose of the trust, and that a suitable cotrustee or successor trustee is available. Compare UTC § 706(b)(4), with RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. f (Tentative Draft No. 3, 2001). For a discussion of the meaning of material purpose, see RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d (Tentative Draft No. 3, 2001).

Section 411(b) is more expansive than RESTATEMENT (SECOND) OF TRUSTS § 337 (1959). Unlike the UTC and *Restatement Third*, the *Restatement Second* did not address trust modification by the beneficiaries.

143. UTC Section 411(e), which is similar to RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. c (Tentative Draft No. 3, 2001), and RESTATEMENT (SECOND) OF TRUSTS §§ 338(2), 340(2) (1959), allows for modification or termination of a trust by beneficiary action even though the consent of less than all of the beneficiaries has been obtained. To

consistent with traditional doctrine, the representation principles of Article 3 may be employed to obtain the necessary consents to termination.<sup>144</sup> Also, it is no longer automatically presumed that a spendthrift provision is a material purpose barring the beneficiaries from compelling termination of a trust.<sup>145</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

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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. This affords the court the opportunity to fashion an appropriate order protecting the interests of the nonconsenting beneficiaries while at the same time permitting the remainder of the trust property to be distributed without restriction. Typically, consent of a beneficiary cannot be obtained because the beneficiary is a minor, incapacitated, unascertained, or unborn, and representation under Article 3 is either unavailable or its application uncertain. The order of protection for the nonconsenting beneficiaries might include partial continuation of the trust, the purchase of an annuity, or the valuation and cashout of the interest.

144. For a discussion of the provisions of Article 3 on representation by others, see *supra* notes 96-111 and accompanying text. A consent given by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented with respect to the particular matter or dispute. Given this limitation, virtual representation of a beneficiary's interest by another beneficiary pursuant to Section 304 rarely will be available in a trust termination case, although it should be routinely available in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual or other form of representation is unavailable, Section 305 of the Code permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms of representation to consent on a beneficiary's behalf to a trust termination or modification traditionally has not been part of the law, although there are some notable exceptions. Compare RESTATEMENT (SECOND) OF TRUSTS § 337(1) (1959) (beneficiary must not be under incapacity), with *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on the beneficiary's behalf).

145. UTC § 411(c). Spendthrift terms sometimes have been construed to constitute a material purpose without inquiry into the intention of the particular settlor. For examples, see RESTATEMENT (SECOND) OF TRUSTS § 337 (1959); GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 1008 (rev. 2d ed. 1983), and 4 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 337 (4th ed. 1989). This result is troublesome because spendthrift provisions are often added to instruments with little thought. Section 411(c), similar to RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. e (Tentative Draft No. 3, 2001), does not negate the possibility that continuation of a trust to assure spendthrift protection might have been a material purpose of the particular settlor. The question whether that was the intent of a particular settlor is instead a matter of fact to be determined based on the totality of the circumstances.

justified has standing to object to a proposed termination or modification.<sup>146</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>147</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>148</sup>

## 2. 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. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.<sup>149</sup> Without

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146. UTC § 410(b).

147. UTC § 410(b). This is contrary to RESTATEMENT (SECOND) OF TRUSTS § 391 (1959), which does not mention, and presumably precludes, a settlor from bringing an action. Section 410(b) also grants a settlor standing to petition the court under Section 413 to apply *cy pres* to modify the settlor's charitable trust. For a discussion, see *infra* note 167 and accompanying text.

148. UTC § 411(d).

149. UTC § 412(a). Subsection (a) is similar to RESTATEMENT (THIRD) OF TRUSTS § 66(1) (Tentative Draft No. 3, 2001), except that this Section, unlike the *Restatement*, does not impose a duty on the trustee to petition the court if the trustee is aware of circumstances justifying judicial modification. The purpose of the "equitable deviation" authorized by Subsection (a) is not to disregard the settlor's intent but to modify inopportune details to better effectuate the settlor's broader purposes. Among other things, equitable deviation may be used to modify administrative or dispositive terms due to the failure to anticipate economic change or the incapacity of a beneficiary. Or modification of the dispositive provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury. For numerous illustrations, see RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. b (Tentative Draft No. 3, 2001). While there must be circumstances not anticipated by the settlor before the court may grant relief under Subsection (a), the circumstances may have been in existence when the trust was created. This Section thus complements Section 415, discussed *infra* notes 155-56 and accompanying text, which authorizes a court to reform a trust based on mistake of fact or law at the creation of the trust.

While a trustee normally must obtain approval of a court before deviating from the terms of the trust, emergencies may arise necessitating that the trustee take immediate

regard to unanticipated 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>150</sup> Upon termination of a trust, the trustee must distribute the property in a manner consistent with the purposes of the trust.<sup>151</sup>

### 3. Uneconomical Trust

Section 414 of the UTC authorizes the court to terminate an uneconomical trust of any size and allows a trustee, without approval of court, to terminate a trust with a value of \$50,000 or less.<sup>152</sup> Before terminating the trust, the court or

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action. Section 412 does not require that the trustee obtain prior approval before deviating from the terms of the trust. Pursuant to RESTATEMENT (SECOND) OF TRUSTS § 167(2) (1959), without first obtaining permission of the court, a trustee properly can deviate from a trust in the event of an emergency or if the trustee reasonably believes there is an emergency.

150. UTC § 412(b). Subsection (b) broadens the court's ability to modify the administrative terms of a trust. Unlike Section 412(a), modification may be ordered whether or not there are circumstances anticipated by the settlor. The standard under Subsection (b) is similar to the standard for applying *cy pres* to a charitable trust. See UTC § 413(a) (discussed *infra* notes 163-65 and accompanying text). Just as a charitable trust may be modified if its particular charitable purpose becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or noncharitable. Subsection (b) is also an application of the requirement of Section 404 that a trust and its terms must be for the benefit of its beneficiaries. See also RESTATEMENT (THIRD) OF TRUSTS § 27(2) & cmt. b (Tentative Draft No. 2, 1999). Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose that is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others. See RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property will fail. See RESTATEMENT (THIRD) OF TRUSTS § 27 reporter's notes to cmt. b (Tentative Draft No. 2, 1999). Subsection (b), unlike Subsection (a), does not have a direct precedent in the common law, but various states have insisted on such a measure by statute. See, e.g., MO. REV. STAT. § 456.590.1 (2000).

151. UTC § 412(c). As under the doctrine of *cy pres*, effectuating a distribution consistent with the purposes of the trust requires an examination of what the settlor would have intended had the settlor been aware of the unanticipated circumstances. Typically, such terminating distributions will be made to the qualified beneficiaries, often in proportion to the actuarial value of their interests, although the Section does not so prescribe. For the definition of qualified beneficiary, see UTC § 103(12), discussed *supra* note 85 and accompanying text.

152. UTC § 414(a). The drafters concluded that a trust with a value of \$50,000 or



trustee must conclude that the value of the trust property is insufficient to justify the cost of administration.<sup>153</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>154</sup> The figure \$50,000 was placed in brackets to signal that states are free to change the amount. Initial indications are that many states will increase the amount to \$100,000.

#### 4. Reformation

Consistent with the *Restatement (Third) of Property: Wills and Other Donative Transfers*,<sup>155</sup> Section 415 of the UTC clarifies that the doctrine of reformation may be applied to testamentary, as well as inter vivos, trusts. 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>156</sup>

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less is sufficiently likely to be inefficient to administer that a trustee should be able to terminate it without the expense of a judicial termination proceeding. Settlor are free to set a higher or lower figure, to specify different procedures, or to prohibit termination without a court order. *See* UTC § 105 (discussed *supra* notes 70-76 and accompanying text).

153. UTC § 414(b). The court may terminate a trust under this Section even if the settlor has forbidden it. *See* UTC § 105(b)(4). Judicial termination under this Section may be used whether or not the trust is larger or smaller than \$50,000.

When considering whether to terminate a trust under either Section 414(a) or (b), the trustee or court should consider the purposes of the trust. Termination is not always wise. Even if administrative costs may seem excessive in relation to the size of the trust, protection of the assets from beneficiary mismanagement may indicate that the trust be continued. The court may be able to reduce the costs of administering the trust by appointing a new trustee.

154. In addition to outright distribution to the beneficiaries, Section 816(21) authorizes payment to be made by a variety of alternate payees. Distribution under Section 414 typically will be made to the qualified beneficiaries in proportion to the actuarial value of their interests. To assure that the qualified beneficiaries are consulted on the plan, Section 414(a) requires that the qualified beneficiaries be notified in advance of a trustee's proposed modification or termination of an uneconomic trust. With respect to modifications or terminations by the court, the qualified and other beneficiaries would usually receive notice as interested parties under local civil procedure rules.

155. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (Tentative Draft No. 1, 1995).

156. UTC § 415. Reformation of inter vivos instruments to correct a mistake of law or fact is a long-established remedy. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (Tentative Draft No. 1, 1995), which this Section copies, clarifies that this doctrine also applies to wills.

## 5. Modification to Achieve Settlor's Tax Objectives

In another provision derived from the *Restatement (Third) of Property: Wills and Other Donative Transfers*,<sup>157</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>158</sup> Such broad authority is

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Reformation is available under the Code whether the mistake is one of expression or one of inducement. 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 excluded. 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. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. i (Tentative Draft No. 1, 1995). Mistakes of expression are frequently caused by scriveners' errors while mistakes of inducement often trace to errors of the settlor.

Reformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent.

Because reformation may involve the addition of language to the instrument or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. e (Tentative Draft No. 1, 1995).

In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement in Section 415 of clear and convincing proof. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. d & reporter's notes (Tentative Draft No. 1, 1995); see also John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982).

157. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.2 (Tentative Draft No. 1, 1995).

158. UTC § 416. "Modification" under this Section is broader than the "reformation" authorized by Section 415. Reformation under Section 415 is available when the terms of a trust fail to reflect the donor's original, particularized intention. The mistaken terms are then reformed to conform to this specific intent. The modification authorized by Section 416 need not conform to the settlor's original intent. Frequently, this original intent cannot be ascertained because the need for modification is due to a change in tax law, an event the settlor could not have anticipated. Modification under Section 416, therefore, is similar in concept to the *cy pres* doctrine for charitable trusts,

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.

## 6. 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 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 action to the qualified beneficiaries. Prior notice to the qualified beneficiaries of a proposed combination or division is required.<sup>159</sup>

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discussed *infra* notes 163-66 and accompanying text, and the deviation doctrine for unanticipated circumstances, discussed *supra* notes 149-51 and accompanying text.

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. Among the specific modifications authorized by the Internal Revenue Code or Service are the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to utilize better the exemption from generation-skipping tax more effectively.

The donor's tax objectives are to be established by a preponderance of the evidence. Such evidence can be gathered from the "express terms of the donative document, by inference from the donative document or by extrinsic evidence." RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 12.2 cmt. c (Tentative Draft No. 1, 1995). Modification of the document to achieve the settlor's tax purposes can be undertaken at any time, even if there has been no change in the tax law. RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 12.2 cmt. e (Tentative Draft No. 1, 1995). If the modification involves the alteration of the beneficial interests of the trust, it must be done in such a manner so as not to violate the donor's probable intention. The greater the alteration of the beneficial interest, the "more rigorous the court should be in measuring the requested modification against the donor's probable intention." RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 12.2 cmt. e (Tentative Draft No. 1, 1995). If the court approves the modification, it can take effect "whenever necessary to achieve the purpose for which the modification is ordered." RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 12.2 cmt. e (Tentative Draft No. 1, 1995).

