

UNIFORM TRUST CODE (2000)

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**DAVID M. ENGLISH
UNIVERSITY OF MISSOURI-COLUMBIA
SCHOOL OF LAW
203 HULSTON HALL
COLUMBIA, MO 65211
(573) 882-6854
englishda@missouri.edu**

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DAVID M. ENGLISH REPORTER, UNIFORM TRUST CODE

The Uniform Trust Code (“UTC”), which was approved by the Uniform Law Commissioners on August 3, 2000, and by the American Bar Association’s House of Delegates in February 2001, is the first effort by the Uniform Law Commissioners to provide the states with a comprehensive model for codifying their law on trusts. This paper describes the reasons for the UTC and many of its provisions. A copy of the UTC, together with over 100 pages of official comments, can be accessed through the Commissioner’s website, www.nccusl.org. The UTC was enacted in Kansas in 2002, and in Arizona, Nebraska, New Mexico and Wyoming in 2003. Several enactments during 2004 are expected, including in states as diverse as Missouri and New Hampshire, and the UTC is currently under study by state bar associations and other groups in numerous other states.

For a more detailed analysis of the topics addressed in this paper, see David M. English, *Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143 (2002).

GENERAL BACKGROUND

Participants in Drafting Process

The UTC was officially drafted by a committee consisting of Uniform Law Commissioners, who are appointed by the governors or legislatures of their respective states. The function of the Reporter was to carry out the drafting committee's decisions on a day-to-day level and to prepare 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 on Real Property Probate and Trust Law (3 advisors), the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys, the American Bankers Association, and the California and Colorado State Bars.

Reasons for Code

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. Other than for specialized acts such as the Uniform Prudent Investor and Principal and Income Acts, the primary source of trust law in most states is the Restatement of Trusts and the multivolume treatises by Scott and Bogert, sources that fail to address numerous practical issues and that on others sometimes provide insufficient guidance. 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 does make some significant changes.

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 must be repealed. 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. 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.

Uniform acts superseded by the UTC are Article VII of the Uniform Probate Code, the Uniform Trustee Powers Act (1964), and the Uniform Trusts Act (1937). 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, Uniform Custodial Trust Act (1987), Uniform Management of Institutional Funds Act (1972), Uniform Principal and Income Act (1997), Uniform Statutory Rule Against Perpetuities, and the Uniform Testamentary Additions to Trusts Act.

Relationship to Restatement

Restatements, which are written and approved by a national body of lawyers comprising the members of the American Law Institute, 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 over time adopt uniform rules of decision.

The Restatement (Second) of Trusts was approved by the American Law Institute in 1957. Beginning in the late 1980s, work on the Restatement Third began. The portion of Restatement Third relating to the prudent investor rule and other investment topics was completed and approved in 1990. A portion of Restatement Third relating to the rules on the creation and validity of trusts was approved in 1996; the portion relating to the office of trustee, trust purposes, spendthrift provisions and the rights of creditors was approved in 1999; the portion on termination and modification of trusts was approved in 2001.

The UTC was drafted in close coordination with this revision of the Restatement of Trusts. A significant minority if not majority of the UTC provisions can be described as a

codification of the Restatement. Less important but still influential was coordination with the revision of the Restatement of Property: Wills and Other Donative Transfers, which contains much of the law on voluntary transfer of property, both during life and at death. 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 will, 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 will thus serve an important educational function. Legal practitioners in many states for the first time will be able actually 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.

Relationship to Common Law

The UTC is supplemented by the common law of trusts, including principles of equity. UTC §106. 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 exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the UTC in no way restricts. 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.

OVERVIEW AND SIGNIFICANT ISSUES

Scope of Coverage

The UTC states the law relating to express trusts. These are trusts created by settlors who during lifetime transfer property to a trustee or declare themselves as trustee of their own property, or by testators who at death create trusts in their wills. Following its creation, the trustee will then 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.

Organization

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 Code's provisions (UTC § 105), the validity of choice of law provisions and the law to govern in the absence of such a provision (UTC § 107), and the procedure for transferring the principal place of administration to another jurisdiction. UTC § 108. 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

(UTC § 201), specification of the court's jurisdiction over trustees and beneficiaries (UTC § 202), and optional provisions on subject-matter jurisdiction (UTC § 203) and venue. UTC § 204. This minimal coverage of judicial proceedings 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.

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 a beneficiary's behalf.

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 trusts. The provisions on the creation of trusts (UTC §§ 401-409) largely track traditional doctrine; those relating to modification and termination liberalize the prevailing law. UTC §§ 410-417. 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 (UTC § 601), the procedure for revocation or modification (UTC § 602), and the statute of limitations on contests. UTC § 604.

Article 7 turns to the office of trustee, specifying numerous procedural rules that apply absent special provision in the trust. Included are the rules on trustee acceptance (UTC § 701), the rights and obligations of cotrustees (UTC § 703), the procedure for resignation (UTC § 705), the grounds for removal (UTC § 706), the methods for appointing successors (UTC § 704), and trustee compensation. UTC § 708.

Article 8 lists the duties and powers of the trustee. The trustee's administrative powers (UTC § 816) are an updated version of the Uniform Trustee Powers Act, including coverage of such current topics as the power to deal with environmental hazards. Statutory powers allay concerns by third parties as to whether the trustee has the authority to engage in a particular transaction. The specified duties of the trustee, like the duty to act with prudence (UTC § 804), were drafted where relevant to conform to the Uniform Prudent Investor Act. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with regard to the management and investment of trust property. The UTC expands on this by also specifying the trustee's duties regarding distributions to beneficiaries. Article 9 fits closely into the preceding article. It provides a place for the jurisdiction enacting the larger UTC to codify its version of the Uniform Prudent Investor Act. The 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

Article 10 addresses liability of trustees and trustee dealings with persons other than beneficiaries. With respect to the rights of beneficiaries, the article

- lists the remedies for breach of trust (UTC § 1001);
- specifies how money damages are to be determined (UTC § 1002);
- 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 (UTC § 1004); and
- specifies certain trustee defenses, including the addition of a statute of limitations for claims alleging breach of trust (UTC § 1005) and a provision on enforcing exculpatory clauses (UTC § 1008).

With respect to transactions by trustees with third persons, the UTC encourages trustees and third persons to engage in commercial transactions to the same extent as if no trust was involved. Addressed are personal liability of the trustee for contract or tort and the rights of bona fide purchasers. UTC § 1010-1012. 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. UTC § 1013.

Article 11 deals with the application of the UTC to existing trusts. The intent is to give the UTC the widest possible application, consistent with limitations placed on it by the United States Constitution. Consequently, the UTC generally applies not only to trusts created on or after the effective date, but also to trusts already in existence. UTC § 1106.

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 make necessary modifications. The other approach is to begin with existing law and to then add selected provisions of the Code. Relying on the UTC as the starting point will result in greater consistency with other states. Such reliance will also 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 (UTC § 112), subject-matter jurisdiction and venue (UTC §§ 203-204), and contest of revocable trusts. UTC § 604.

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 is or 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 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 or impossible.
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 will often result in split votes when the debate moves to the states. To encourage uniformity, the Commissioners request that state drafting committees start from the assumption that the uniform law approach is correct.

Nearly all of the modifications made in the jurisdictions that have enacted the UTC to date fit within one of the above categories. Those generating the most discussion relate to the provisions discussed below, particularly those addressing reporting to beneficiaries and spendthrift protection.

Changing the Judge-Made Law

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 many states. These are also the issues likely to receive the most discussion when the UTC is considered by the states. The following ten issues are addressed:

- Default Rules (Section 105);
- Principal Place of Administration (Section 108);
- Representation and Settlements (Section 111 and Article 3);
- Trust Modification and Termination (Sections 410-417);
- Cy Pres (Section 413);
- Spendthrift Provisions and Rights of Beneficiary's Creditors (Article 5);
- Revocable Trusts (Article 6);
- Trustee Removal (Section 706);
- Duty to Keep the Beneficiaries Informed (Section 813); and
- Trustee Dealings with Third Persons (Sections 1010-1013).

Default Rules (Section 105)

Much 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 in the terms of the trust. But prior to the UTC, neither the Restatement, treatise writers, nor state legislatures had attempted to describe the principles of law that are *not* subject to the settlor's control. The UTC collects these principles in Section 105. Included are:

- the requirements for creating a trust;
- the rights of third parties in their dealings with the trustee;
- the power of the court to take certain actions, such as to remove a trustee;
- the power of the court to modify or terminate a trust on the grounds specified in the Code;
- a trustee's obligation to act in good faith, and in accordance with the purposes of the trust and to administer the trust in the interests of the beneficiaries; and
- the trustee's duty to keep the adult beneficiaries age 25 and over generally informed of matters relating to the trust's administration.

The limits on the settlor's ability to waive the duty to keep the beneficiaries informed, which is described in detail below in connection with the discussion of UTC § 813, is the most discussed provision in the UTC. The other provisions in Section 105 have received little comment.