159. UTC § 417. This Section is subject to contrary provision in the terms of the trust. *See* UTC § 105; *supra* notes 69-76 and accompanying text. Many trust instruments and standardized estate planning forms include comprehensive provisions governing combination and division of trusts. Except for the requirement that the qualified beneficiaries receive advance notice of a proposed combination or division,

### G. Charitable Trusts (Sections 405 and 413)

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

Charitable trusts must have a charitable purpose, a concept that was firmly established by the Statute of Charitable Uses of 1601<sup>160</sup> and that has evolved

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Section 417 is similar to RESTATEMENT (THIRD) OF TRUSTS § 68 (Tentative Draft No. 3, 2001).

Numerous states have enacted statutes authorizing division of trusts, either by trustee action or upon court order. For a list of these statutes, see RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 12.2 statutory note (Tentative Draft No. 1, 1995). Combination or division also has been authorized by the courts in the absence of an authorizing statute. *See, e.g.*, *BankBoston v. Marlow*, 701 N.E.2d 304 (Mass. 1998) (division); *In re Heller Inter Vivos Trust*, 613 N.Y.S.2d 809 (Sur. Ct. 1994) (division); *In re Will of Marcus*, 552 N.Y.S.2d 546 (Sur. Ct. 1990) (combination).

Section 417 allows a trustee to combine two or more trusts even though their terms are dissimilar. Typically, the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the trusts to be combined differ from each other, the more likely it is that a combination would impair some beneficiary's interest, hence the less likely that the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by Section 414. *See supra* notes 152-54 and accompanying text.

Division of trusts is often beneficial and, in certain circumstances, almost routine. Division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. While the terms of the trusts that result from such a division are identical, the division will permit differing investment objectives to be pursued and allow for discretionary distributions to be made from one trust and not the other. Given the substantial tax benefits often involved, a failure by the trustee to pursue a division might, in certain cases, be a breach of fiduciary duty.

Section 417 authorizes a trustee to divide a trust even if the trusts that result are dissimilar. Conflicts among beneficiaries, including differing investment objectives, often invite such a division, although, as in the case with a proposed combination of trusts, the more the terms of the divided trusts diverge from the original plan, the less likely it is that the settlor's purposes would be achieved and that the division could be approved. Even if the terms of the divided trusts are identical, identity of the assets is not required. For the authority of the trustee to make non-pro-rata distributions in distributing the assets of the divided trust, see UTC § 816(22).

160. Statute of Charitable Uses, 1601, 43 Eliz., c. 4 (Eng.).

over the centuries as society has changed. Doctrine also has evolved regarding what is to be done upon failure of a charitable purpose as provided in a trust's terms. The court will apply what is known as *cy pres* to reform the gift to better carry out the settlor's broader charitable purposes. If the settlor's charitable purpose is deemed specific rather than general, however, under traditional doctrine, the charitable trust has failed, and the property must be returned to the settlor or settlor's successors in interest.

Copying a provision from the *Restatement of Trusts*, the UTC provides that a charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes, the achievement of which is beneficial to the community.<sup>161</sup> A charitable trust does not fail because the settlor has insufficiently specified a charitable purpose. Applying a doctrine akin to *cy pres*, the court may save the trust by selecting a charitable purpose or beneficiaries.<sup>162</sup>

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161. UTC § 405(a); see RESTATEMENT (THIRD) OF TRUSTS § 28 (Tentative Draft No. 3, 2001); RESTATEMENT (SECOND) OF TRUSTS § 368 (1959). The directive to the courts to validate purposes the achievement of which are beneficial to the community has proved to be remarkably adaptable over the centuries. The drafters concluded that it should not be disturbed. Charitable trusts are subject to the restriction in Section 404, discussed *supra* notes 134-35 and accompanying text, that a trust purpose must be legal and not contrary to public policy. This would include trusts that involve invidious discrimination. See RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. f (Tentative Draft No. 3, 2001). For a modern perspective on the charitable purposes doctrine, see Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341 (1995).

162. UTC § 405(b) (similar to RESTATEMENT (SECOND) OF TRUSTS § 397 cmt. d (1959)). In addition to specifying particular charitable purposes or recipients if the charitable purpose expressed in the trust is insufficiently definite, the court may delegate to the trustee the framing of an appropriate scheme. To the extent the settlor's charitable intent can be ascertained, the particular scheme selected must be consistent with that intent. Section 405(b) is a corollary to Section 413(a), discussed *infra* notes 163-65 and accompanying text, which codifies the doctrine of *cy pres*. Under the doctrine of *cy pres*, a trust failing to state a general charitable purpose does not fail upon failure of the particular means specified in the terms of the trust. The court instead must apply the trust property in a manner consistent with the settlor's charitable purposes to the extent they can be ascertained.

Section 405(b) does not supercede the long-established estate planning technique of delegating to the trustee the selection of the charitable purposes or recipients. In that case, judicial intervention to supply particular terms is not necessary to validate the creation of the trust. The necessary terms instead will be supplied by the trustee. See RESTATEMENT (SECOND) OF TRUSTS § 396 (1959). Judicial intervention under Section 405(b) is necessary only if the trustee fails to make a selection. See RESTATEMENT (SECOND) OF TRUSTS § 397 cmt. d (1959).

Perhaps more significantly, the UTC liberalizes the doctrine of *cy pres*<sup>163</sup> in a way believed more likely to carry out the average settlor's intent. First, the Code expands the ability of the court to apply *cy pres*. To enable the court to more efficiently structure the gift to carry out the settlor's charitable purposes, the Code provides that the court may apply *cy pres* not only if the original scheme becomes impossible or unlawful, but also if it becomes impracticable or wasteful.<sup>164</sup> Second, the Code creates a presumption in favor of general charitable intent. In applying *cy pres*, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide. The court instead must modify the trust's terms or apply or distribute the trust property in a manner consistent with the settlor's charitable purposes.<sup>165</sup>

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

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163. *Cy pres* may be applied to modify either an administrative or dispositive term, or the court may order the trust terminated and distributed to other charitable entities. Partial termination also may be ordered if the trust property is more than sufficient to satisfy the trust's current purposes.

164. UTC § 413(a) (similar to RESTATEMENT (THIRD) OF TRUSTS § 67 (Tentative Draft No. 3, 2001)). Cases of waste normally involve situations where the funds allocated to the particular charitable scheme far exceed what is needed.

165. UTC § 413(a). Traditional doctrine did not supply such a presumption, leaving it to the courts to determine whether the settlor had a general charitable intent. If such an intent was found, the trust property was applied to other charitable purposes. If not, the charitable trust failed. See RESTATEMENT (SECOND) OF TRUSTS § 399 (1959). In the great majority of cases, the settlor would prefer that the property be used for other charitable purposes. In addition, courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor. For criticism of the traditional doctrine, of which the drafters of the UTC took cognizance, see Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L.J. 407 (1979); Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353 (1999); Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 CLEV. ST. L. REV. 471 (1998); Roger G. Sisson, Comment, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635 (1988).

trust's creation.<sup>166</sup> Some may conclude that this period is too short. One option for lengthening the period would be to provide that a reversion back to the settlor or settlor's estate is valid if the failure of charitable purpose occurs at any time during the lives of the settlor or settlor's descendants alive at the creation of the trust. Whichever period is chosen, the objective is to promote administrative convenience, with the shorter period in the UTC being the more efficient.

Traditionally, standing to enforce a charitable trust is conferred on the state's attorney general and on persons with a special interest. Concluding that the settlor often has the greatest, if not the only, practical interest in seeing that the trust is enforced, the Code also grants a settlor standing to enforce or to seek modification of a charitable trust.<sup>167</sup>

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

Spendthrift provisions, when effective, prohibit a beneficiary from assigning the beneficiary's interest and preclude an attachment of the interest by the beneficiary's creditor or assignee. 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, depending on the type of creditor, the category of beneficiary, or the time when the claim was made.

The article containing the provisions of the UTC relating to spendthrift provisions and the rights of a beneficiary's creditors was the most widely debated article of the Code. The result, however, largely tracks standard

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166. UTC § 413(b). Subsection (b) does not apply to a charitable lead trust, under which a charity receives payments for a term certain with a remainder to a noncharity. In the case of a charitable lead trust, the settlor's particular charitable purpose does not fail upon completion of the specified trust term and distribution of the remainder to the noncharity. Upon completion of the specified trust term, the settlor's particular charitable purpose instead has been fulfilled. For a discussion of the reasons for a provision such as Section 413(b), see Ronald Chester, *Cy Pres of Gift Over: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK U. L. REV. 41 (1989).

167. UTC § 405(c) (enforcement); UTC § 410(b) (modification). For the right of the state attorney general, a cotrustee, or persons with special interests to enforce either the trust or their interests, see RESTATEMENT (SECOND) OF TRUSTS § 391 (1959). Persons with a special interest are typically charitable organizations specifically designated to receive a benefit in the terms of the trust, although a class, if of sufficiently small size, also may qualify. See RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1959).

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.<sup>168</sup> 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 drafting committee concluded that it was undesirable as a matter of policy for a beneficiary to be able to transfer the beneficiary's interest while at the same time denying the beneficiary's creditors the right to reach the trust in payment of their claims. Even with the Code's requirement that a spendthrift provision, to be valid, must restrain both voluntary and involuntary transfer, the settlor, in effect, can give a beneficiary power to assign the interest by granting the beneficiary a power of appointment.

The drafting committee also concluded that it was undesirable as a matter of policy to allow a settlor to create a trust, retain a beneficial interest, but yet

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168. This rule is consistent with the approach in the great majority of states. However, a few state statutes prohibit assignment by a beneficiary, thereby making the trust automatically spendthrift. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 7-1.5(a) (McKinney 1992); *see also* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. b & reporter's note (Tentative Draft No. 2, 1999). Given that spendthrift provisions are routinely inserted in trust instruments, it can be argued that applying a spendthrift presumption to instruments that have neglected to include a provision would better carry out settlor intent. But the routine insertion argument also supports the opposite conclusion—that the drafter's omission of a spendthrift provision was not inadvertent but deliberate.

169. UTC § 502(a). The requirement that a spendthrift provision, to be valid, must restrain both voluntary and involuntary transfer, is consistent with the *Restatement*. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. b (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS § 152(2) (1959).

Under the Code, a spendthrift provision is effective regardless of whether it restrains an interest in income, principal, or both. A spendthrift provision valid under the Code also will be recognized as valid in a federal bankruptcy proceeding. *See* 11 U.S.C. § 541(c)(2) (2000). A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. *See, e.g.*, UNIF. PROBATE CODE § 2-801(a) (amended 1998). Releases and exercises of powers of appointment are also not affected because they are not transfers of property. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. c (Tentative Draft No. 2, 1999).

A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, but the trustee may choose to honor the beneficiary's purported assignment. The trustee may recommence distributions to the beneficiary at any time. The beneficiary, not having made a binding transfer, can withdraw the beneficiary's direction but only as to future payments. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. d (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS § 152 cmt. i (1959).



deny the settlor's creditors the right to reach the trust. Consequently, the UTC rejects the approach taken in the legislation enacted in Alaska, Delaware, and, more recently, Rhode Island and Nevada, which allows a settlor to retain a beneficial interest immune from claims of the settlor's creditors.<sup>170</sup> Under the Code, a creditor of the settlor fully can reach the settlor's beneficial interest.<sup>171</sup>

A key policy issue in drafting the UTC was determining which classes of creditors should be exempt from the spendthrift restraint. In determining the exceptions, the drafting committee did not start from scratch but paid particular attention to the exceptions listed in *Restatement (Third) of Trusts* Section 59.<sup>172</sup> The *Restatement of Trusts*, and the trust statutes in many states, as well as other relevant statutes, such as the Federal Bankruptcy Code<sup>173</sup> and the Employee Retirement Income Security Act,<sup>174</sup> grant special deference to collection of court orders for support of a beneficiary's child, spouse, or former spouse. Given this background and the important public policy concerns in making certain that those to whom legal obligations of support are owed actually receive such payment, the Code concluded that the settlor's possible contrary intent should be subordinate to the right of a child, spouse, or former spouse to attach the beneficiary's interest in the trust to collect on a court order for support.<sup>175</sup>

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170. 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).

171. UTC § 505(a)(2). The power of the creditors to reach the settlor's beneficial interest applies irrespective of whether the trust contains a spendthrift provision. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect is the same as if no trust had been created; the settlor's creditors can reach the entire trust. Section 505(a)(2) is consistent with RESTATEMENT (THIRD) OF TRUSTS § 58(2) & cmt. e (Tentative Draft No. 2, 1999), and RESTATEMENT (SECOND) OF TRUSTS § 156 (1959).

172. Exceptions recognized under RESTATEMENT (THIRD) OF TRUSTS § 59 (Tentative Draft No. 2, 1999) are claims for the support of a child, spouse, or former spouse; services or supplies provided for necessities or for the protection of the beneficiary's interest; and claims of a governmental unit to the extent recognized by state statute or federal law.

173. Under the Federal Bankruptcy Code, an individual debtor is not discharged from any debt to a spouse, former spouse, or child for alimony, maintenance, or support. See 11 U.S.C. § 523(a)(5) (2000).

174. To qualify under the Employee Retirement Income Security Act ("ERISA"), a pension plan must provide that a participant's benefits may be used to satisfy a qualified domestic relations order. See 29 U.S.C. § 1056(d)(3) (2000).

175. UTC Section 503(b) authorizes a claimant for unpaid support to attach present or future distributions that otherwise would be made to the beneficiary. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee otherwise has decided to make, such as through the exercise of discretion. Protection of the claims of

The UTC also creates an exception for claims by governmental units to the extent a state statute or federal law so provides,<sup>176</sup> thereby leaving to other state law the extent to which a state can pierce a trust to collect for the costs of institutionalized care. Unlike the *Restatement*, the UTC does not create an exception for the providers of a beneficiary's necessary support.<sup>177</sup> Most such claims involve claims of the state for the costs of institutionalized care, which the Code's drafters concluded was better handled by the exception for governmental claims. The UTC, however, allows a judgment creditor who has provided

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dependents and former spouses is supported by a number of state statutes and is widely, although not universally, supported by case authorities. See RESTATEMENT (THIRD) OF TRUSTS § 59 reporter's note to clause (a) & cmt. b (Tentative Draft No. 2, 1999); 2A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 157.1 (4th ed. 1987).

Section 503(a) provides that a "child" includes any person for whom an order of child support has been entered. This definition accommodates the differing approaches states take to defining the class of individuals eligible for child support, including such issues as whether support can be awarded to stepchildren. However the state making the award chooses to define "child," the definition will be recognized under the Code, whether the order sought to be enforced was entered in the same or different state.

176. UTC § 503(c) (similar to RESTATEMENT (THIRD) OF TRUSTS § 59 cmt. a (Tentative Draft No. 2, 1999)). Federal pre-emption guarantees that certain federal claims, such as claims by the Internal Revenue Service, may bypass a spendthrift provision no matter what this Code might say. The case law and relevant Internal Revenue Code provisions on the exception for federal tax claims are collected in GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 224 (rev. 2d ed. 1992), and 2A SCOTT & FRATCHER, *supra* note 175, § 157.4. Regarding claims by state governments, Section 503(c) recognizes that states take a variety of approaches with respect to collection, depending on whether the claim is for unpaid taxes, for care provided at an institution, or for other charges. Acknowledging this diversity, Section 503(c) does not prescribe a rule, but refers to other statutes of the state on whether particular claims are subject to or exempted from spendthrift provisions.

177. Unlike RESTATEMENT (THIRD) OF TRUSTS § 59(b) (Tentative Draft No. 2, 1999), and RESTATEMENT (SECOND) OF TRUSTS § 157(b) (1959), the UTC does not create an exception to the spendthrift restriction for creditors who have furnished necessary services or supplies to the beneficiary. Most of these cases involve claims by governmental entities, which the drafters concluded are better handled by the enactment of special legislation as authorized by Subsection (c). The drafters also declined to create an exception for tort claimants. For a discussion of the exception for tort claims, which has not generally been recognized, see RESTATEMENT (THIRD) OF TRUSTS § 59 reporter's notes to cmt. a (Tentative Draft No. 2, 1999). For a discussion of other exceptions to a spendthrift restriction, recognized in some states, see BOGERT & BOGERT, *supra* note 176, § 224, and 2A SCOTT & FRATCHER, *supra* note 175, §§ 157-157.5.

services for the protection of the beneficiary's interest to reach that interest in repayment.<sup>178</sup>

Exemption from a spendthrift bar does not necessarily mean that a beneficiary's creditor will collect. If the trust is discretionary or for support, the creditor usually cannot attach the beneficiary's interest. The UTC abolishes the often evasive distinction between discretionary and support trusts. The beneficiary's creditor cannot collect whether the discretion is expressed in the form of a standard of distribution or not, even if the discretion was abused.<sup>179</sup> The only exception pertains to claims for child support or alimony, which are recognized because of the important societal interests involved. To the extent a trustee has failed to comply with a standard of distribution or has abused a discretion, the court may direct that the shortfall be paid to satisfy a judgment or court order for support or alimony. The court must direct the trustee to pay the child, spouse, or former spouse such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary.<sup>180</sup>

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178. UTC § 503(b). This exception is in accord with RESTATEMENT (THIRD) OF TRUSTS § 59(b) (Tentative Draft No. 2, 1999), and RESTATEMENT (SECOND) OF TRUSTS § 157(c) (1959). Without this exception, a beneficiary of modest means might be prevented from obtaining services essential to the protection or enforcement of the beneficiary's rights under the trust. See RESTATEMENT (THIRD) OF TRUSTS § 59 cmt. d (Tentative Draft No. 2, 1999).

179. UTC § 504(b). Under Subsection (b) and the *Restatement (Third) of Trusts*, a so-called "support" trust is viewed as a discretionary trust with a support standard even if the trust purportedly directs the trustee to provide for the beneficiary's support. See RESTATEMENT (THIRD) OF TRUSTS § 60 reporter's notes to cmt. a (Tentative Draft No. 2, 1999).

Subsection (b) will have limited application. Pursuant to Section 502, the effect of a valid spendthrift provision, where applicable, is to prohibit a creditor from collecting on a distribution prior to its receipt by the beneficiary. Only if the trust is not protected by a spendthrift provision or the creditor falls within one of the exceptions to spendthrift enforcement created by Section 503 is Section 504 relevant.

Section 504(b), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under Section 504(d), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. The inability of a beneficiary's creditor to force a distribution from a discretionary interest applies even if the creditor may attach other interests of the beneficiary, such as a required distribution of income.

180. UTC § 504(c). Before fixing this amount, the court having jurisdiction over the trust might wish to consider that, in setting the respective support award, the family court already has considered the respective needs and assets of the family. The Code does not prescribe a particular procedural method for enforcing a judgment or order against the trust, leaving that matter to local collection law.

The UTC addresses several miscellaneous creditor issues. To protect a trust from an immediate attachment as soon as a payment becomes due, whether the payment is periodic or upon termination of the trust, the UTC provides that spendthrift protection is lost only after the trustee has had a reasonable time in which to make the distribution.<sup>181</sup> The UTC clarifies that a revocable trust is fully subject to the settlor's creditors while the settlor is living.<sup>182</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>183</sup> Although the UTC treats the holder of a power of withdrawal the same as the settlor of a revocable trust,<sup>184</sup>

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Section 504(a), which is identical to Section 503(a), provides that a "child" includes any person for whom an order of child support has been entered. *See supra* note 175 (discussing the definition of "child").

181. UTC § 506. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims against a beneficiary by refusing to make a distribution required to be made by the express terms of the trust. On the other hand, a spendthrift provision would become largely a nullity were a beneficiary's creditors able to attach all required payments as soon as they became due. Section 506 reflects a compromise between these two competing principles. A creditor can reach a mandatory distribution, including a distribution upon termination, if the trustee has failed to make the payment within a reasonable time after the required distribution date. Following this reasonable period, payments mandated by the express terms of the trust are, in effect, being held by the trustee as agent for the beneficiary and should be treated as part of the beneficiary's personal assets. Section 506 is similar to RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. d (Tentative Draft No. 2, 1999).

182. UTC § 505(a)(1). The ability of a settlor's creditors to reach a revocable trust prior to the settlor's death is now a well-accepted conclusion. *See* RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. e (Tentative Draft No. 1, 1996). Such claims were not allowed at common law, however. *See* RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. o (1959). Because a settlor usually also retains a beneficial interest that a creditor may reach under Section 505(a)(2), the common law rule, were it to be retained in this Code, would be of little significance.

183. UTC § 505(a)(3). For a discussion of this provision, see *infra* note 203 and accompanying text.

184. UTC § 505(b)(1). This provision treats a power of withdrawal as the equivalent of a power of revocation because the two powers are functionally identical. This is also the approach taken in RESTATEMENT (THIRD) OF TRUSTS § 56 cmt. b (Tentative Draft No. 2, 1999). If the power is unlimited, the property subject to the power will be fully subject to the claims of the power holder's creditors, the same as the power holder's other assets. If the power holder retains the power until death, the property subject to the power may be liable for claims and statutory allowances to the extent the power holder's probate estate is insufficient to satisfy those claims and allowances. For powers limited either in time or amount, such as a right to withdraw an annual exclusion contribution within thirty days, the creditors would be limited to the withdrawal amount and would be required to take action prior to the expiration of the

an exception is created for Crummey and five and five powers. Upon the release or lapse of a power of withdrawal, assets falling within the annual exclusion or five and five limit are exempt from claims of the holder's creditors.<sup>185</sup>

### *I. Revocable Trusts (Article 6)*

The revocable trust is the most common trust created in the United States and is used largely as a substitute for a will. In a desire to avoid the probate process, the settlor will place all of his or her assets into the trust. These assets then will be disposed of at the settlor's death as provided in the trust instrument. Typically, the trust will be self-declared, with a successor trustee stepping in only at the settlor's death or incapacity.

Because the extensive use of revocable trusts is a recent phenomenon, beginning decades, if not centuries, after most traditional trust law was formulated, there are numerous issues involving such trusts that have yet to be adequately addressed in the case law or state statutes. The provisions of the UTC on revocable trusts not only fill in many of these gaps but are also among the Code's most important and innovative provisions. The biggest change is a reversal of the common law presumption that trusts are irrevocable. Reflecting the increasing, if not predominant, use of the revocable trust in the United States,

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thirty-day period.

The Code does not address creditor issues with respect to property subject to a special power of appointment or a testamentary general power of appointment. For creditor rights against such interests, see RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §§ 13.1-13.7 (1986). The Code also does not address possible rights against a settlor who was insolvent at the time of the trust's creation or was rendered insolvent by the transfer of property to the trust. This subject is instead left to the state's law on fraudulent transfers. A transfer to the trust by an insolvent settlor also might constitute a voidable preference under federal bankruptcy law.