Principal Place of Administration (Section 108)

Determining a trust's principal place of administration is important for a variety of reasons. It may determine which state's income tax applies to the trust. It will establish which court has primary jurisdiction concerning trust administrative matters, or the venue for bringing a judicial proceeding. Locating a principal place of administration in a particular jurisdiction also makes it more likely that the particular jurisdiction's law will govern the trust.

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. However, UTC §108 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 as long as 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. UTC §108(a). Second, for trust instruments failing to address the subject, the UTC specifies a procedure for transferring the principal place of administration, whether to another state or country. The procedure balances the desire of the trustee to transfer with the possible objection of a beneficiary, perhaps because of a concern that the trustee's service, following the transfer, will be less personal and attentive. 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. But if a qualified beneficiary objects, the trustee must obtain a court order. If the transfer involves the appointment of a new trustee, the requirements for the appointment of a successor trustee, either under the trust instrument or otherwise, must also be satisfied before the transfer can be affected. UTC §108(b)-(f). “Qualified beneficiary,” a term which is defined in UTC §103, excludes a beneficiary with a remote remainder interest.

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 (UTC §108);
- combination of separate trusts into one or the division of a single trust into two or more separate trusts (UTC §417);
- resignation of a trustee (UTC §705);
- submission of a trustee’s report (UTC §813); and
- trustee’s notice of proposed plans of distribution. UTC §817.

Other actions can be accomplished upon consent of the beneficiaries. These include:

- selection of a successor trustee (UTC §704);
- release of a trustee from potential liability. UTC §1009.

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 can in theory last in perpetuity. 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, but the UTC addresses the subject in more detail 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--see UTC §303), 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 by another beneficiary with a similar beneficial interest with respect to the particular matter or dispute. UTC §304. 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 (UTC § 302), and allows a parent to represent and bind a minor or unborn child. UTC § 303(6).

The representation provisions of the UTC can be utilized not only for purposes of achieving notice to or the consent of the beneficiaries for the matters detailed above, but also to settle any dispute whether in or out of court. The nonjudicial settlement provision is broad. The

parties may enter into a nonjudicial settlement agreement with respect to any matter involving a trust. UTC §111(b). The settlement agreement can contain any term or condition that a court *could* properly approve. UTC §111(c). Among the issues that can be resolved by a nonjudicial settlement agreement are the interpretation or construction of the terms of the trust; approval of a trustee's report or accounting; direction to a trustee to refrain from performing a particular act or to grant a trustee any necessary or desirable power; resignation or appointment of a trustee and determination of a trustee's compensation; transfer of a trust's principal place of administration; and liability of a trustee for an action relating to the trust. UTC §111(d).

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. 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 Code, the appointment of a representative is available whether the matter to be resolved is in or out of court. Furthermore, in making decisions, a representative may consider general family benefit accruing to living members of the individuals's family. UTC §305.

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. The result is a liberalizing nudge in the law but one that is founded on traditional doctrine.

Modification or Termination by Beneficiaries. Section 411 follows traditional doctrine in allowing for termination or modification of an irrevocable trust by unanimous agreement of the settlor and beneficiaries. UTC § 411(a). The UTC also follows traditional doctrine in allowing for termination of an irrevocable trust by unanimous agreement of the beneficiaries if the trust no longer serves a material purpose. A trust may be modified by the beneficiaries alone only if such modification is not inconsistent with a material purpose. UTC § 411(b). Provision is made for partial termination or modification if obtaining the consent of all beneficiaries is impracticable. UTC § 411(e). Similar to other sections of the UTC but not consistent with traditional doctrine, the representation principles of Article 3 may be employed to obtain the necessary consents to termination. Also, it is no longer automatically presumed that a spendthrift provision is a material purpose barring the beneficiaries from compelling termination of a trust. UTC § 411(c).

The trustee's consent is not required to modify or terminate a trust under Section 411. However, a trustee who concludes that the beneficiaries' action is not justified has standing to object to a proposed termination or modification. 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. UTC § 410(b). 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. UTC § 411(d).

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. UTC § 412(a). Without regard to unanticipated circumstances, the court may also modify an administrative term if continuation of the trust on its existing terms would be impracticable, wasteful, or impair the trust's administration. UTC § 412(b). Upon termination of a trust, the trustee must distribute the property in a manner consistent with the purposes of the trust. UTC § 412(c).

Uneconomic 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. UTC § 414(a). Before terminating the trust, the court or trustee must conclude that the value of the trust property is insufficient to justify the cost of administration. UTC § 414(b). Upon termination of the trust, the trustee is to distribute the trust property in a manner consistent with the purposes of the trust. The figure \$50,000 was placed in brackets to signal that states are free to change the amount. Four of the six jurisdictions enacting the UTC to date have increased the amount to \$100,000, and one to \$150,000.