185. UTC § 505(b)(2). Upon the lapse, release, or waiver of a power of withdrawal, the property formerly subject to the power normally will be subject to the claims of the power holder's creditors and assignees the same as if the power holder were the settlor of a now irrevocable trust. Pursuant to Section 505(a)(2), a creditor or assignee of the power holder generally may reach the power holder's entire beneficial interest in the trust, whether or not distribution is subject to the trustee's discretion. However, following the lead of Arizona and Texas, Section 505(b)(2) creates an exception for trust property that was subject to a Crummey or five and five power. See ARIZ. REV. STAT. ANN. § 14-7705(G) (West Supp. 2001); TEX. PROP. CODE ANN. § 112.035(e) (Vernon Supp. 2002). Upon the lapse, release, or waiver of a power of withdrawal, the holder is treated as the settlor of the trust only to the extent the value of the property subject to the power at the time of the lapse, release, or waiver exceeded the greater of the amounts specified in IRC §§ 2041(b)(2) or 2514(e) (2000) (the greater of five percent or \$5,000), or IRC § 2503(b) (2000) (\$11,000 in 2002).

the Code follows the lead of California, Iowa, Montana, Oklahoma, and Texas in providing that a trust is revocable absent clarifying language in the terms of the trust.<sup>186</sup> Professional drafters routinely state whether a trust is revocable or irrevocable. Providing a presumption in the statute is, therefore, most relevant to self-drafted trusts or trusts prepared by less competent counsel. These trusts, when silent, are more often than not intended to be revocable. Because the Code's presumption of revocability will reverse the rule in most jurisdictions, the presumption applies only to trust instruments executed on or after the date of enactment.<sup>187</sup> Should an intent to make the trust irrevocable be omitted from the instrument, the court may reform the trust to conform it to the settlor's intention.<sup>188</sup>

The UTC treats the revocable trust, in most respects, as the functional equivalent of a will, at least while the settlor is alive. Following the trend in the case law, the capacity requirement for creating a trust is the same as that for a will. The capacity standard for wills also applies to revocation, amendment, adding property to the trust, or otherwise directing the actions of the trustee.<sup>189</sup>

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186. UTC § 602(a). The most recent revision of the *Restatement of Trusts* similarly reverses the former approach. A trust is presumed revocable if the settlor has retained a beneficial interest. See RESTATEMENT (THIRD) OF TRUSTS § 63 cmt. c (Tentative Draft No. 3, 2001). For the state statutes, see CAL. PROB. CODE § 15400 (West 1991); IOWA CODE ANN. § 633.3102 (Supp. 2001); MONT. CODE ANN. § 72-33-401 (2001); OKLA. STAT. ANN. tit. 60, § 175.41 (West 1994); TEX. PROP. CODE ANN. § 112.051(a) (Vernon 1995).

187. UTC § 602(a).

188. See UTC § 415 (discussed *supra* notes 155-56 and accompanying text); see also RESTATEMENT (THIRD) OF TRUSTS §§ 62, 63 cmt. d (Tentative Draft No. 3, 2001).

189. UTC § 601 (patterned after RESTATEMENT (THIRD) OF TRUSTS § 11(1) (Tentative Draft No. 1, 1996) and consistent with recent case law); see *Argo v. Moncus*, 721 So. 2d 218, 219 (Ala. Civ. App. 1998); *Upman v. Clarke*, 753 A.2d 4 (Md. 2000); *Martone v. Martone*, 509 S.E.2d 302 (Va. 1999). Because the revocable trust is used primarily as a will substitute, applying the capacity standard for wills is appropriate. Also, the revocable trust is normally used in conjunction with a pourover will. The use of a pourover will assures that property not transferred to the trust during life will, at death, be combined and distributed with the property the settlor managed to convey. Applying the capacity standard for wills assures that one standard, the standard for wills, will govern in such coordinated revocable trust/pourover will plans.

The Code does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 402, discussed *supra* notes 128-32 and accompanying text, does require that the settlor have capacity. Section 601 includes a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the

In addition, while the settlor has capacity, the settlor has the same control over the trust that a testator has over a will and the testator's own property. Notices that otherwise would be given to the beneficiaries instead must be given to the settlor, and all other rights that the beneficiaries might have are within the settlor's exclusive control. The settlor is authorized to give binding consents on a beneficiary's behalf, and access to the trust document is also within the settlor's control. Just as the devisees under the will of a living testator do not have a right to be informed of their prospective devise, then neither do the beneficiaries of a revocable trust. Under the Code, however, the settlor's authority over the beneficiaries terminates upon the settlor's loss of capacity.<sup>190</sup> Thereafter, unless provided otherwise in the terms of the trust, the beneficiaries may assert their rights as beneficiaries.<sup>191</sup>

The rights of the beneficiaries upon the settlor's incapacity was extensively debated by the drafting committee. One view was that a revocable trust should, in all instances, be treated the same as a will. Because the devisees under a will have no right to know of the devise no matter how incapacitated the settlor, then neither should the beneficiaries of a revocable trust. Another approach emphasized the use of a trust as a lifetime management device. Those holding this view argued that, in order for the beneficiaries to protect their rights, disclosure of the trust upon the settlor's incapacity should be required even if such disclosure was prohibited in the terms of the trust. The provision as finally drafted was a compromise. Settlers for whom confidentiality is important can so provide in the terms of the trust. Otherwise, upon the settlor's incapacity, the beneficiaries are entitled to learn of the trust.

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property free of trust. *See generally* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 (Tentative Draft No. 3, 2001); RESTATEMENT (THIRD) OF TRUSTS § 11 (Tentative Draft No. 1, 1996).

190. UTC § 603(a).

191. The beneficiaries are entitled to request information concerning the trust, and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under Section 813. *See infra* notes 234-43 and accompanying text. Because Section 603 may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the revocable trust. *See* UTC § 105 (discussed *supra* notes 69-76, *infra* notes 244-45, and accompanying text). Also, should an incapacitated settlor later regain capacity, the beneficiaries' rights again will be subject to the settlor's control. The cessation of the settlor's control upon the settlor's incapacity or death does not mean that the beneficiaries may reopen transactions the settlor approved while having capacity. The trustee, however, may be required to account to the beneficiaries for transactions taken during such period. *See* *Evangelho v. Presoto*, 79 Cal. Rptr. 2d 146 (Ct. App. 1998) (interpreting Sections 15800 and 16064 of the California Probate Code, upon which Section 603(a) of the UTC was based).

Revocation of a trust differs fundamentally from revocation of a will. Revocation of a will, because a will is not effective until death, does not affect an existing fiduciary relationship. With a trust, however, because a revocation will terminate an existing fiduciary relationship, there is a need to protect a trustee who might act without knowledge that the trust has been revoked. There is also a need to protect trustees against the risk that they will misperceive the settlor's intent and mistakenly assume that an informal document or communication constitutes a revocation when that was not, in fact, the settlor's intent. To protect trustees against these risks, drafters habitually insert provisions providing that a revocable trust may be revoked only by delivery to the trustee of a formal revoking document. Some courts require strict compliance with the stated formalities. Other courts, recognizing that the formalities were inserted primarily for the trustee's, and not the settlor's, benefit will accept other methods of revocation as long as the settlor's intent is clear.<sup>192</sup>

This Code tries to effectuate the settlor's intent to the maximum extent possible while at the same time protecting a trustee against inadvertent liability. While notice to the trustee of a revocation is good practice, the Code does not make the giving of such notice a prerequisite to a trust's revocation. Furthermore, the Code generally honors a settlor's clear expression of intent even if inconsistent with stated formalities in the terms of the trust. To protect the trustee, however, a trustee is immunized for actions taken without knowledge of the revocation or amendment.<sup>193</sup>

Unless the terms of the trust make a specified method of revocation exclusive, the UTC provides that a trust may be revoked by substantial compliance with the method specified in the trust's terms or by any other method

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192. See RESTATEMENT (THIRD) OF TRUSTS § 63 reporter's notes to cmts. h-j (Tentative Draft No. 3, 2001).

193. UTC § 602(g) (providing that a trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked).



manifesting clear and convincing evidence of the settlor's intent,<sup>194</sup> including by a later will or codicil.<sup>195</sup>

The Code also addresses the extent to which a guardian, conservator, or agent under a durable power of attorney may exercise the power to revoke or amend on behalf of an incapacitated settlor. Because most revocable trusts are created with the intent that management of the settlor's assets will be handled by the trustee and not by a subsequently-appointed guardian or conservator, a guardian or conservator should not succeed automatically to the settlor's power to revoke the trust. Requiring that the guardian or conservator first obtain court permission is appropriate, and the Code so requires.<sup>196</sup> Similarly, when a settlor

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194. UTC § 602(c). Even if the method is made exclusive, a failure to comply with a technical requirement, such as required notarization, may be excused as long as compliance with the method specified in the terms of the trust is otherwise substantial.

While revocation of a trust ordinarily will continue to be accomplished by signing and delivering a written document to the trustee, other methods, such as a physical act or an oral statement coupled with a withdrawal of the property, also might demonstrate the necessary intent. These less formal methods, because they provide less reliable indicia of intent, often will be insufficient, however. The method specified in the terms of the trust is a reliable safe harbor and should be followed whenever possible.

195. UTC § 602(c)(2) (providing that a trust may be revoked or amended by a later will or codicil that expressly refers to the trust or that specifically devises property that otherwise would pass under the trust). The drafters mentioned revocation or amendment by will not to encourage the practice, but to make clear that it is not precluded by omission. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. e (Tentative Draft No. 3, 2001) (validating revocation or amendment of will substitutes by later will). Situations do arise, particularly in death-bed cases, where revocation by will may be the only practicable method. In such cases, a will, a solemn document executed with a high level of formality, may be the most reliable method for expressing intent. A revocation in a will ordinarily becomes effective only upon probate of the will following the testator's death. For the cases, see RESTATEMENT (THIRD) OF TRUSTS § 63 reporter's notes on cmts. h-i (Tentative Draft No. 3, 2001).

A residuary clause in a will disposing of the estate differently than the trust is alone insufficient to revoke or amend a trust. The provision in the will either must be express or the will must dispose of specific assets contrary to the terms of the trust. The substantial body of law on revocation of Totten trusts by will offers helpful guidance. The authority is collected in William H. Danne, Jr., Annotation, *Revocation of Tentative ("Totten") Trust of Savings Bank Account by Inter Vivos Declaration or Will*, 46 A.L.R.3d 487 (1972).

196. UTC § 602(f). Under the UTC, a "conservator" is appointed by the court to manage the ward's party, a "guardian" to make decisions with respect to the ward's personal affairs. UTC § 103.

Many state conservatorship statutes authorize a conservator to exercise the settlor's power of revocation only upon approval of the court supervising the conservatorship.

creates both a revocable trust and a durable power of attorney, the power of attorney is usually intended to supplement and not supercede the trust. Implementing this presumption, the UTC allows the settlor's agent to revoke or amend the trust only to the extent expressly authorized either in the trust or power of attorney.<sup>197</sup>

Will contests are typically barred under one of two alternative statutes. Normally, a contest is barred following some period of time following notice of probate, ranging from two to six months. 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>198</sup> Most states currently have no limitation period on contest of a revocable trust. Section 604 corrects this omission. The Section is designed to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death. A potential contestant must file a

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*See, e.g.*, UNIF. PROBATE CODE § 411(a) (amended 1998). UTC Section 602(f) ratifies this practice. Because a settlor often creates a revocable trust for the very purpose of avoiding conservatorship, the authority of the court to approve a conservator's request to revoke should be exercised reluctantly. Settlers concerned about revocation by a conservator may wish to deny a conservator a power to revoke. While such a provision in the terms of the trust is entitled to considerable weight, the court may override the restriction if it concludes that the action is necessary in the interests of justice. *See* UTC § 105(b)(13).

Steps a conservator can take to stem possible abuse are not limited to petitioning to revoke the trust. The conservator could petition for removal of the trustee under Section 706. *See infra* notes 223-33 and accompanying text. The conservator, acting on the settlor-beneficiary's behalf, also could bring an action to enforce the trust according to its terms. Pursuant to Section 303, a conservator may act on behalf of the beneficiary whose estate the conservator controls whenever a consent or other action by the beneficiary is required or may be given under the Code. *See* UTC § 303; *see also supra* note 97 and accompanying text.

If a conservator has not been appointed, Section 602(f) authorizes a guardian to exercise a settlor's power to revoke or amend the trust upon approval of the court supervising the guardianship. The court supervising the guardianship will need to determine whether local law allows it to grant a guardian authority to revoke a revocable trust or whether it will be necessary to appoint a conservator for that purpose.

197. UTC § 602(e) (similar to RESTATEMENT (THIRD) OF TRUSTS § 63 cmt. 1 (Tentative Draft No. 3, 2001)). An express provision is required because most settlors usually intend that the revocable trust, and not the power of attorney, function as the settlor's principal property management device. The power of attorney is usually intended as a backup for assets not transferred to the revocable trust or to address specific topics, such as the power to sign tax returns or apply for government benefits, which may be beyond the authority of a trustee or are not customarily granted to a trustee.

198. *See, e.g.*, UNIF. PROBATE CODE § 3-108 (amended 1998).

contest within the earlier of 120 days following receipt of an optional notice or three years following the settlor's death.<sup>199</sup> For those not receiving notice, three years should be ample time in which to determine whether they have an interest that will be affected by the trust. These time limits have been placed in brackets, however, with the suggestion made in the comments that states should substitute the periods under their comparable will contest statutes.<sup>200</sup> In addition, to encourage expeditious distribution of trust assets, a trustee who has not been notified that a contest has or will be filed is absolved from liability for making distributions before the contest period has expired.<sup>201</sup> Liability in such cases is solely on the distributees.<sup>202</sup>

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199. UTC § 604(a). The drafters rejected the approach taken in California, which mandates notice. *Cf.* CAL. PROB. CODE § 16061.7 (West 1991 & Supp. 2002). To trigger the 120-day period, the trustee must send the potential contestant a copy of the trust instrument, and the notice must inform the potential contestant of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a contest.

Section 604 applies only to actions to contest a trust. A "contest" is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee. Grounds for contest include lack of intent to create a trust or lack of capacity, *see* UTC § 402 (discussed *supra* notes 128-32 and accompanying text), that undue influence, duress, or fraud was involved in the trust's creation, *see* UTC § 406 (discussed *supra* note 136 and accompanying text), or that the trust had been revoked or modified, *see* UTC § 602 (discussed *supra* notes 193-97 and accompanying text). An action against a beneficiary or other person for intentional interference with an inheritance or gift, is not considered a contest, and therefore, is not subject to this Section. For the law on intentional interference, *see* RESTATEMENT (SECOND) OF TORTS § 774B (1979). Nor does Section 604 preclude an action to determine the validity of a trust that is brought during the settlor's lifetime, such as a petition for a declaratory judgment, if such action is authorized by other law. *See* UTC § 106 (UTC supplemented by common law of trusts and principles of equity) (discussed *supra* notes 25-26 and accompanying text).

200. UTC § 604 cmt.

201. UTC § 604(b). Because only a small minority of trusts are actually contested, trustees should not be restrained from making distributions because of concern about possible liability should a contest later be filed. Absent a protective statute, a trustee is ordinarily absolutely liable for misdelivery of the trust assets, even if the trustee reasonably believed that the distribution was proper. *See* RESTATEMENT (SECOND) OF TRUSTS § 226 (1959). Section 604(b) addresses liability concerns by allowing the trustee, upon the settlor's death, to proceed expeditiously to distribute the trust property. The trustee may distribute the trust property in accordance with the terms of the trust until and unless the trustee receives notice of a pending judicial proceeding contesting the validity of the trust, or until notified by a potential contestant of a possible contest, followed by its filing within sixty days.

202. UTC § 604(c) (making the beneficiaries of what later turns out to have been an invalid trust liable to return any distribution received). Issues as to whether the distribution must be returned with interest, or with income earned or profit made are not

Because a revocable trust is usually employed as a will substitute, it is appropriate to subject trust assets at the settlor's death to the claims of the settlor's creditors and other estate-related expenses. The UTC clarifies that the assets of a revocable trust are liable for such charges to the extent the probate estate is insufficient.<sup>203</sup> The Code, however, does not try to resolve the many other issues that can arise, such as liability among different categories of nonprobate assets, whether claims against nonprobate assets should be subject to a special statute of limitations, and whether this period can be shortened by the giving of notice. The appropriate answers to these questions will depend on the particulars of the state's probate code. Section 6-102 of the UPC, added to that Code in 1998, may be looked to as a model both by states that have enacted the UPC and by those having different probate systems.

### *J. Cotrustees (Section 703)*

While most of the procedural issues involved in administering a trust can be addressed in the trust instrument, it is difficult to anticipate all questions. Even if the drafter does anticipate every issue, the drafter frequently will rely on the local trust statute for guidance on the language to employ. Oftentimes, the drafter will choose to let the statute control. The UTC specifies numerous procedural rules for administering a trust. All of these procedures are subject to override in the terms of the trust,<sup>204</sup> but the drafters of the UTC expect that many scrivener's of trust instruments may prefer to rely on the Code. Among the procedural issues addressed in the UTC are the methods for transferring a trust's principal place of administration to or from another country or American state;<sup>205</sup> the method for revoking or amending a revocable trust;<sup>206</sup> the requirements for rejecting or accepting appointment as trustee;<sup>207</sup> the division of responsibilities

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addressed in the Code but are left to the law of restitution.

203. UTC § 505(a)(3). Death-related expenses for which the revocable trust is potentially subject include creditor claims, costs of administration, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children.

204. UTC § 105 (discussed *supra* notes 69-76 and accompanying text).

205. UTC § 108 (discussed *supra* notes 77-87 and accompanying text).

206. UTC § 602 (discussed *supra* notes 193-97 and accompanying text).

207. UTC § 701. Under the Code, a person designated as trustee accepts the trusteeship by substantially complying with the method of acceptance provided in the terms of the trust, or if the terms of the trust do not make the specified method exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trustee. UTC § 701(a). The procedure by which a trustee may accept office closely tracks the procedure for revoking a trust. Compare UTC § 701(a), with UTC § 602(c) (discussed *supra* notes 194-95 and

among cotrustees;<sup>208</sup> the procedure for appointing a successor trustee;<sup>209</sup> and the requirements for an effective trustee resignation.<sup>210</sup>

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accompanying text).

To avoid the inaction that can result if the person designated as trustee fails to communicate a decision either to accept or to reject the trusteeship, Section 701(b) provides that a failure to accept within a reasonable time after learning of the designation constitutes a rejection of the trusteeship. A trustee's rejection normally precludes a later acceptance but does not cause the trust to fail. See RESTATEMENT (THIRD) OF TRUSTS § 35 cmt. c (Tentative Draft No. 2, 1999). Section 701(c)(1) allows a nominated trustee to act expeditiously to preserve the trust property without being considered to have accepted the trusteeship. However, within a reasonable time after acting, the nominated trustee must send a rejection of office to the settlor, if living and competent, or otherwise to a qualified beneficiary. Because of the potential liability that can inhere in trusteeship, Section 701(c)(2) allows a person designated as trustee, without accepting the trusteeship, to inspect or investigate trust property for any purpose. The condition of real property is a particular concern, including possible tort liability for the condition of the premises or liability for violation of state or federal environmental laws such as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607 (1994 & Supp. V 1999).

208. UTC § 703 (discussed *infra* notes 218-22 and accompanying text).

209. UTC § 704(c)-(d). The Code creates separate procedures for the filling of a vacancy required to be filled depending on whether the trust is charitable or noncharitable. Section 704(c) specifies the procedure for filling a vacancy in the trusteeship of a noncharitable trust. Absent an effective provision in the terms of the trust, Subsection (c)(2) permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries. If the qualified beneficiaries fail to make an appointment, Section 704(c)(3) authorizes the court to fill the vacancy. In making the appointment, the court should consider the objectives and probable intention of the settlor, the promotion of the proper administration of the trust, and the interests and wishes of the beneficiaries. See RESTATEMENT (THIRD) OF TRUSTS § 34 cmt. f (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS § 108 cmt. d (1959).

Section 704(d) specifies the procedure for filling a vacancy in the trusteeship of a charitable trust. Absent an effective designation in the terms of the trust, a successor trustee may be selected by the charitable organizations expressly designated to receive distributions in the terms of the trust but only if the attorney general concurs in the selection. If the attorney general does not concur in the selection or if the trust does not designate a charitable organization to receive distributions, the vacancy may be filled only by the court.

210. UTC § 705(a). This Section rejects the common law rule that a trustee may resign only with permission of the court and goes further than the *Restatements*, which allow a trustee to resign with the consent of the beneficiaries. See RESTATEMENT (THIRD) OF TRUSTS § 36 (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS § 106 (1959). Rather, Section 705(a) approximates standard drafting practice by providing that a trustee may resign by giving notice to the qualified beneficiaries, a living settlor, and

All of the above items were the subject of extensive discussion during the drafting of the UTC. The resulting rules are an effort to further several not-always-consistent objectives. The UTC generally prefers the honoring of intent over required formalities. Consequently, absent specific provision in the terms of the trust, a trustee may accept office or a settlor may revoke or amend a revocable trust by any method indicating the necessary intent.<sup>211</sup> The Code also expresses a preference for the approach under what might be termed the better-drafted document.<sup>212</sup> For example, many trust documents allow a trustee to resign following notice to a specified class of beneficiaries. Under the UTC, the specified class of beneficiaries is known as the “qualified beneficiaries,”<sup>213</sup> and a trustee may resign by giving notice to that group.<sup>214</sup> The UTC also expresses a preference for resolving disputes outside of court. The Code contains a comprehensive provision on nonjudicial settlements.<sup>215</sup> This philosophy also applies to matters of procedure. A trustee may transfer the principal place of administration upon notice to the qualified beneficiaries and without approval of a court;<sup>216</sup> absent a successor appointment in the terms of the trust, a successor trustee may be appointed upon unanimous agreement of the qualified beneficiaries.<sup>217</sup>

Among the more difficult procedural provisions to draft was Section 703, the Section on relations among cotrustees. While appointment of cotrustees is common and offers significant benefits, the situations under which cotrustees are appointed are so varied that designing appropriate default rules is difficult. Given this difficulty, specifying the powers, duties, and divisions of responsibilities among cotrustees is among the more important issues to address

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any cotrustee. A resigning trustee also may follow the traditional method and resign with approval of the court.

211. See UTC § 602(c)(2) (revocation); UTC § 701(a)(2) (acceptance).

212. For an explanation of this approach, see Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611 (1988).

213. See UTC § 103(12) (defining “qualified beneficiaries”) (discussed *supra* note 85 and accompanying text).

214. UTC § 705 (discussed *supra* note 210 and accompanying text).

215. UTC § 111 (discussed *supra* notes 106-09 and accompanying text).

216. UTC § 108 (discussed *supra* notes 77-87 and accompanying text).

217. UTC § 704 (discussed *supra* note 209 and accompanying text).

in drafting.<sup>218</sup> Yet, this issue is often neglected. Among the matters the trust instrument should address are the following:

- Would the settlor have preferred that the cotrustees act by majority or unanimity? The UTC opts for efficiency by allowing the cotrustees to act by majority;<sup>219</sup>
- To what extent did the settlor intend to allow cotrustees to delegate responsibilities to each other? The UTC allows a cotrustee to delegate to the other trustee responsibilities the settlor did not expect the cotrustee to

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218. Cotrustees are appointed for a variety of reasons. Having multiple decision-makers serves as a safeguard against eccentricity or misconduct. Cotrustees are often appointed to gain the advantage of differing skills, perhaps a financial institution for its permanence and professional skills, and a family member to maintain a personal connection with the beneficiaries. On other occasions, cotrustees are appointed to make certain that all family lines are represented in the trust's management.