Reformation. Consistent with the Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1, 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 of either of expression or inducement, but in any event must be established by clear and convincing evidence.

Modification to Achieve Settlor's Tax Objectives. Consistent with Restatement (Third) of Property: Wills and Other Donative Transfers § 12.2, 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 may also give the modification retroactive effect. Such broad authority is appropriate because the settlor's objective—to achieve tax savings of a particular type—is usually abundantly clear. The other sections of Article 4, where applicable, can also be used to secure modifications for tax reasons.

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 have adversely affect achievement of the purposes of the

trust. 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.

Cy Pres (Section 413)

Charitable trusts must have a charitable purpose, a concept that was firmly established by the Statute of Charitable Uses of 1601 and that has evolved over the centuries as society has changed. Doctrine also has evolved regarding what is to be done upon failure of a charitable purpose. The court will apply what is known as *cy pres* to reform the gift to better carry out the settlor's charitable purposes. 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.

The UTC liberalizes the doctrine of *cy pres* in a way believed more likely to carry out the average settlor's intent. First, Section 413(a) expands the ability of the court to apply *cy pres*. UTC § 413(a)). 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. Second, Section 413(a) 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.

Spendthrift Provisions and Rights of Beneficiary's Creditors (Article 5)

Spendthrift provisions, when effective, prohibit a creditor or assignee of a beneficiary from attaching the beneficiary's interest 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 is made.

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 American doctrine. A trust is not spendthrift unless the instrument specifically so states, the drafters rejecting the approach that all trusts are spendthrift unless the instrument says otherwise. In addition, a restraint against claims by the creditors of a beneficiary is effective only if the beneficiary is also restrained from assigning the beneficiary's interest. UTC §502(a). 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 can in effect 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 deny the settlor's creditors the right to reach the trust. Consequently, the Code rejects the approach taken in the legislation enacted in Alaska and Delaware and, more recently, Rhode Island and Nevada. each of which allows a settlor to retain a beneficial interest immune from claims of the settlor's creditors. Under the Code, a creditor of the settlor can fully reach the settlor's beneficial interest. UTC §505(a)(2).

A key policy issue in drafting the Code was determining which classes of creditors should be exempt from the spendthrift bar. In determining the exceptions, the drafting committee did not start from scratch but paid particular attention to the exceptions listed in Restatement (Second) of Trusts § 157, and Restatement (Third) of Trusts § 59. Both Restatements, the trust statutes in many states, as well as other relevant statutes such as Federal Bankruptcy Code § 523(a)(5) and ERISA § 206(d)(3) 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 drafters of 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. UTC §503(b).

The UTC also creates an exception for claims by governmental units to the extent a state statute or federal law so provides (UTC §503(c)), therefore largely leaving to other law of the state the extent to which a state can pierce a trust to collect for the costs of institutionalized care. The Code allows a judgment creditor who has provided services to the beneficiary to reach the beneficiary's interest (Section 503(b)) but does not create a specific exception for the providers of necessities. Unlike the Restatement, the UTC does not create an exception for the providers of a beneficiary's necessary support. 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. However, the UTC does allow a judgment creditor who has provided services for the protection of the beneficiary's interest to reach that interest in repayment. UTC § 503(b).

Exemption from a spendthrift bar does not necessarily mean that a beneficiary's creditor will collect. If the trust is discretionary or for support, the creditor cannot usually 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, or even if the discretion was abused. UTC § 504(b). The only exception pertains to claims for child support or alimony, which is 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. UTC § 504(c).

Revocable Trusts (Article 6)

The revocable trust is the most common trust created today in the United States. The revocable trust in the United States is today 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 will then 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 trust 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, the Code follows the lead of California, Iowa, Montana, Oklahoma, Texas in providing that a trust is revocable absent clarifying language in the terms of the trust. UTC § 602(a). 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. UTC § 602(a). 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. UTC § 415.

The UTC treats treating 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. UTC § 601. 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 would otherwise be given to the beneficiaries must instead 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. UTC § 603(a). 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. Thereafter, unless provided otherwise in the terms of the trust, the beneficiaries may assert their rights as beneficiaries.

Revocation of a trust differs fundamentally from revocation of a will. Revocation of a will, because a will is not effective until death, cannot affect an existing fiduciary relationship. With a trust, however, because a revocation will terminate an already 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.

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. However, to protect the trustee, a trustee is immunized for actions taken without knowledge of the revocation or amendment. UTC § 602(g).

Unless the terms of the trust make a specified method of revocation exclusive, the UTC provides that a trust may be revoked by substantially complying with the method specified in the trust's terms or by any other method manifesting clear and convincing evidence of the settlor's intent, including by a later will or codicil. UTC § 602(c).