Cotrusteeship should not be called for without careful reflection. Division of responsibility among cotrustees is often confused, the accountability of any individual trustee is uncertain, obtaining consent of all trustees can be burdensome, and, unless an odd number of trustees is named, deadlocks requiring court resolution can occur. Potential problems can be reduced by addressing division of responsibilities in the terms of the trust. Like the other sections of this Article, Section 703 is freely subject to modification in the terms of the trust. See UTC § 105 (discussed *supra* notes 69-76 and accompanying text).

219. UTC Section 703(a), which is in accord with RESTATEMENT (THIRD) OF TRUSTS § 39 (Tentative Draft No. 2, 1999), rejects the common law rule, followed in earlier *Restatements*, that required unanimity among the trustees of a noncharitable trust. See RESTATEMENT (SECOND) OF TRUSTS § 194 (1959). In adopting a majority rule approach, the UTC is following the lead of numerous, if not a majority of, states that have enacted statutes reversing the unanimity requirement for the trustees of noncharitable trusts. See RESTATEMENT (THIRD) OF TRUSTS § 39 cmt. a & reporter's note (Tentative Draft No. 2, 1999). Allowing for action by a majority permits administration to proceed without the delay inherent in having to seek unanimity, particularly if a cotrustee is not readily available. Settlers who prefer that trustees act unanimously may so provide in the terms of the trust. See UTC § 105 (discussed *supra* notes 69-76 and accompanying text).

perform personally.<sup>220</sup> The standard is appropriate but may be difficult to apply in practice;

- To what extent should a nonparticipating cotrustee be liable for another trustee's breach? The UTC generally immunizes a nonparticipating trustee from liability.<sup>221</sup> However, the Code also assumes that the settlor did not intend for the trustee totally to neglect duties. Each trustee must exercise reasonable care to: (1) prevent a cotrustee from committing a serious breach of trust; and (2) compel a cotrustee to redress a serious breach of trust.<sup>222</sup>

### K. Trustee Removal (Section 706)<sup>223</sup>

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

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220. UTC § 703(e). This standard differs from the standard for delegation to an agent as provided in Section 807. Section 807, which is identical to Section 9 of the Uniform Prudent Investor Act, recognizes that many trustees are not professionals. Consequently, trustees should be encouraged to delegate functions they are not competent to perform. Section 703(e), on the other hand, is premised on the assumption that the settlor selected cotrustees for a specific reason and that this reason ought to control the scope of a permitted delegation to a cotrustee. Section 703(e) prohibits a trustee from delegating to another trustee functions the settlor reasonably expected the trustees to perform jointly. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint cotrustees. The better practice is to address the division of functions in the terms of the trust, as allowed by Section 105. See *supra* notes 69-76 and accompanying text. For a discussion of a famous case in which unlimited delegation among cotrustees contributed to trust mismanagement, see Edward C. Halbach, Jr., *Foreword: Symposium Issue on the Bishop Estate Controversy*, 21 U. HAW. L. REV. 1, 7 (1999).

221. UTC § 703(f) (providing that a trustee who does not join in an action of another trustee is not liable for the action).

222. UTC § 703(g) (codifying the substance of RESTATEMENT (SECOND) OF TRUSTS §§ 184, 224 (1959)). Unless absolved from this responsibility in the terms of the trust, the duty to monitor the actions of a cotrustee applies even to functions the trustee has properly delegated to a cotrustee.

223. For an analysis of this provision from a contractual perspective, 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).



becomes an important term of the trust, a term that should not easily be changed.<sup>224</sup> The UTC follows traditional doctrine by authorizing a trustee to be removed for acts of misconduct or other disqualification.<sup>225</sup> Acts of misconduct or other disqualification justifying removal of the trustee include serious breach of trust,<sup>226</sup> unfitness, and unwillingness or persistent failure to perform the function effectively.<sup>227</sup> A trustee also may be removed if lack of cooperation substantially impairs the trust's administration.<sup>228</sup> Removal for serious breach

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224. It traditionally has been more difficult to remove a trustee named by the settlor than a trustee named by the court, particularly if the settlor at the time of the appointment was aware of the trustee's failings. *See* RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. f (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS § 107 cmts. f-g (1959). Because of the settlor's interest in seeing that the settlor's intent is properly carried out, the Code grants the settlor standing to petition for removal of the trustee. UTC § 706(a).

225. UTC § 706(b)(1), (3). The grounds for removal specified in Section 706(b) are similar to those found in RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. e (Tentative Draft No. 2, 1999). While removal of a trustee can be regulated in the terms of the trust, the court retains inherent equity authority to remove a trustee if necessary in the interests of justice. *See* UTC § 105(b)(13).

226. UTC § 706(b)(1) (consistent with RESTATEMENT (THIRD) OF TRUSTS § 37 cmts. e & g (Tentative Draft No. 2, 1999)). UTC § 706(b)(1) makes clear that not every breach of trust justifies removal of the trustee. The breach must be "serious." A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust also may consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together.

227. UTC § 706(b)(3). "Unfitness" may include not only mental incapacity but also lack of basic ability to administer the trust. Before removing a trustee for unfitness, the court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing. "Unwillingness" includes not only cases where the trustee refuses to act but also a pattern of indifference to some or all of the beneficiaries. *See* RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. e (Tentative Draft No. 2, 1999). A "persistent failure to administer the trust effectively" might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to similar trusts.

228. UTC § 706(b)(2). Lack of cooperation among trustees justifying a trustee's removal need not involve a breach of trust. The standard instead is whether the administration of the trust is significantly impaired by the trustees' failure to agree. Removal is particularly appropriate if the naming of an even number of trustees, combined with their failure to agree, has resulted in deadlock requiring court resolution. The court may remove one or more or all of the trustees. While friction between trustees may justify removal, friction between the trustee and beneficiaries is ordinarily insufficient. However, removal might be justified if a communications breakdown is caused by the trustee or appears to be incurable. *See* RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. e (Tentative Draft No. 2, 1999).

of trust or lack of cooperation among the cotrustees requires no additional findings. Removal for unfitness, unwillingness, or persistent failure to administer the trust effectively requires that the court also find that removal would best serve the interests of the beneficiaries.<sup>229</sup> “Interests of the beneficiaries,” a defined term, means the beneficial interests provided in the terms of the trust.<sup>230</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 to whether the particular trustee is appropriate to the trust, not whether the trustee has committed particular acts of misconduct or is totally unfit. Consequently, in deciding whether to remove the trustee, the court may consider whether there has been a substantial change of circumstances<sup>231</sup> or if removal is unanimously requested by the qualified beneficiaries.<sup>232</sup> Nonetheless, in neither case may the court remove the trustee unless it 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>233</sup>

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

The duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee, for only by being informed can the beneficiaries know of and enforce their interests. Section 813 of the Code codifies this common law obligation, and, at the same time, adds detail and makes application of the duty more precise. When in doubt, the UTC

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229. UTC § 706(b)(3).

230. UTC § 103(7).

231. UTC § 706(b)(4). Changed circumstances justifying removal of a trustee might include a substantial change in the character of the service or location of the trustee. A corporate reorganization of an institutional trustee is not itself a change of circumstances if it does not affect the service provided the individual trust account.

232. UTC § 706(b)(4). The court’s ability to take the views of the qualified beneficiaries into account in deciding whether to remove the trustee is a specific but more limited application of Section 411. *See supra* notes 141-48 and accompanying text. Section 411 allows the beneficiaries by unanimous agreement to compel modification of a trust if the court concludes that the particular modification is not inconsistent with a material purpose of the trust. Section 706(b)(4) similarly allows the qualified beneficiaries to request removal of the trustee if the designation of the trustee was not a material purpose of the trust. Under Section 706(b)(4), before removing the trustee, the court also must find that removal will best serve the interests of the beneficiaries and that a suitable cotrustee or successor trustee is available.

233. UTC § 706(b)(4).

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<sup>234</sup> and several specific notice requirements.<sup>235</sup> Nonqualified beneficiaries are entitled to information from the trustee only upon a specific request. By focusing on disclosure to those beneficiaries most likely to receive distributions, the Code hopefully will increase trustee accountability, while at the same time relieving the trustee of the undue burden of having to identify and notify those holding truly remote interests.

A trustee is required to notify the qualified beneficiaries of the trustee's acceptance of office<sup>236</sup> and of any change in the method for computing or the rate of the trustee's compensation.<sup>237</sup> Regular reporting by the trustee is

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234. UTC § 813(a). The trustee must keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. This requires that the trustee communicate to a qualified beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights and to prevent or redress a breach of trust. UTC § 813 cmt.; see RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (1959). The general obligation articulated in Section 813(a) is ordinarily satisfied by providing the beneficiary with a copy of the annual report mandated by Section 813(c). However, special circumstances may dictate that the trustee provide additional information. For example, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee must communicate material facts relating to the transaction that the trustee knows or should know. See RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959). Furthermore, to enable the beneficiaries to take action to protect their interests, the trustee may be required to provide advance notice of transactions involving real estate, closely-held business interests, and other assets that are difficult to value or to replace. See *In re Green Charitable Trust*, 431 N.W.2d 492, 500 (Mich. Ct. App. 1988); *Allard v. Pac. Nat'l Bank*, 663 P.2d 104, 110 (Wash. 1983).

235. UTC § 813(b)-(c).

236. UTC § 813(b). To enable beneficiaries to protect their interests effectively, it is essential that they know the identity of the trustee. Subsection (b)(2) requires that a trustee inform the qualified beneficiaries within sixty days of the trustee's acceptance of office, and of the trustee's name, address, and telephone number. Similar to the obligation imposed on a personal representative following admission of the will to probate, Subsection (b)(3) requires the trustee of a revocable trust to inform the qualified beneficiaries of the trust's existence within sixty days after the settlor's death. UTC § 813(b)(3). These two duties can overlap. If the death of the settlor also happens to be the occasion for the appointment of a successor trustee, the new trustee of the formerly revocable trust would need to inform the qualified beneficiaries both of the trustee's acceptance and of the trust's existence. UTC § 813 cmt.

237. UTC § 813(b)(4). Changes can include changes in a periodic base fee, rate of percentage compensation, hourly rate, termination fee, or transaction charge. The Code does not specify a trustee's compensation other than that it must be reasonable. See

required. Unless the beneficiary has waived its receipt,<sup>238</sup> the trustee must furnish the current beneficiaries, 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>239</sup> The trustee also must promptly respond to any beneficiary's request for information, unless unreasonable under the circumstances.<sup>240</sup> This includes a requirement that the trustee provide a

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UTC § 708(a).

238. UTC § 813(d). Section 813(d) allows trustee reports and other required information to be waived by a beneficiary. A beneficiary also may withdraw a consent with respect to future reports and other information. UTC § 813(d). A waiver of a trustee's report or other information, however, does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed. UTC § 813 cmt.

239. UTC § 813(c). Section 813(c) defines the current beneficiaries as the "distributees or permissible distributees of trust income or principal." Mandatory reporting is limited to the current beneficiaries because they are most likely to have the greatest interest in the day-to-day activities of the trust. Section 813(c), however, provides that any other beneficiary, upon request, is entitled to a copy of a report. Unless a cotrustee remains in office, the former trustee also must provide a report to all of the qualified beneficiaries upon that trustee's resignation or removal. If the vacancy occurred because of the former trustee's death or adjudication of incapacity, a report may, but need not, be provided by the former trustee's personal representative, conservator, or guardian. UTC § 813 cmt. The drafters concluded that the resignation or removal of a trustee was a significant enough event that all qualified beneficiaries should receive a report, not merely those currently entitled to distributions. The termination of the trust is also a significant event, but, in that case, the current and qualified beneficiaries are the same, negating the need for special statutory language.

The Code employs the term "report" instead of "accounting" in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. Section 813(c), however, requires, at a minimum, that the report indicate the trust's liabilities, receipts, disbursements, including the source and amount of the trustee's compensation, and list the trust assets and, if feasible, their respective market values.

240. UTC § 813(a). Requiring that the trustee respond to a beneficiary's request for information is premised on the assumption that the beneficiary should be allowed to make an independent assessment of what information is relevant to protecting the beneficiary's interest. But, not all requests need be honored. A request may be unreasonable in terms of the volume of information requested, the speed with which the beneficiary expects a response, and the relevance to the beneficiary's particular beneficial interest. The requirement that a trustee respond to a beneficiary's request applies to all beneficiaries and not merely to those holding qualified interests. This requirement is premised on the assumption that all beneficiaries have a right to information necessary to protect their interests, particularly if they have demonstrated sufficient attention to have formulated a request. However, the likelihood that a requesting beneficiary actually will receive a distribution from the trust may affect the degree to which the trustee must

beneficiary upon request with a copy of the trust instrument.<sup>241</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>242</sup> Like most provisions of the Code, however, the requirement that the beneficiary be furnished with a copy of the entire trust instrument may be waived in the terms of the trust.<sup>243</sup>

The most discussed issue during the drafting of the UTC and subsequent to its approval is the extent to which a settlor may waive the above disclosure requirements. Most of the specific disclosure requirements are waivable. Not waivable is the trustee's obligation to notify the qualified beneficiaries of an irrevocable trust who are age twenty-five or older of the existence of the trust, of the identity of the trustee, and of the right to request trustee's reports.<sup>244</sup> With respect to any beneficiary regardless of age, the settlor of an irrevocable trust also may not waive the trustee's obligation to respond to a request for a trustee's report and other information reasonably related to the trust's administration.<sup>245</sup> In other words, if a beneficiary finds out about the trust and makes a request for information, the trustee must respond to the request even if the trustee was not obligated to inform the beneficiary about the trust in the first instance.

Early indications are that some of the states that will enact the UTC will modify the waiver provision. One alternative being discussed is to eliminate or lower the age twenty-five limit, making the obligation to inform the beneficiaries of the trust's existence applicable to all beneficiaries or all adult beneficiaries. Another alternative is to allow a settlor to waive notice to remainder beneficiaries regardless of age. Yet another response is to permit a settlor to

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respond.

241. UTC § 813(b)(1).

242. *See Taylor v. Nationsbank Corp.*, 481 S.E.2d 358, 362 (N.C. Ct. App. 1997); *Fletcher v. Fletcher* 480 S.E.2d 488, 491 (Va. 1997). While consistent with recent case law, the UTC is more expansive than the Commissioners' previous pronouncement on the topic. UPC Section 7-303(b), which was approved in 1969, requires that the trustee disclose only those terms that describe or affect the beneficiary's interest.

243. UTC § 105(b)(8). Disclosure of the instrument or of particular provisions, however, still may be required if the beneficiary can establish eligibility under some other provision, such as Section 105(b)(9) (qualified beneficiary entitled to information reasonably related to the administration of the trust) or Section 105(b)(13) (court may take such action and exercise such jurisdiction as may be necessary in the interests of justice). UTC § 105(b)(9)-(13).

244. UTC § 105(b)(8).

245. UTC § 105(b)(9).

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

The waiver issue brings into direct conflict the goal of effectuating settlor intent with the goal of making certain the beneficiaries have sufficient information to enforce their interests. The result is a compromise on which some on both sides of the issue will not be satisfied. Restricting a settlor's ability to limit disclosure is not a new concept,<sup>246</sup> but reducing the matter to the form of a statute brings the issue into much sharper relief.

### *M. 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 Code, the trustee is liable for the higher of the two amounts: the profit made by the trustee or the loss to the trust.<sup>247</sup> Also

246. See RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (1959). This comment states:

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.

247. UTC § 1002(a) (based on RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 205 (1992)). For purposes of Sections 1002 and 1003, "profit" does not include the trustee's compensation. UTC § 1002 cmt. A trustee who has committed a breach of trust is entitled to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to Section 1001(b)(8).

For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE §§ 205-213 (1992). See also GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 862 (rev. 2d ed. 1995); 3 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 205 (4th ed. 1987). Potential damages may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. For the use of benchmark portfolios to determine damages, see RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE §§ 205 & 208-11 reporter's notes (1992). On the authority of a court of equity to reduce or excuse damages for breach of trust, see RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. g (1959). The fact that the beneficiaries hold the trustee liable for the results of a breach of trust does not relieve the trustee of the duty to continue to administer the trust properly, nor does it preclude a court from granting any other relief that it deems appropriate.

provided are a series of non-monetary remedies, including such actions as recovery of trust assets misappropriated by a trustee.<sup>248</sup> Finally, similar to any other action sounding in equity, the Code 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>249</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, a

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248. UTC § 1001(b). 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 as provided in Section 706 (discussed *supra* notes 223-33 and accompanying text); 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). The court also may order any other appropriate relief. UTC § 1001(b)(10). The remedies identified in Section 1001 are derived from RESTATEMENT (SECOND) OF TRUSTS § 199 (1959).

249. UTC § 1004. 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. Unlike in actions in law, a court of equity is not restrained by the so-called "American Rule," which provides that the parties are responsible for payment of their own attorneys' fees, regardless of the outcome of the litigation. In connection with a judicial proceeding concerning the administration of a trust, the court may award a party its own fees and costs from the trust. The court also may charge a party's costs and fees against another party to the litigation. UTC § 1004 cmt.

Despite this broad authority, courts of equity generally have charged fees against another party only in the case of egregious conduct, such as bad faith or fraud. Far more common is the awarding of fees from the trust fund itself. UTC Section 709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust, which may include the fees of the trustee's attorney. With respect to the beneficiary, the court may order the beneficiary's attorney's fees reimbursed from the trust if, applying what is usually known as the "common fund" theory, the litigation was deemed beneficial to the trust. Frequently, the litigation brought by a beneficiary will concern the proper interpretation of the terms of the trust. On other occasions, the litigation will involve an allegation that the trustee has committed a breach of trust. On still other occasions, the suit may concern the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust. For the authority of a beneficiary to bring an action when the trustee fails to take action against a third party, see RESTATEMENT (SECOND) OF TRUSTS §§ 281-282 (1959). For the case law on the award of attorney's fees and other litigation costs, see 3 SCOTT & FRATCHER, *supra* note 247, § 188.4.

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>250</sup> Should the trustee not report or inadequately disclose, the beneficiary must commence an action within five years after the termination of the trust, the termination of the beneficiary's interest, or the date the particular trustee complained of leaves office.<sup>251</sup> A beneficiary who has consented to a trustee's action is also precluded from suing for breach of trust.<sup>252</sup>

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250. UTC § 1005(a). The drafters rejected the approach followed in some states that the statute begins to run only upon the filing of a final report or other termination of the trust relationship. 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. The representative referred to is the person who may represent and bind a beneficiary as provided in Article 3, discussed *supra* notes 96-111 and accompanying text. With respect to the beneficiary's obligation to inquire into a potential claim, a mere "general feeling of suspicion" of how the trustee is handling the trust is not sufficient to trigger the obligation. *See, e.g.,* *Deutsch v. Wolff*, 994 S.W.2d 561, 572 (Mo. 1999).

251. UTC § 1005(c). The five-year statute is intended to provide some ultimate repose for actions against a trustee. It applies only if the trustee has failed to report, the report does not contain adequate disclosure, or the report fails to warn of the one-year time limit. The five-year statute will commence to run on the termination of the trustee's or beneficiary's relationship with the trust. *See* UTC § 1005(c). Ordinarily, this will be the date that the trust terminated, but it also can be earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. UTC § 1005(c)(1). If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution. UTC § 1005(c)(2).

If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty, like other claims against the trustee's estate, would be barred by a probate creditor's claim statute even though the statutory period prescribed by this Section has not yet expired. UTC § 1005 cmt.

252. UTC § 1009. 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.

Section 1009 is based on RESTATEMENT (SECOND) OF TRUSTS §§ 216-218 (1959). UTC § 1009 cmt. The consent of a beneficiary may be given by a person authorized to represent the beneficiary as provided in Article 3, discussed *supra* notes 96-111 and accompanying text. A beneficiary's consent, release, or affirmation may occur either before or after the approved conduct. UTC § 1009 cmt. Section 1009 requires an affirmative act by the beneficiary. A failure to object is not sufficient. UTC § 1009 cmt.;



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>253</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>254</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

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*see* RESTATEMENT (SECOND) OF TRUSTS § 216 cmt. a (1959); *see also In re Scheib Trust*, 457 N.W.2d 4, 9 (Iowa Ct. App. 1990). To constitute a valid consent, the beneficiary must know of the beneficiary's rights and of the material facts relating to the breach. UTC § 1009 cmt.; *see* RESTATEMENT (SECOND) OF TRUSTS § 216 cmt. k (1959). It is not necessary that the beneficiary know all details within the trustee's knowledge. Rather, the trustee should see that the beneficiary is sufficiently informed so that the beneficiary knows the character of the transaction and is in a position to form an opinion as to its advisability. *See* RESTATEMENT (SECOND) OF TRUSTS § 216 cmt. k (1959). If the beneficiary's approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 170(2), 216(3) cmt. n (1959). A beneficiary is also not bound if the approval was induced by the trustee's improper conduct. Invalidating conduct includes fraud, duress, undue influence, misrepresentation, or other abuse of the trustee's fiduciary relationship. *See* RESTATEMENT (SECOND) OF TRUSTS § 216 cmt. l (1959); *see also Clayton v. James B. Clow & Sons*, 154 F. Supp. 108, 116-17 (N.D. Ill. 1957).

253. UTC § 1008(a)(1). This test is consistent with the standard expressed in Section 105(b)(2), which provides that the terms of the trust may not dispense with the trustee's obligation to act in good faith and in accordance with the purposes of the trust. UTC § 105(b)(2). It is consistent with Section 814(a), which provides that a trustee must exercise a discretionary power over distributions in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Section 1008(a) is also similar to RESTATEMENT (SECOND) OF TRUSTS § 222 (1959). Unlike the *Restatement*, however, the Code does not allow a settlor to exculpate a trustee for a profit that the trustee made from the trust. For the law on exculpatory provisions generally, *see* Robert Whitman, *Exoneration Clauses in Wills and Trust Instruments*, 4 HOFSTRA PROP. L.J. 123 (1992).

254. UTC § 1008(a)(2). In determining whether the clause was inserted as the result of an abuse of a fiduciary or confidential relationship, the court may wish to examine: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) whether the insertion of the provision was due to undue influence or other improper conduct; (5) the trustee's reasons for inserting the clause; and (6) the scope of the particular provision inserted. *See* RESTATEMENT (SECOND) OF TRUSTS § 222 cmt. d (1959).

that the clause was fair, and that its existence and contents were adequately communicated to the settlor.<sup>255</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.<sup>256</sup> Also, grounds may exist, such as reformation due to a mistake of fact or law, resulting in the reformation of apparently unambiguous terms.<sup>257</sup> To enable a trustee to administer a trust with some dispatch and without concern that reliance 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>258</sup>

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255. UTC § 1008(b). The drafters of the Code disapprove of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991), which held that an exculpatory clause in a trust instrument drafted by the trustee was valid because the beneficiary could not prove that the clause was inserted as a result of an abuse of a fiduciary relationship. UTC § 1008 cmt. For a later case where sufficient proof of abuse was present, see *Rutanan v. Ballard*, 678 N.E.2d 133, 140-41 (Mass. 1997). Section 1008(b) responds to the danger 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.