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. UTC § 602(f). Similarly, when a settlor 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. UTC § 602(e).

Contest of a will is typically barred under one of two alternative statutes. Normally, a contest is barred following some period of time following notice of probate, 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. *See, e.g.*, UPC §3-108. 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 contest within the earlier of 120 days following receipt of an optional notice or three years following the settlor's death. UTC § 604(a). 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. 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. UTC § 604(b). Liability in such cases is solely on the distributees. UTC § 604(c).

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. UTC § 505(a)(3). However, the Code 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 Uniform Probate Code, added to that Code in 1998, may be looked to as a model both by states that have enacted the UPC as well as by those having different probate systems.

Trustee Removal (Section 706)

Trustees in many states may be removed only for breach of trust or other untoward act. This standard gives great weight to the settlor's particular selection of trustee. Because trust instruments typically place weight on a trustee's judgment and exercise of discretion, the particular trustee selected becomes an important term of the trust, a term which should not easily be changed. UTC §706(b) follows traditional doctrine by authorizing a trustee to be removed for acts of misconduct or other disqualification. Acts of misconduct or other disqualification justifying removal of the trustee include serious breach of trust, unfitness, and unwillingness or persistent failure to effectively perform the function. A trustee may also be removed if lack of cooperation among the cotrustees substantially impairs the trust's administration. Removal for serious breach of trust or lack of cooperation among the cotrustees requires no additional findings. Removal for unfitness, unwillingness or persistent failure to effectively administer the trust requires an additional finding by the court that removal would best serve the interests of the beneficiaries. "Interests of the beneficiaries," which is defined in UTC §103, means the beneficial interests provided in the terms of the trust.

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, UTC §706(b) also allows the court to consider whether there has been a substantial change of circumstances or if removal is unanimously requested by the qualified beneficiaries. However, 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.

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 beneficiary know of and enforce their interests. Section 813 of the Code codifies this common law obligation but at the same time adds detail and makes application of the duty more precise. When in doubt, the UTC favors disclosure to beneficiaries as being the better policy. The UTC imposes both a general obligation on the trustee to keep the qualified beneficiaries reasonably informed of administration (UTC § 813(a)) as well as several specific notice requirements. UTC § 813(b)-(c). 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 from 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 and of any change in the method or rate for computing the trustee's compensation. UTC §813(b). Regular reporting by the trustee is required. Unless the beneficiary has waived the requirement (UTC § 813(d)), the trustee must furnish the qualified 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. UTC §813(c). The trustee must also promptly respond to any beneficiary's request for information, unless unreasonable under the circumstances. UTC §813(a). This includes a requirement that the trustee provide a beneficiary upon request with a copy of the trust instrument. UTC §813(b)(1). 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. *See Taylor v. Nationsbank Corp.*, 481 S.E.2d 358 (N.C. Ct. App.1997); *Fletcher v. Fletcher* 480 S.E.2d 488 (Va. 1997). However, like most provisions of the Code, the requirement that the beneficiary be furnished with a copy of the entire trust instrument may be waived in the terms of the trust.

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 age 25 or older of the existence of an irrevocable trust, of the identity of the trustee, and of the right to request trustee's reports. UTC §105(b)(8). With respect to any

beneficiary regardless of age, the trustee also may not waive the trustee's obligation to respond to a request for a trustee's report and other information reasonably related to the trust's administration. UTC §105(b)(9). 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 25 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 direct a trustee to keep silent about the trust even in the face of a specific request by a beneficiary for information.

The waiver issue brings into direct conflict the goal of effectuating settlor intent with the goal of making certain the beneficiaries have sufficient information to enforce their interests. The result is a compromise of which some on both sides of the issue will not be satisfied. Restricting a settlor's ability to limit disclosure is not a new concept (*see* Restatement (Second) of Trusts § 173 cmt. c (1959)), but reducing the matter to the form of a statute brings the issue into much sharper relief.

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 to 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. In addition, a third person making payment to the trustee could be held responsible for the trustee's misapplication, regardless of whether the third person was at fault. 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 (UTC § 1010(a)), and is personally liable for torts committed in administering the trust only if the trustee was personally at fault. UTC § 1010(b). A trustee is protected from

personal liability for contract and tort liability of partnerships of which the trustee is a general partner. UTC § 1011. 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. UTC § 1012. Finally, to protect the 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. UTC § 1013.

The Limits of Legislation

This paper 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 comprehensively codify the law of trusts must therefore 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 to quickly become obsolete as conditions change.

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 in the courts to adapt to changing conditions. Even on issues which 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.