The requirements of Section 1008(b) are satisfied if the settlor was represented by independent counsel. UTC § 1008 cmt. 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. UTC § 1008 cmt. 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.

256. Pursuant to the definition of "terms of the trust," the terms include not only expressions in the written trust instrument but also other evidence that would be admissible in a judicial proceeding. Oral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered, and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust's meaning. See RESTATEMENT (THIRD) OF TRUSTS § 4 cmt. a (Tentative Draft No. 1, 1996); RESTATEMENT (SECOND) OF TRUSTS § 4 cmt. a (1959). If a trust established by order of court is to be administered as an express trust, the terms of the trust are determined from the court order as interpreted in light of the general rules governing interpretation of judgments. See RESTATEMENT (THIRD) OF TRUSTS § 4 cmt. f (Tentative Draft No. 1, 1996).

257. See UTC § 415 (discussed *supra* notes 155-56 and accompanying text).

258. UTC § 1006. This Section is similar to Section 1(b) of the Uniform Prudent Investor Act, which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust. UTC § 1006 cmt. A trustee's reliance on the trust instrument would not be justified if the trustee is aware of a prior court decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.

A trustee is also entitled to rely on reasonable inferences as to a beneficiary's family or other status. Whenever the happening of 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>259</sup>

### *N. Trustee Dealings with Third Persons (Sections 1010-1013)*

Third persons, in trust law parlance, are persons other than trustees and beneficiaries. These are the persons who purchase property from the trust, sell property or provide services to the trust, or otherwise engage in transactions with the trustee. The law on trustee transactions with third persons is a compromise of competing policies—the desire to protect the beneficiaries from harm versus the need to facilitate transactions. The common law, developed in an age when most trusts consisted largely of real estate and commercial transactions moved at a slower pace, emphasized beneficiary protection. A trustee was personally liable on contracts with third persons and could be denied reimbursement even if the expense was proper.<sup>260</sup> In addition, a third person making payment to the

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UTC § 1006 cmt.

259. UTC § 1007. This Section, which is based on Washington Revised Code Section 11.98.100, is designed to encourage trustees to administer trusts expeditiously and without undue concern about liability for failure to ascertain external facts, often of a personal nature, that might affect administration or distribution of the trust. The common law, contrary to this Section, imposed absolute liability against a trustee for misdelivery regardless of the trustee's level of care. See RESTATEMENT (SECOND) OF TRUSTS § 226 (1959). The events listed in this Section are not exclusive. A trustee who has exercised reasonable care to ascertain the occurrence of other events, such as the attainment by a beneficiary of a certain age, is also protected from liability.

Frequently, exercising reasonable efforts will require the trustee to make inquiries into a beneficiary's status. For example, in the well-known case of *National Academy of Sciences v. Cambridge Trust Co.*, 346 N.E.2d 879 (Mass. 1976), the trust provided for continuing payments to the testator's widow but with the payments to terminate upon her remarriage. In surcharging the trustee for continuing to make payments following the widow's remarriage, the court found that, despite the widow's many different addresses, the trustee had made no effort whatsoever to inquire into the widow's marital status.

260. At common law, a trustee was personally liable on all contracts whether or not the trustee's fiduciary office was disclosed to the other contracting party. The trustee then could look to the trust estate for reimbursement. But if the trust estate was insufficient to reimburse the trustee, the trustee was liable for the deficiency even if the trustee's actions were proper. Only if personal liability was specifically negated in the contract was it certain that the third party could look only to the trust for payment. See RESTATEMENT (SECOND) OF TRUSTS §§ 246, 262, 263 (1959); Jerome J. Curtis, Jr., *The Transmogrification of the American Trust*, 31 REAL PROP. PROB. & TR. J. 251, 277-80

trustee could be held responsible for the trustee's misapplication, regardless of whether the third person was at fault.<sup>261</sup> The result was careful scrutiny by third persons of the terms of the trust and an approach of caution when dealing with a trustee. The overall effect was the chilling of transactions. Why bother transacting with a trustee when one can make the same deal elsewhere without the same risks and restrictions.

The provisions of the UTC addressing trustee relations with third persons are built on the premise that third persons should approach transactions with trustees the same way they approach any other commercial deal. The theory is that trust beneficiaries are helped more by the free flow of commerce than they were by the largely ineffective protective features of former law. Under the Code, a trustee is not personally liable on contracts as long as the trustee disclosed the fiduciary capacity<sup>262</sup> and is personally liable for torts committed in administering the trust only if the trustee was personally at fault.<sup>263</sup> A trustee is protected from personal liability for contract and tort liability of partnerships in

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(1996).

261. See 4 SCOTT & FRATCHER, *supra* note 145, § 321.

262. UTC § 1010(a). This Section is derived from Section 7-306 of the UPC, approved in 1969. UTC § 1010 cmt. Like the UPC, Section 1010 reverses the common law rules with the aim of facilitating a trustee's transactions with third persons.

Section 1010 is built on two assumptions. First, it is awkward and unnecessary to require a third party to sue a trustee personally, and then require that the trustee seek indemnification from the trust. Rather, it is more efficient if the third party can sue the trustee in a fiduciary capacity. Consequently, Section 1010(c) provides that a judicial proceeding against the trustee, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

Second, the drafters of the Code assumed that the best course is to hold a trustee personally liable for dealings with third parties only if the third party was somehow misled. Section 1010(a) negates a trustee's personal liability on contracts if the fiduciary capacity was disclosed in the contract. This can be evidenced simply by the trustee signing as trustee. Unlike Section 7-306 of the UPC, there is no requirement that the contract specifically identify the trust. However, the protection afforded the trustee applies only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power and not violating a duty.

263. UTC § 1010(b). The common law also imposed onerous responsibilities on a trustee for torts and for liabilities arising from ownership of property. The trustee was personally liable for a tort committed during the course of administration and for liabilities arising from holding title to property, such as the obligation to pay real estate taxes. In either case, the trustee could look to the trust for reimbursement. However, should the trust assets prove inadequate, the trustee was required personally to pay any deficiency resulting from liability in tort. Only in the case of liability arising from holding title to property was the third party prevented from recovering a deficiency from the trustee. See RESTATEMENT (SECOND) OF TRUSTS §§ 244, 247, 264, 265 (1959).

which the trustee is a general partner.<sup>264</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>265</sup> Finally, to protect the

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264. UTC § 1011. The objective of this Section, which is modeled after Ohio Revised Code Section 1339.65, is to immunize the trustee of a trust that holds an interest in a partnership from personal liability for contracts that the partnership has entered into and for torts that agents of the partnership may have committed. Section 1010 does not offer such protection, immunizing a trustee only from the trustee's own contracts or torts, not the contracts or torts of an entity in which the trust has an ownership interest. Section 1011 is limited to interests as a general partner. Special protection is not needed for other business interests that the trustee may own, such as an interest as a limited partner, a membership interest in a limited liability corporation, or an interest as a corporate shareholder. In those cases, the nature of the entity or the interest owned by the trustee carries with it its own limitation on liability. UTC § 1011 cmt.

Section 1011 was placed in brackets to alert enacting jurisdictions to consider modifying it to conform to the state's specific laws on partnerships and other forms of unincorporated businesses. UTC § 1011 cmt.

265. UTC § 1012. This Section, which is derived from Section 7 of the Uniform Trustee Powers Act, provides protections for persons other than beneficiaries who have dealings with a trustee. The objective is to treat persons dealing with a trustee the same as if they were engaged in a transaction not involving trust property. Section 1012(a) codifies the bona fide purchaser rule. A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

Section 1012(b) negates a duty of inquiry. A person other than the beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise. The third party may assume that the trustee has the necessary power. Consequently, there is no need to request or examine a copy of the trust instrument. Section 1012(b), and the comparable provisions enacted in numerous states, are intended to negate the rule, followed by some courts, that a third party is charged with constructive notice of the trust instrument and its contents. The cases are collected in GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 897 (rev. 2d ed. 1995), and 4 SCOTT & FRATCHER, *supra* note 145, § 297. That approach stemmed from the premise that the trust beneficiaries' equitable interests take precedence over the interests of and damages to third parties who did not bother to inquire into the trustee's authority, even if they were acting in good faith. *See* Curtis, *supra* note 260, at 298-301.

Section 1012(c) negates any obligation to follow property after its delivery to the trustee. A person who in good faith delivers assets to a trustee need not ensure their proper application.

Section 1012(d) protects individuals who deal with a trustee without knowledge that the trusteeship has terminated. A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee. This provision logically follows from the protection

privacy of the trust's dispositive provisions, the trustee may provide the third person with a certification of trust in lieu of a copy of the trust instrument. A certification is a document signed by the trustee reciting the trustee's authority and containing the portion of the trust instrument relevant to the transaction. The third person is entitled to rely on the statements contained in the certification without making further inquiry.<sup>266</sup>

## IX. THE LIMITS OF LEGISLATION

This Article has reviewed the organization and major advances contained in the UTC. The drafters desire and hope that the Code will be enacted in all fifty states. The result would be one uniform approach to trust law in the United States. But there are limits to what legislation can accomplish. Over time, legislation tends to become obsolete. Updating obsolete legislation is often far more difficult than securing an original enactment. Minor amendments do not excite interest, and other issues will enjoy higher legislative priority. Any attempt to codify the law of trusts comprehensively, therefore, must stand the test of time and not require constant amendment. The statute must be sufficiently specific to add content to the rules developed by the courts but yet not so detailed as quickly to become obsolete as conditions change.

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afforded by Section 1012(a), as in both cases the third party is acting in good faith and without knowledge of the trustee's (or ex-trustee's) impropriety.

Provisions similar to Section 1012 are not unique to statutes involving trusts but are also present in statutes regulating general commerce. To assure maximum uniformity for those involved in commerce, the more general statute should control in the event of inconsistency. For this reason, Section 1012(e) provides that the protections provided by Section 1012 are secondary to and superseded by comparable protective provisions of other laws relating to commercial transactions or to the transfer of securities. *See* UTC § 1012(e). Such other laws would include Article 8 of the Uniform Commercial Code, The Uniform Fiduciaries Act, and the Uniform Simplification of Fiduciary Security Transfers Act. UTC § 1012 cmt.

266. UTC § 1013. The certification of trust procedure, which is derived from CAL. PROB. CODE § 18100.5 (West Supp. 2000), is intended to provide a mechanism for maintaining the privacy of the trust instrument in situations where a person other than the beneficiary seeks to verify the trust or the trustee's authority. UTC § 1013 cmt. By validating the trustee's certification of authority to engage in the transaction, the objective is to protect the privacy of the trust instrument by discouraging requests by outside parties for complete copies of the trust instrument in order to verify an often specific and narrow trustee authority.

It is hoped that the UTC has met the challenges for a utilitarian, comprehensive code of law. The drafters have not tried to codify all conceivable trust law topics. Not all topics are amenable to legislation. Problems are sometimes too new for workable solutions to have suggested themselves, or efforts to reduce rules to writing will result in excess rigidity and insufficient discretion vested in the courts to adapt to changing conditions. Even on issues the drafters have elected to codify, the UTC, in many cases, does not specify every possible detail, the drafters preferring flexibility and brevity to greater precision but probable quick obsolescence. Hopefully, the final result is a Code that will serve as the model for trust statutes for decades to come.